

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NOS. 20, 21 & 22 OF 2006****SECOND APPEAL NO. 20 OF 2006**

1. Mr. Narendra Pandurang Chatim,
son of Pandurang alias Pandu Chatim,
major of age, married,
residing at Salvador do Mundo,
Bardez Goa.
2. Mrs. Vandana Narendra Chatim,
wife of Narendra Chatim,
residing at Salvador do Mundo,
Bardez Goa. (Original plaintiffs/Respondents) Appellants

V e r s u s

1. Mr. Vasant Vital Bhonsle,
Son of Vital Bhonsle,
major of age,
married,
 2. Mrs. Vasant Vithal Bhonsle,
wife of Vasant Bhonsle,
both residing at Manxebhatt,
Penha da Franca,
Bardez Goa.
 3. Mr. Harikumar Pandurang Chatim,
(since deceased)
son of Pandurang alias Pandu Chatim,
major of age, married,
residing at Salvador do Mundo,
Bardez Goa.
- 3a) Abhita Harikumar Chatim,
residing at Salvador do Mundo,
Bardez Goa.

b) Abhaykumar Harikumar Chatim,
residing at Salvador do Mundo,
Bardez Goa.

4. Mrs. Aruna Harikumar Chatim,
wife of Harikumar P. Chatim,
residing at Salvador do Mundo,
Bardez Goa (Original Defendants/Appellants) Respondents

AND

SECOND APPEAL NO. 21 OF 2006

1. Mr. Narendra Pandurang Chatim,
son of Pandurang alias Pandu Chatim,
major of age, married,
residing at Salvador do Mundo,
Bardez Goa.
2. Mrs. Vandana Narendra Chatim,
wife of Narendra Chatim,
residing at Salvador do Mundo,
Bardez Goa (Original plaintiffs/Respondents) ... Appellants

V e r s u s

1. Mr. Ramnath Yeshwant Parvotkar,
(since deceased)
represented by :
1(a) Mr. Rajesh Ramnath Parvotkar,
son of late Ramnath Parvotkar,
unmarried, major of age,
- (b) Miss. Sunita Ramnath Parvotkar,
d/o late Ramnath Parvotkar,
unmarried, major of age,
both r/o Manxe Bhatt,
Penha da Franca,
Bardez Goa.
2. Mrs. Ramnath Yeshwant Parvotkar,
wife of Ramnath Y. Parvotkar,
residing at Manxe Bhatt,

Penha de Franca,
Bardez Goa.

3. Mr. Harikumar Pandurang Chatim,
(since deceased)
son of Pandurang alias Pandu Chatim,
major of age, married,
residing at Salvador do Mundo,
Bardez Goa

3a) Abhita Harikumar Chatim,
residing at Salvador do Mundo,
Bardez Goa.

b) Abhaykumar Harikumar Chatim,
residing at Salvador do Mundo,
Bardez Goa.

4. Mrs. Aruna Harikumar Chatim,
wife of Harikumar P. Chatim,
residing at Salvador do Mundo,
Bardez Goa (Original Defendants/Appellants) ..Respondents

AND

SECOND APPEAL NO. 22 OF 2006

1. Mr. Narendra Pandurang Chatim,
son of Pandurang alias Pandu Chatim,
major of age, married,
residing at Salvador do Mundo,
Bardez Goa.
2. Mrs. Vandana Narendra Chatim,
wife of Narendra Chatim,
residing at Salvador do Mundo,
Bardez Goa (Original plaintiffs/Respondents) ... Appellants

V e r s u s

1. Mr. Meghashama Vinaik Gharse,
married, major of age, and his wife,

2. Mrs. Meghashama Vinaik Gharse,
wife of Mr. Meghashama V. Gharse,
Both residing at Maxebhatt,
Penha de Franca, Bardez Goa.
3. Mr. Harikumar Pandurang Chatim,
(since deceased)
son of Pandurang alias Pandu Chatim,
major of age, married,
residing at Salvador do Mundo,
Bardez Goa.

3a) Abhita Harikumar Chatim,
residing at Salvador do Mundo,
Bardez Goa.

b) Abhaykumar Harikumar Chatim,
residing at Salvador do Mundo,
Bardez Goa.

4. Mrs. Aruna Harikumar Chatim,
wife of Harikumar P. Chatim,
residing at Salvador do Mundo,
Bardez Goa. (Original Defendants/Appellants) .. Respondents

Mr. S. D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar and Ms. M. Furtado, Advocates for the appellants.

Mr. N. Sardesai, Senior Advocate with Mr. V. Amonkar and Ms. S. Pereira, Advocates for the respondent nos. 1 and 2.

Coram:- F. M. REIS, J

Date:- 7th October, 2016

ORAL JUDGMENT

Heard Mr. S. D. Lotlikar, learned Senior Counsel and Mr. C.

Padganokar, learned counsel appearing for the appellants and Mr. N. Sardesai, learned Senior Counsel and Ms. S. Pereira, learned counsel appearing for the respondent nos. 1 and 2.

2. All the above appeals were admitted by an order dated 03.10.2006 on the following substantial questions of law.

(1) Whether, once the appellants were held to be owners of the property surveyed under number 14/2, their prayer for demolition of the suit structure lying in the suit property could be refused, when the trial Court recorded a finding that the respondent nos. 1 and 2 had no right, title or interest and, therefore, did not have a better title than the appellants in respect of the suit property ?

(2) Whether, the conclusion reached by the first appellate Court, reversing the finding recorded by the trial Court, that the suit was barred by limitation in so far as demolition of the house constructed by the respondents nos. 1 and 2 in the suit property is concerned, is perverse ?

(3) Whether, in the absence of a plea taken by the respondents No.1 and 2, that the

appellants came to know about the construction of the suit house as having been done by them in the suit property in the year 1981 or thereabout and that, therefore, the suit was barred by limitation in so far as demolition of the house was concerned, it was open to the first appellate Court to dismiss the suit as far as prayer for demolition of the construction was concerned, the limitation in the instant case being a mixed question of law and facts ?

3. The parties shall be referred to in the manner they so appear in the cause title of the judgment of the learned Trial Judge.

4. Mr. S. D. Lotlikar, learned Senior Counsel appearing for the plaintiffs has submitted that the learned Judge has erroneously come to the conclusion that the suit was barred by limitation. The learned Senior Counsel further pointed out that the suit filed by the plaintiffs was essentially for restoration of possession based on title and as such the limitation for filing such a suit is 12 years. It is further pointed out that on perusal of the plaint, it clearly shows that the relief sought by the plaintiffs is to be construed to be a relief of restoration of possession and as such according to him, the learned Lower Appellate Court was not justified to come to the conclusion that the relief of demolition was barred by

limitation. It is further submitted that even the defendants have obtained a licence to put up a construction in the property surveyed under No.14/1 which is not the area where the disputed structure is located. The learned Senior Counsel has also taken me through the written statement filed by the defendants to point out that it is the case of the defendants that they have put up a construction in the property surveyed under No.14/1 which clearly shows that the construction put up by the defendants is on the mistakenly belief that it was located in the property surveyed under No.14/1. It is further submitted that the action of the defendants is of a trespasser and as such the encroachment is bound to be removed as the plaintiffs have established their title over the subject property. It is further pointed out that it is well settled that possession follows title and that as the defendants have encroached into the property of the plaintiffs, the learned Lower Appellate Court was not justified to refuse the relief of demolition of the encroachment existing in the property belonging to the plaintiffs. The learned Senior Counsel further pointed out that the judgment relied upon by the learned Lower Appellate Court is not at all applicable to the facts of the present case as in the said case the mudkar had encroached into the property of the Bhatkar and in fact, the Bhatkar had issued a notice to remove such encroachment and the suit was for a mandatory injunction for demolition of such structure came to be filed after three years from the date of such notice which is not at all the

situation in the present case. The learned Senior Counsel further pointed out that in the present case, only in the year 1988 when the plans were obtained by the plaintiffs they learnt about the encroachment put up by the defendants and immediately thereafter notice was issued for demolition of the subject construction in the property of the plaintiffs. The learned Senior Counsel as such points out that the suit cannot be said to be barred by limitation and the findings of the learned Lower Appellate Court to that effect deserve to be quashed and set aside.

5. On the other hand, Mr. N. Sardesai, learned Senior Counsel appearing for the defendants has supported the impugned judgment. The learned Senior Counsel has pointed out that the suit for mandatory injunction has to be filed within three years in terms of Article 113 of the Limitation Act, from the date of the cause of action. It is further pointed out that the licence itself was issued in favour of the defendants in the year 1983 and as such the suit filed in the year 1988 is hopelessly barred by limitation. The learned Senior Counsel has also taken me through the judgment of the Apex Court passed in Civil Appeal No. 190 of 2007 dated 28.09.2011 to contend that as the relief of mandatory injunction as sought by the plaintiffs does not fit into any of the Articles under the Limitation Act, the period provided under Article 113 of the Limitation Act, 1963 would govern the relief sought by the plaintiffs. The learned Senior

Counsel as such submits that the licence was issued for the disputed structure in the year 1983 and the suit filed in the year 1988 is barred by limitation and as such the learned Lower Appellate Court was justified to come to the conclusion that the suit was barred by limitation.

6. I have duly examined the rival contentions and I have also gone through the records. On perusal of the judgment of the learned Lower Appellate Court dated 21.09.2005, I find that the relief for demolition of the subject structure has been refused to the plaintiffs essentially on the ground that the suit is barred by limitation. In the present case, it is the contention of the plaintiffs that in the year 1988 they learnt that the subject construction put up by the defendants was located in the portion of the property surveyed under No.14/2 which belongs to the plaintiffs. Even on perusal of the alleged licence issued in respect of the subject structure by the Statutory Authorities, the permission was issued to the defendants to put up a structure in the property surveyed under No.14/1. There was no permission granted by any of such authorities to carry out any development in the property surveyed under No.14/2. This itself shows that the acts committed by the defendants was an encroachment into the property of the plaintiffs. While disposing of Second Appeal Nos. 51 of 2007, 52 of 2007 & 53 of 2007 by judgment passed today I have come to the conclusion that the plaintiffs have

established their title over the disputed property. Hence, the fact that the defendants had encroached into the property belonging to the plaintiffs cannot be disputed.

7. On going through the averments in the plaint, the suit filed by the plaintiffs is based on title. It is averred in the plaint that in the year 1988 when the survey plan was obtained by the plaintiffs and after verifying the situation at loco they learnt that there was an encroachment into the property belonging to the plaintiffs carried out by the defendants. The defendants have not produced any evidence to show that the plaintiffs were aware about the encroachment in their property much before the year 1988. On perusal of the plaint in Regular Civil Suit No. 50/98 (Regular Civil Suit No. 297/88 (old), it is clearly pleaded that the suit property known as “XIR” bearing survey No.14/2 of Village Penha da Franca, which originally belonged to Pandurang alias Pandu Chatim and Siuram Chatim who are the father and the paternal uncle of the plaintiffs had devolved upon the plaintiff no.1 and the defendant no.3. It was also pleaded that in the Inventory Proceedings No.101/92 initiated upon the death of the said parents Pandurang Chatim and Premavati P. Chatim, the subject property surveyed under No.14/2 was allotted to the plaintiff no.1 in the auction. It is further pointed out that somewhere in the month of July, 1988, the plaintiffs obtained a copy of Form I and XIV of the suit

property and to their surprise found that the names of one Datta Shet and Martha Viegas were wrongly mentioned as the occupants of the suit property. It is further pointed out that the plaintiffs moved the Court to rectify the survey records as the said Martha Viegas was the owner of the property situated on the west of the suit property. It is further pointed out that somewhere in the month of July, 1988, the plaintiffs obtained a new survey plan and found that the defendants herein had built their house in the suit property which is marked by letter 'B' in the plan annexed to the plaint. Accordingly, the plaintiffs have approached the defendant nos. 1 and 2 to demolish the suit house. Accordingly, on the basis that the cause of action first arose in July, 1988 and thereafter, in the second week of November, 1988, the suit was filed inter alia for declaration that the plaintiffs are the owners in possession of the property and to order the defendant nos. 1 and 2 to demolish the suit house and bring back the area covered by the suit house to its original condition as well as for permanent injunction.

8. On perusal of the written statement filed by the defendants, the defendants have denied for want of knowledge that the plaintiffs are owners in possession of the property known as "XIR" surveyed under No.14/2. It was further pointed out at para 2.B. that the property located on the western side of the suit property belonging to Martha Viegas has

been purchased by the defendant no.1 along with one Ramnath Porvotkar and one Meghasham Gharse from the said Martha Viegas and her husband by a Deed of Sale dated 01.07.1980. It is further pointed out that the said property on the western boundary of the suit property is now owned, enjoyed and possessed by the defendants and the said Porvotkar and Gharse. It is also submitted that the said property on the western side of the suit property is surveyed under No.14/1 in the records of right.

9. While dealing with the averments at paras 3, 4, 5, 6, 7 and 8 the defendants alleged that the averments made in the written statement are not within their knowledge. In such circumstances, the fact that the plaintiffs have learnt about the encroachment only in the year 1988 is not specifically denied by the defendants in their written statement. Dealing with para 9 of the plaint, it is contended by the defendant nos. 1 and 2 that the plan attached to the plaint is not the survey plan as according to him the said construction put up is not shown in the survey plan either in the property surveyed under No.14/1 and/or 14/2 as the house was constructed after the preparation of the survey plan. It is further pointed out that the house existing therein was constructed in the year 1982. It is further pointed out that the other two joint purchasers of the said property have also built their houses but surprisingly the date has not been mentioned therein. It is further pointed out that after filing of the suit as there were

allegations that the suit house was located in the property surveyed under no.14/2, the defendants had engaged a competent surveyor to locate their house vis-a-vis the survey plan, and they were informed that there has been an error in drawing of the survey map in respect of some survey numbers which includes survey nos.14/1 and 14/2. It is further pointed out that in view of the error in the survey records though the house falls in their property i.e. surveyed under no.14/1 a part of the house is shown in survey no.14/2. It is further contended at para 4.J. that they were informed by the Survey Authorities that there was an error in drawing the survey map. It is also pointed out that the application has been filed before the Dy. Collector for rectifying the error in survey No.14/1. It is further pointed out at para 5 that the house has been constructed in their property surveyed under No.14/1 after taking permission from the Village Panchayat.

10. On perusal of the pleadings in the plaint in Regular Civil Suit No.298/88 (Old) and Regular Civil Suit No.49/1998 (New), similar averments were made as reflected in the earlier suit referred to herein above by the plaintiffs. It is further pointed out that in August, 1988 the plaintiffs approached the defendant nos. 1 and 2 to demolish the suit house and after issuing the notice, the defendant no.1 by his reply dated 12.11.1988 addressed to the Advocate of the plaintiffs raised false claim

and stated that he was the owner in possession of the suit property.

11. On perusal of the written statement, similar averments were made by the defendants as referred to in the earlier written statement and further contended that the defendants were informed that there has been an error in drawing the survey plan in respect of some survey records including the survey nos.14/1 and 14/2. It is further contended that the house was put up in the year 1982 by the said defendants.

12. Even on perusal of the written statement filed in Regular Civil Suit No.296/1988 (Old) and Regular Civil Suit No.57/98 (New), similar pleadings have been made by the said defendants and stated that the house was constructed in the year 1982 and that there was an error in the survey records. While dealing with the contents of para 15 of the plaint, it was contended by the defendants in their reply dated 12.11.1988 that they had claimed that they are owners of the property surveyed under no.14/1 and not of the suit property which is surveyed under No.14/2. It was also denied that they have claimed ownership of the suit property for the first time in the reply dated 12.11.1988 or at any other time. On perusal of the averments in the plaint and the written statement, it is the case of the plaintiffs that they learnt and confirmed about the encroachment only in the year 1988. The notice to remove the construction was issued

admittedly in the year 1988 and the suit was filed immediately thereafter in the year 1988. The stand taken by the defendants however suggest that there is a mistake in the survey records with regard to the survey boundary. The defendants contend that they put up the subject construction in the property surveyed under No.14/1 and not in 14/2. Both the Courts below have found that the claim of the defendants about the error in the survey records has not been established by any material on record. The contention of the defendants as such that there is an error in the survey records cannot be accepted. While disposing of Second Appeal preferred by the defendants, I have come to the conclusion that the findings of the Courts below that the plaintiffs are the owners and in possession of the property surveyed under no.14/2 cannot be faulted. In such circumstances, the question of claiming that there was a dispute in the boundary separating the property surveyed under nos.14/1 and 14/2 as claimed by the defendants is totally without any foundation.

13. On perusal of the averments in the written statement, it is not disputed that the encroachment carried out by the defendants came to the knowledge of the plaintiffs for the first time in the year 1988. The relief sought by the plaintiffs is to demolish the encroachment in their property and restore the land to its original position. The cause of action for filing such suit only accrued when the encroachment stands detected and in the

present case considering the pleadings in the plaint, the fact that the plaintiffs learnt about such encroachment in the year 1988 cannot be disbelieved. In fact the defendants themselves contend that there is an alleged mistake in the depiction of the property in the survey records. Though it is contended by the defendants that the construction was put up in the year 1982 nevertheless, there is no specific averments in the written statement as to when the alleged construction was put up in the property surveyed under No.14/2 as the case of the defendants has been that the construction put up by them was in the property surveyed under No.14/1. The learned Lower Appellate Court has dismissed the suit as being barred by limitation on the ground that the cause of action has arisen when the encroachment was carried out by the defendants. The pleadings of the plaintiffs itself suggest that the defendants contend that the construction was put up in survey no.14/1 and not in survey no.14/2. It is also contended that there is a mistake in depiction in the survey records. Even assuming that the provisions of Article 113 of the Limitation Act are applicable to the facts of the present case, the cause of action for filing such suit would be three years from the date of accrual of the cause of action. The cause of action accrues to the plaintiffs when all the bundle of facts required to constitute such cause of action are available to the plaintiffs. In the present case, it is the case of the plaintiffs that they learnt about the encroachment only in the year 1988 when the copy of the

survey records were sought from the concerned authorities. The fact that the plaintiffs were not aware about the encroachment in their property on an earlier occasion has not been seriously disputed by the defendants in their written statement. Even the judgment of the Apex Court relied upon by Mr. N. Sardesai, learned Senior Counsel appearing for the defendants in ***Civil Appeal No. 190 of 2007*** in the case of ***Antonio Lobo and Another V/s Felix Fernandes and others dated 28.09.2011*** would not be applicable to the facts in the present case as admittedly, the facts therein suggest that even though a notice was issued by the Bhatkar to the mundkar specifying the encroachment carried out in the property to the extent stated in the notice, the suit for the relief of demolition was filed only after three years after such date of cause of action. The initial entry of the mundkar therein was permitted by the Bhatkar/plaintiff in the said suit. The occupation of such mundkar of the dwelling house was with the consent of the Bhatkar and such occupation is protected under the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975. But on the contrary, in the present case, the notice was issued only in the year 1988 calling upon the defendants to demolish the structure put up in the property belonging to the plaintiffs and the suit was filed in the same year immediately thereafter. The initial entry of the defendants was not with the consent of the owner nor there is an encroachment to the knowledge of the plaintiffs. The encroachment was detected only in the year 1988

which led to the plaintiffs issuing notice for demolition of the encroachment in the property of the plaintiffs. As already pointed out herein above, the plaintiffs are the owners of the subject property wherein the disputed structure is located and as the title has not been divested, the plaintiffs are entitled to file a suit for demolition of the encroachment being the title owner of the subject property and the cause of action to the plaintiffs to file a suit for removal of the encroachment arises when such facts came to the knowledge of the plaintiffs and consequently, a notice was issued to the defendants to remove such encroachment from such property. As already pointed out herein above, there is no material on record to suggest that the plaintiffs had knowledge or had detected such encroachment in the portion of their property at any earlier point of time. The character of the relief sought in the suit based on the averments in the plaint would clearly suggest that it is contended by the plaintiffs that they are the owners in possession of the subject property which finding has been accepted by the Courts below. The relief sought is for declaration as well as to demolish the structure and restore the land to its original position and also for permanent injunction. Such relief in the context of the suit based on the title is to be construed to be in any event a suit for restoration of possession based on title.

14. Apart from that, on perusal of the averments referred to

herein above of the written statement of the defendants, it clearly suggest that the defendants assumed that there was a mistake in the boundary line separating the property belonging to the plaintiffs and the defendants surveyed under Nos. 14/1 and 14/2. It is further contended that accordingly an application was filed before the Dy. Collector for rectifying the error in survey no.14/1. But, it is contended by the plaintiffs that in the year 1988 when they appointed a Surveyor to examine the location of the subject house, it was found that the part of the structure was located in the property belonging to the plaintiffs surveyed under No.14/2. This clearly shows that though it is contended by the defendants that they have put up a construction in the property surveyed under No.14/1 on the mistaken belief that it was part of their property. In fact, only in the year 1988 the mistake was realised by the parties to the effect that the part of the house was located in the property belonging to the plaintiffs surveyed under No.14/2. In such circumstances, the cause of action for filing such suit would arise only after the mistake was detected as contended by the plaintiffs in the year 1988 when the notice was served by the plaintiffs on the defendants which led to filing of the suit in the same year. In such circumstances, the cause of action would arise to file a suit only after the mistake is detected on the basis of the title established by the plaintiffs. As such, the suit being based on title, the learned Lower Appellate Court has failed to note that the possession follows title and on

minutely reading the plaint, the relief sought by the plaintiffs is essentially to restore the land to its original position which would itself show that such relief has to be construed, in any event, as a relief for restoration of possession based on title.

15. This Court in the judgment passed in ***Second Appeal No.47 of 2003 dated 17.10.2011*** in the case of ***Mr. Eleuterio de Remedios V/s Mrs. Antoinetta Nazareth & others*** has observed at paras 11 and 12 thus :

“11. Dealing with the contention of Shri S.D. Lotlikar, learned Senior Counsel to the effect that the lower Appellate Court was not justified to grant restoration of possession of the suit property, I find that on perusal of the reliefs sought by the respondents in the suit the prayer clause (b) was to seek for mandatory injunction directing the appellants to remove from the suit property the container referred to in the plaint and restore the land to its original condition. The other relief sought by the respondents was for a mandatory injunction to repair the compound wall and the parapet wall. Both the Counsel do not dispute that the relief with regard to repairing the compound wall and the parapet wall and filling the trenches have not been granted by the Courts below. On perusal

of the said relief it is apparent that the respondents sought for a mandatory injunction to remove the container as well as to restore the land to its original condition. The respondents have filed the suit on the premise that they are the owners in possession of the suit property. Considering the prayer sought by the respondents it is implicit that the prayer to restore the land to its original condition implies that the respondents also sought for restoration of possession of the land which was occupied by such structures. The learned Senior Counsel appearing for the respondents has rightly relied upon the judgment of the learned Single Judge of this Court passed in Second Civil Appeal No.15/B/1980 wherein the learned Single Judge has construed a similar prayer made in the said proceedings amounts to restoration of possession of the area occupied by such illegal structure. Considering the submissions of the learned Senior Counsel Shri J.E. Coelho Pereira, that restoration of possession granted by the lower Appellate Court is restricted only to the area covered by the container as well as the additional structures put up during the pendency of the suit, the contention of the learned Senior Counsel Shri S.D. Lotlikar to the effect that the lower Appellate Court has granted restoration of possession of the suit

property cannot survive on the basis of the findings of the Courts below and taking note of the said submissions of the learned Senior Counsel appearing for the respondents. No infirmity can be found on that count in the judgment of the lower Appellate Court.

12. Considering the said judgments of the learned Single Judge of this Court and in the facts and circumstances of the case, I find that the learned lower Appellate Court was justified to come to the conclusion that the respondents were entitled for a mandatory injunction to remove the illegal container/structure put up during the pendency of the suit and grant the reliefs to the respondents. In view of the above, the first substantial question of law is answered by holding that the learned lower Appellate Court was justified to direct the removal of the container as well as structure existing therein coupled with the direction to restore the possession of the area occupied by such structures.”

16. The judgment reported in **(2014) 2 SCC 269** in the case of ***Union of India and others V/s Vasavi Cooperative Housing Society Limited and others*** relied by Mr. N. Sardesai, learned Senior Counsel appearing for the defendants is not applicable to the facts of the present

case. As pointed out herein above, the plaintiffs have established their title over the subject property and as such the question of contending that no declaration can be granted in favour of the plaintiffs in such circumstances, would not be justified. The reliance by Mr. N. Sardesai, learned Senior Counsel appearing for the defendants the judgment of the Apex Court reported in ***AIR 1968 SC 1165*** in the case of ***Nair Service Society Ltd V/s K. C. Alexander and others*** cannot be accepted. In the present case, the plaintiffs have established their title over the subject property and as such the contention of the defendants that they have better right to continue in possession than the plaintiffs cannot be accepted. As already pointed out herein above, in the present suit the plaintiffs have established their title and in such circumstances, the defendants are not entitled to continue in possession of such property unless they have perfected their right by adverse possession.

17. In ***2010(3) MLJ 624*** in the case of ***Vijaya wd/o Vijay Vitthalani and others V/s Jagdish Kanjubhai Vitthalani***, it has been observed at para 18 thus :

“18. With regard to the contention of the learned Counsel that the respondent ought to have filed a suit for restoration of possession, and the relief for mandatory injunction was not sufficient, I find considering the findings of

the courts below, the question of seeking of restoration of possession does not arise at all. The courts below have concurrently held that the respondent is in possession of the suit plot. The courts below had found that appellant No. 1 had kept only an iron structure in the suit plot and the respondent is entitled to seek its removal by way of mandatory injunction. On perusal of the written statement by the appellants there are no pleadings to disclose any act of continued possession by the appellants in the suit plot. There is no material to establish any continued occupation by the appellants of the said iron structure. It is an admitted fact that immediately after the respondent noticed that the appellant No. 1 had kept the iron structure, the counter claim was filed seeking for mandatory injunction. The learned Counsel for the respondent has relied upon the judgment of this Court reported in 1979 Bom. C.R. 348 : A.I.R. 1980 Bombay 123 (Nagin Mansukhlal Dagli Vs. Haribhau Manibhai Patel)³, this Court has held at para 10 as under -

“ prayer (b) of the plaint, in the guise of a prayer for a mandatory injunction against the defendant to remove himself from the said flat, is in substance no other than a prayer

for the recovery of possession of the said flat. Realizing full well that the proper relief to pray for would be a decree or order for possession but at the same time being desirous of bringing the suit in this Court and simultaneously not wishing the suit to suffer from a technical defect, the draftsman of the plaint has in the said prayer sought to protect the plaintiff by using the phraseology that the defendant be ordered and decreed by a mandatory order or injunction... Thus, really, what is prayed for is a decree for possession. It is now well settled that when we have to determine the nature of the suit what we are to look at is the real substance of the suit and not legal ingenuity in drafting the plaint. The plaint read as a whole and the real substance of the suit leave no doubt that this is a suit between persons who hold the character of a licensor and licensee, which relationship having come to an end according to the plaintiff, the plaintiff has become entitled both in law and under the

agreement of licence to recover possession of the property from the defendant, his licensee.”

In 1966 BCI (0) 4 : A.I.R. 1966 Bombay 113 (Miss. Aninha Dcosta Vs. Mrs. Parvatibai M. Thakur)⁴, the Division Bench of this Court has held at para 2 as under -

....but in that case we also pointed out that the Court would be entitled to construe the plaint and if on a fair construction the Court could arrive at the conclusion that what was really intended by the plaint was a claim to possession, then the suit ought not to be dismissed only on the ground that Court-fee had been paid as on an injunction. In view of this judgment, Naik J. construed the plaint and directed the plaintiff to pay the Court-fee which she would have been bound to pay as on a suit for possession on the basis of the value of the property as fixed by him.....

Considering that the appellants failed to establish that they were in possession of the suit plot, the courts below were justified to come to the conclusion that the respondent was entitled for mandatory injunction to direct the

appellants to remove the iron structure from the suit plot as well as for a permanent injunction as prayed for and there was no need for seeking restoration of possession. In any event the said aspect has no relevance in view of the said judgment of this Court.”

18. Taking note of the said observations and considering that the suit filed by the plaintiffs is based on the title which has been duly established and accepted by the Courts below, I find that the learned Lower Appellate Court was not justified to refuse the relief of demolition of the encroachment into the property surveyed under no.14/2 which belongs to the plaintiffs herein.

19. During the course of the hearing of the above appeals, considering the nature of the dispute, I had called upon the parties to consider whether the matter could be amicably settled. The learned Senior Counsel appearing for the appellants had even suggested that the property could be exchanged in order that the structure put up by the defendants could be protected. There was also a suggestion that the defendants could pay the value of the land as encroached by the subject construction. But however, despite of many opportunities the defendants refused to come to some terms and as such the matter proceeded for final disposal.

20. For the aforesaid reasons, I find that the learned Lower Appellate Court was not justified to come to the conclusion that the suit was barred by limitation. Considering the relief sought, the cause of action arose to the plaintiffs even assuming the Article 113 of the Limitation Act is applicable to the facts of the present case only after the notice was issued in the year 1988 and as such, the suit is within the time prescribed. Once the title and ownership of the property is established in favour of the plaintiffs, the learned Lower Appellate Court was not justified to refuse a relief sought by the plaintiffs for demolition of the encroached area in the property surveyed under No.14/2. In such circumstances, I find that the learned Lower Appellate Court was not justified to grant a relief of permanent injunction and declaration only in part as in fact the plaintiffs were entitled for the relief of declaration and permanent injunction in respect of the entire property as well as to remove the encroached portion by the defendants in the property surveyed under No. 14/2 situated at Penha da Franca.

21. Considering the above findings and the relief sought by the plaintiffs, while examining as to what relief the plaintiffs are entitled in the peculiar facts and circumstances of the case, I find it appropriate to remand the matter to the learned Lower Appellate Court to consider whether the plaintiffs are entitled for the relief of demolition of

encroached portion of the structure in the part of the property surveyed under No. 14/2 or in lieu thereof the payment of compensation for the area encroached or any other appropriate relief. At this stage, the learned counsel appearing for the respective parties have pointed out that the defendants are occupying the disputed structure in the property surveyed under No.14/2 on the assumption that such construction was in the property surveyed under No.14/1 though it is found located in the property surveyed under No.14/2. The learned counsel appearing for the plaintiffs however point out that the defendants are liable to demolish the part of the structure which is located in the property surveyed under No.14/2 which belongs to the plaintiffs. The learned counsel appearing for the defendants however points out upon instructions of the respondent no.2 who is present in Court that in lieu of the area of the land occupied by such disputed structure, the respondents are prepared to allot corresponding area which is unencumbered and open land of similar nature having same value and potential to the plaintiffs in the property belonging to the defendants surveyed under no.14/1 or pay the value of such encroached area to the plaintiffs. The learned counsel as such points out that the required set back would have to be maintained to proceed to the southern portion of the property surveyed under No.14/1. The learned counsel as such points out that instead of remanding the matter to examine the relief which has been granted, some time be granted to both the parties to work

out a solution and settle the matter before passing the final relief in the above appeals. As such, at the request of both the learned counsel, the matter was adjourned to enable the parties to work out a settlement and an opportunity was given to them to mention the matter. But however, despite of number of opportunities the matter was again placed on board on 07.10.2016. When the learned counsel appearing for both the parties have pointed out that despite of every attempt no final decision could be arrived at with that regard. Consequently, the above appeals are directed to be disposed of accordingly.

22. In such circumstances, whether the plaintiffs should be granted a relief of demolition of encroachment in the property surveyed under No.14/2 or in lieu thereof direct the payment of compensation of the encroached area to the plaintiffs, I find that for this limited extent, the matter deserves to be remanded to the learned Lower Appellate Court to examine what relief is to be granted in the facts and circumstances of the case in the light of the findings arrived at herein above.

23. In view of the above, I pass the following :

O R D E R

- (i) The appeals are partly allowed.
- (ii) The impugned judgment and decree passed by the learned Lower Appellate Court to the extent it dismissing the suit of the appellants as being barred by limitation and refusing relief of demolition and injunction to the area of land occupied by the subject structure put up by the defendants is quashed and set aside.
- (iii) The matter is now remanded to the learned Lower Appellate Court to consider granting of an appropriate relief in the context of the relief sought for demolition of the structure put up by the defendants in the light of the observations made herein above after hearing the parties in accordance with law.
- (iv) The parties are directed to remain present before the learned Lower Appellate Court on 13.02.2017 at 2.30 p.m.
- (v) All contentions of both the parties with that regard are left open.

(vi) All the above appeals are disposed of accordingly with no orders as to costs.

F. M. REIS, J

at*