-*Dr. Ajay Nathani*

Citations on Easement

Section 2.-Easement.-Distinction with *profit-a-prendre.* A profit-a-prendre in gross.-that is a right exercisable by an indeterminate body of person to take something from the land of others, but not for the more beneficial enjoyment of a dominant tenement.-is not an easement with the meaning of the Easements Act. To the claim of such a right, the Easements Act has no application. Section 2 of the Easements Act expressly provides that nothing in the Act contained shall be deemed to affect, *inter alia*, the derogate from any customary or other right (not being a lincese) in or over immovable property which the Government, the public or any person may possess irrespective of other immovable property. A claim in the nature of a profit-a-prendre operating in favour of an indeterminate class of persons and arising out of a local custom may be held enforceable only if it satisfies the tests of a valid custom. A custom is a use by virtue of which a class of persons belonging to a defined section in a locality are entitled to exercise specific rights against certain other persons or property in the same locality. To the extent to which it is inconsistent with the general law, undoubtedly the custom prevails. But to be valid, a custom must be ancient, certain and reasonable, and being in derogation of the general rules of law must be construed strictly. A right in the nature of a profit-a-prendre in the exercise of which the residents of locality are entitled to excavate stones for trade purposes would ex-facie be unreasonable, because the exercise of such a right ordinarily tends to the complete destruction of the subject-matter of the profit. *State of Bihar and others v. Subodh Gopal Bose and another etc.,* AIR 1968 SC 281: 1968 BLJR 177: 1968(1) SCR 313

Section 7(i).-Right to pass flood waters.-Necessity of rain.-Effect of usual occurrence of flood over the higher land.-Right to pass on the flood water to the lower land. The appellate court has not been able to fix the precise year of commencement of the phenomenn. It would, therefore, follow that upon the evidence available in this case the proper inference to be drowned be that this phenomenon has been known from time immemorial. A phenomenon is said to be happening from time immemorial when the date of its commencement is not within the memory of man of the date of its commencement is shrouded in the mists of antiquity. Where a right is based upon the illustration (i) to Section 7 of the Indian Easements Act, 1882 (5 of 1882), the owner of higher land can pass even flood water received by him on to the lower land, at any rate where the flood is a usual or a periodic occurrence in the locality. Now the water on a higher ground must by operation of the force of gravity flow on to lower ground. Where the owner of the lower ground by creating an embankment impedes the natural flow of water he would be obstructing the natural outlet for that water. It makes little difference that the water happens to be not merely rain water but flood water provided the flood is of the kind to which the higher land is subjected periodically. The floods from the defendants 1 and 2 are seeking to themselves are not of an extraordianry. In the circumstances, therefore, they erected by them and the trenches due to them must be held to constitute a was act entitling the plaintiff to the relief by him. *Patneedi Rudrayya v. Veluabantla Venkayya and others,* AIR 1961 SC 1821: 1961 Andh LT 829: 1962 All WR 2: 1962(1) SCR 836

Section 8(c).-Application of.-Easement of right to take water.-Right based on co- ownership and in alternative on the basis of easement.-Provision is applicable. In the absence of any specific pleading regarding prejudice or detriment to the defendants-respondents the plaintiffs have every right to use the common land and the common channel. The plaintiffs-appellants were claiming their right on the basis of admitted co-ownership rights which includes unrestricted user, unlimited in point of disposition, and the High Court was not justified in holding that the plaintiffs' right to take water was not acquired by any grant from the defendants-respondents or from any other sale deed. The right of co-ownership presupposes a bundle of rights. The only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment. Illustration (c) to Section 8 of the Indian Easements Act applies

where a co-owner seeks to impose an easementary right on the land or any part thereof. In the instant case, however, the plaintiffs claim easementary right only as an alternative ground but the main ground on which they based their claim is on the right of co-ownership. *Ayyaswami Gounder and others v. Munnuswamy Gounder and others,* AIR 1984 SC 1789: 1984(4) SCC 376: 1985(1) SCR 808: 1984(2) Scale 437

Section 12.-Right to access.-Easement of.-The access in use of land should be as a matter of right and not permissive in nature. The access and use, on the basis of which an easement is claimed, must be as and by way of easement and without interruption for a period of 20 years. The enjoyment must be, in other words, as of right and not permissive either under a licence or an agreement. A party to a suit can plead inconsistent pleas in the alternative such as the right of ownership and a right of easement. But, where he has pleaded ownership and has failed, he cannot subsequently turn around and claim that right as an easement by prescription. To prove the latter, it is necessary to establish that it was exercised on some one else's property and not as an incident of his own ownership of that property. For that purpose, his consciousness that he was exercising that right on the property treating it as someone else's property is a necessary ingredient in proof of the establishment of that right as an easement. *Chapsibhai Dhanjibhai Dand v. Purushottam,* AIR 1971 SC 1878: 1971(2) SCC 205: 1971 Supp. SCR 335

Section 15.-Right of easement.-Plaintiff and defendant purchasing adjacent lands.-Sale deeds of both parties mentioned that they had right of ingress and egress over open passage.-Defendant executed release deed relinquishing all his rights except the right to passage in open space.-Release deed subsequently cancelled.-Plaintiff cannot claim any right of easement to have water from his property flow onto land of his neighbour.# *Saraswati and another vs. S. Ganapathy and another,* AIR 2001 SC 1844 : 2001(4) SCC 694

Section 18.-Customary right.-Reasonableness of.-Exercise of right by indefinite body of persons.-Permissibility. If by the exercise of a customary right in favour of an indefinite body of persons the property which is the subject-matter of the profit-a-prendre is in danger of being destroyed the customary right will not be recognised. In the present case the right to take "spontaneous produce of forest and minerals" for domestic or agricultural purposes by the tenants is not in issue. What is in issue in the right claimable by all the tenants of the two villages.-to excavate stone from all lands in the village for trade purposes by installing machinery. Such a custom would, if exercised in its amplitude as claimed, may lead to breaches of the peace, for it would be open to all tenants to claim to work any quarry simultaneously for trade purposes, and may also tend to the destruction of the subject-matter. Such a custom would be unreasonable. *State of Bihar and others v. Subodh Gopal Bose and another etc.,* AIR 1968 SC 281: 1968 BLJR 177: 1968(1) SCR 313

Sections 20 and 23.-Right of privacy.-Opening of windows.-No customary right of privacy pleaded or proved.-Opening of window cannot be restrained though the other party may block the same by raising the height of the walls. *Smt. Anguri and others v. Jiwan Dass and another,* AIR 1988 SC 2024: 1988(4) SCC 189: 1988 Supp. (2) SCR 736: 1988(2) Scale 560: 1988(3) JT 528

Section 23.-Easement.-Increase in burden.-Permissibility.-The protection under the provision is not available. The burden of the easement has been increased by the action of the defendants. Section 23 of the Indian Easements Act, in terms, provides that the dominant owner may, from time to time, alter the mode and place of enjoying the easement provided that he does not thereby impose any additional burden on the servient heritage. In the present appeal before us, as additional burden on the property of the plaintiffs has been imposed by the action of the defendants, the provisions of the said section cannot come to the aid of the defendants. *Smt. Anguri and others v. Jiwan Dass and another,* AIR 1988 SC 2024: 1988(4) SCC 189: 1988 Supp. (2) SCR 736: 1988(2) Scale 560: 1988(3) JT 528

Section 28.-Implied easement.-Determination of.-Gift of adjacent land with a common area in between.-Subsequent gift to common area also is one of the grantees.-The other grantee

cannot claim to have easement of work the common area by implication. *Mst. Kamla and others v. Bhanwarlal Vaid and others,* AIR 1985 SC 473: 1985(1) Scale 355: 1985 Guj LH 379: 1985(1) SCC 563

Section 52.-Licence.-Determination of.-Grant of accommodation by erstwhile Nawab of the State.-No unequivocal transfer of ownership.-The grant is nothing any more than a licence. *The State of U.P. and another v. Sayed Abdul Jalil,* AIR 1972 SC 1290: 1973(2) SCC 26

Section 52.-Licence.-Distinction with lease.-Determination of the nature of transaction.-The real test is the intention of the parties.-The test of exclusive possession alone is not totally irrelevant. *Capt. B.V. D'Souza v. Antonio Fausto Fernandes,* AIR 1989 SC 1816: 1989(3) SCC 574: 1989(3) SCR 626: 1989(2) Scale 197: 1989(3) JT 265

Section 52.-Licence.-Distinction with lease.-Right to remove forest produce.-No interest created in immovable property.-The document in question is a licence and not lease. *Board of Revenue etc. etc. v. A.M. Ansari etc.,* AIR 1976 SC 1813: 1976(3) SCC 512: 1976(3) SCR 661

Section 52.-Licence.-Distinction with lease.-Rooms in hotel, if a lease or licence.-Determination of.-Conferment of right to use the property without any intention to create interest in the property is a licence and not lease. A lease is a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. If a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. The following propositions may, thereafter, be taken as well-established: (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties.-whether they intended to create a lease or a licence; (3) if the document creates an interest in the property; it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, *prima facie*, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. *Associated Hotels of India Ltd. v. R.N. Kapoor,* AIR 1959 SC 1262: 1960 SCJ 453: 1960 (1) SCR 368

Section 52.-Licence.-Distinction with lease.-Sanad granted by erstwhile ruler.-The grant not conferring the status of a permanent lessee.-Right of limited access.-The sanad conferring a mere licence and is not a lease.Section 52.-Licence.-Distinction with lease -Substance of document must be preferred over form of document.-Authority to sublet, cannot by itself convert a licence into a lease.-Document giving authority to run the business, held to be licence and not lease. *Vayallakath Muhammodkutty v. Illikal Moosakutty,* AIR 1996 SC 3288: 1996(9) SCC 382: 1996(4) Scale 617: 1996(6) JT 665: 1996 Civ. CR (SC) 708: 1996(2) Land LR 418

Section 52.-Licence.-Duty of licensee.-A licensee is always deemed to be a licensee.-He is not entitled to set up title in defence. The respondent was a licensee, and he must be deemed to be always a licensee. It is not open to him, during the subsistence of the licence or in the suit for recovery of possession of the property instituted after the revocation of the licence to set up title to the property in himself or anyone else. It is his plain duty to surrender possession of the property as a licensee and seek his remedy separately in case he has acquired title to the property subsequently through some other person. He need not do so if he has acquired title to the property from the licensor or from someone lawfully claiming under him, in which case there would be clear merger. The respondent has not surrender possession of the property to the appellant even after the termination of the licence and the institution of the suit. The appellant is, therefore, entitled to recover possession of the property. *Sant Lal Jain v. Avtar Singh,* AIR 1985 SC 857: 1985(2) SCC 332:

1985(3) SCR 184: 1985(1) Scale 423

Section 52.-Licence.-Meaning of.-Decree of ejectment against tenant.-Compromise between the parties to deliver possession of premises on the subsequent date.-No fresh lease in favour of tenant/judgment debtor.-The possession is only permissive in nature.-Tenant is liable to eviction at any time. *Sultana Begum v. Prem Chand Jain,* AIR 1997 SC 1006: 1997(1) SCC 373: 1996(9) Scale 55: 1996(11) JT 1: 1997(1) Raj. LW 53: 1997(2) Mad. LW 521

Section 52.-Licence.-Meaning of.-Permission to use land without creating any interest therein is not a lease but is a licence. If an interest in immovable property entitling the transferee to enjoyment was created, it was a lease; if permission to use land without exclusive possession was alone granted, a licence was the legal result. We are of the opinion that this was a licence and not a lease as we discover the intent. For this purpose reference may be made to the language used and the restrictions put upon the use of the premises in question by the appellant. In the document in question the expression "licence" was introoduced and Cl. (2) said that it was only for the business purposes. The licence fee was fixed. If permitted user only for 20 hours. Restriction in the hours of work negates the case for a lease. Clause (12) is significant which gave to the licensor the right to enter upon the premises and inspect the same at any time. In our opinion the background of the facts of this case and the background of the entire document negate the contention of the appellant that it was a lease and not a licence. *Khalil Ahmed Bashir Ahmed v. Tufellhussein Samasbhai Sarangpurwala,* AIR 1988 SC 184: 1988(1) SCC 155: 1988(1) SCR 1057: 1987(2) Scale 1034: 1987(4) JT 342: 1988 Mah LR 61

Section 52.-Licence.-Permissive possession.-Effect of.-Every exclusive possession is not a lease.-Necessity to gather intention of the parties.-Compromise between the parties in a suit for ejectment whereby the tenant granted liberty to continue in premises for five years.-The nature of possession held to be not a lease but a licence not governed by the provisions of Rent Control Act. *Kt. N. Rm. Thenappa Chettiar and others v. N.S. Kr. Karuppan Chettiar and others,* AIR 1968 SC 915: 1968 (2) Andh WR (SC) 95: 1968(2) SCR 897

Section 52.-License.-Profit a prendre.-Distinction with lease.-Lessee enjoys the property without any right to take it away while in a profit a prendre one has a licence to enter on the land, without the right to enjoy, for the purpose of removing a part of the produce of the soil. *Smt. Shantabai v. State of Bombay and others,* AIR 1958 SC 532: 1958 SCA 727: 1958 SCJ 1078: 1959 SCR 265

Sections 52 and 62(c).-Licence.-Distinction with lease.-Necessity of notice to quit before termination of licence does not render the transaction as lease. Thus the mere necessity of giving a notice to a licensee requiring him to vacate the licensed premises would not indicate that the transaction was a lease. Indeed, Section 62(c) of the Indian Easements Act, 1882 itself provides that a licence is deemed to be revoked where it has been either granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled. In the agreements in question the requirement of a notice is a condition and if that condition is fulfilled the licence will be deemed to be revoked under Section 62. *Mrs. M.N. Clubwala and another v. Fida Hussain Saheb and others,* AIR 1965 SC 610: 1964(2) MadLJ (SC) 83: 1964(6) SCR 642

Section 52.-Licence.-Absence of pleading that deed executed between parties was camouflage to evade rigours of provisions of Rent Act.-Terms of document, if treated as sub-lease, would be illegal.-Agreement must be held to be deed of lease and licence and not 'lease deed'.

To find out whether the document creates lease or licence real test is to find out 'the intention of the parties', keeping in mind that in cases where exclusive possession is given, the line between lease and license is very thin. The intention of the parties is to be gathered from the document itself .... Where it was nowhere pleaded that the deed executed between the parties was a camouflage to evade the rigours of the provisions of the Rent Act nor was it stated that a sham document was executed for

achieving some other purpose the intention of the parties would be required to be gathered from the express words of various terms provided by them in the deed. Consequently, when the terms of the document provided that the agreement was a licence and should not be treated or used or dealt with or construed by the parties in any way as lease to confer any relationship as landlord and tenants between the parties and the parties were capable of understanding their rights fully, and parties were conscious that a lawful lease deed could be executed only after obtaining consent of the landlord and the document if treated as sub-lease, would be illegal, the deed must be held to be deed of lease and license and not lease deed. *Delta International Ltd. vs. Shyam Sunder Ganeriwalla and another,* AIR 1999 SC 2607 : 1999(3) Mad LJ 70 : 1999(1) Rent LR 557 : 1999(2) All Mah LR 576 : 1999(4) SCC 545 : 1999(2) Cal HM 16

Section 60(b).-Application of.-Equitable application.-Act not applicable in State of Assam.-The provision comprising of principles of equity, justice and good conscience can be applied.-In view of Inequitable conduct of the party setting up false case, relief on the basis of principles of the provision, declined. *Panchugopal Barua and others v. Umesh Chandra Goswami and others,* AIR 1997 SC 1041: 1997(4) SCC 713: 1997(2) Scale 145: 1997(2) JT 554: 1997(3) Land LR 3

Section 60(b).-Irrevocable licence.-Permanent construction.-Acquiescence by Licensor.-No objection raised to permanent construction put up by Licensee.-Revocation of licence not permissible. In view of the licenser's donation of the property to the school and his subsequent conduct, the licensee could reasonably entertain a belief that the licenser had permitted the construction on the land, and in pursuance thereof, the licensee made constructions and incurred expenses. The result is that the respondents 'acting upon the license' had executed works by incurring expenses which rendered the license irrevocable. Raja Ram Kumar Bhargva who was examined as a witness on behalf of plaintiff admitted in his testimony that he continued to be the president of the school since 1938 to 1961 and thereafter his wife has continued to be the president, it is therefore difficult to believe that he had no knowledge of the constructions. If the license did not permit the school to execute any permanent constructions. Raja Ram Kumar Bhargva would have certainly raised objections. His conduct of acquiescence to the raising of constructions is eloquent enough to show that the license was irrevocable. No doubt Raja Ram Kumar made attempts to support the plaintiff's case by saying that he had not given the property to the school permanently but the trial Court and the High Court both have discarded his testimony and we find no good reason to take a different view. These faces and circumstances point out the terms and conditions of the license that the school was permitted to occupy and enjoy the land permanently for the purpose of education. In this background, it would be reasonable to infer an implied condition that the license was irrevocable and the school was permitted to occupy and use the premises so long as it continued the purpose of imparting education to the students. *Ram Sarup Gupta (dead) by LRs. v. Bishun Narain Inter College and others,* AIR 1987 SC 1242: 1987(2) SCC 555: 1987(2) SCR 805: 1987(1) Scale 700: 1987(2) J.T. 76

Section 60(b).-Permanent licence.-Determination of.-Construction by Director of the company on the property of the company.-The purpose of licence not clear or stood abandoned.-No licence came into existence. When the appellant was making the offer for creating a trust he was not merely an agent of the company; he was also a trustee of the assets of the company and was in a fiduciary relationship with the respondent. Therefore the appellant could not do anything in regard to the assets of the company which would prejudicially affect its rights. The appellant made an offer that he would erect the building on the land belonging to the respondent which is in schedule A, the building being schedule B. He also offered that it would be a trust property, i.e., the super structure would be the trust property. He could not create a trust in regard to land which belonged to the company nor could he by a unilateral act create a lease in his own favour in regard to the land which is in schedule. In our opinion no case of license really arises but if it does what is the license which the appellant obtained and what is the license which he is seeking to plead as a bar. The license, if it

was a license, was to construct the building and hand it over to the respondent company as trust property. There was no license to create another kind of trust which the appellant has sought to create. It cannot be said therefore that there was an irrevocable license which falls under Section 60(b) of the Act. Even such a license is deemed to be revoked under Section 62(f) of that Act where the license is granted for a specific purpose and the purpose is attained on abandoned or becomes impracticable. In the present case the purpose for which the license was granted has either been abandoned or has become impracticable because of the action of the appellant. *Chevalier I.I. Iyyappan and another v. The Dharmodayan Co.,* AIR 1966 SC 1017: 1963(1) SCR 85

Section 60(b).-Permanent licence.-Pleading for the first time as an alternative plea, in first appellate Court.-Such plea is not permissible in appeal. *Chevalier I.I. Iyyappan and another v. The Dharmodayan Co.,* AIR 1966 SC 1017: 1963(1) SCR 85
