

**(2014) 01 KL CK 0097**  
**In the High Court Of Kerala**  
**Case No : R.S.A. No. 137 of 2013**

Orkatkandiyil Shuhaib

APPELLANT

Vs

Maniyoth Moidu and Another

RESPONDENT

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**Date of Decision :** 21-01-2014

**Acts Referred:**

Transfer of Property Act, 1882 — Section 108, 108(d)

**Citation :** (2014) 1 ILR 1086 : (2014) 1 KHC 665 : (2014) 2 KLT 177

**Hon'ble Judges :** N.K. Balakrishnan, J

**Bench :** Single Bench

**Advocate :** B. Krishnan and R. Parthasarathy, Advocate for the Appellant; K.M. Sathyanatha Menon and Kavary S. Thampi, Advocate for the Respondent

**Final Decision :** Dismissed

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## Judgement

N.K. Balakrishnan, J.—The 2nd defendant in a suit for recovery of possession is the appellant. The plaintiff contended that he is the absolute owner of the plaint schedule property. The property shown in B schedule was admittedly leased out by the defendant as per rent deed dated 03/07/2005. According to the plaintiff, the defendant trespassed into a portion of A schedule property which is not covered by the rent deed. That portion of the property is shown in the C schedule to the plaint. It is alleged that the defendant, after trespassing into the C schedule property, constructed a shop touching the northern side of the B schedule property which was the property leased out by the defendant. The defendant on the other hand contended that the C schedule property also forms part of the leasehold. An oral lease in respect of the C schedule property was also set up by the defendant/appellant.

2. The Courts below found that the appellant could not prove the oral lease in respect of the C schedule property. It was found that as per the lease deed only B schedule property was leased out to the defendant. It was also found that C schedule property is actually an area encroached upon by the defendant. A decree was granted for recovery of possession of the C schedule property. The

Appellate Court confirmed the decree and judgment and dismissed the appeal filed by defendants.

3. Learned counsel for the 2nd defendant/appellant has vehemently argued that the area alleged to have been encroached upon should be treated as part of the leasehold property and so if only the lease is terminated the landlord can get possession of the said area. It is argued that C schedule property should be treated as accession. In the plan prepared by the Advocate Commissioner, the property covered by the rent deed is shown in yellow colour. Just to the north of the leased premises the area encroached upon is demarcated in brown lines; that is the C schedule property.

4. The decision of a Division Bench of this Court in *Sainaba and Others Vs. Syed Jaffer Aydeed* has been relied upon by the learned counsel for the appellant. That was a case where the defendant therein encroached upon a purampoke land and thus extended the tenanted premises over which the landlord has no title and hence it was contended that the plaintiff cannot recover the encroached portion. The admission made by the defendant in the written statement filed in that suit was that in order to have security for the rooms, he had extended the room and so the extension made by him was for protecting the tenanted premises. It was held by the Division Bench in the aforesaid case:

When the defendant's case is that he has encroached upon a purampoke land and extended the tenanted premises, the entire burden lies on him to prove the same by adducing cogent evidence. There is absolutely, no evidence adduced by him. Therefore, whether as a matter of fact, there was any encroachment or not itself is not proved in the case. Besides, even assuming that any such encroachment was made by the defendant, that is only for protecting the tenanted premises even according to his own admission made in the written statement. As per Section 108(d) of the Transfer of Property Act, if during the continuance of the lease any accession is made to the property, such accession shall be deemed to be comprised in the lease, subject, of course, to the law relating to the alluvion for the time being in force. Therefore, whatever extension made during the continuance of the lease, the defendant cannot claim any independent right over the same as it will be comprised in the lease itself.

5. In fact, the aforesaid decision does not come to the rescue of the appellant herein since even in that case it was held that whatever be the extension made by the lessee during the continuance of lease, the defendant cannot claim any independent right over the same as it will be comprised in the lease itself. Accretion is caused by natural or artificial means. The contention that the portion of the lessor's property which was encroached upon by the lessee should be treated as accretion cannot be sustained at all since even otherwise the encroached portion of the land belongs to the landlord. That portion cannot be said to be an accretion so as to fall within the ambit of Section 108(d) of the TP Act. If the lessee, during the continuance of lease gets into possession of a puramboke land and is enjoyed for the beneficial enjoyment of the leased

premises as per Section 108(d) of the TP Act, the accretion or accession so made, would certainly ensure to the benefit of the lessor because the lessee should be deemed to be holding the leased property on behalf of the lessor, so that the accessed land should form part of the leased premises. The lessee cannot claim any independent right over that land which was accessed because of the provision contained in Section 108(d) of the TP Act. It was held in the aforesaid decision that 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.

6. Section 108(d) of TP Act which deals with the rights and liabilities of the Lessee says:

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;

Usually the doctrine of accretion is capable of applying to a land situated over the shores of an inland or bank of a river which recognises the fact that where a land is bounded by water, the force of nature is likely to cause change in the boundary between land and water. Because of the change in the course of the flow of water, sometimes a portion of the leased land may be lost due to erosion. Similarly, there would be accession of land by the side of the river and in such cases, there would be accretion of land which, by virtue of clause (d) of Section 108 of TP Act shall be deemed to be comprised in the lease.

7. The argument that the section does not specifically say that it must be some other land or a puramboke land and so the land encroached upon by the lessee should be treated as accession, is palpably unsound. It is the property owner's right to all that is added to the land, naturally or by labour. That accretion cannot be of the owner's land itself. Accession is a mode of acquiring property as addition to the existing property by natural growth or by application of human labour.

8. The possession by the lessee should be presumed to be for and on behalf of the lessor. In the case on hand the question of accretion does not arise at all since it is a case where the appellant who was granted lease of a building encroached upon the land of the lessor and reduced it to his wrongful possession. The plea of the appellant in the plaint in regard to accession was vague. Though he set up an oral lease in respect of that land, it was found against by the Courts below. There was no plea of accession by adverse possession. The suit is filed by the owner of the land for recovery of possession on the strength of title. That portion of the land is not covered by the lease. The appellant could not establish any right over that property. Hence, the decree for recovery of possession granted by the Courts below is only to be confirmed.

9. The learned counsel for the appellant submits that at least one year time may be granted to the appellant to vacate the rooms. It is submitted that cement

bags, steel rods etc. are kept in that premises and so in order to find out a suitable accommodation for shifting the materials that much time is required. The request so made by the learned counsel is strongly opposed by the learned counsel for the respondents. However, I find that six months time can be granted to the appellant to vacate the plaint schedule rooms. In the result, this RSA is dismissed.

The appellant is granted six months time to vacate the plaint schedule room but on condition that the appellant should file an affidavit before the Trial Court within two weeks from today undertaking that he will surrender possession of encroached area (shown in the plaint schedule) within six months from today and also on condition that the appellant should pay or deposit before the Trial Court a sum of Rs. 1000/- (Rupees one thousand only) per month for the period till he surrenders possession of the same.