

balance of convenience overwhelmingly lies in favour of the suit being tried on the original side of the Chief Court and that the plaintiff is actuated by some ulterior motive in avoiding the Chief Court of Oudh.

We may note that in taking action under section 151 of the Civil Procedure Code the question whether the application of Yuvraj Datt Singh is not maintainable for want of a previous notice to the plaintiff as required by section 22 becomes immaterial.

The result is that these applications succeed. We hold that the suit should be tried by the Chief Court of Oudh on the original side. Accordingly we stay all proceedings before the Subordinate Judge of Aligarh. It will be open to the plaintiff to apply to the Subordinate Judge of Aligarh for the return of his plaint with a view to presenting it before the Chief Court of Oudh.

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APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and
 Mr. Justice King*

MANZOOR AHMAD AND OTHERS (DEFENDANTS) *v.*
 MUHAMMAD ABDUL JAMIL (PLAINTIFF)*

 1933
 August, 24

Easements Act (V of 1882) sections 60(b), 64—Work of a permanent character executed by licensee—License irrevocable—Licensor not entitled to revoke on payment of compensation.

Where a work of a permanent character has been executed in pursuance of a license, whether express or implied, it becomes irrevocable, under section 60(b) of the Easements Act. Section 64 of the Act in no way destroys the irrevocability of the license in such a case.

Where a license has become irrevocable the licensor is not entitled to revoke the license on payment of compensation to the licensee. It would be a contradiction in terms to hold that a license is irrevocable under section 60 of the Easements Act and, at the same time, to say that the grantor can revoke the license provided he is willing to make compensation.

Mr. M. A. Aziz, for the appellants.

Mr. Akhtar Husain Khan, for the respondent.

*Appeal No. 19 of 1932, under section 10 of the Letters Patent.

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SULAIMAN, C. J., and KING, J.:—This is a defendants' appeal arising out of a suit for an injunction and damages. The lower portion of a wall between the houses of the parties admittedly belongs to the defendants. Ten or eleven years before the suit the plaintiff was allowed to raise this wall by constructing its upper portion as part of the walls of his privy on the upper storey. The lower appellate court has found that this construction by the plaintiff must have been made with the knowledge of the defendants, either with their consent or, at any rate, without any protest on their part, and remained in existence for a long number of years, though not for more than twelve years. The defendants subsequently demolished the upper portion and prevented the plaintiff from reconstructing it. The plaintiff accordingly sued for damages for the demolition of that portion of the wall and also for an injunction restraining the defendants from interfering with this construction. The first court gave the plaintiff a decree both for injunction and damages, but on appeal the lower appellate court came to the conclusion that the right not having been enjoyed for the full period of twenty years the plaintiff had not acquired any right by prescription or otherwise, and that accordingly, although he was entitled to get damages for the loss incurred by him, he was not entitled to any injunction against the defendants.

In second appeal a learned Judge of this Court came to the conclusion that the lower appellate court had overlooked that the construction made by the plaintiff was the work of a permanent character and that on the finding of the lower appellate court there was an implied grant of a license by the defendants to the plaintiff to construct the wall on the upper storey and that, as the wall had cost at least Rs.25, the construction was a work of a permanent character and not of a temporary nature, and the defendants were therefore not entitled to revoke the license under section 60(b) of the Indian Easements Act. The learned Judge has

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further held that section 64 of the Act does not apply to a case where the work executed is of a permanent character and that accordingly the plaintiff was not entitled to revoke the license on payment of compensation.

In our opinion the view taken by the learned Judge of this Court is perfectly correct. In the absence of a clear finding to the contrary he was entitled to examine the record and the circumstances of the case and come to the conclusion that the wall built on the upper storey was a work of a permanent character. He was not bound to send an issue to the lower appellate court on that point. A license, which under section 52 of the Indian Easements Act is a mere right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, is ordinarily revocable. But section 60 provides that a license can be revoked by the grantor, unless (a) it is coupled with a transfer of property and such transfer is in force; or (b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution. The present case undoubtedly falls within the scope of sub-section (b) of section 60. The license, therefore, cannot be revoked by the grantor.

In several earlier cases it was held by this Court that where a work of a permanent character has been executed in pursuance of the license, it becomes irrevocable.

In a recent case *IQBAL AHMAD, J.*, has held that where a license has become irrevocable the courts cannot allow a licensor to revoke the license on condition of his making compensation to the licensee for loss incurred by the revocation of the license. The learned Judge distinguished the Calcutta case of *Surnomoyee v. Chunder Kumar Das* (1), and another Calcutta case, on the obvious ground that the Indian Easements Act was not in force in Bengal and the learned Judges of

(1) (1910) 12 C.L.J., 443.

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the Calcutta High Court had not to consider the effect of section 60, but merely proceeded on general principles deducible from English rulings.

It seems to us that it would be a contradiction in terms to hold that a license is irrevocable under section 60 of the Easements Act if a work of a permanent character has been executed and, at the same time, to lay down that the grantor can revoke the license provided he is willing to pay compensation.

We also think that the provisions of section 64 in no way, destroy the irrevocability of the license, for that section deals with a license that has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted and is claiming compensation. It is always open to a licensee not to insist on the restoration of the license but be merely content with the compensation.

We therefore think that the decree passed by the learned Judge of this Court is right and we accordingly dismiss this appeal with costs.

REVISIONAL CRIMINAL

Before Mr. Justice Kendall and Mr. Justice Bajpai

EMPEROR *v.* LALA AND OTHERS*

1933
August, 25

Jury—Empanelling of jury—Number of jurors summoned being less than the minimum prescribed—Defect curable—Criminal Procedure Code, sections 326, 537—Deficiency in number of jurors attending in obedience to summons—Procedure for making up the deficiency from persons present in court—Whether such persons are to be chosen by lottery—Criminal Procedure Code, section 276, second proviso—Trial on joint charges—Acquittal on first charge and conviction on second—Conviction on second charge set aside on appeal and retrial ordered—Whether at the retrial the accused could be convicted of the first charge—Criminal Procedure Code, sections 403, 423.

*Criminal Revision No. 950 of 1932, from an order of W. Y. Madeley, Sessions Judge of Benares, dated the 12th of November, 1932.