Chapsibhai Dhanjibhai Danad vs Purushottam on 5 April, 1971

Equivalent citations: AIR1971SC1878, (1971)2SCC205, [1971]SUPPSCR335

Bench: I.D.Dua, J.M. Shelat

JUDGMENT

Shelat, J.

1. By a deed of lease, dated May 5, 1906, the predecessor-in-title of the respondent let out to the appellant's father an open portion of land measuring 26 ft. x 225 ft. out of a larger plot. The lease was for constructing buildings and for a period of 30 years certain at the annual rate of Rs. 130. The lease contained, inter alia, the following:

> Even after the prescribed time limit, I shall have a right to keep my structure on the leased out 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 I 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 anyone else, then, the purchaser shall be bound by all the terms in this lease-deed....
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> The trouble between the parties started when the respondent commenced construction on the rest of the land in a fashion so as to be in close vicinity to the western boundary of the leased land to house an industry, called Sudha Industries.

2. The appellant filed the suit in 1958, out of which this appeal arises, urging that the said lease was a permanent lease, that buildings had been constructed on the leased land partly in 1906, and the rest in 1909 and 1922, that the said plot of land was subsequently demarcated into two survey numbers, 94 and 93, that a strip of land, 4 ft. in width and measuring 650 sq. ft immediately to the west of survey No. 94 and forming part of survey No. 93 was covered by the said lease and was in his possession as part of the leased land or was acquired by him as accession. Pending the suit the appellant amended the plaint asserting that the portion let out under the said deed of lease was 5850 sq. ft. in the aggregate, which Included the said strip of land, and annexed a new plan showing details of the land which according to him was leased out under the said deed.

3. Out of the structures put up by the appellant's father, the central building, as shown in the plan produced by the appellant, has windows on the ground, first and second floors, all opening on the

western side. The eaves of that building protrude on that side by about 2 1/2 ft. with the result that the rain water falls over the said strip of land. According to the plaint, there is a drain partly in plot No. 94 and partly over the said strip of land which carries the entire waste water from the said building. According to the appellant, the said construction made by the respondent shut off light and air which he had been enjoying from the aforesaid windows. He had other complaints also to make and claimed amongst other things a declaration that the said strip of land was part of the leased land covered by the said deed, or in the alternative, that he had acquired it by way of accession, and prayed for a permanent injunction against shutting off light and air through the said windows and interference with his rights over the said strip of land either as the lessee thereof or as and by way of easements over it. The respondent's answer to the suit briefly was that the appellant was not entitled to the said strip of land either as falling under the said lease or as accession. The respondent also denied that the appellant was entitled to any of the reliefs claimed by him, that the said lease was not a permanent lease but was for a period of 30 years in the first instance, but being a lease for constructing buildings thereon and being transferable, could at best be for the lifetime of the lessee, the appellant's father. He also averred that part of the land comprised in plot No. 93 used to be let out from time to time to persons including the appellant's father, who had executed a separate rent note, dated July 21, 1935, and who had under the said note been in possession thereof as a lessee from 1935 to 1941, and that he having been permitted as such a lessee the use of the said strip of land to enable him access to the said leased portion of survey No. 93, there was no question of his having acquired any easementary rights by prescription over the said strip of land.

4. The Trial Court partially decreed the appellant's suit, in that it rejected the appellant's claim to the said strip of land, but granted a declaration of easement for light and air through the said windows and for carrying waste and rain water through the said drain over the said strip of land. Against that judgment and decree, the appellant filed an appeal before the District Court. The respondent also filed cross-objections. The District Court dismissed the appellant's appeal and allowed the cross-objections with the result that the appellant's suit was dismissed. A second appeal filed' by the appellant in the High Court was heard by a Single Judge who Held that the said lease was a permanent lease, that the appellant had acquired the said strip of land as access aloft to the leased land and as a consequence of those findings granted a mandatory injunction directing removal of any construction or projection by the respondent over the said strip of land. In view of his finding that the said strip of land had always been in the possession of the appellant and earlier of his father ever-since 1906 and thus had been acquired as an accession, he considered it unnecessary to go into the question of easementary rights claimed by the appellant. The principal ground on which the Single Judge founded his judgment was that the lease was both transferable and heritable, and therefore, had to be held as a permanent lease.

5. Aggrieved by the judgment and decree passed by the learned Single Judge, the respondent filed a letters patent appeal wherein three principal questions were canvassed; (1) whether the said lease was a permanent lease, (2) whether the strip of land in dispute was covered by the said lease, or in the alternative, acquired as accession, and (3) in the alternative, whether the appellant had acquired easementary rights over the said strip of land (a) of light and air, (b) of passage and (c) of draining water, both waste and rain, over the said strip of land. The Letters Patent Bench answered all the three questions against the appellant holding that the said lease being a lease for building purposes

and transferable, was a lease for an indefinite period, and therefore, for the lifetime of the lessee, the said Dhanji, that the said strip of land was neither covered under the said lease, nor acquired as accession through adverse possession, and lastly, that except for the drain extending upto 32 ft. constructed on the said strip of land, the appellant had not acquired any other easementary rights over it. As to light and air, the Bench held that the appellant failed to establish that the obstruction caused by the respondent's construction was such as to give him an actionable claim against the respondent. The result was that except for the said drain, the Bench dismissed the appellant's suit.

6. Mr. Desai for the appellant raised three contentions in support of the appeal; (1) that on a proper interpretation of the document of lease, the lease was a permanent lease, (2) that there was an accession in respect of the said strip of land within the meaning of Section 108(d) of the Transfer of Property Act, 1882, and therefore, the said strip of land must be deemed to be comprised in the lease, and (3) that the appellant had acquired by prescription rights of easement of light and air, of throwing rain water and draining waste water through the said drain and of passage over the said strip of land under Section 15 of the Easements Act, 1882.

7. On the question of interpretation of the document of lease, Mr. Desai supported the view taken by the Single Judge. The learned Single Judge construed the document to mean (a) that the lease was for building purposes, (b) that ft was in the first instance for 30 years certain, (c) that the lessee was to continue to enjoy all rights as a lessee even after the expiry of 30 years, and (d) that the lesser could not increase the rent even after the expiry of 30 years. The most important term of the said lease, said the Single Judge, was "the one which provides for the leasehold right continuing to the heirs and successors". The Letter Patent Bench, however, felt that on a proper construction of the document, the lease was for an indefinite period, and though transferable, did not provide for any hereditary rights. In support of that conclusion the Bench pointed out that the view consistently taken by the High Court of Bombay, right from the decision in Vaman Shripad v. Maki I.L.R. 4 Bom. 424 was that such a lease is to be construed as one for the lifetime of the lessee and not as a permanent lease. The only solitary case where a lease for an indefinite period was construed as permanent was that in Sonabai v. Hiragavri, 28 Bom. L.R. 552 but subsequent decisions of that High Court had dissented from that decision and had consistently held leases for indefinite periods as leases for the lifetime of the lessee. (see Donkangonda v. Revanshiddappa 45 Bom. L.R. 194. In Bavasaheb v. West Patent Company 56 Bom. L.R. 61. Sonabai's case 28 Bom. L.R. 552 was once again dissented from, the High Court reiterating that a lease for an indefinite period is ordinarily to be construed as one for the lifetime of the lessee and that a distinction should be made between a transferable and a heritable lease. The High Court there observed (1) that if a lease were to be for a definite period and before that period was over, the lessee died, the leasehold rights during the remainder of the period would enure for the benefit of his heirs, unless the document stipulated that in such an event the rights of the lessee were not to enure for the benefit of his successors, (2) that if the lease was for an indefinite period, it would not enure for the benefit of the lessee's heirs. Such a lease would usually be for the lifetime of the lessee himself unless it clearly appeared from the contract that the benefit of the lease was intended to accrue to the lessee's successOrs. Whether a lease was permanent or for the lifetime only of the lessee, even where it was for building structures and was transferable, depended upon the terms of the lease and the Court must, therefore, look at the substance of it to ascertain whether the parties intended it to be a permanent lease. But the fact

that the lease provided that the lessee could continue in possession of the property so long as he paid the stipulated rent did not mean that the lease was for perpetuity. It would usually be regarded as a lease for an indefinite period and as such for the lessee's lifetime. The High Court also pointed out that the fact that tenancy rights were transferable, as provided by Section 108(j) of the Transfer of Property Act, did not mean that they were also heritable.

8. In two of its decisions, Runge Lall Lobes v. Wilson [1899] I.L.R. 26 Cal. 204 and Promada Nath Roy v. Section Chowdhry [1905] I.L.R. 32 Cal. 648 the Calcutta High Court took the view that where the purpose of the lease was for constructing buildings, the court could presume, even though the document did not in terms so provide, that the lease was intended to be permanent. To the same effect was also the decision in Navalram v. Javerilal 7 Bom. L.R. 401. On the other hand in Lekhraj Roy v. Kunhya Singh [1876-77] L.R. 41. A. 223 where the lease was for the period of the continuance of the lessors' mokurruri, the Privy Council held that if it could be ascertained what the term was the rule of construction that a grant of an indefinite nature enured for the lifetime of the grantee would not apply. But, if the grant was made to a person for an indefinite period, it enured, generally speaking, for his lifetime and passed no interest to his heirs unless there were words showing an intention to grant a hereditary interest. In Abdul Rahim v. Sarafalli 30 Bom. L.R. 1596 the Bombay High Court adhered to the view consistently taken by it that the lease there was for the lessee's lifetime. The lease there contained terms similar to those before us. It was for building a factory and although it provided for 25 years certain in the first instance it also provided that after the expiry of that period the lessee would continue to take the agreed rent so long as the lessee remained in possession and further provided for the lessee's right to remove the factory when he decided to hand over the land to the lessor.

9. The conflict of opinion amongst these decisions has since then been resolved by the decision in Bavasaheb's case 56 Bom. L.R. 61 having been expressly approved by this Court in Sivavogeswara Cotton Press v. Panchaksharappa . The lease here was for building factories and other structures and was for a period of 20 years certain. It, however, provided that the lessee could continue to remain in possession so long as he desired and observed the terms of the lease which provided for a higher rent for the first 10 years after the expiration of the said 20 years and a still higher rent thereafter. Clause (14) of the lease in addition provided that it was to be binding "on me, my heirs, executors, administrators, successors and assigns, as well as on your heirs, executors, administrators, successors and assigns ...". The question was as to the nature of the lease. At page 885 of the report, the Court remarked that Clause (14) was a very important clause "which though coming as the last clause must govern all the stipulations between the parties. Thus the terms and conditions of the lease which created the rights and obligations between the lessor and the lessee were specifically declared to be binding on the heirs and successors-in-interest of the lessor and the lessee". The Court then examined various decisions of the different High Courts including Navalram's case 7 Bom. L.R. 401. Promada Nath Roy's case [1905] I.L.R. 32 Cal. 648 and lastly, Bavasaheb's case 56 Bom. L.R. 61. As to the last case, the Court at page 889 of the report expressed its "complete agreement" with the observations of Gajendragadkar, J. (as he then was), namely, that the nature of the tenancy created by a document must be determined by construing the document as a whole, that if the tenancy is for building purposes, prima facie it might be arguable that it was intended for the life-time of the lessee or might in certain cases be even a permanent lease, and

lastly, that whether it was a tenancy for life or a permanent tenancy must ultimately depend upon the terms of the contract itself. As can be seen from an earlier passage on that very same page, the Court distinguished Bavasaheb's 56 Bom. L.R. 61 case on the ground that the lease there did not contain a provision similar to Clause (14) in the case before it. Besides, the Court sought an additional support for its conclusion that the lease was permanent in the provision which stipulated that the rent would be Rs. 350 a year for the first 20 years, Rs. 400/-for the next 10 years and Rs. 500/-thereafter until the lessee continued to occupy the land, which provision indicated that the lease was not intended to be only for the life-time of the lessee. It is clear from the decision that what clearly weighed with the Court was the fact that the document of lease distinctly indicated that the parties intended that the rights under the lease were to be hereditary. The question, therefore, is whether the lease under consideration is of the type in the case of Sivayogeswara Cotton Press. .

10. Looking at the document (Ex. P-4) as a whole, the lease undoubtedly is for building a residential structure. Though it is for 30 years certain, the lessee was entitled to remain in possession of the land so long as he paid the stipulated rent, which the lessor was not entitled to increase. But, though the lease is for building structure and the period is indefinite there are at any rate no express words indicating that the leasehold rights thereunder were intended to be heritable. On the other hand, it expressly provides, as was the case in Abdul Rekim 30 Bom. L.R. 1596 for the right of the lessee to remove the structures, meaning thereby vacating the land, if he so desired. The clause providing for such removal is not that the lessee would remove the structures on default in payment of rent, but depends on his own volition, a clause indicative of the parties not having intended the lease to be permanent. For, if it was intended to be permanent, there was no necessity for providing such a right. But the argument was that there are words in the document indicative of the lease having been intended to be heritable as was the case in Sivayogeswara Cotton Press . The mere fact, however, that a lease provides for the interests thereunder to pass on to the heirs of the lessee would not always mean that it is a permanent lease. Such a provision can be made in two ways resulting in two different consequences. A lease may provide a fixed period and then include a provision that in the event of the lessee dying before the expiry of such period, his heirs would be entitled to have the benefit of the lease for the remainder of the period. In such a case, although the lease may provide for the heirs to succeed to the interests in the leased land, it would only mean that such heirs succeed to the rights upto the expiry of the lease period. If the lease, on the other hand, were for an indefinite period, and contains a provision for the rights thereunder being heritable, then such a lease, though ordinarily for the lifetime of the lessee, would be construed as permanent. The question, therefore, is to which of these two classes of leases the present lease belongs.

11. After reciting the purpose for which it was made, the term of 30 years and the rent, the deed provides:

> Even after the prescribed time limit, I shall have a right to keep my structure on the leased out land, so long as I like, and I shall be paying to you the rent every year as stated above.
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> Though the period is 30 years, this part of the document would make the lease for an indefinite period which would ordinarily mean a lease for the lifetime of the lessee.

What follows then, however, gives scope for the argument that it is not merely for the lifetime of the lessee:

You will have no right to increase the rent and I shall also not pay it, myself and my heirs 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.

And further:

In case I were to sell away the buildings, which I shall be constructing on the above land, to anyone else, then, the purchaser shall be bound by all the terms in this lease deed.

This part of the document undoubtedly gives the lessee the right to transfer by sale the leasehold interest. But, as already stated, a clause enabling the leasehold interest to be transferred does not render such interest heritable.

12. The effect of these clauses is that the first part of the document ensures that the lessor cannot charge rent higher than the agreed rent even if the lessee were to remain in possession after the period of 30 years. That part is consistent with the lease being for an indefinite period, which means for the lifetime of the lessee. The next part provides for the right to remove the structures "after the lease period". The words "after the lease period" mean either at the end of the 30 years, or on the death of the lessee, because, it also says that if the lessee were to remove the buildings before the expiry of 30 years, he would have to pay the rent for the remainder of that period. This part of the document does not show the intention that the lease was to be a permanent lease. It merely ensures the right to remove the structures if the lessee or his heirs so desired on the expiry of the lease period, i.e., either at the end of 30 years, or after the lifetime of the lessee. The heirs are mentioned here to provide for the contingency of the lessee dying before the expiry of 30 years and also for the contingency of his living beyond that period and continuing to occupy the land. In the event of the first contingency, the lessee's heirs would continue in possession till the expiry of 30 years and then remove the structures if they wished. In the case of the second contingency, the heirs of the lessee would have the right to remove the structures on the death of the lessee. In either event the right provided for is the right to remove the structures. It is not a provision for the lease being heritable and its being consequently a permanent lease. Thus, the lease is for a period certain, i.e., 30 years and on the expiry of that period if the lessee still were to continue to pay the rent, for his lifetime. In the event of his dying before that period, the benefit of the lease would enure to his heirs till the completion of 30 years. They would be entitled to remove the structures either at the end of the 30 years if the lessee were to die before the expiry of that period or at the end of the lessee's life were he to continue to be in possession of the leased property after the expiry of 30 years. But the lease did not create hereditary rights so that on the death of the lessee his heirs could succeed to them.

13. In this connection it is necessary to note that, as translated in English, it would appear as if the document uses the pronoun 'I', meaning as if the lessee, in the earlier part and the pronoun "we", meaning the lessee and his Heirs, in the latter part. Such a translation, however, is not correct. We ascertained from Mr. Ratnaparkhi who after looking at the original Marathi assured us that the pronoun used throughout is ami, which means "we", a term often used in documents written in regional language for the executant instead of the singular I.

14. In our view the lease before us is clearly distinguishable from that in the case of Sivayogeswara Cotton Press where the leasehold rights were in clear terms made heritable and where the Court held that Clause (14), though placed last in the document, governed all its terms. There is no provision in the present case comparable with such a clause. The lease was undoubtedly for an indefinite period which only means that it was to enure for the lessee's lifetime. Reference in it of the heirs of the lessee is only for the limited purposes set out earlier and not for making the leasehold interests heritable. We do not find in the document words such as those in Sivayogeswara Cotton Press would compel us to the conclusion that the lease was intended to be permanent.

15. That leads us to the second contention of Mr. Desai. Under Section 108(d) of the Transfer of Property Act, if any accession is made to the leased property during the continuance of a lease, such accession is deemed to be comprised in the lease. If the accession is by encroachment by the lessee, and the lessee acquires title thereto by prescription, he must surrender such accession together with the leased land to the lessor at the expiry of the term. The 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 lease continues and afterwards for the benefit of the landlord. The plea of the appellant in the plaint in regard to an accession was vague and confused. Para 2 of the plaint simply stated that the said strip of land was part of plot No. 93, but was used by the appellant as a passage. Para 7(a) of the plaint, however, used the words "accession to the leasehold rights of the plaintiff in respect of the nazul plot No. 94", but did not say that such accession came about as a result of or by means of adverse possession. In para 8(a), which was inserted in the plaint by an amendment in 1959, an alternative plea was made that the said strip of land was part of the land under the lease. The written statement of the respondent denied the user of the said strip of land by the appellant and also the plea of accession thereof to the leased land. But the appellant's case was only that the building which his father had constructed extended upto the end of the western boundary of plot No. 94, with the result that (a) the eaves of that building projected over plot No. 93 by about 2 1\2 ft., that its windows on that side opened on plot No. 93 and a drain was constructed by the side of the appellant's western boundary through which waste water flowed from that building. According to the appellant's case, the said strip of land, which without doubt forms part of plot No. 93, was used by the appellant as a passage for going to a well situate in plot No. 93. Plot No. 93, however, was an open plot until recently, except for a small structure on its northern side, so that there was no definite or well marked passage which was used by the appellant in order to reach the said well. The projection of the eaves or the opening of the windows on to the said strip of land were not asserted as acts of adverse possession or encroachment but as easementary rights. The appellant did not claim any right to the said well as admittedly the use of the said well for drawing water was with the consent of the lessor. Therefore, the use of the passage for going to the well would be incidental to the permissive use of the said well. As regards the drain, the appellant's evidence was that it passed

partially through the said strip of land. Originally a kachha drain, it was made pucca upto a distance of 32 ft. in 1923. No width of it, however, was shown. Obviously, there can, therefore, be no adverse possession over the whole of the 4 ft. wide strip of land.

16. The Letters Patent Bench has pointed out three circumstances as emerging from the evidence which clearly negative the case of accession by adverse possession: (1) that the original plot was given two numbers, 94 and 93 in 1929, plot No. 93 being shown as commencing from the western wall of the appellant's building, (2) that no protest was ever made against such a demarcation by the appellant or his father, and (3) a clear admission by the appellant in cross-examination that according to him the said strip of land was covered by the lease deed and was not an acquisition over and above the leased land under that deed.

17. Parties to a suit are, it is true, entitled to make contradictory pleas in the alternative in their pleadings. But at the stage of the evidence, no serious attempt was made by the appellant to establish accession by adverse possession. On the contrary, the appellant sought to make out a case of easementary rights by prescription, a case incompatible with the claim of adverse possession where a party claims title over the land of another as his own and therefore there would be no dominant tenement claiming a right by prescription over a servient tenement. In this state of the evidence the Letters Patent Bench, in our judgment, was right in rejecting the claim of accession which the learned Single Judge had erroneously accepted.

18. As regards the appellant's claim to the easementary rights, assuming that a lessee can claim such rights over an adjacent property belonging to his lessor, Section 15 of the Easements Act requires that the access and use, on the basis of which an easement is claimed, must be as and by way of easement and without interruption for a period of 20 years. The enjoyment must be, in other words, as of right and not permissive either under a licence or an agreement. In Abdul Rashid v. Brahman Saron I.L.R. [1938] All. 538 a Full Bench of the Allahabad High Court held, on the principle embodied in Section 12, that the possession of a tenant being in law the possession of his landlord, the tenant cannot acquire by prescription an easement in favour of his holding except on behalf of his landlord. The Full Bench, however, made a distinction between an easementary right of way and an easementary right of light and air mentioned in the first two paragraphs of Section 15, and held that though a lessee of land, who is the owner of the building on such land, cannot acquire by prescription an easement of a right of way or one to flow water over another land of the lessor, so far as the use of light and air or support for his building is concerned he is the owner of the building and may under the first two paragraphs of Section 15 acquire such easements as he would not acquire them for any one except himself under Section 12. This decision was followed in Haji Abdulla Harron v. Municipal Corporation, Karachi A.I.R. 1939 Sind 39. But in Ambaram v. Budhalal [1943] I.L.R. Bom. 690 the High Court of Bombay differed from the Allahabad High Court holding that the distinction in English law arising from the language of Sections 2 and 3 of the Prescription Act, 1832 between an easement of light and air on the one hand and of easement of way on the other, did not hold good under the Easements Act as no such distinction is made in Sections 4 and 12 of the Act, that it is under Section 12 that an easement is acquired and not under Section 15 which provides for not the persons who can acquire easementary rights but the method by which they can be acquired, and therefore, the principle laid down in Sections 4 and 12 would apply, namely, that if the lessee

acquires a right to light and air, he does so on behalf of the owner and therefore he cannot acquire it on behalf of the owner as against such owner. There is thus clearly a conflict of view between the two High Courts. It is, however, not necessary to resolve this conflict in this case as the question of easements in the present case can be disposed of in another way.

19. Ch. IV of the Act deals with the disturbance of easements' and Section 33 therein provides that the owner of any interest in the dominant heritage or the occupier of such heritage may institute a suit for the disturbance of the easement provided that the disturbance has actually caused substantial damage to the plaintiff. Under Explanation II read with Explanation I to the section, where the disturbance pertains to the right of free passage of light passing through the openings to the house, no damage is substantial unless the interference materially diminishes the value of the dominant heritage. Where the disturbance is to the right of the free passage of air, damage is substantial if it interferes materially with the physical comfort of the plaintiif. In Rayachand v. Maniklal I.L.R. 1946 Bom. 184 (F.B.) it was held that an easement by prescription under Sections 12 and 15 of the Act is in fact an assertion of a hostile claim of certain rights over another man's property and in order to acquire the easement the person who asserts the hostile claim must prove that he had the consciousness to exercise that hostile claim on a property which is not his own and where no such consciousness is proved he cannot establish a prescriptive acquisition of the right. Therefore, if the owner of a dominant tenement has, during the period of prescription, exercised rights on the footing that he is the owner but which he later on claims as an easement over a servient tenement, then, his exercise of those rights is not exercised as an easement and be must fail in a claim for an easement. As already stated, a party to a suit can plead inconsistent pleas in the alternative such as the right of ownership and a right of easement. But, where he has pleaded ownership and has failed, he cannot subsequently turn around and claim that right as an easement by prescription. To prove the latter, it is necessary to establish that it was exercised on some one else's property and not as an incident of his own ownership of that property. For that purpose, Ms consciousness that he was exercising that right on the property treating it as someone else's property is a necessary ingredient in proof of the establishment of that right as an easement.

20. In his evidence, the appellant did not claim the right of passage or of light and air or of draining his waste and rain water over the said strip of land as rights over the respondent's property. On the contrary, he made it clear that the said strip of land fell under the document of lease. "I have a right on both the properties under the lease dead itself", he declared in his evidence, and added, "whatever rights I have acquired are under the lease deed itself and not afterwards". His claim that the strip of land was included in the leased land could not succeed because he had to admit that although two different municipal numbers, 94 and 93, were given as early as 1929 to the portions of the land, 94 to the portion under his possession, and 93 to that under the possession of the respondent, no complaint was ever made to the municipality or any other authority that the strip of land which he claimed to be covered under the lease should be included in his plot, namely, No. 94. In 1940, and again in 1955, when transfer deeds in respect of plot No. 94 were executed by him, the area mentioned therein was described as measuring 5182 sq. ft., which would not include the strip of land forming part of plot No. 93. Having thus failed in his claim that the said strip of land was acquired either as accession or as one covered by the lease deed, he could not turn round and successfully claim that he had during the requisite period exercised rights over it on the footing of an

owner of a dominant tenement exercising those rights over a servient tenement of another.

21. Assuming, however, that the said strip of land was used by him as a passage, the evidence clearly showed that it was permissive. There was evidence of a permission having been asked for from the respondent's father by the appellant for installing a hand-pump over the respondent's well in plot No. 93. If the appellant, and previously his father, were permitted to draw water from that well, the use of the well for drawing water and of the strip of land as a passage for going to the well was clearly permissive and not as an open hostile use over the lessor's property. The appellant himself admitted that his father had taken a portion of plot No. 93 on lease paying separate rent therefore at Rs. 45/-a year, and had put up thereon a tin-shed which stood there from 1935 to 1941. It is clear that the strip of land was allowed to be used as a passage both to the well and the said tin-shed. He admitted two letters, dated September 30, 1958 and December 4, 1959, having been written by him to the respondent both relating to rent due by him in respect of the said land on which the said tin-shed stood. On these facts it is impossible to sustain the right of passage over the said strip of land as an easementary right by prescription for a continuous period of 20 years.

22. As to the light and air through the windows on the western side, it is clear from Explanations II and III to Section 33 that to constitute an actionable obstruction of free passage of light or air to the openings in a house it is not enough that the light or air is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable, according to the ordinary notions of mankind. See Colls v. Home and Colonial Stores [1904] A.C. 179.

23. The plan produced in evidence shows that the central part of the appellant's building has five windows on the ground floor, five in addition to one smaller window on the first floor and four on the second floor. All these windows are in the rear side of the building and open out on to the said strip of land. There can be no doubt and the plan shows clearly that as a consequence of construction by the respondent, there would be a deprivation, partially though it would be, of light and air previously enjoyed by the appellant through these windows, especially as they are on the western side. On the ground floor, all the five windows are affected. On the first floor, only three windows are affected, and that too partially. On the second floor, none of the four windows is affected at all. Thus, so far as the ground and first floors are concerned, the appellant would not have the same amount of light and air as before. But the evidence shows that there are openings, doors and windows, on each of these floors on the front side, i.e., on the eastern side. There was some evidence also that the ground floor bad so far been used as a godown or a store room, though the appellant asserted that he had been using it also as a living room. No attempt, however, was made on behalf of the appellant to establish that the obstruction caused by the respondent's construction had been such as to amount to a substantial privation, so as to render occupation of the house by him uncomfortable. In the absence of such proof he was rightly non-suited by the High Court.

24. As regards the drain, we say nothing, as part of the appellant's claim in regard to it has been allowed by the High Court and there are no cross-objections against it by the respondent.

25. In the view that we take, the appellant cannot succeed on any one of the three questions raised by his counsel. The appeal, therefore, fails and has to be dismissed with costs.