
(2015) 10 KL CK 0152

In the High Court Of Kerala

Case No : Regular Second Appeal No. 282 of 2015

Indira Motor Service and Others

APPELLANT

Vs

Panakkat Nazaruddin and Others

RESPONDENT

Date of Decision : 07-10-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2015) 5 KHC 174 : (2015) 4 KLJ 357

Hon'ble Judges : A. Hariprasad, J

Bench : Single Bench

Advocate : Biju Abraham and B.G. Bhaskar, for the Appellant; P.B. Krishnan, K.R. Avinash and Abdul Raoof Pallipath, Advocates for the Respondent

Final Decision : Dismissed

Judgement

A. Hariprasad, J—This second appeal raises the following substantial questions of law:

"(i) When the renewal clause in a lease deed expressly incorporates the renewal clause also as one of the terms of renewal, does the term of the lease expire with one renewal or only on expiry of two consecutive terms?

(ii) Whether the terms of Ext. A1 lease deed have been correctly interpreted by the lower courts in limiting the term of renewal to twenty years alone?

(iii) Whether a finding not required for the determination of the lis will operate as res judicata in a subsequent suit?"

2. Relevant facts, shortly stated, are thus: Defendants 1 to 3 in a suit for recovery of vacant possession of the plaint schedule property and also for realisation of money are the appellants. Plaintiff is the contesting respondent. For the sake of convenience, the parties are referred to as the plaintiff and defendants.

3. Property described in the plaint schedule belonged to deceased Panakkad

Abdul Khader. He had created the commercial lease in question in favour of the first defendant firm represented by its then managing partner, deceased Balakrishnan. Ext. A1 document, styled as an indenture of lease, is dated 29.12.1971. The purpose of lease was for erecting/installing and maintaining a petrol/high speed diesel pump, storage tank, service and lubricating station, etc. Original term fixed in Ext. A1 was 20 years commencing from 01.01.1972. Rent agreed to between the parties was Rs. 400/- per month for the first ten years and at the rate of Rs. 450/- per month for the remaining ten years. After granting the lease, the first defendant firm erected a petrol pump with all accessories in the plaint schedule land. Even now the business is continuing. The managing partner of the firm later died and the firm is at present represented by the contesting defendants. Panakkad Abdul Khader also died. His legal heirs effected a partition of larger properties belonged to him, including the property in dispute, as per a partition deed dated 11.05.1982. Item No. 2 in that partition deed is described in the plaint schedule. It was allotted to the share of one Ahamed with absolute right of disposition. After the death of Ahamed, all his legal heirs, except one son by name Mohammed Sajin, assigned their rights over the plaint schedule property to the plaintiff as per a registered document dated 12.12.2000. Subsequently, Mohammed Sajin also released his share in the property in favour of the plaintiff by another registered document dated 17.12.2000. Thus, the plaintiff became absolute owner of the plaint schedule property.

4. Aforementioned Ahamed had filed a suit, viz., O.S. No. 49 of 1996, against the first defendant for recovery of possession of the plaint schedule property and for damages for use and occupation. Pending the suit, he died. His legal heirs were impleaded in the proceedings. While so, the disputes between the plaintiffs and defendants therein were settled out of court. Thus the suit was compromised. Ext. A2 is the certified copy of the judgment and decree in O.S. No. 49 of 1996, which contains the compromise petition also. As per the terms of compromise, the first defendant agreed to pay rent at the rate of Rs. 2,000/- per month. Other contentions available to the parties were left open in the compromise.

5. The plaintiff after obtaining ownership over the plaint schedule property, informed the first defendant of the change of ownership and thereupon, the firm attorned to the plaintiff. Rent upto and inclusive of 31.03.2004 was paid. Then the plaintiff instituted O.S. No. 1 of 2005 against the defendants before the Munsiff's Court, Kannur for recovery of possession and arrears of rent. The defendants appeared and contested the suit. The defendants inter alia contended that the lease created as per Ext. A1 is a permanent lease and it could not be terminated. The trial court decreed the suit in part allowing the plaintiff to recover certain amounts towards arrears of rent. Although the defendants were allowed to continue as per the terms in Ext. A1, their claim for permanent tenancy was disallowed. Against the judgment and decree in the above suit, the fifth defendant filed an appeal, viz., A.S. No. 217 of 2006 before the Additional District Court, Thalassery. The plaintiff also filed an appeal challenging the

judgment and decree as A.S. No. 204 of 2006. Both these appeals were considered together and the appellate court dismissed both the appeals confirming the judgment and decree of the trial court. The contesting defendants took up the matter in second appeal to this Court, viz., R.S.A. No. 725 of 2011. Learned Single Judge disposed the appeal, at the stage of admission itself finding that there was no substantial question of law involved. The said judgment is Ext. A7. According to the plaintiff, a true interpretation of Ext. A1 would show that the defendants are not entitled to continue in possession after the renewed period of 20 years stipulated therein.

6. The contesting defendants strongly opposed the suit. According to them, Ext. A1 created a permanent lease. The lessor is not given any option to terminate the lease on attaining a period of 20 years initially fixed. Lease will be automatically renewed as per the terms in Ext. A1. That means, the agreement will be automatically renewed in every 20 years. There is nothing wrong in law in creating a perpetual lease. From the lease agreement, it can be seen that the property leased out was a barren land. The lessee had invested huge amounts for reclaiming the land and for erecting a petrol bunk in the property. It is the contention that the land was lying more than 15 feet lower than the ground level of the neighbouring properties. The land was not fit for any purpose. Considering the expenses that would be incurred by the lessee in reclaiming the land, the parties intended to create a lease for a long period. The parties never intended to confine the term of lease for 20 years. In this background, Ext. A1 will have to be interpreted. The views taken by the trial court and lower appellate court are legally incorrect. Crux of the matter lies in the interpretation of Ext. A1 document.

7. Heard Shri B.G. Bhasker, learned counsel for the appellants/defendants and Shri P.B. Krishnan, learned counsel for the contesting respondent/plaintiff.

8. Pivot of the controversy lies in the interpretation to be given to the relevant clause in Ext. A1. As mentioned above, the lease deed is dated 29.12.1971. The tenancy created thereunder commenced from 01.01.1972. Purpose of the lease was to erect and establish an outlet for storage and sale of petroleum products. Instead of narrating about the terms in the indenture of lease in my words, I would prefer to extract the words used by the parties in Ext. A1. The following excerpt from page No. 3 of Ext. A1 will throw light on the nature of jural relationship intended to be established between the parties:

".....whatsoever to the said piece or parcel of land belonging or therewith held or enjoyed and together also with the right for the Lessee to install, erect and maintain in upon and underneath the said piece of land petrol and/or High Speed Diesel Oil Pumps, storage tanks, service and lubricating stations, weigh bridges, roads, culverts and erections, ancillary thereto and together also with the right for the lessee, its agents, customers and representatives of INDIAN OIL CORPORATION Ltd. and other authorised persons to use the premises hereby demised at all times and for all purposes whatsoever TO HOLD UNTO THE Lessee for a term of twenty years commencing from the 1st day of January, 1972 but

renewable and determinable as hereinafter provided yielding and paying therefore during the said term a monthly rent of Rs. 400/- (Rupees Four hundred only) for the first ten years and Rs. 450/- (Rupees Four hundred and fifty only) for the next ten years payable by regular monthly payments and also on the determination of the said term during any month, then paying the proportionate part of the month's rent in respect of the portion of the month elapsed at the time of determination and upon the conditions of the performance and observance of the covenant and conditions hereinafter contained....."

9. Most important clause in Ext. A1 is the one contained in 1(h). In fact, the proviso therein is the most relevant part for our purpose. Clause 1(h) and the proviso in Ext. A1 is re-produced hereunder:

"(h) The Lessee shall at the expiration or sooner determination of the said term yield up and deliver peaceful and vacant possession of the demised premises. All buildings, structures, installations, fittings, fixtures, and erections of whatsoever kind, and nature whether in, upon or underneath the demised premises shall during the said term and at the expiry thereof entirely belong to and revert to the Lessee who shall be entitled to take away the same. The Lessor will not have any right, title or interest therein nor shall they be entitled to appropriate or retain the same or any part thereof.

PROVIDED ALWAYS AND IT IS AGREED AND DECLARED that at the expiration of the said term of twenty years this lease will be automatically and without any further act of any of the parties hereto be renewed for a further term of twenty years from the expiration of the said term hereby granted unless the Lessee shall prior to the expiration of the first mentioned term give to the Lessor one calendar month's previous notice in writing of their intention not to take any renewed lease. The renewed lease will be under and subject to the same covenants and conditions and agreements as are herein contained including the present covenant for renewal."

(underline supplied by me)

10. Based on the above clause in Ext. A1, learned counsel for the defendants/appellants contended that even if the contention of a perpetual lease is found against in the previous round of litigation, the lessee under Ext. A1 is entitled to get renewal of the lease atleast for another term as provided therein. According to him, the expressions "lease will be automatically and without any further act of any of the parties hereto be renewed for a further term of twenty years" is an indication that the lessor has no power or authority to limit the term of lease according to his choice. Still more, Shri B.G. Bhasker, the learned counsel for the defendants, contended that the expression in Ext. A1, that "the renewed lease will be under and subject to the same covenants and conditions and agreements as are herein contained, including the present covenant for renewal" gives the lessee a right atleast to claim renewal for the second time, if not more.

11. Per contra, learned counsel for the plaintiff Shri P.B. Krishnan contended that

the recitals in clause 1(h) of Ext. A1 will have to be construed limiting them to 20 years only. Since the original term of lease has expired and the lessee continues in possession of the property at present, it can only be assumed that he had availed a right of one time renewal for another term of 20 years. As that period is also over, the plaintiff/lessor has every right to recover possession of the property with compensation for use and occupation from the defendants. No question of renewing the lease for a second time arises as that is not the intention of the parties deducible from clause 1(h) of Ext. A1.

12. Before I venture to discuss the precedential law cited at the Bar, I would like to recount and restate certain basic principles regarding the interpretation of deeds. First and foremost principle is that whenever a document is couched in a language which is clear and definite and no doubt arises in its application to the facts, there is no need to resort to the rules of interpretation. Rules of interpretation of deeds are intended to ascertain, to the extent possible, the exact meaning of a document which is not clear and definite. Many a time, language proved to be an imperfect vehicle for expressing thought and intention. The rules of interpretation or canons of constructions are the products of real life experiences of Judges and Jurists. Prime purpose of interpretation of a document is to ascertain the intention of the parties manifested at the time when the document was executed. To ascertain the intention of the parties, the document must be considered as a whole. It is from the whole of the document, coupled with the surrounding circumstances, that the general intention of the party or parties is to be ascertained. Attempt must be made to gather the intention of the parties from the exact words used in the deed. When the words used in a deed are in their literal meaning unambiguous and when such meaning is not excluded from the context and is sensible with respect to the parties at the time of executing the deed, such literal meaning must be taken. Where, the words used in a deed, if taken in its literal sense lead to absurdity and inconsistency, then an interpretation to avoid that absurdity and inconsistency should be made. It is also a settled principle that when the intention of the maker or makers of a deed cannot be given effect to in its full extent, effect is to be given to it as far as possible. Where the intentions are sufficiently clear from the deed itself, mis-recital in some part of the deed cannot vitiate it. Anything expressly mentioned in the deed excludes another view impliedly possible.

13. As far as possible, effect is to be given to all words used in a document. This is yet another important principle in the interpretation of deeds. A document should be construed in its entirety. Further, if possible, it should be construed so as to give effect to every word employed therein. The court is not at liberty to discard a word, if some meaning can be ascribed to it. Normally, the words employed in a deed should be taken in its ordinary sense, unless there are indications to do otherwise. It is also an important rule that plain words should be given plain meaning.

14. The Supreme Court in Sant Ram Vs. Rajinder Lal and Others, AIR 1978 SC

1601 : (1979) 81 PLR 60 : (1979) 2 SCC 274 : (1979) 1 SCR 900 : (1978) 10 UJ 858 enunciated certain principles regarding the interpretation of a lease deed. His Lordship V.R. Krishna Iyer, J., speaking for the three Judges bench, quoting with approval from "Lux Gentium Lex - Then and Now, 1799" held as follows:

"Two rules must be remembered while interpreting deeds and statutes. The first one is:

"in drafting it is not enough to gain a degree of precision which a person reading in good faith can understand, but it is necessary to attain if possible to a degree to precision which a person reading in bad faith cannot misunderstand." The second one is more important for the Third World countries. Statutory construction, so long as law is at the service of life, cannot be divorced from the social setting....."

Apex Court in *Provash Chandra Dalui and Another Vs. Biswanath Banerjee and Another*, AIR 1989 SC 1834 : (1989) JT 92 Supp : (1989) 1 SCALE 844 : (1989) 1 SCC 487 Supp : (1989) 2 SCR 401 : (1989) 2 UJ 412 laid down the following proposition:

"Ex praecedentibus et consequentibus optima fit interpretation". The best interpretation is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. It is an accepted principle of construction that the sense and meaning of the parties in any particular part of instrument may be collected "ex antecedentibus et consequentibus;" every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that is possible. As Lord Davey said in *N.E. Railway Co. v. Hastings*: ".....the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible....."

In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject matter to which it was designed and intended they should apply."

With these principles in mind, I shall venture to interpret Ext. A1 indenture of lease.

15. The first two substantial questions of law formulated above can be considered together. Shri B.G. Bhasker vehemently contended that the courts below failed to appreciate the relevant clause in Ext. A1 in the light of the

principles in Green v. Palmer ((1944) 1 All.E.R. 668), which was approved by the Supreme Court in State of U.P. and Others Vs. Lalji Tandon (Dead), AIR 2004 SC 32 : (2004) 1 CTC 359 : (2003) 8 JT 334 : (2004) 137 PLR 113 : (2003) 9 SCALE 188 : (2004) 1 SCC 1 : (2003) 5 SCR 77 Supp . I shall start with Green v. Palmer.

16. Uthwatt, J. sitting in Chancery Division decided Green v. Palmer in the following factual settings. By a tenancy agreement made on 1st July, 1940 between the plaintiff Green and the defendant Palmer, it was agreed that the landlord would let and the tenant would take a house together with furniture, fixtures and effects therein at a weekly rent of three guineas. The term of tenancy was to commence on 9th July, 1940 and to end on 7th January, 1941. It was for six months. Then there were certain other provisions. The first of which was to pay the rent on particular dates. The next was to make good, repair and restore all articles of furniture or fixtures which might have been damaged or destroyed by the tenant, his servants, etc. during the said term. The most important clause which gave rise to the litigation read as follows:

"The tenant is hereby granted the option of continuing the tenancy for a further period of six months on the same terms and conditions including this clause, provided the tenant gives to the landlord in writing four weeks" notice of his intention to exercise his option".

The question that came up for decision of the court was about proper construction of this clause giving the tenant an option of continuing the tenancy. Learned Judge after considering various aspects ruled as follows:

"Turning to the actual language of the clause, the first thing one observes is that, in terms, there is granted to the tenant a single option exercisable only once upon the named event, and the subject-matter of that option is an option "of continuing the tenancy for a further period of six months on the same terms and conditions including this clause." To my mind, what that means is this: the tenant is to be allowed once, and once only, the opportunity of continuing the tenancy-continuing it for a further six months. Then we come to the critical words "on the same terms and conditions including this clause." As I read it, that means there is included in the new tenancy agreement a right in the tenant, if he thinks fit, to go on for one further six months, and when you have got to that stage you have finished with the whole matter. In other words, it comes to this: "Here is your present lease. You may continue that, but I tell you, if you continue it, you continue it on the same terms as you were granted the original lease. You may continue it for a further 6 months with the right to go on for another 6 months."

Upon that footing, in the events which have happened, all the landlord was bound to do under this arrangement was to permit the tenant to occupy for a period not exceeding 18 months in the whole from the time when the original lease was granted."

In Varkey Yohannan Vs. Narayanan Vasudevan Chakkiyar, AIR 1954 Ker 161 , a

Division Bench of this Court considered the ratio in *Green v. Palmer* and quoted it with approval. Later the Supreme Court in *Lalji Tandon's* case considered the principles in *Green v. Palmer*, inter alia, decisions rendered by Indian High Courts. Summary of the facts in *Lalji Tandon's* case is thus: The property in question was a plot of land in Allahabad District over which a bungalow had been built. Ownership of the land vested in the State. The superstructure seemed to have been brought up by the lessee or his transferee, as the facts were not very clearly presented before the Supreme court. The suit property was given on 50 years lease to one J.W. Walsh. The lease contained a clause for renewal which, as far as ascertainable from the materials placed before the Supreme Court and also from the findings of the High Court, conferred an option on the lessee to seek renewal of the lease for another term of 50 years and on such option being exercised before the expiry of the term of 50 years of the existing lease, the lessor shall "act upon forthwith and execute and deliver to the lessee upon his duly executing a counter part or renew the lease for the said premises for a further term of 50 years and with and subject to the same covenants, conditions and provisions as are herein contained." The Supreme Court observed that the original deed of lease, though very material for ascertaining the covenants thereof, including the one for renewal, had not been placed on record by either party. From a reading of the decision rendered by the Apex Court, it is evident that the court had no occasion to go through the original lease deed and with the materials available on record, the case was decided. The High Court as well as the Supreme Court expressed the view that the State ought to have produced the lease deed or its copy to assist the court in arriving at a just decision. But the same was not done in spite of several opportunities having been allowed. The High Court had even chosen to draw an adverse inference against the State, without expressly stating so, for the non-production of the original lease deed. Facts showed that original lessee Walsh alienated his interest in the suit property to Lalji Tandon, the respondent-plaintiff, who later died and his legal representatives were brought on record. Lalji Tandon having stepped into the shoes of Walsh sought for renewal of the lease consistently with covenant for renewal as contained in the original lease. State Government agreed for renewal and the renewed lease deed came to be executed on 20th February, 1945. Although the State Government was agreeable to renew the lease for a term of 50 years, by 20th February, 1945, the day on which the renewed lease came to be executed, a period of 42 years, two months and 20 days had remained available out of the 50 years of the second term. Therefore, the term of the renewed lease was confined to the said period of 42 years, two months and 20 days. This lease deed was produced on record and that is marked as Covenant 2. The relevant clause therein read as follows:

"It is hereby mutually covenanted and agreed by and between the lessor and the lessee that the obligations hereunder shall continue throughout the term hereby created and shall be binding on their respective successors-in-interest in the demised premises that they will perform and observe the several covenants,

provisos and stipulations in the aforesaid lease expressed as fully as if the same covenants, provisos and stipulations had been herein repeated in full with such modifications only as are necessary to make them applicable to this demise and as if the name of the parties hereto had been substituted for those in the aforesaid lease provided always that the building referred to in the aforesaid lease having been erected the lessee shall not be under any obligation to erect another."

17. Proceeding on the assumption that the renewed lease incorporated all the covenants of the original lease, including the covenant for renewal, the plaintiff (Lalji Tandon) sought for renewal of the lease for yet another term of 50 years. The District Collector recommended the renewal. Board of Revenue also directed renewal to be expedited. However, the State Government did not renew it as recommended, which resulted in his filing a writ petition before the High Court. The High Court dismissed the writ petition summarily with certain observations. The High Court expressed hope that the State would renew the lease at the earliest. But, those observations did not bring in any result. Therefore, Lalji Tandon had to file another writ petition which led to the passing of the order impugned before the Supreme Court. The grievance raised by Lalji Tandon, as writ petitioner before the High Court, was that he was entitled for a renewal of lease for yet another term of 50 years and since the State failed to do so, he requested the Court to issue a writ of mandamus directing the State Government to renew the lease. The High Court held that the State Government was bound to renew the lease held by the legal representatives of deceased Lalji Tandon in accordance with the covenant for renewal. That was challenged before the Supreme Court.

18. The Supreme Court after considering various statutory principles and the decision of the Andhra Pradesh High Court in *Syed Jaleel Zane Vs. P. Venkata Murlidhar and Others*, AIR 1981 AP 328, that of the Calcutta High Court in *Secretary of State for India in Council Vs. A.H. Forbes*, 17 Ind. Cas. 180 and also the principles in *Green v. Palmer* (supra), approved the principles in those decisions and held as follows:

"18. We find ourselves in full agreement with the view of the law taken in the decisions cited hereinabove. It is pertinent to note that the respondent is not claiming a lease in perpetuity or right to successive renewals under the covenant for renewal contained in the 1887 lease. The term of 50 years under the 1887 lease came to an end in the year 1937 and the option for renewal was exercised by the respondent as assignee of the original lessee which exercise was honoured by the lessor State executing a fresh deed of lease belatedly on February 20, 1945. This lease deed does not set out any fresh covenants, mutually agreed upon between the parties for the purpose of renewal. Rather it incorporates, without any reservation, all the covenants, provisos and stipulations as contained in the principal lease as if they had been herein repeated in full. Not only was a fresh deed of lease executed but the conduct of

the parties also shows that at the end of the term appointed by the 1945 lease, i.e. in or around the year 1987, the lessor did not exercise its right of reentry. On the other hand, the respondent exercised his option for renewal. The officials of the appellant State, i.e. the Collector and the Board of Revenue, all recommended renewal and advised the State Government to expedite the renewal. The State Government was generally renewing such like leases by issuing general orders/instructions to its officers. At no point of time prior to the filing of the counter-affidavit, on the present litigation having been initiated, the State or any of its officers took a stand that the right of renewal, as contained in the principal deed of lease, having been exhausted by exercise of one option for renewal, was not available to be exercised again.

19. Now that the covenant for renewal has been referentially incorporated without any reservation in the lease deed of 1945 the exercise of option for renewal cannot be denied to the respondent. However, in the lease deed to be executed for a period of 50 years commencing May 20, 1987, the covenant for renewal need not be incorporated and, therefore, the term of the lease would come to an end on expiry of 50 years calculated from May 20, 1987. This view also accords with the view of the law taken in *Green v. Palmer* (supra)."

With these observations, the Apex Court dismissed the appeal preferred by the State.

19. Glaring differences in the facts to be noticed between *Green v. Palmer* and the case on hand is that in *Green v. Palmer*, the tenant was bound to issue a notice in writing four weeks prior to the expiry of the lease revealing his intention to exercise the option to renew. But in the present case, the fact situation is just the reverse. The words employed in the proviso to clause 1(h) in Ext. A1 is that after the term of 20 years the lease will be automatically and without any further act of any of the parties hereto be renewed for a further term of twenty years. Again it says that automatic renewal will take effect unless the lessee, prior to the expiration of the first mentioned term, give to the lessor one calendar month's previous notice in writing of their intention not to take any renewed lease. In *Lalji Tandon's* case, the lessor was bound to execute a lease deed after the original term of 50 years for renewal of the lease. Such a condition is not incorporated in Ext. A1. Relevant clause in Ext. A1 shows that automatic renewal would take place if the lessee did not issue one month's prior notice before expiration of the term evincing an intention not to take a renewed lease. Meaning of the expression "renewal" shall be considered below.

20. Before proceeding further, an important development happened to the legal principle in *Green v. Palmer* will have to be taken cognizance of. Another Chancery Division judgment rendered by Harman, J. in *re Greenwood's Agreement* (*Parkus v. Greenwood* - 1949 G. 886) distinguished the principle enunciated in *Green v. Palmer*. Facts involved in the said case are that by an agreement made between the defendant as landlord and the plaintiff's predecessors-in-title as tenants, the defendant agreed to let certain premises for

a term of three years, and the agreement contained a provision that "the landlord will on the written request of the tenants made three calendar months before the expiration of the term grant to them a tenancy of the said premises for a further term of three years from the expiration of the said term at the same rent and containing the like agreements and provisions as are herein contained including the present covenant for renewal." The plaintiff took out a summons for determination of the question whether this provision created a lease for 2000 years by virtue of the Law of Property Act, 1922. After considering the matter, the learned Judge ruled that the Act only operated where the lease was on the face of it perpetually renewable, and contained an express covenant for perpetual renewal; and, there being no such covenant in the agreement in suit, a lease for 2000 years was not created. Regarding the ratio in *Green v. Palmer*, the following observations were made:

"I ought to mention that there was also cited to me a decision of Uthwatt J., as he then was, of *Green v. Palmer*, where he held, without regard to this present point, that words in somewhat similar form as these created a right to renew twice and no more. That was an instance of a six monthly furnished tenancy and the improbability that the parties had thought of creating a 2000 years term was very high. The learned Judge stated that he was entitled to take into account and into consideration all the surrounding circumstances. How he came to the conclusion that he did I find difficult to follow, but I say no more about it because it does not seem to me that it touches the point which I have to decide here."

21. Single Judge's decision in *Parkus* was taken to the Court of Appeal. Three learned Judges heard and decided the matter. (see - *Parkus v. Greenwood* ((1950) Ch. 644). Correctness of the decision in *Green v. Palmer* was also questioned. Ultimately the Bench ruled that the provisions in that particular lease were to be taken as an expression of intention that the right of renewal was to be perpetual and that the agreement therefore came within the definition of a perpetually renewable lease contained in Section 190 of the Law of Property Act, 1922 which lease was converted into a demise for a term of 2000. With that reasoning, the decision by Harman, J. was reversed. Following observations of the Bench are profitable in the context of this case:

"*Green v. Palmer* was a case in which perhaps any Judge would feel even stronger inclination than in the present to avoid a result which on the face of it would appear unlikely to have been contemplated by the parties, for it was a furnished tenancy for a six-month period only. The material passage which the court had to construe was: "The tenant is hereby granted the option of continuing the tenancy for a further period of six months on the same terms and conditions, including this clause, provided the tenant gives to the landlord in writing four weeks" notice of his intention to exercise his option." Uthwatt J., having regard to the circumstances of the case, read this qualification, as I understand his judgment, into the provision which I have just quoted: that "the same terms and conditions including this clause" must be read as meaning

"including this clause on the first occasion; but that, when the clause came to be operated again, there was no ground for once more reproducing the whole formula, including the right or option to renew. I share with Harman J. considerable difficulty in following the logic of the argument, but it may well be a circumstance which has to be borne in mind that this was a six-month tenancy of furnished premises. The report does not contain a full statement of all the terms of the lease. It may have contained covenants or obligations with regard to specific furniture which might have forced a court to give a strained or artificial construction to a formula which otherwise in essentials I should have thought hardly possible to distinguish from that of the present case."

Learned Judges were of unanimous opinion that if *Green v. Palmer* were to be followed in another case, it would have to be shown that the facts in *Green v. Palmer* were very special and that those of the case which sought to follow it were for practical purposes identical with them. On the facts of the case in *Parkus*, the learned Judges did not think that *Green v. Palmer* should be followed.

22. Fact that the principles in *Green v. Palmer* was deviated by a Bench of Chancery Division was not noticed either by this Court in *Yohannan's* case (supra) or by the Supreme Court in *Lalji Tandon's* case. Upshot of the present discussion is that the legal principles in *Green v. Palmer* cannot be said to be absolute and it cannot be blindfoldedly applied to all fact situations. As rightly argued by Shri P.B. Krishnan, the principles in *Green v. Palmer* should be considered in the background of the special facts and circumstances revealed in that case, especially in the context of the facts that the lease was for a period of six months only and the subject matter of the lease was a furnished building. I am of definite view that the principles in *Green v. Palmer* can never be boldly lifted and applied to the facts in this case.

23. Despite the fact that non-approval of the principles in *Green v. Palmer* by a larger bench of Chancery Division went unnoticed by this Court and the Supreme Court, those decisions are still binding on this Court for obvious reasons. In *Lalji Tandon's* case, the Supreme Court placed reliance on the principles in a Division Bench decision of the Calcutta High Court in *A.H. Forbes* (supra). There a dispute relating to renewal of a lease granted by the Collector to the original grantee for a period of 27 years came up for consideration. It was held that although the agreement in question contained a covenant for renewal, such a clause in a lease does not necessarily import permanency. A lease which creates a tenancy for a term of years may yet confer on the lessee an option of renewal. If the lease does not state by whom the option is exercisable, it is exercisable by the lessee only. The option is exercisable not merely by the lessee personally but also by his representative-in-interest. If the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself. The decision further laid down that there is no sort of legal presumption against a right of perpetual renewal. The burden of strict proof is

imposed upon a person claiming such a right. It should not be inferred from any equivocal expressions which may fairly be capable of being otherwise interpreted. The intention in that behalf should be clearly shown; otherwise the agreement is satisfied and exhausted by a single renewal. A covenant for renewal runs with the land. All these principles in A.H. Forbes were approved by the Supreme Court in Lalji Tandon's case.

24. In Lalji Tandon's case, the legal principle in Syed Jaleel Zane's case (supra) was also approved. In that case, a lease was executed in favour of the tenant for a period of five years from 01.01.1964. The lease contained a clause for renewal also. The landlord brought a suit for eviction on the ground of waste and damage on 10.01.1969. The suit was dismissed on 16.02.1973. An appeal was preferred. By the time the appeal came up for hearing more than three years had elapsed after the renewal period and still the tenant was continuing in the premises on the same terms and conditions. The appellate court held that the tenant was not guilty of waste and damage but allowed the appeal on 24.03.1977 observing that the lease was not perpetual. Thereafter a suit for eviction was filed on the basis of the observations and the tenant preferred a letters patent appeal against the appellate judgment. Considering the entire issues, the court held that it was unjust to allow the tenant to continue in the premises on the same terms and conditions agreed to in 1963. Indeed, the tenant was trying to reap an unfair advantage over the landlords by insisting upon and by continuing in possession of the premises even after the second term of five years. The tenant was clearly taking an unreasonable and unjust stand which could not be allowed and there should be a decree for eviction of the tenant. Since Lalji Tandon's case considered various decisions touching on the subject, it cannot be said that dilution of the principles in Green v. Palmer by a larger bench of the Chancery Division, although it went unnoticed in Lalji Tandon's case, will diminish its binding force.

25. It will be apposite to note that the Court of Appeal in Parkus had observed that tenancy agreements with an option for successive renewals were in accordance with the old conveyancing practice whereby the words "including" or "excluding this present covenant" were used to confer or exclude a perpetual right of renewal.

26. Reverting to the contentions in this case, I have to notice that the claim of permanent tenancy raised by the defendants was found against in the earlier round of litigation as well as in the present one. There can never be any doubt as to the proposition that the claim of perpetual lease or permanent tenancy is now barred by res judicata. Shri B.G. Bhasker contended for the defendants that neither in the first round nor in this round of litigation, the question of renewal of lease created by Ext. A1 for a second time was considered by any of the courts. It is, therefore, contended that the defendants are entitled to get at least a third term of lease as per clause 1(h) in Ext. A1. The phraseology employed in clause 1(h) proviso to Ext. A1 that "at the expiration of the said term of twenty years

this lease will be automatically and without any further act of any of the parties hereto be renewed for a further term of twenty years" and "the renewed lease will be under and subject to the same covenants and conditions and agreements as are herein contained including the present covenant for renewal" clearly indicate the right of the defendants to get a third term and it is an automatic event. Therefore, the defendants would contend that the suit for eviction is not maintainable.

27. Per contra, Shri P.B. Krishnan argued for the plaintiff that even the first renewal enjoyed by the defendants was without any legal basis and a true interpretation of Ext. A1 will indicate that the stipulations therein did not confer any right on the defendants.

28. As mentioned earlier, the theory propounded by the defendants with regard to perpetual lease or permanent tenancy can no longer be reckoned in the light of the fact that it is barred by res judicata. The real question surviving for consideration is whether they are entitled to get a third term of twenty years as per the recitals in Ext. A1? Ancillary question arising is whether the defendants' plea for a third term is also barred by res judicata? I shall consider it in the succeeding paragraphs elaborately. For the time being, I shall proceed on the assumption that the said contention of the defendants is not hit by res judicata.

29. Ext. A1 lease deed was executed on 29.12.1971 for the purpose of establishing and running a petroleum outlet. Considering the nature of the business, the expenses that might have been incurred for making up land for running a petrol bunk, erecting machinery for the sale of petroleum products, constructing other structures necessary for conducting the business, making underground storage facility, etc., it can only be assumed that the parties must have intended to keep the lease for a sufficiently long period. Excerpt from page 3 of Ext. A1 quoted above clearly shows the foresight of the parties. It is an admitted fact that besides the original term of 20 years, the lessee had enjoyed another term of 20 years as provided in clause 1(h) of Ext. A1. The question that falls for decision is whether the lessee is entitled to get a second renewal, i.e., a third term of 20 years in succession.

30. Shri P.B. Krishnan contended that original term of lease itself was for considerably a long period. That apart, the lessee had already enjoyed another term of 20 years by virtue of the aforementioned clause. According to the plaintiff, there was no legal reason to interpret the said clause in Ext. A1 enabling the defendants to claim renewal at the first instance itself. Second renewal is legally impossible, according to the plaintiff. Shri P.B. Krishnan pointed out an anomaly, which may cause great prejudice to the plaintiff, if the interpretation advanced by the defendants is accepted. As per the terms in Ext. A1, monthly rent for the premises was Rs. 400/- for the first ten years. Then, for the next ten years, monthly rent was to be enhanced to Rs. 450/-. It is contended on behalf of the plaintiff that consequent to the renewal of the lease, as provided in clause 1(h) in Ext. A1, the parties would arrive at a precarious position wherein after 20

years the monthly rent would revert back to Rs. 400/- per mensem and again after ten years it will be enhanced only to Rs. 450/- per mensem. This single factor itself is sufficient to show that the parties never intended to confer any right on the lessee to claim an automatic renewal of the lease. This is one of the strongest points of the plaintiff. According to the learned counsel for the plaintiff, no sensible land owner would have agreed to accept a lesser rent for a renewed lease, that too, after a long term of 20 years and after it was enhanced once. Further, long duration of lease itself is an indication against the right of renewal as it would be idle to think that the parties might have been oblivious of the possible decline in money value and appreciation of the land value. The location of the disputed land is in Kannur town. All these factors are pointers to think that the defendants had no right of first renewal. However, the facts that it had been renewed once and that the term is over are now unchallengeable. The right of defendants to get the first renewal was decided in the earlier round of litigation. In this context, the plaintiff would contend that the second renewal shall never be permitted.

31. Clause 1(h) in Ext. A1 quoted above is positioned after the specific provisions wherein the parties have decided to give and take the property on lease. In otherwords, the clause showing the vestiture of leasehold right preceded clause 1(h). For a proper and complete interpretation of Ext. A1, I have gone through the deposition of D.W. 1. In the affidavit filed in lieu of the chief examination, he has asserted that they had spent lot of amounts for reclaiming the land and for erecting the structures and fixtures for starting a petrol bunk. Considering the age of the witness at the time of deposition, it goes without saying that he is incompetent to prove the actual amount that might have been spent by the original lessee to make up the land suitable for petroleum business. No other evidence was adduced to establish this case of the defendants. Therefore, there is no extraneous evidence available in this case to find that the stipulations in clause 1(h) of Ext. A1 regarding renewals were made considering the cost that would have been incurred by the lessee for making the land suitable for a petroleum outlet. Even though in the proviso to clause 1(h) of Ext. A1 it is mentioned that the lease will be under the same covenants and conditions including the covenant for renewal, the clause which created the demise shows that the lease was for a term of 20 years commencing from 01.01.1972. It is specifically mentioned that the lease is renewable and determinable as provided therein.

32. In this context, the cardinal distinction between the terms "extension" and "renewal" must be remembered. Normally the term "extend" means to enlarge, lengthen, prolong, etc. Settled law is that renewal of a lease denotes the creation of a new lease for all practical purposes. Supreme Court in *Provash Chandra Dalui's case* (supra) restated the principles thus:

"It is pertinent to note that the word used is "extension" and not "renewal". To extend means to enlarge, expand, lengthen, prolong, to carry out further than its

original limit. Extension, according to Black's Law Dictionary, means enlargement of the main body; addition of something smaller than that to which it is attached; to lengthen or prolong. Thus extension ordinarily implies the continued existence of something to be extended. The distinction between "extension and "renewal" is chiefly that in the case of renewal, a new lease is required, while in the case of extension the same lease continues in force during additional period by the performance of the stipulated act. In other words, the word "extension" when used in its proper and usual sense in connection with a lease means a prolongation of the lease....."

33. If we read the entire terms and conditions in the document conjointly, it can only be seen that the parties did not intend to create a perpetual lease or a right of renewal for more than one time. As rightly pointed out by the learned counsel for the plaintiff, the ratio in *Green v. Palmer* cannot be applied to this case disregarding the facts herein. Even the judgment of the Court of Appeal in *Parkus* (supra) would show that the special features attached to the terms and conditions of lease must have prompted the learned Judge in *Green v. Palmer* to allow a second renewal. The lease in *Green v. Palmer* was for a short term of six months and it was in respect of a furnished building. *A.H. Forbes's* case and *Syed Jaleel Zane's* case approved by the Supreme Court in *Lalji Tandon's* case show that even though the law does not abhor a perpetual lease, there must be clear indications emanating from the lease deed itself to think that the parties intended a perpetual lease. In this case, a stipulation regarding the determination of the lease has been specifically provided. If all those conditions in Ext. A1 are harmoniously read with clause 1(h) and proviso, it can be seen that the parties must have intended at the most one renewal after the original term of 20 years. As mentioned above, the stipulations in the proviso to clause 1(h) is only in accordance with an old conveyancing practice. Ext. A1 cannot be interpreted only on the basis of clause 1(h) and proviso, completely negating other provisions therein.

34. As stated above, the principles in *Green v. Palmer* were later deviated by English Courts. They cannot be straight away applied discounting the facts of this case. Startling differences in facts in both the cases cannot be ignored. Although the contention raised by the plaintiff that as in the case of *Lalji Tandon*, a separate deed is required for renewal of the lease may not hold good in this case because in *Lalji Tandon's* case that was a stipulation borne out from the materials placed before the Supreme Court. And in this case, no such stipulation could be seen from Ext. A1. Having regard to the entire facts and circumstances under which the lease was made, purpose of the lease, original term of the lease agreed to by the parties, rate of rent, stipulations regarding the manner in which rent was agreed to be paid, etc., I am of the view that theory of automatic renewal of lease beyond a term of first renewal for 20 years cannot be read into the terms in Ext. A1. In other words, second renewal of the lease cannot be said to be an automatic event and the concept of automatic renewal in the said clause can only be made applicable to the first renewal. Recalling the principles of

interpretation of deeds discussed above, all the clauses in the document must be given effect to and they should be harmoniously construed. Notwithstanding that law does not frown upon a permanent lease, there must be clear indications arising from the terms in the document to hold that the lease in question was intended to be a permanent one. Applying the relevant principles mentioned above to the facts of this case, I am of the definite view that the lessee cannot claim a right to get a second renewal for another term of 20 years and clause 1(h) conferred only a legal right on the lessee for one renewal after the expiry of the original term. Viewing from this angle, the courts below are legally justified in dismissing the claim of the defendants.

35. I shall answer the third substantial question of law now. Learned counsel for the plaintiff heavily relied on the doctrine of res judicata to contend that the defendants cannot be heard to say that they are entitled to renew the lease for a second term. According to the learned counsel, the defendant's plea based on the theory of permanent lease was negated by all the courts in the earlier round of litigation. So much so, they are precluded from raising a contention that they are entitled to get another term of 20 years from the date of expiry of the renewed lease. Per contra, learned counsel for the defendants contended that the cumulative effect of clause 1(h) and its proviso is that the defendants are entitled to get at least a second renewal. I have already seen that clause 1(h) in Ext. A1 does not confer any right on the defendants to claim a second renewal. However, the question of res judicata having forcefully raised by the parties will have to be examined.

36. It is well settled that the doctrine of res judicata is founded on the principles of justice, equity and good conscience. (see *Lal Chand (Dead) by Lrs. and Others Vs. Radha Krishan*, AIR 1977 SC 789 : (1977) 2 SCC 88 : (1977) 2 SCR 522 . It is equally settled that the doctrine applies to all judicial proceedings and to all quasi judicial proceedings before the Tribunals. Section 11 of the Code of Civil Procedure, 1908 (in short, "CPC") operates against both the parties to the suit and not against the defendant alone. The principle of res judicata is an inhibition against the court, barring the courts from trying any suit in which the matter has been directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title in a court of competent jurisdiction to try such subsequent suit. Another important condition is that the former suit must have been heard and finally decided by such court. It is also axiomatic that res judicata is a mixed question of fact and law and has to be specifically pleaded.

37. Conditions for attracting res judicata can be generally divided into five heads. They are:

(i) the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue either actually (Explanation III) or constructively (Explanation IV) in the former suit. Explanation I is also relevant in this context.

(ii) the former suit must have been a suit between the same parties or between the parties under whom they or any of them claim. Explanation VI is to be read with this condition.

(iii) the parties as aforesaid must have litigated under the same title in the former suit.

(iv) the court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised. Explanation II is also to be read with this condition as also Explanation VIII.

(v) the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Explanation V must be read with this condition.

38. Learned counsel for the defendants contended that the doctrine of res judicata is not applicable in this case as in the former round of litigation what was claimed by the defendants was only a permanent lease. The right to get a second renewal was not raised by the defendants in the previous suit and therefore, there was no occasion for the court to embark on an enquiry in that matter. Ext. A5 is the certified copy of the judgment in O.S. No. 1 of 2005 between the same parties. Learned counsel for the defendants drew my attention to issue No. 4 in that suit where the question of permanent lease alone was raised. An additional issue was raised in that suit touching on the clause in Ext. A1 deed regarding the enforceability of the clause for renewal. It is, therefore, contended by the learned counsel that the plea now raised by the defendants for getting one more renewal was not raised in the previous suit and therefore, was not heard and finally decided. Per contra, learned counsel for the plaintiff contended that the entire case was examined by the trial court, the lower appellate court and this Court in second appeal in the first round of litigation and no claim thereafter can be raised by the defendants regarding the right of renewal as it is barred by res judicata. In Ext. A5 judgment, the court below while answering issue Nos. 2 and 4 together, observed that the case of permanent lease set up by the defendants was not acceptable and after a renewal for one time, the defendants could not claim a further term. This was taken in appeal by the plaintiff as well as the defendants. Ext. A6 is the common judgment in the appeals. There also the whole issue was examined under points 1 and 2. The lower appellate court clearly found that the relevant clause in Ext. A1 could be interpreted only against the theory of a perpetual lease. The lower appellate court further observed that as the renewed lease would end only on 29.12.2011 the suit was premature. Second appeal filed before this Court was also dismissed finding that there was no substantial question of law. We have to analyse the contention regarding res judicata in this backdrop.

39. The principle of constructive res judicata enunciated in Explanation IV to Section 11 CPC is directly applicable to the facts of this case. The principle of constructive res judicata, stated shortly, is that any matter which might and

ought to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit. In other words, though it has not been actually in issue directly and substantially, it will be regarded as having been constructively in issue directly and substantially (see *P.K. Vijayan Vs. Kamalakshi Amma and Others*, AIR 1994 SC 2145 : (1994) 3 JT 92 : (1994) 2 SCALE 368 : (1994) 4 SCC 53 : (1994) 3 SCR 213). Where a matter has been actually in issue, then, in order to constitute the matter of res judicata, it is necessary that it should have been heard and finally decided. But, where a matter has been constructively in issue, it could not, from the very nature of the case, be heard and decided and it will be deemed to have been heard and decided against the party omitting to allege it except when an admission by the defendant obviates a decision. It is clear from the pleadings and findings entered by the courts in the first round of litigation that the defendants, although did not specifically raise a right for a second renewal based on clause 1(h) in Ext. A1, might and ought to have raised that contention and the matter can only be deemed to have been heard and decided against the defendants by operation of the rule of constructive res judicata in Explanation IV to Section 11 CPC.

40. Learned counsel for the plaintiff strongly relied on the decision in *Pawan Kumar Gupta Vs. Rochiram Nagdeo*, AIR 1999 SC 1823 : (1999) 3 JT 191 : (1999) 2 SCALE 702 : (1999) 4 SCC 243 : (1999) 2 SCR 767 : (1999) 2 UJ 862 : (1999) AIRSCW 1420 : (1999) 4 Supreme 249 . It is contended by the plaintiff that merely because the defendants had no right of appeal as the plea for eviction raised by the plaintiff was turned down in the first round of litigation, there are clear negative findings on the issues raised by the defendants regarding the right of renewal. Therefore, it is vehemently contended that the principle in *Pawan Kumar Gupta's* case will squarely apply to this case. Paragraphs 16 and 19 of the said decision are relied on by the plaintiff, which are quoted hereunder:

"16. The rule of res judicata incorporated in Section 11 of the Code of Civil Procedure (CPC) prohibits the court from trying an issue which "has been directly and substantially in issue in a former suit between the same parties," and has been heard and finally decided by that Court. It is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as res judicata. It is not correct to say that the party has no right of appeal against such a decision on an issue though the suit was ultimately recorded as dismissed. The decree was not in fact against the plaintiff in that first suit, but was in his favour as shown above. There was no hurdle in law for the defendant to file an appeal against the judgment and decree in that first suit as he still disputed those decisions on such contested issues.

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19. Thus the second legal position is this: if dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment

adverse to the defendant would not operate as res judicata in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as res judicata in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of res judicata in the subsequent suit."

41. Learned counsel for the plaintiff, to strengthen his argument that the claim of the defendants is barred by constructive res judicata, relied on a decision of the Apex Court in Ramadhar Shrivastava Vs. Bhagwandas, (2005) 9 JT 534 : (2005) 9 SCALE 114 : (2005) 13 SCC 1 . Following quotation is relevant for our purpose:

"..... The expression "matter in issue" under Section 11 of the Code of Civil Procedure, 1908 connotes the matter directly and substantially in issue actually or constructively. A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits. A matter is constructively in issue when it "might and ought" to have been made a ground of defence or attack in the former suit. Explanation IV to Section 11 of the Code by a deeming provision lays down that any matter which "might and ought" to have been made a ground of defence or attack in the former suit, but which has not been made a ground of defence or attack, shall be deemed to have been a matter directly and substantially in issue in such suit.

The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence in one and the same suit....."

42. To sum up the discussion on this point, I have no hesitation to hold that the defendants' claim for second renewal is barred by the doctrine of constructive res judicata embodied in Section 11, Explanation IV, CPC. Therefore, on this count also, the appeal has to fail.

In the result, the appeal is dismissed confirming the judgments and decrees passed by the courts below. Considering the facts and circumstances, there is no order as to costs.