

(1964) 03 BOM CK 0008

In the Bombay High Court

Case No : Appeal No's. 217 and 218 of 1961

Chapsibhai Dhanjibhai

APPELLANT

Vs

Purshottam Motilal

RESPONDENT

Date of Decision : 04-03-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Easements Act, 1882 — Section 12
Limitation Act, 1908 — Article 142
Transfer of Property Act, 1882 — Section 105, 108

Citation : AIR 1964 Bom 287 : (1964) 66 BOMLR 525 : (1964) MhLj 668

Hon'ble Judges : Naik, J

Bench : Single Bench

Advocate : P.P. Deo and R.R. Dandige, for the Appellant; S.N. Kherdekar, for the Respondent

Judgement

1. These two appeals can be disposed of by common judgment for the sake of convenience since they involve some facts which are common to both the cases. Second Appeal No. 217 of 1961 has arisen out of a suit filed by Chapsibhai Dhanjibhai Jain against Purushottam son of Motilal Jhunjhunwala. Second Appeal No. 218 of 1961 has arisen out of a suit filed by Purushottam Motilal Jhunjhunwala against Chapsibhai Dhanjibhai Jain. Throughout the judgment, Chapsibhai will be referred to as the plaintiff and Purushottam will be referred to as the defendant. The fact underlying this litigation may be briefly stated as follows: There is an open piece of land belonging to the predecessors-in-title of the defendant at Khamgaon, on 5-5-1906 the plaintiffs father took the easternmost portion of this land, measuring 26 feet east-west and 225 feet north-south on lease and passed a kabuliyat in 5-5-1906 in respect of the same. In 1906 the plaintiff's father constructed a building which he started using as a shop in the northernmost portion of the plot taken on lease by him. Again, in 1909 he built a godown in the southern-most portion. In 1921, the plaintiff's father put up a three storied structure in the middle of the plot, that is to say,

between the two buildings already constructed by him and started residing therein. There was a well situate to the west of the northernmost strip of the plot leased to the plaintiff's father. The portion to the west of the plot given on lease to the plaintiff's father was lying vacant for a long time. It appears that the defendant's father put up a small structure in the northernmost portion of the land belonging to him to the west of the well, but the year or the construction has not come on record. It is, however, in evidence that in about the year 1954 the defendant had installed a printing Press in the building. Even after the construction of the aforesaid building, the remaining portion to the south of the defendant's plot continued to remain vacant and unoccupied. It is the case for the plaintiff that he used a four feet strip lying to the west of the plot given to him on lease as a passage. The plaintiff has opened six windows on the ground floor and three windows on the first floor of his residential building which have an opening to the west. It appears that, in about 1929, the entire land was measured and the portion leased out to the plaintiff was given plot No. 94 whereas the portion remaining with the defendant was given plot No. 93. The measurement appears to have been based on the area mentioned in the lease deed. The plaintiff has alleged that, in 1954, the defendant started constructing a building as a result of which five of the windows on the ground-floor and three on the first floor of his building have been blocked. According to the plaintiff, he has acquired a right in the nature of easement of taking light and air through these windows by user for over the statutory period. It is further his case that the roof of his building projects to a distance of about 2 1/2 feet towards the west and that the rain water falls on plot No. 93 from the eaves of the roof. It is also his case that he has put up a "pakka" gutter from point N to O, and that further to the south he has put up a "kaccha" drain for the passage of rain water, as also the water used by the residents of the building. According to the plaintiff, the defendant's building almost touches the western wall of his own building and, in that way, not only obstructs the free access of light and air to the windows but also affects the drain. The plaintiff has appended a map along with the plaint. He has described the four feet strip lying to the west of his house by the letters PNHORSTMP. According to the case originally made out in the plaint, the plaintiff claimed a right to this strip by accession to his leasehold property. Later on, he amended the plaint and stated that this strip is a part of the property given to him on lease. The plaintiff contended that the defendant has encroached upon this strip and has spoiled the gutter in parts. The plaintiff has further stated that the defendant has put up an Oil Mill in the newly constructed building, and the noise created by the working of the Mill, the bad odour, emitted by the oil-cakes and the dumping, have created a nuisance for the residents of the building. The plaintiff had also alleged that the vibrations caused by the working of the Mill, had affected the safety of his building; but this aspect of the case is not pressed before me in this appeal by the plaintiff's counsel and need not, therefore, detain us. The plaintiff, therefore, claimed the following reliefs :

(1) Declaration that the strip of land denoted by the letters PNHOSSTMP is an

accession to the lease, dated 5-5-1906, within the meaning of Section 108(e) of the Transfer of Property Act.

(2) Declaration that the said strip is covered by the said lease.

(3) A direction to the defendant to remove the encroachments and encumbrances in respect of the said strip and to deliver possession of the same to the plaintiff. In case the defendant fails to remove the encroachments, the plaintiff should be permitted to remove the same and obtain possession thereof.

(4) (a). A permanent injunction restricting the defendant, his agents and servants from interfering with the plaintiff's right to enjoy free and uninterrupted light and air from the windows.

(4) (b). From interfering with the plaintiff's right to enjoy uninterrupted use of the strip of land mentioned above.

(4) (c) (i) From interfering with the plaintiff's right to enjoy physical and mental comfort by closing the windows by the roof of the corrugated iron sheets.

(4) (c) (ii) Working an Oil Mill in plot No. 93 which creates nuisance by unbearable noise, foul smell, vibrations, smoke and the like.

It may be mentioned that, according to the plaintiff, the lease created by the kabuliyat (Exhibit P-4) is a permanent lease.

2. The defendant resisted the plaintiffs claim on various grounds which may be set out as follows : (1) The lease created under the kabuliyat (Exhibit P-4) is not a permanent lease but a lease for a fixed period of thirty years at the end of which there would be a tenancy at will. (2) The plaintiff and his predecessors-in-interest have, never been in possession of this strip which is mentioned by the letters PNHORSTMP at any time. There is no question of the aforesaid strip amounting to accession to the plaintiff's lease. The defendant also denied that the aforesaid strip was used as a passage for going to the well or taking cattle to the well. According to the defendant, the gutter was constructed recently and the plaintiff had acquired no right of easement so far as the gutter was concerned. (3) As regards the right to take light and air through the windows in the western wall of the plaintiffs building, the defendant contends that this wall is at the western extremity of the plot given to the plaintiff on lease, and the plaintiff, therefore, is incapable of acquiring any rights of easement so far as the passage of light and air is concerned. (4) The defendant has denied that any hind of nuisance is created to the plaintiff or the members of his family either as a result of the noise created by the working of the Mill or as a result of any bad smell emitted through the working of the Mill.

3. Before setting out the decisions of the Courts below so far as the plaintiff's suit (for the sake of convenience I will occasionally call it the first suit is concerned, it would be convenient to refer to the suit filed by the defendant. This suit (for the sake of convenience I will call it the second suit) relates to the well

which has to the west of the plaintiff's plot. This well has been in existence since before the date of Exhibit P-4 as is clear from the description of the boundaries contained in the deed. It appears that the plaintiff was taking water from this well for domestic consumption and also for the use of his cattle. It further appears that in 1931, with the permission of the defendant, the plaintiff put up a hand-pump for pumping water from the well. Later on, the plaintiff started pumping water from the well with the aid of an electric motor fixed in his own premises. The defendant, therefore, brought a suit for the removal of the pumping arrangement and for an injunction restraining the plaintiff from taking water through the well with the aid of the electric pump. The defendant also wanted a prohibitory injunction restraining the plaintiff from taking water from the well in any manner.

4. The plaintiff contended that he and his predecessors-in-interest have been using the water of the well since the date of the lease; that is, since 1906 and, therefore, he has acquired a right in the nature of an easement of taking water from the well according to his needs.

5. Several issues were framed in the first suit brought by the plaintiff. The trial Court held that the lease in favour of the plaintiff was a perpetual lease. It further held that the plaintiff failed to prove his claim to the strip of the width of four feet as accession to the leasehold property. -The trial Court went so far as to say that the plaintiff failed to prove his possession within twelve years before the institution of the suit. The trial Court, however, upheld the plaintiff's claim for cashment rights over this strip as accession to the leasehold property, the trial Court also accepted the plaintiff's claim so far as the right to take light and air through the windows in question was concerned and held that the plaintiff had acquired such light by prescription. According to the trial Court, the plaintiff has acquired a right to drain out the waste water from his house and also roof water through the gutter which lies on the four feet wide strip. The trial Court did not accept the plaintiff's claim, namely that the, Oil Mill was causing nuisance, mischief or discomfort to the plaintiff. Consequently, the plaintiff's suit came to be partially decreed.

6. With regard to the defendant's suit, the trial Court held that, although the plaintiff might be using the water from the well, there was nothing to suggest that he was doing so. In the exercise of an easement right. The trial Court took the view that the plaintiff's use of the well water was all along permissive, in consequence, the defendant's suit came to be decreed in full.

7. The plaintiff preferred Civil Appeal No. 199 of 1960 from the part of his claim which was rejected by the trial Court and the defendant filed cross-objections from the decree granted in favour of the plaintiff. The plaintiff preferred Civil Appeal No. 189 of 1960 against the decree passed in favour of the defendant in the second suit. Both these appeals were heard by the Assistant Judge, Kiramgaon, together as they involved certain common questions of fact and law.

8. The Assistant Judge came to the conclusion that the lease was not a perpetual lease but a lease for a specific period at the end of which it would be a tenancy at will. He negatived the plaintiff's claim to accession of the four feet wide strip to his leasehold interest. Disagreeing with the view taken by the trial Court, the appellate Court came to the conclusion that the plaintiff had not and could not prescribe any right way of easement of taking light and air through the windows in the western wall. The, appellate Court agreed with the conclusion reached by the trial Court on the question of the Oil Mill causing any nuisance to the inmates of the plaintiffs-family. It also agreed with the view taken by the trial Court in the suit filed by the defendant regarding the well. Consequently, the appellate Court dismissed the plaintiff's appeal, allowed the cross-objections and dismissed the plaintiff's suit in toto. It also dismissed the-plaintiffs appeal in the second suit, maintaining the order of dismissal of his suit by the trial Court. It is against these two judgments that the plaintiff has preferred Second. Appeals Nos. 217 of 1961 and 218 of 1961 from the first and second suit respectively.

9. The first and the main question to be considered in this appeal is whether the lease granted under Exhibit. P-4 is a permanent lease or not. The finding on this issue will have an important bearing on certain other matters in issue, such as, the nature of the right acquired by accession to the four feet wide strip (if held proved) and the right to take light and air through the windows. The decision of this question mainly turns upon the construction of the document Exhibit P4 as a whole and the surrounding circumstances. It may be noted that the document is in the form of a rent note, passed by the lessee to the lessor on 5-5-1906. The main terms of the document, are as below:

"I have taken from you the above open land on a 30 years agreement of lease for constructing a pucca structure and to reside there as agreed to. I shall construct a house on the said land according to my convenience and I shall myself incur whatever expenses will be needed for that construction The ownership of the building shall vest in me and you shall have no right over it. The rent of the land, which shall be Rs. 130/- per annum, shall be paid by me to you every year Even after the prescribed time limit, I shall have a right to keep my structure on the leased land so long as I like and I shall be paying to you the rent every year as stated above. You will have no right to increase the rent and-F shall also not pay it. Myself and my heirs shall use this land in whatever manner we please. After the lease period, we shall, if we like, remove our building right from the foundation and vacate your land. In case we remove, our structure before the stipulated period, we shall be liable to pay to you the rent for all the thirty years as agreed to above In case I were to sell away the buildings which, I shall be constructing on the above-land, to any one else, then the purchaser shall be bound-by all the terms in this lease deed I shall have- a right to build pucca or kaccha structures on this land in whatever way I please and you shall not be entitled to raise any objection thereto."

10. The important features of this lease are :

- (a) This is a lease for building purposes.
- (b) The lease is to enure, in the first instance, for a period of thirty years.
- (c) The lessee will have a right to continue to enjoy all the rights under the lease even after the expiry of the initial period of thirty years.
- (d) The rent is fixed and the lessor has no right to increase it in any manner.
- (e) The rights of the lessee will be heritable and shall pass on to the heirs. The right under the lease is transferable.

11. Till 1926 there was a consistent trend of judicial decisions so far as this High Court is concerned which held that when the lessee is given the power of holding the land as long as he pleases, the lease of land is determined by the death of the lessee vide *Gopalrav v. Bhavan- rao*, 1874 PJ 279, *Suleman v. Asmad*, 1877 PJ 177 and *Vaman Shripad v. Maki* ILR 4 Bom 424. The question of interpretation of a similar clause came up for consideration before a Division Bench comprising Macleod, C. J., and Crump, J. in *Bai Sona Vs. Bai Hiragavri*, . Macleod, C. J., differed from the view taken by the Bombay High Court in earlier cases on the ground that the documents conveying interests in (and in this country are loosely drawn. The learned Chief justice also referred to Section 108(j) of the Transfer of Property Act which allows the lessee to transfer his interest in the leasehold property to emphasize his view that such a lease would also enure for the benefit of his heirs. According to the learned Chief Justice, where the terms of the lease provide that so long as the lessee goes on paying rent to the lessor, the lessor will not be entitled to get the premises vacated, that the lease is a permanent lease and is not determined by the death of the lessee.

12. The view taken by the Madras High court was contrary to the view that prevailed in Bombay. In *Karani Manika Mudaliar v. Chinnappa Mudaliar* ILR 36 Mad 557, it was held :

"A lease by which the lessees are to hold for such time as they require or wish is a tenancy at the will of the lessees which in law is a tenancy at the will of the lessor also."

The logical corollary of this view would be that whenever a lease stipulates a specific period beyond which it gives an option to the lessee to continue as long as he pleases, the tenancy would become a tenancy at will of either of the parties after the expiry of the stipulated period. This question was considered by a Division Bench of the Bombay High Court in *Abdulrahlm v. Sarafali* 30 Bom LR 1596 : AIR 1929 Bom 66. Dissenting from the view taken by the Madras High Court, Justice Patkar held that the lease for a particular period, after which an option is given to the lessee to continue in possession on payment of rent, enures for lessee's benefit, and the principle of reciprocity or mutuality cannot be invoked. After the expiry of the lease, the lessee can continue in possession as long as he pays the rent, that is, it endures during the lifetime of the lessee. Justice Patkar relied upon the earlier decision of the Bombay High Court. In ILR 4

Bom 424 and pointed out that although there was a conflict between that decision and the decision in *Bai Sona Vs. Bai Hiragavri*, it would not be necessary to consider that aspect of the matter since it was not contended in the Court below that the lease in question amounted to a permanent lease. According to Justice Patkar, ordinarily a lease, which gives an option to the lessee to continue on payment of rent, is a lease for the lifetime of the lessee. An option given to the lessee would not necessarily also amount to an option given to the lessor for the simple reason that such an option is for the benefit of the lessee, and the lessee will be presumed to exercise the option in his own favour. There was, therefore, no reciprocity or mutuality involved in the option given to the lessee. In order that a tenancy should amount to a tenancy at will, an option must be given to the lessor to terminate the lease at his will. A similar view was taken by the Division Bench comprising Patkar, J. and Barlee, J. in *Indian Cotton Co. Ltd. Vs. Raghunath Hari Deshpande*, . In that case, the land was given to a limited Company on lease for five years with an option to the Company to continue on the same rent so long as they wanted to continue. Justice Patkar held that such a lease amounts to a lease for the lifetime of the Company. In the same volume is reported the case of *Ramchandra Balwant v. Narasinha Chintaman* AIR 1931 Bom 466, decided by a Division Bench consisting of Patkar, J. and Broomfield, J., wherein it was held :

"Where a certain property is leased for an "aniyamit (i.e. indefinite or unlimited or unrestricted) period viz., "So long as the Kesari Maratha institution is in existence the lease though not a permanent lease is yet one which is valid according to law and will enure so long as the trust was in existence."

13. It would thus be seen that barring the discordant note struck by Macleod, C. J., in *Bai Sona Vs. Bai Hiragavri*, it has been consistently held in Bombay that a tenancy, which is either for an indefinite period or is held good so long as the tenant pays the stipulated rent is ordinarily a tenancy which enures till the lifetime of the lessee and determines by the death of the lessee.

14. In *Donkangouda Ramchandragouda Vs. Revanshiddappa Shivalingappa Balganur*, , a Division Bench comprising Beaumont, C. J. and Wassoo-dew, J. emphatically dissented from the view taken by Macleod, C. J. in *Bai Sona Vs. Bai Hiragavri*, . The terms of the lease in that case were as follows :

". I shall go on paying the amount of rent and take a receipt from you every year. You should not evict me from possession of the house so long as you receive from me the said amount of rent You must never raise the rent"

It was held that the tenancy created was not permanent but was such as to enure during the lifetime of the tenant; Sir John Beaumont pointed out that merely because the tenancy is transferable, it does not follow that it is at the same time heritable. He also pointed out that *Bai Sona Vs. Bai Hiragavri*, , was wrongly decided because of the failure to note a distinction between transferability and heritability. Sir John Beaumont emphasized that, if the

intention was to create a permanent lease, one would expect to find a reference towards such as "heirs or successors" and that, since the lease provides that the lessee shall continue so long as he pays the rent, the lease must be treated as a lease enuring for the lifetime of the lessee.

15. It would be clear from the above discussion that ordinarily a lease, which provides that the lessee will continue so long as he pays the rent, will be a lease for the lifetime of the lessee; but this is just a presumption of law and cannot be treated as a universal proposition of law as there may be cases of lease wherein there are other terms suggesting that the lease was heritable in which case, on a proper construction of the document, the Court is free to come to the conclusion that the lease is a permanent lease. In this connection, a reference may be made to the decision of the Privy Council in *Lakhraj Roy v. Kurthya Singh* ILR 3 Cal 210, wherein it was held :

"The rule of construction that a grant made to a man for an indefinite term enures only for the life of the grantee and passes no interest to his heirs, does not apply in cases where the terms can be definitely ascertained by reference to the interest which the grantor himself has in the property, and which the Errant purports to convey."

The entire question was fully reviewed by the Division Bench of the Bombay High Court in *Bavasaheb Walad Mansursaheb Kotri and Another Vs. West Patent Press Co. Ltd. and Others*, . The material part of the lease provided thus:

" At the end of the remaining years out of the agreed period of 30 years, you may continue on the premises, so long as you choose or desire, provided you go on paying me Rs. 40/- as rent every year. You may erect buildings or lay out lanes on the premises and I have no objection for the same, if you do so, with the permission of the Government. In case you want to quit and go, you should remove your woodwork and machinery and leave the walls on the land for us"

The learned Judges took a comprehensive survey of the various cases decided by the High Court of Bombay and also other High Courts. They expressed their dissent from the view taken by the Madras High Court in ILR 36 Mad 557 and approved of the view taken by Patkar, J. in *Indian Cotton Co. Ltd. Vs. Raghunath Hari Deshpande*, . Their Lordships also dissented from the view taken by Chief Justice Macleod in *Bai Sona's case* 28 Bom LR 552 : AIR 1926 Bom 374 and approved of the view taken by Beaumont, C. J. in *Donkangouda Ramchandragouda Vs. Revanshiddappa Shivalingappa Balganur*, . They summed up the position in the following words:

"The position, therefore, is that subsequent to the decision of this Court in 45 Bom LR 194 : AIR 3943 Bom 148, this Court has always taken the view that the contract of tenancy which authorises the tenant to remain in possession of the property on payment of rent is a contract for indefinite period and therefore must be treated to be a contract valid during the lifetime of the tenant."

At the same time, following the view taken by the Privy Council in ILR 3 Cal 210, the Division Bench held that the decision in each case must turn upon a proper construction of the terms of the document. This principle would also apply to a tenancy for a building purpose in respect of which a presumption may be available, namely, that such a tenancy is either for the lifetime or in certain cases is a permanent tenancy but, in no case, is a tenancy at will. Their Lordships laid down the following rule of construction relating to a lease for building purposes which provides that the lessee has an option of continuing on the premises so long as he liked or so long as he paid rent:

"The nature of the tenancy created by any document must be determined by construing the document as a whole. If the tenancy is for a building purpose, prima facie, it may be arguable that it is intended for the lifetime of the lessee or may in certain cases be even a permanent lease. Prima facie such a lease is not intended to be tenancy at will. But whether it is a tenancy for life or a permanent tenancy must ultimately depend upon the terms of the contract itself. And in construing the terms of such contracts the Court must look at the substance of the matter and decide what the parties really intended to do. If the lease is for a definite period and before the period is over, the lessee dies, during the remainder of the period, the leasehold rights enure for the benefit of his heirs, unless the document clearly stipulates that in case of the lessee's death before the expiration of the period the rights of the lessee are not to enure for the benefit of his successors. If the lease is for an indefinite period, it does not enure for the benefit of his heirs. It is usually for the lifetime of the lessee himself, unless again it clearly appears from the contract that the benefit of the lease is intended to accrue to the successor of the lessee. If the lease is expressed to be terminable at the option of the lessor or at the option of the lessee it creates a tenancy at will and such tenancy is determined at the option of either party to the contract. A tenancy at will is necessarily determined by the death of the lessee. It can be determined by the lessee creating a lease in favour of another person or by the lessee assigning his right to a stranger."

16. The terms and circumstances set out below will have an important bearing in applying the principles set out above :

- (1) The lease is granted for building purposes.
- (2) The lessee was allowed to construct a pucca structure and, as a matter of fact, he has put up three massive structures.
- (3) The rent, was fixed at Rs. 130/- and was not liable to be revised.
- (4) At the end of the period of thirty years, the lessee was allowed to continue on payment of the same rent as long as he liked.
- (5) The lease was transferable.
- (6) The lease was heritable, and

(7) It contained an express stipulation "Myself and my heirs shall use this land in whatever manner we please."

(8) Even after the death of the original lessee, his heirs have been allowed to continue without demur and rent is accepted from the heirs and successors of the original lessee.

The most important term in the document is the one which provides for the leasehold right continuing to the heirs and successors. As was stated by the Privy Council in ILR 3 Cal 210 and also by Bavasaheb Walad Mansursaheb Kotri and Another Vs. West Patent Press Co. Ltd. and Others, , any words indicating that the interest shall pass on to the heirs would suggest that the lease was not to come to an end on the death of the lessee but it was to enure permanently. In this connection, I may refer to another decision of the Bombay High Court in R.S. Rammohanrai Jaswantraai Desai and Others Vs. Somabhai Nathabhai Patel and Others, , in which emphasis was laid upon the use of the words indicating that the tenancy was to continue after the death of the lessee and also upon the surrounding circumstances, such as, the subsequent conduct of the parties. On considering the terms of the lease as a whole and taking into account the conduct of the lessee in putting up strong and massive construction and that of the lessor in not terminating the lease on the death of the original lessee, I feel no hesitation in holding that the lease in the present case was intended to be a permanent lease.

17. The next question for consideration in the order of importance is whether the plaintiff was in possession of the four feet strip for over a period of twelve years and whether he has acquired this strip as accession to his leasehold property. Section 108(d) of the Transfer of Property Act provides:

"If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease."

The learned Assistant Judge has interpreted this clause to mean that there can be accession to the leasehold property only if the land has imperceptibly accreted as happens in alluvial re-formation. The plaintiff has never pleaded that he got this property by imperceptible accretion either by alluvion or otherwise. His case throughout was that he encroached upon the four feet strip for various purposes. Firstly he used it as a passage to go to the well. Secondly he took a projection of 2 1/2 feet of the eaves of the roof and allowed the rain water to fall on this strip. Thirdly, he put up an open gutter for the passage of the domestic, as also, the rain water, it seems to have been assumed in the Courts below that the plaintiff had not pleaded accession to the said strip by adverse possession. I will refer to the pleadings shortly but it may at once be conceded that he has not used the words "adverse possession" as such. But his case throughout has been that he has remained in possession of this strip from the beginning of the tenancy and has put it to various uses and, therefore, he has acquired that strip as accession

to the leasehold right.

18. Before discussing the pleadings and the evidence in this case, it will be necessary to clarify the position as to how there can be accession to the leasehold properly by adverse possession and what would be the legal effect of such accession. At page 671 of Mulla's Transfer of Property Act, 1949 Edition, under the heading "Encroachments", the learned author, after referring to the English rule as to accretions,, comments :

"Therefore, although the clause (clause relating to artificial accretions) does not in terms apply to encroachments made by the lessee, the law as to encroachments is the same. If the lessee encroaches upon adjoining land and acquires title thereto by prescription, he must surrender the land to the lessor at the expiry of the term whether the land be waste land or land of a stranger. The true presumption is that the land so encroached upon is added to the tenure and forms part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of the landlord. If the land of the lessor is encroached upon the lessor may of course eject the lessee before he has acquired a prescriptive title, but not in the interval after the acquisition of that title and before the end of the term."

Two conclusions can be deduced from the above quotation. The first is that the lessee can acquire additional property belonging to the lessor by adverse possession and the second is that the lessee does not, however, get absolute title to that property but such properly enures to him as an accretion. The Courts below have not appreciated the distinction between a lessee acquiring additional land is accession to the leasehold property and prescribing absolute title thereto. In the same connection, a reference may be made to a passage appearing at page 1043 in Woodfall on Landlord and Tenant, 26th Edition, as follows :

"An encroachment upon adjoining land of the landlord, after occupation by the tenant for more than twelve years, cannot be recovered by the landlord during the term, and in one case was held on the facts to have been occupied by the tenant as part of the holding, so as to be recoverable by the landlord at the end of the term."

19. In *Esubai v. Damodar Ishvardas* ILR 16 aom 552, a plot of land in the centre of the defendants' part was granted to the plaintiff's predecessor-in-title on Fazendar tenure, to build a dwelling upon. A hut was accordingly built thereon. No privy was built with or attached to the hut, the occupants of the hut using the cart, or neighbouring parts, for natural purposes. The plaintiff bought the hut, knocked it down and proceeded to build a substantial dwelling with a privy on the site of the old hut. Defendant denied his right to build a privy, or to have any right of way for sweepers to the said privy when built. The plaintiff claimed a right of passage over a strip of land 10 or 15 feet in width surrounding the premises including the site for the privy and for an injunction restraining the defendants from so obstructing him. It was not clear from the evidence as to

whether the aforesaid piece of land was originally granted by the Fazendar under the lease of that date but it was found that this strip was occupied since 1862, either by original grant or by encroachment, either" with or without the assent of the Fazendar. It was held that an encroachment would be deemed to be added to the tenure and formed a part thereof although it could not be presumed to have been made by the tenant absolutely for his benefit.

20. In *Devendra v. Jhumur* AIR 1926 Cal 883, their Lordships observed :

"If the land is found as not included in the admitted tenancy, it must be a case of encroachment or trespass by the defendant. In such a case it is well settled that if the tenant is in adverse possession of the absolute interest for over twelve years, then the landlord's right should be held to be completely extinguished. If the tenant is in adverse possession for such a period in respect of only of a limited interest as tenant, then, whatever may be the effect of it on the question of the landlord's right to khas possession a claim for assessment of rent will not be barred"

21. In the light of the above principles, let us now turn to the facts established in the case. In the plaint, at paragraph 2, the plaintiff asserted :

"During this period (1906 to 1958) excepting a small structure which has been let out to Sovereign Soap Factory, the rest of the Nazul plot No. 93 was all vacant. This portion of the width of 4 feet is shown in the schedule "No. 1" by letters "PNHORSTMP" in the Section titled as "Plan of the Western wall of the building". The total area of the strip is 650 sq. ft. and is the land in suit in respect of which the plaintiff is claiming relief along with other reliefs. Plaintiff further submits that although a large space between the construction made in 1906 and 1909 was vacant till the year 1922, the land in suit was under the user of the plaintiff as a, passage for all purposes."

At paragraph 3, the plaintiff avers:

"..... the entire waste water of the plaintiff's house is made to pass by a drain which was constructed within the strip of the land (4 feet wide strip) more particularly described in para 2 above and which is the land in suit. This drain was constructed along with the western border of the Nazul plot No. 94 but within the area of the Nazul plot No. 93 and the water used to be drained from the north to the south along the points PNHO" and thereafter from "O" to "M" and "S" as shown in the schedule....."

At paragraph 4, the plaintiff states:

"The roof of the entire building of the plaintiff has a projection of a width of 24 feet and on the western side. This projection of the roof extends over the area of the Nazul plot No. 93 but within the width of the strip of (and of which possession is claimed by the plaintiff as detailed in paragraph 2 above. As a consequence of this projection, the rain water from the roof must necessarily fall within the area of the said strip of land. Besides on the first and second floors

there are openings in the western wall for the passage of rain water falling on the terraces."

At paragraph 7, the plaintiff mentions the right which the defendant has either violated or threatened to violate. Sub-para (a) of paragraph 7 runs thus :

"The plaintiff has a right to hold and possess quietly and without interruption the strip of land denoted by letters "PNHORSTMP" as shown in the schedule being an accession to the lease-hold rights of the plaintiff in respect of the Nazul plot No. 94."

The plaintiff has claimed possession of the aforesaid strip. This was the case as made out by the plaintiff in the original plaint. Later on, he amended the plaint by adding the alternative contention that the four feet wide strip is a part of the leasehold area covered by the original kabuliyat, dated 5-5-1906. It is true that the plaintiff has not stated in so many words that he has acquired the above strip by adverse possession as a lessee. At the same time, he has stated that this property is an accession to his lease-hold property and has also mentioned the detailed uses to which he has been putting this property. The trial Court framed issues Nos. 1 (a) and 1 (b) covering the plaintiff's main case about accession and the alter-native case about the strip being a part of the leasehold property. Since the plaintiff had asked for possession on the ground of dispossession in 1957, the Court also framed an issue No. 1 (c) calling upon the plaintiff to prove his possession within twelve years before the institution of the suit. The discussion of these issues is found at paragraph 10 of the trial Court's judgment, which is very perfunctory, as follows :

"Thus the plaintiff has three-fold ease in relation to this strip. There is, however, not an iota of evidence to show that the plaintiff got this strip by accession with the permission of the defendant's ancestors. The plaintiff himself is silent on the point. The defendant does not admit the same. " Hence, the plaintiff fails to prove alleged accession. This plaintiff's learned Advocate Mr. Chande, however, argues at the bar that the plaintiff claims this accession by adverse possession. But this argument has no substance and basis because that was never the plaintiff's case, nor is there any evidence on this point." As pointed out above, it was wrong on the part of the trial Court to have assumed that the plaintiff had not made out a case of accession by adverse possession. It was equally wrong on the part of the trial Court to have dismissed the whole question by a cryptic half sentence "nor is there any evidence on this point."

22. With regard to the plaintiff's proving his possession to the four feet wide strip within twelve years, the trial Court has confused the issue. At the end of paragraph 14 the trial Court has disposed of this matter by another misleading sentence :

"The plaintiff has, however, failed to prove his possession as owner of the strip in dispute. So issue No. 1(c) is decided in the negative."

There was no question of proving possession as owner and it was enough for the plaintiff to prove the fact of his having been in possession within twelve years. The only requirement under Article 142 of the Limitation Act is that the plaintiff should prove to the satisfaction of the Court the fact of his having been in possession within twelve years of the institution of the suit.

23. Let us now turn to the approach made to this question by the appellate Judge. The appellate Judge has interpreted certain statements of the plaintiff to which reference will be made presently to mean that the plaintiff has given up his case of accession to the four feet wide strip on the strength of adverse possession and that he wanted to confine his case only to the said strip having been included in the leasehold property under the document. Even so, the learned Assistant Judge proceeded to discuss this question at paragraph 15 of the judgment. After pointing out that there was no specific case made out in the plaint of accession by adverse possession and no specific issue in the trial Court, the learned Assistant judge has referred to a decision in *Prohlad Teor v. Kedar Nath Bose* ILR 25 Cal 302 and observed :

"It was held in the above case that when a tenant encroaches on the land of his landlord, he does not by such encroachment become a tenant of the encroached land against the will of the landlord. It is not the plaintiff's case that the initial lease was valid and hence his possession of the entire area was wrongful from 1965 with the result that he perfected a title in himself by adverse possession for more than 12 years."

Again, while discussing the question as to whether the plaintiff has prescribed the right to take light and air through the windows in the western wall of his building the learned Assistant Judge has pointed out that from 1935 to 1941 the plaintiff's father had also taken on lease, plot No. 93 and was in possession in his capacity as a tenant. Mr. Kherdekar wanted, to make use of this observation in support of his contention that the plaintiff's adverse possession so far as the four feet wide strip of land is concerned, was interrupted between the period from 1935 to 1941. The plaintiff, therefore, cannot get the four feet wide strip as accession by adverse possession. It may at once be pointed out that the above observation of the learned Assistant Judge is not only not supported from the evidence but is actually negatived therefrom. In his plaint, the plaintiff specifically stated at paragraph 2 that this strip of four feet was not included in the lease of plot No. 93 obtained by him. It is significant to note that, in the notice given by the plaintiff to the defendant on 24-12-1941 (Exhibit P-6), it is stated that a portion of plot No. 93 was leased out to the plaintiff's father. The rent note, which the plaintiff's father had executed in respect of plot No. 93, was produced during the cross-examination of the plaintiff and the plaintiff was asked to identify the signature of his father. The plaintiff stated that he was unable to identify the signature of his father. No attempt was made thereafter to prove the document and the document remained unexhibited till the end. Later on the document was taken back by the defendant. It was not produced either before

the lower appellate Court nor was it produced before me. It is, therefore, extremely unfair to say that the rent note executed by the father of the plaintiff related to the entire portion of plot No. 93. The sudden manner in which the plaintiff was confronted with the document in the witness-box and the surreptitious way in which it was taken back without attempting to prove the same, raise doubts either about the genuineness of the rent note or about the suggestion that the rent note related to the entire plot No. 93. Apart from the mistaken observation made by the learned Assistant Judge in regard to the so-called interruption of the plaintiff's possession of the four feet wide strip, as I have stated above, the whole case about the accession has been misunderstood by the learned Assistant Judge, At one stage, the learned Assistant Judge has stated that the plaintiff had given up his case of accession by adverse possession, and at another stage the learned Assistant Judge has proceeded to consider the question on the basis as to whether the plaintiff could acquire a right of absolute ownership to the four feet wide strip. I have also pointed out how the trial Judge has mis-applied his mind to this aspect of the matter. That being the case, the finding of fact arrived at by the Courts below cannot be considered as binding.

24. It has been observed by the Privy Council in AIR 1943 208 (Privy Council)

"Their Lordships had occasion to point out in *Damusa v. Abdul Samad* 46 Ind App 140 : AIR 1919 PC 29 that where the Courts below had misconceived the real question of fact they had to try there was an error of law on which a second appeal lay; and their Lordships can see no difference in principle between a failure to appreciate and determine the real question of fact to be tried and a failure to appreciate and determine a question of fact which vitally affects the issue stated in the case. In either case the failure is a failure in the duty imposed by law upon the Court and the question whether there has been such a failure must in their Lordships' opinion be a question of law."

25. In my view, the Courts below have misconceived the real question of fact which they had to try. They have also failed to appreciate and determine a question of fact which vitally affects the issue stated in the case. The Courts below ought to have recorded a clear finding as to whether the plaintiff was, in fact, in possession of the four feet wide strip for over a statutory period in his capacity as a lessee. Such an issue was never formulated nor has any finding been recorded on that precise question. It is, therefore, necessary to see whether the plaintiff has led evidence to show that he has been in possession of the four feet wide strip and has been enjoying the same in his capacity as a lessee. I have already referred to the averments contained in the plaint and the various acts of user which have been set up by the plaintiff so far as the above strip is concerned. In his deposition, the plaintiff has reiterated the position taken up by him in the plaint relating to the user. In answers to questions in cross-examination, the plaintiff stated :

"I say even now that the land covered by the land and the well is in my right

under the lease deed, and I say so in respect of the land surrounding the well also. I do not say that the land comprising the lane was got by me after the lease deed. I have a right on both the properties under the lease deed itself..... I am under the impression that both these properties are covered by my lease deed Whatever rights I have acquired are under the lease deed itself and not afterwards."

26. Mr. Kherdekar contended that these admissions amounted to the plaintiff giving up his claim to the four feet strip by adverse possession. I am unable to accept this line of reasoning. It is the plaintiff's case in the alternative that the four feet wide strip is included in the [and leased to him. It is an admitted fact that no measurements had taken place at the time when the present plot No. 94 was granted in lease to the plaintiff's father. The lands must have been roughly demarcated and delivered into the possession of the lessee. The plaintiff's predecessors and the plaintiff have all along been under the impression that they got this strip under the lease. That only means that they have been in possession of this strip, from the commencement of the lease. These admissions are in no way destructive of the plaintiff's claim to this property as accession by adverse possession. In the present case, what is necessary for the plaintiff to prove, is not that he has remained in possession in assertion of his ownership. All that is necessary for him to prove is that he has been in possession in his capacity as a lessee. Far from being inconsistent with such a case, the plaintiff's statements cited above lend full support to his case of accession of this strip to his leasehold right. It is equally clear from the evidence of the plaintiff that the statement made by the Courts below that there is no evidence to show that the plaintiff has been in possession as a lessee, is erroneous. It appears that the plots were measured in 1929 and plot No. 94 was given to the leased land, and plot No. 93 to the remaining portion belonging to the defendant. Mr. Kherdekar contended that the measurements must have been made on the basis of the actual possession and since it is clear that the area of four feet wide strip is not included in plot No. 94, this strip must not have been in the possession of the plaintiff or his predecessors-in-interest. Unfortunately, no evidence has been led as to on what basis the measurements were made. Judging from the areas of the respective plots, it appears that the measurements have been made on the basis of the area mentioned in the lease deed Exhibit P-4. Mr. Kherdekar drew my attention to the admission made by the plaintiff to the effect that plot No. 94 was given to the land in his possession and plot No. 93 was given to the land in the possession of the defendant. This is, in my view, a general statement and does not specifically touch the question of the possession of four feet wide strip. The other witness on this point is Kripal Khanji (P. W. 6), who was in the service of the plaintiff's family since 1907. He left the service in 1939. He has, therefore, no axe to grind in supporting the plaintiff's case. He says:

The land towards the west of the godown measuring about 4/5 feet right up to the well, was in plaintiff's use. Plaintiff's cattle used to go on that land for drinking well water. People using the well were also going from that land. There

was also a drain for carrying away, the water. The roof of the house slopes towards the west. It extends to about 2 1/2 feet on the open land. The rain water and the utensils water used to (all in that gutter. The drain was constructed pucca in 1922, about 40/50 feet in length." This evidence remains unshaken in cross-examination, it is equally necessary to remember that the plaintiff's wall comes at the western extremity of plot No. 94. It is unlikely that a wall will be built at the extreme end without leaving any space for coming in and going. It is still more unlikely that a number of windows would be kept in that wall, if the plaintiff and his predecessors were to know that the land beyond the wall did not belong to them and that the landlord would have a right to close the windows at any time by erecting a wall adjoining their own wall. The defendant nor his predecessors have ever obstructed the plaintiff and his predecessors in opening the windows in the western wall and in putting up the eaves which projected to a distance of about 2 1/2 feet upon the defendant's land. The conduct of the parties, therefore, suggests that both the lessor and the lessee were under the impression that some more land beyond the western wall was given to The lessee and the latter was entitled to use the same. The plaintiff's evidence is consistent about the width of this land and, according to him, this strip was four feet wide. I am, therefore, satisfied that the plaintiff was in possession of the four feet wide strip since 1906 in his capacity as lessee and, therefore, has acquired this strip as secession to his leasehold property.

27. In view of my finding about the four feet wide strip, it is wholly unnecessary to consider the question as to whether the plaintiff has acquired a right to take light and air through the windows as easements by user for over a statutory period. Only a few observations would therefore, suffice on this point. Before succeeding on this point, the plaintiff has to cross two hurdles. The first is that a lessee cannot acquire an easementary right to take light and air as against the land of his lessor and the second is that the plaintiff has not enjoyed the right to take light and air with the consciousness that the windows open against the land of another. On the first point, Mr. Deo referred me to a Full Bench decision of the Allahabad High Court in Abdul Rashid and Others Vs. B. Braham Saran, . In that case, their Lordships held that although a lessee of land, which he has taken for building purposes, cannot acquire a right of way by prescription over the land of the landlord, he may acquire such a right so far as the passage of light and air through, the windows opening on the latter's property is concerned. This distinction was based on the provisions of Sections. 2 and 3 of the English Prescription Act of 1832. Right of way and other easements have been dealt with in Section 2 and the right by way of easement of the use of light for a dwelling house is dealt with in Section 3. Section 2 did not refer to buildings at all, whereas Sections 3 related to rights acquired in favour of a dwelling house. Their Lordships held that Indian Easements Act closely follows the English law and, therefore, came to the conclusion that an easement for the use of light in favour of a house belonging to the lessee can be acquired as against the land of the lessor. This question came up for consideration before a Division Bench of the

Bombay High Court in *Ambaram Popat Vankar Vs. Budhalal Mahasukram Shah*, . Alter referring to the Allahabad decision, Sir John Beaumont pointed out that Section 12 did not make a distinction between the acquisition of an easement for light and other easements, such as, the use of a way. He also stated that there was no basis for the view that the Indian Easements Act closely follows the provisions of the English Prescription Act. Finally, he observed :

"I must confess that I am wholly unable to agree with that view. I demur to the suggestion that lessee who builds a house as a permanent structure on the land comprised in the lease becomes the owner of the house for more than the leasehold interest in the land. He may have right to remove the house; and he may even be regarded as the owner of the materials of which, the house is built. But that is the ownership of a chattel, and an easement cannot be annexed to a chattel."

Sir John Beaumont pointed out that if the lessee acquires a right to light he acquires it on behalf of the owner which means the absolute owner and he cannot acquire it on behalf of the owner as against such owner, because a man cannot acquire art easement as against himself. He, therefore, held that, under the Indian Easements Act, a lessee cannot acquire a right to light over the adjoining property which belongs to his landlord. Mr. P. P. Deo contended that this decision is based on the supposition that the duration of the lease is limited and that a time may come when the lease would come to an end. In the present case, the lease is a permanent lease and, therefore, there is no question of the house being removed and turned into a chattel. There is some force in this line of reasoning but I do not think it necessary to pursue the point any further, firstly because I am sitting singly and thus would be bound by the view taken by the Division Bench, and secondly, decision on this controversy is not called for in view of my finding about the four feet wide strip.

28. On the second hurdle also, it is sufficient to refer to the decision of the Bombay High Court In *Raychand v. Maneklal* AIR 1946 Bom 266, wherein Justice Divalia after pointing out the inconsistency in the position of claiming ownership over the strip of the land and claiming easement rights as against the same, stated at page 269 :

"To prove that the right was exercised as an easement, it is necessary to establish that it was exercised on somebody 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 somebody else's property, is a necessary ingredient in proof of the establishment of that right as an easement."

29. Turning to the question as to whether any, nuisance is caused to the inmates of the plaintiffs house by reason of the working of the Oil Mill set up by the defendant in plot No. 93, it may be pointed out that there is a concurrent finding of the two Courts below to the effect that no nuisance is caused as a result of the

working of the Oil Mill. Mr. P. P. Deo gave up his case that the working of the Oil Mill creates vibrations to the plaintiffs building and thereby endangers its safety. The case for nuisance thus restricts itself to the creation at noise which causes disturbance and discomfort to the inmates of the plaintiffs house and to emitting bad smell and flames through the chimney, it was alleged that the mill was working day and night. It is, however, conceded that the Mill is now working only during day time. Originally, the Mill was working as an Oil Mill and, therefore, a chimney was set up for the passage of the smoke. Sparks used to be flown through this chimney. During the trial, a device was fixed for preventing the flying of these sparks through the chimney. It is an admitted fact that at present the whole mill is working on electric energy. The result obviously, therefore, is that the noise is abated and there is no question of emitting any smoke or flying of the sparks. The witnesses examined on behalf of the plaintiff have indulged in considerable exaggeration so far as the causing of disturbance and discomfort to the members of the plaintiff's family are concerned. The Oil Mill is known as Baby Expeller Oil Mill and it has been found that the noise created is not of such a character as to cause any disturbance to the inmates of the plaintiff's house. It is true that the lower appellate Court has tried to apply a somewhat rigorous standard by saying that the house must be rendered useless for habitation. Apart from indicating a very stiff yard-stick, there is nothing to suggest that the lower appellate Court has thus applied its mind to the real question in controversy, namely, as to whether the noise was of such magnitude as to cause discomfort taking into account the locality in which the mill is situated and the conditions of modern life. I do not, therefore, think it necessary to discuss the various decisions cited at the Bar on this point and it is sufficient to observe that I entirely agree with the finding arrived at by the Courts below that no nuisance is caused to the plaintiff and the members of his family as a result of the working of the Oil Mill in plot No. 94.

30. So far as the appeal relating to the plaintiff's right to use the water from the defendant's well is concerned, the finding is clear, namely, that such use as the plaintiff was making was permissive. This finding is based not only upon the evidence led in the case but also the contents of the agreement at Exhibit P-4. The very fact that the plaintiff's father felt the need of securing the consent of the defendant's predecessors for fixing a hand-pump on the well clearly shows that the plaintiff was not using the water of the well as a matter of right. The finding arrived at in this respect also is essentially a finding of fact which cannot be reopened in second appeal.

31. The plaintiff had asked for a direction for removing the encroachments and encumbrances made by the defendant in respect of the four feet wide strip. It will be recalled that the defendant constructed the structure which adjoins the plaintiff's western wall and covers even some of the windows on the first floor. That means that part of the structure falls within the four feet wide strip which, according to my finding, is an accession to the plaintiff's leasehold property. We have, therefore, to consider the logical effect of this finding. Mr. Deo contended

that it must follow from the finding that a mandatory injunction is given to the defendant calling upon him to remove the encroachment from the four feet wide strip. The words "mandatory injunction" have not been used in the plaint. The trial Court has not granted any relief by way of mandatory injunction although it held that the plaintiff was entitled to an easementary right of light and air through the western windows. One of the grounds perhaps may be that the plaintiff had not asked for mandatory injunction in so many words. It appears that an application was made to the trial Court after the passing of the decree for amending the decree by granting the relief of mandatory injunction u/s 152 of the Code of Civil Procedure. That application was, however, rejected. Mr. P. P. Deo has made an application to this Court requesting that he should be allowed to amend the plaint by adding the prayer for mandatory injunction. The application has been very vigorously opposed by Mr. Kherdekar on behalf of the defendant. In my view, however the amendment sought is not necessary because the prayer made covers the relief of mandatory injunction. If, however, the clarification is allowed to be made in the form of amendment, that will not in any way affect or prejudice the defendant's case. This appears to be an amendment by way of abundant caution and I see no reason why the same should not be allowed.

32. The result is that Second Appeal No. 217 of 1961 partly succeeds; the decree of the lower appellate Court is reversed and the decree of the trial Court is modified and the following order substituted in its place.

33. The plaintiff has acquired- the four feet wide strip described by the letters PNHORSTMP in the schedule as accession to his leasehold which is of a permanent character. The defendant has no right to encroach upon any part of this strip so long as the lease remains in existence nor has he any right to obstruct the windows by putting up a construction or projection so as to block either wholly or partially these windows. The defendant is hereby directed to remove the construction or projection put up by him on any part of this four feet wide strip within 30 days from the date of this order failing which the same would be removed under directions of the lower Court at the cost of the defendant. The plaintiff's claim for relief against the nuisance alleged to have been created by the working of the mill fails. The defendant to pay the costs of this appeal. Second Appeal No. 218 of 1961 is dismissed with costs.

34. Order accordingly.