Narsingh Das And Ors. vs Mian Safiullah Sha on 24 August, 1954

Equivalent citations: AIR1954ALL773, AIR 1954 ALLAHABAD 773

JUDGMENT

Chaturvedi, J.

1. This is a defendants' appeal arising out of a suit for possession.

2. The suit was filed in the Court of the Civil Judge of Bahraich by the plaintiff in his capacity as Sajjadanashin of Takia Kalan on 4-1-1946. The main relief claimed in the suit was for pos-

session of a piece of land by demolition of the building standing thereon. The disputed land is enclosed by letters A E F B in the map of the commissioner, who was appointed by Court to prepare a site plan. For a better appreciation of the case, this area (A E F B) may be split in two portions, one lying within the letters A B C D and the other enclosed by letters C D E F. At the time when the suit was brought a completed pucca building stood on the land A B C D while on the other piece an incomplete building stood.

3. There is a Muslim religious endowment known as Takia Kalan in the city of Bahraich owning considerable landed property in the various muhallas of the town. The land described above is situate in Muhalla Chhaoni Bazar and is about a furlong or so from the main building of the Takia. It is not disputed that the disputed land is endowed property belonging to Takia Kalan.

4. Safiullah Shah, the present manager of the endowed property of the Takia Kalan, brought the suit alleging that the defendants had taken illegal possession of the land covered by letters A B C D about six years ago while the land covered by letters C D E F was encroached upon about four months prior to the suit. The plaintiff therefore claimed possession by demolition of the building standing on the land in suit.

5. The three defendants, namely Narsingh Das, his brother Bhomraj, and his son Munna, contested the suit of the plaintiff on various grounds. They claimed to be the transferees of three houses under the sale deeds obtained by them from previous owners. It was asserted by them, and the fact has not been disputed, that originally there were three houses. One of them was owned by Ali Bakhsh and Nabi Bakhsh, the other by Ganga . Prasad and Bhup Narain and the third one by Maiku Bhuj, who had built these houses with the permission of the then Sajjadanashin of the Takia.

These three houses existed on the site lying towards the east of the red line marked A.E. in the commissioner's map. (Note--This portion is not in dispute). In tracing the history of the disputed

land it was alleged that the land in suit was lying 'parti' till about the year 1922 when; one Kanhaiya Lal obtained the permission of the Sajjadanashin to build a house thereon. Thereupon the aforesaid owners of the three houses approached the Sajjadanashin (Miyan Hamid-ud-din) who revoked the permission previously given to Kanhaiya Lal and gave the land in suit for building purposes to the owners of each of the three houses mentioned above.

The owners then built pucca ahatas to include the land in their respective houses. It was alleged that alter the purchase of the house of Ali Bakhsh and Nabi Bakhsh in 1934, the defendants constructed a double storeyed house in the year 1935. It is not disputed that this house stands on the land marked A B C D in the commissioner's plan. Similarly after the purchase of the house of Maiku Bhuj in 1943 and that of Ganga Prasad and Bhup Narain in 1945 the defendants got the old houses demolished and started new constructions. The building, which lies on the disputed land C D E F, could not be completed when this suit was filed.

Shortly stated., the defence was that the land in suit was given by the previous Sajjadanashin for building purposes to previous owners of the three houses who were in occupation of the land under an irrevocable license, and that the defendants acquired the rights which tfteir vendors had in the disputed property. It was also pleaded that as the plaintiff had acquiesced in the constructions made on the disputed land, he was estopped from claiming demolition of the structures in suit. It is not necessary to refer to other pleas raised in defence.

Suffice it to say, that the defendants had challenged the right of the plaintiff to bring the suit. Though the point was not conceded, the appellant did not choose to advance any arguments before us. The learned Civil Judge has held that the plaintiff was the 'de facto' Sajjadanashin of the Takia Kalan as he has been managing the endowed properties ever since the death of the previous Sajjadanashin, which took place more than 18 years ago. This finding was arrived at after considering the oral evidence of the parties and nothing has been urged before us to enable us to interfere with the finding of the trial Judge.

6. On the question of license set up by the defendants the learned Court below found the following facts proved.

> (1) The land in suit was first granted to one Kannaiya Lal for building purposes in or about the year 1922 but this permission was revoked by the then Sajjadanashin.
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> (2) Mian Hamid-ud-din Ali Shah (Sajjadanashin) after revoking the permission previously granted to Kanaiya Lal granted the disputed land to All Bakhsh, Qanga Prasad and Maiku Bhuj for building purposes.
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> (3) In the year 1923 or soon thereafter, the entire land in dispute was included in the houses of All Bakhsh, Ganga Prasad and Maiku Bhuj. Each, had built an ahata so as to make it a part and parcel of his house.

(4) The three houses of Ali Bakhsh, Ganga Prasad and Maiku Bhuj were purchased by the defendants who rebuilt them after demolishing the old structure. The house on the land marked ABCD was built about 10 or 11 years prior to the suit, while the constructions on C D E F were started soon after the last purchase in the year J945.

7. The learned Civil Judge, while recognizing that the transferors of the defendants were holding the disputed land under an irrevocable license held that the appellants, as transferees, could not be treated as licensees as they had failed to establish, 'the exact terms of the permission'. On the question of estoppel the trial Court held that the constructions ABCD were made 10 or 11 years ago without any let or hindrance by the Sajjadanashin, who was estopped from questioning the rights of the defendants to occupy building with the site.

As regards the constructions on C D E F, it was held that they were recently started and no ques-

tion of estoppel arose. The result was that part of the plaintiff's suit in respect of the land ABCD was dismissed; but the remaining part which related to the area covered by C D E F was decreed and the present appeal is directed against the decreed portion. The plaintiff has also filed cross-objection with regard to the portion of his claim which was dismissed.

8. Learned counsel for the appellants has contended that on the facts found established by the trial Court, the position of the appellants in relation to the entire disputed property is that of a licensee under an irrevocable licence. The contention must prevail.

9. It is not disputed before us that the entire land in suit was once included in the three houses of Ali Bakhsh, Ganga Prasad and Maiku Bhuj. The disputed land was at the back of these three houses and the owner of each had built a pucca compound wall enclosing his portion in the house. This was done by them in pursuance of the permission given to them by the Sajjadanashin, Miyan Hamid-ud-din, who did so after revoking the previous permission which had been granted to Kanhaiya Lal.

The evidence of Kanhaiya Lal assumes great importance in this case. He has deposed that the land in suit was originally granted to him on payment of Rs. 200/- as Nazrana to the Sajjadanashin and that subsequently he was called by the Sajjadanashin with a view to cancel his permission and to grant it in favour of the owners of the three houses, which were contiguous to the land in suit. He is definite that the land in suit was granted for building purposes to Ali Bakhsh, Ganga Prasad and Maiku Bhuj, who after obtaining the permission, made pucca enclosures to include the land in their respective houses.

It is, therefore, manifest that the land in suit was given finally to Ali Bakhsh, Ganga Prasad and Maiku Bhuj for building purposes. It is in the evidence of Balak Ram (D. W. 9), who was working as 'munim' at the shop of Ganga Prasad Bhup Narain that Ganga Prasad had given a sum of Rs. 200/- for a portion of the disputed land which was at the back of their shop. We are not impressed with the criticism of the Civil Judge about the veracity of his statement.

It is plain that the Sajjadanashin used to grant permission to build pn receipt of 'na-zrana', and there is nothing strange, if 'nazrana' were realised at the time of granting the disputed land in three portions, one to each of the owners of the three houses, which already existed there. Ladli Prasad (P. W. 14) has stated that in his presence Ali Bakhsh and Maiku Bhuj each paid Rs. 200/- for the land lying at the back of their respective houses.

We have been taken through the evidence of Ladli Prasad and we are satisfied that his evidence should be believed. Once the correctness of the story that Mian Hamid-ud-din had, after revoking the previous permission granted to Kanhaiya Lal, again granted permission to Ganga Prasad, Ali Bakhsh. and Maiku is accepted, one would expect that he did so after realising the usual nazrana. We are satisfied that the fresh permission to build on the land in suit was given. by Mian Hamid-ud-din, the then Sajjadanashin, after receiving a sum of Rs. 600/- for the entire land in suit.

The learned counsel for the appellants has not disputed the finding of the learned Civil Judge that the land in suit was granted by the previous Sajjadanashin for inclusion of the land in suit in the respective houses of Ganga Prasad, Ali Bakhsh and Maiku. It is also not controverted that these persons had built ahatas so as to make the land given to them as part and parcel of their houses.

10. The contention of the learned counsel for the respondents is that the construction of the ahatas by the predecessors of the appellants could not be regarded as a work of permanent nature 60 as to attract the provisions of Clause (b) of Section 60, Easements Act. We do not think that this contention has any force. We agree with the view enunciated in -- 'Nasir-ul-Zaman Khan v. Azim-ul-lah', 28 All 741 (A) that the expression 'work o,f permanent character' occurring in Section 60 is intended to denote some work which is not merely of a temporary nature.

As pointed out above, the land in suit was given for building purposes and if the licensees did not put up costly constructions but merely built a pucca wall so as to include the land in their respective houses and to make it a part and parcel of their houses, it will be deemed to be a work of permanent nature within the meaning of Clause (b) of Section 60.

11. It was next argued that in view of the fact that licensees had constructed only enclosures (ahatas), it should be presumed that the license was granted for building an enclosure only and for no other type of building. We are unable to accept this contention also. We know it that originally the entire land in suit was given to Kanhaiya Lal for building a house. Indeed Kanhaiya Lal had obtained the sanction of the Municipal Board also for building a house on the land in suit but he could not do so as his license was revoked by the then Sajjadanashin, as pointed out above.

If the land in suit was granted for building purposes to Kanhaiya Lal, it is reasonable to infer that when it was again granted to the three persons named above, the purpose for which the permission was given could be no other than to grant the land for building purposes. The mere fact that the three persons were not able to put up an expensive building will not justify an inference that the land was granted only for building an 'ahata' and not for any other type of building.

The construction of a pucca 'ahata' by each of the three owners is sufficient to show that each of them, had put up constructions of a permanent nature on the land given to them by the Sajjadanashin. We are, therefore, unable to hold that the land in suit was granted only for the purpose of building an 'ahata'.

12. Section 60, Easements Act, 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."

As pointed out above, Ganga Prasad, Ali Bakhsh and Maiku each had erected construction of a permanent nature and in doing so each one of them had incurred expenses in the erection of their respective 'ahatas'. Under Clause (b) of Section 60, each of the three persons, namely Ganga Prasad, Ali Bakhsh and Maiku, was holding the land in suit under an irrevocable license.

13. We now take up the main contention of the learned counsel for the respondent to the effect that a licensee, who has built a house, has no right to transfer it. In other words, the contention is that such rights are heritable but non-transferable. In support of this contention reliance has been placed upon a Division Bench case of the Court in -- 'Kallu Shah v. Rahim Baksh', AIR 1924 All 825 (B). The matter came up before a Bench in a Letters Patent Appeal and the Division Bench merely approved of the decision of Gokul Prasad, J., by remarking as under:

> "There is nothing in this appeal. It was clearly rightly decided."

We have, therefore, to fall back upon the judgment of Gokul Prasad, J. It was a suit brought by a mutawalli to eject defendant 2 from a house. It appears that defendant 1 in that case had built a house and it was found that defendant 1's position was that of a licensee holding the house under an irrevocable license. The question was whether the licensee could make a transfer. It was pointed out by Gokul Prasad, J. that "a license is ordinarily only a personal right and carries with it the incident of non-transfera-

bility."

It is unfortunate that there is no indication in the judgment to show whether the house in dispute in that case was situate in a village 'abadi', or in a town. The broad proposition of law laid down by Gokul Prasad, J. would hold good if the house was built by a tenant in an agricultural village. The case is of little assistance to us. We might, however, point out that there is another Division Bench case reported in the same volume at p. 112 -- 'Govind Prasad v. Kundan', AIR 1924 All 112 (C), wherein it was observed that the presumption of non-transferability of houses built by licensees in agricultural villages has no application to towns.

In that case a licensee under an irrevocable license had transferred the house along with the site, and the transfer was questioned by the licensor. The house was situate in the town of Nazibabad and it was held that the transfer could not be assailed as the presumption of non-transferability by the licensees in respect of houses in agricultural villages could not be applied to sites in towns. We are in accord with the observations made in 'Govind Prasad's case (C)'.

14. In agricultural villages, the practice of allowing tenants to build houses on sites owned by zamindars had its origin in antiquity. Such riya-yas of the zamindar were licensees holding under an irrevocable license under Section 60, Easements Act. The purpose for which the riyayas were permitted to settle down on the land of the zamindar was to enable them to carry on their occupation of agriculture. It is evident that their occupation of houses was inseparably connected with their agricultural holding; and so long as they and their heirs continued to carry on cultivation in the village, they enjoyed the right of occupation of the house which was built with the leave and license of the zamindar.

If the tenant died without leaving any heir to succeed him to the agricultural holding or if he abandoned the village, the house would escheat to the zamindar. The prevailing practice in the case of the houses built by riyayas was that such houses were heritable but not transferable. It was to exclude any stranger creeping in the village community against the wishes of the zamindar that the practice of non-transferability of houses built by riyayas came into vogue. Keeping in view the conditions prevailing in agricultural vil-lages, it was well understood that the riyayas who built houses with the permission of the zamindar had heritable rights in those houses but had no right to transfer them against the wishes of the zamindar.

15. In cities and towns also, the practice of granting permission to build by landlords has been in vogue from time immemorial. The conditions prevailing in cities and towns were, however, different. The licensees in urban areas were in a position to built costly houses, and the houses were built on the understanding that a licensee had transferable rights in the house. Thus the prevailing practice that grew up was that in cities a. licensee had a right to transfer his house.

It was, however, open to the licensor to impose a restrictive condition at the time when permission to built was granted, and in that event the case of such a licensee would not be governed by the general usage. It has been recognised by a long string of judicial decisions that under the general practice prevalent in urban areas licensees had transferable rights in the houses built by them with the permission of the owner of the land, while in rural areas the practice was that the tenants had no such right of transfer.

16. Learned counsel for the appellant has placed reliance upon the decision of this Court in --'Mohammad Sher Khan v. Amjad Hussain', AIR 1929 All 494 (D). The point that came up for decision was whether a licensee, who had built a house in the city of Kanauj, was competent to transfer it. The licensee had transferred the house to a third person and the owner of the site brought the suit to eject the transferee. Niama-tullah J. made the following observation :

> "Having regard to conditions prevailing in agricultural areas, it is to be presumed till the con- trary is proved that the right of transfer is not an incident implied in the license under which riyayas occupy sites of their houses. In urban areas the presumption is otherwise."

We entirely agree with the observation of Niama-tullah, J. We need hardly emphasize that there is a' clear distinction between the position of a licensee in rural area and that of a licensee in urban area relating to the transfer of houses built by them as licensees. In rural areas, non-transferability is the rule, while in urban areas the presumption is that the licensees occupying houses in cities and towns have a right to transfer them unless the contrary is established. (17) The question whether a licensee in urban areas had a right to transfer his house again came up for decision before a Division Bench of this Court in -- 'Ram Bharose v. Bishnath Prasad', AIR 1934 All 336 (E). The Division Bench upheld the view of Niamatullah, J. With regard to the transferability of a house built by a licensee in urban areas, the following observation may be quoted with advantage :

> "We are of opinion that in cases of houses built in cities on the land belonging to the landlords, there can be no presumption that they have no power of transfer. If the landlord contends that the tenant had no right to transfer the building which he had built and which he was occupying, it is for him to show that under the terms of the license the right of the tenant was limited and it was expressly agreed that he would be incompetent to make a transfer."

The general practice prevailing in this State as-to the rights of licensees to transfer their houses in cities is so well known that the Courts of law have consistently recognised that a licensee in urban areas will be presumed to have a right of transfer unless under the terms of any particular licence it was specifically provided that the licensee shall have no such right of transfer. The existence of this usage was again recognised by the Court in the case of -- 'Misri Lal v. Durga Narain Singh', AIR 1940 All 317 (P). Allsop J. pointed out that "the general rule in these provinces is that tenants in rural areas or agricultural villages are not entitled to transfer houses and the sites of houses but are entitled only to transfer the materials of which the houses are built, whereas tenants in urban areas are entitled to transfer the houses as they stand upon their sites." We have, therefore, no hesitation in holding that the three original licensees in this case were entitled to transfer their respective houses along with enclosures and that the appellants' right to occupy these houses cannot be questioned.

18. Learned counsel for the respondent has next argued that under Section 56, Easements Act, a licence is always treated to be a personal right and it cannot be made the subject of transfer. We are not impressed with this argument, Section 56 runs, thus :

> "Unless a different intention is expressed or necessarily implied, a licence to attend a place of public entertainment may be transferred by th& licensee; but, save as aforesaid, a licence cannot, be transferred by the licensee or exercised by his servants or agents."

19. The words 'save as aforesaid' are important and they must be read with the opening words of the section 'unless a different intention is expressed or necessarily implied." The intention referred to in Section 56 may be gathered from the terms of the grant itself or from the local usage. In order to entitle a licensor to take advantage of Section 56 o f the Easements Act it is his duty to show that under the terms of a particular license no trans-We do not, therefore, think that Section 56 helps the ferable rights were to be enjoyed by the licensee, respondent.

20. The learned trial Judge has recognised the fact that the original licensees were holding the disputed land under an irrevocable licence. He has, however, pointed out that as the terms of the licence under which the licensees had built the houses were not established it was not possible for him to hold that the original licensees had a right to transfer the houses built by them under the licence. This was clearly an erroneous view of the law. We have already pointed out that there is a presumption that licensees have transferable and heritable rights in the houses built by them in eities and towns.

In view of this presumption it was the duty of the plaintiff to establish that under the terms of the licence granted by his predecessor the licensees had no transferable rights. This was not done. In view of what has been stated above, the appellants had stepped into the shoes of the original licensees and they had every right to reconstruct the building, as the disputed land was granted for building purposes and the licence had become irrevocable, as stated above.

(21) In view of our finding on the question of licence it is not necessary to consider the question of estoppel and we do not propose to express any opinion on that point.

22. The last contention advanced by the learned counsel for the respondent was that the previous Sajjadanashin, who granted the permission to build on the disputed land, was holding the particular office for his life only and any act done by him is not binding upon his successor, the plaintiff. It appears that this plea was not raised before the trial Court. However, we have allowed the point to be argued although it is a new point. The aforesaid contention is based upon Section 53, Easements Act, which is as follows :

> "53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license."

From the language of Section 53 it is manifest that a person who has a transferable interest in land is competent to grant a license. It was therefore contended that the previous Sajjadanashin was holding his office for his lifetime and as such he could not grant a license which would enure beyond his life. In support of this contention reliance has been placed upon a Privy Council case of

-- ''Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar', AIR 1922 PC 123 (G). In that case their Lordships remarked as under :

> "According to the well-settled law of India (apart from the question of necessity which does not here arise) a Mohunt is incompetent to create any interest in respect

of the Mutt property to enure beyond his life."

It has been pointed out to us, and rightly, that the position of a mahant is analogous to the position of a, Sajjadanashin and it may be conceded as a general proposition of law that a Sajjadanashin is not competent to create any interest in respect of the endowed property which would last beyond his life. Their Lordships of the Privy Council were, however, careful in pointing out that in suitable cases a transaction entered into by a mahant may be justified on the ground of necessity.

The position of a Shebait or a Sajjadanashin in relation to endowed property is that of a prudent manager. If a Sajjadanashin deals with the en-dowed property for the benefit of the endowment then his action will be binding upon his successor also. Let us examine the facts of this case in order to find out whether the act of the previous Sajjadanashin was that of a prudent manager.

As indicated in the earlier part of the judgment, the endowment known as Takia Kalan was owner of vacant lands lying in various muhallas in the city of Bahraich. This particular plot was in muhalla Chhawni Bazar. As a piece of vacant land it was not yielding any profit to the endowment. When the licence was given the disputed land, as pointed out above, brought an income of Rs. 600/- which was paid as 'nazrana' for the permission granted by the Sajjadanashin. Muhalla Chhawni Bazar gradually grew up to be a market place where carts laden with goods used to arrive.

It seems to us that when businessmen were allowed to settle down in this part of the muhalla and as trade increased, a larger number of carts began to pour in and thus the income of the Takia from realization of 'tahbazari' dues went up appreciably. It is in the evidence of Kanhaiya Lal (D. W. 4) that carts for selling grains used to go to muhalla Chhawni Bazar and from the owners of those carts 'tahbazari' dues were realised. We have it in the evidence of Balak Ram (D. W. 9) that formerly 'tahbazari' dues yielded an income of Rs. 100/- to Rs. 200/- per year and that the income from that very source increased to Rs. 7000/- to Rs. 8000/- per year.

Thus the granting of lands by the Sajjadanashin to various persons for building houses brought income to the Takia at first in the shape of 'Nazrana' and when businessmen began to settle down in this muhalla and a larger number of carts began to come in, the income from 'tahbazari' dues showed a marked increase. It cannot, therefore, be doubted that the act of the previous Sajjadanashin in granting lands for building purposes was an act of a prudent manager, as it had the effect of bringing more income to Takia Kalan.

In our opinion it is not open to the present Sajjadanashin plaintiff to question the act of his predecessor which was beneficial to the endowment. We might as well refer to another case of -- 'Bawa Maniram Sitaram v. Kasturbhai Mani-bhai', AIR 1922 PC 163 (H). In that case their Lordships of the Privy Council observed that "the disability of a Shebait to make the permanent grant is not absolute" and that "under special circumstances it must be presumed that the grant would be valid beyond life of the grantor if a long time has elapsed after the grant."

It may be pointed out with advantage that the previous Sajjadanashin died in the year 1928 but no action was taken by the present Sajjadanashin to question the grants made by the predecessor. This

conduct of the plaintiff-respondent leads to the inference that he had ratified the transactions which had been entered into by his predecessor. On that score too, we are not disposed to upset the arrangement under which the previous Sajjadanashin had granted the previous disputed land for building purposes, as he must have done so in conformity with the established practice under which the Sajjadanashins were working.

It is, therefore, not possible to accept the contention of the respondent's Counsel that the permission which was granted by the previous Sajjadana-shin could not enure beyond his lifetime. The plaintiff Sajjadanashin brought the suit treating the appellants as rank trespassers. We have held that the appellants are holding the disputed land under the irrevocable licence and that they were quite justified in pulling down old structures in order to enable them to put up new constructions on the disputed land. In this view of the case, the plaintiff's suit should have been dismissed by the Civil Judge.

23. The respondent also filed cross-objections in respect of that part of the decree by which the claim to possession of land covered by letters A B C D was dismissed. As indicated above, there is no substance in the cross-objections, as in our opinion the entire disputed land stands on the same footing.

24. We, therefore, allow the appeal and dismiss the suit with costs in both the Courts. The cross-objections are also dismissed with costs.