

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEALS NO. 38/1998 & 5/1999****SECOND APPEAL NO. 38/1998**

1. Pundalik Shamba Naik (since deceased)
by legal representatives

- 1a) Ananda Pundalik Naik (son) married to,
 - b) Smt. Anita Ananda Naik,
(daughter-in-law), Both residing at
Manaswada, Kundaim, Goa.
 - c) Smt. Kalavati Vidiadar Sawant,
(daughter) married to,
 - d) Shri Vidiadar Sawant,
(son-in-law), both residing at
Ribandar.
 - e) Shri Vidyanand Pundalik Naik
(son) married to
 - f) Smt. Pramodini alias Vassundhara
Vidyanand Naik, (daughter-in-law)
Both residents of Opposite
Kanara Bank, Ponda, Goa.
 - g) Shri Dayananda Pundalik Naik
(son) bachelor, residing at
Manaswada, Kundaim, Goa
 - h) Smt. Namrata Namdev Gauncar
(daughter) married to
 - i) Shri Namdev Gauncar (son-in-law)
Both residents of Mapusa, Goa.

2. Satiavati Pundalik Naik,
married, housewife, residing at
Manaswada, Kundaim, Ponda, Goa
All of major in age.

..... Appellants.

V/s.

1. Smt. Maria Luisa Jorge e Rodrigues,

married, landowner, major and her husband.

2. Luis Francisco Rodrigues

2a. Mr. Augusto Virgilio Jose Manuel Jose Rodrigues (son) of late Luis Francisco Rodrigues;

2b. Mr. Mikie Rodrigues (grandson) son of Augusto Jose Manuel Jorge Rodrigues;

2c. Ms. Queenie Anne Rodrigues (grand daughter) d/o. Augusto Jose Manuel Jorge Rodrigues;

All r/o. H. No.WH/212/6, Near Ponda Municipality Building, Ponda, goa.

2 d. Ms. Elizabeth Rodrigues (daughter) late Luis Francisco Rodrigues;

2e. Ms. Deena Rodrigues, (Grand daughter), wife of Kurian Joseph;

2f. Mr. Kurian Joseph (grand son-in-law);

All r/o. Delia Residency, B-2, Near D'Costa Hospital, Fatorda, Margao, Goa.

(Dismissed against respondents No.2a. to 2f. in view of Order dated 2.12.16.)

2g. Mr. Bosco Rodrigues (son), of late Luis Francisco Rodrigues;

2h. Mrs. Divina Rodrigues, (daughter-in-law), wife of Bosco

Rodrigues;
Both r/o. F1, Sterling Apartments,
Pajifond, Malbhat, Margao, Goa.

2i. Mr.Luizito Rodrigues alias
Luis Roque Jorce e Rodrigues,
(son), son of late Luis Francisco
Rodrigues;

2j. Mrs. Joyce Edvina Rodrigues,
(daughter-in-law), wife of
Luizito Rodrigues alias Luis
Roque Jorge e Rodrigues;

Both r/o. 74, Rolartson Road,
Taiylor's Lakes, Melbourne,
Victoria, Australia.

2k. Mr. Adelino Rodrigues (son)
son of late Luis Francisco Rodrigues,

2l. Mrs. Jennifer S. Rodrigues
(daughter-in-law), wife of
Adelino Rodrigues,

Both r/o. Delia Residency,
B-2, Near D'Costa Hospital,
Fatorda, Margao, Goa.
(dismissed against respondents No.2k.
and 2l. in veiw of order dated 2.12.16).

3. Shri Joildo de Souza Aguiar,
major, married, landlord, and his wife

4. Smt. Lira Nelly Marques e Aguiar,
major, married, housewife, residing
Near Ponda Municipality,
Ponda, Goa.

..... Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Ms. Neelam Patil, Advocate

for the appellants.

Mr. G. Panandikar, Advocate for the respondents.

SECOND APPEAL NO.5/1999

1. Smt. Maria Louisa George e Rodrigues,
married, landowner, 64 years old and
her husband.

2. Luis Francis Rodrigues,

2a. Mr. Augusto Virgilio Jose Manuel
Jorge Rodrigues (son) of late
Luis Francisco Rodrigues;

2b. Mr. Mikie Rodrigues (grandson)
son of Augusto Jose Manuel Jorge
Rodrigues;

2c. Ms. Queenie Anne Rodrigues
(grand daughter) d/o. Augusto
Jose Manuel Jorge Rodrigues;

All r/o. H. No.WH/212/6, Near
Ponda Municipality Building,
Ponda, Goa.

**(respondents No.2 b and 2c stand
deleted as per Order dated 1/2/2012)**

2 d. Ms. Elizabeth Rodrigues
(daughter) d/o. late Luis Francisco Rodrigues;

2e. Ms. Deena Rodrigues,
(Grand daughter), wife of Kurian Joseph;

2f. Mr. Kurian Joseph (grand son-in-law);

All r/o. Delia Residency, B-2,
Near D'Costa Hospital, Fatorda,

Margao, Goa.

**(respondents No.2 e and 2f stand
deleted as per Order dated 1/2/2012)**

2g. Mr. Bosco Rodrigues (son),
of late Luis Francisco Rodrigues;

2h. Mrs. Divina Rodrigues,
(daughter-in-law), wife of Bosco
Rodrigues;
Both r/o. F1, Sterling Apartments,
Pajifond, Malbhat, Margao, Goa.

2i. Mr.Luizito Rodrigues alias
Luis Roque Jorge e Rodrigues,
(son), son of late Luis Francisco
Rodrigues;

2j. Mrs. Joyce Edvina Rodrigues,
(daughter-in-law), wife of
Luizito Rodrigues alias Luis
Roque Jorge e Rodrigues;

Both r/o. 74, Rolartson Road,
Taiylor's Lakes, Melbourne,
Victoria, Australia.

2k. Mr. Adelino Rodrigues (son)
son of late Luis Francisco Rodrigues,

2l. Mrs. Jennifer S. Rodrigues
(daughter-in-law), wife of
Adelino Rodrigues,

Both r/o. Delia Residency,
B-2, Near D'Costa Hospital,
Fatorda, Margao, Goa.

..... Appellants.

V/s.

1. Pundalik Shamba Naik (since deceased)
through legal representatives
 - 1a) Anand Pundalik Naik (son) married to,
 - b) Smt. Anita Anand Naik,
 - c) Smt. Kalavati Vidiadar Sawant,
(daughter) married to,
 - d) Shri Vidiadhar Sawant,
(son-in-law), both residents of
Ribandar-Goa.
 - e) Vidyanand Pundalik Naik
(son)
 - f) Smt. Pramodini alias Vassundhara
Vidyanand Naik, (daughter-in-law)
 - g) Shri Dayananda Pundalik Naik
(son)
 - h) Smt. Namrata Namdev Gaonkar
(daughter) married to
 - i) Shri Namdev Gauncar (son-in-law)
2. Smt. Satyawati Pundalik Naik,
married, 56 years old, r/o.
Kundaim, Ponda, Goa
3. Joildo De Souza Aguiar,
major, married, landlord,
and his wife;
4. Mrs. Lira Nely Marques e Aguiar,
major, married, housewife,
both Nos. 3 and 4 r/o. Near Ponda
Municipal Council, Ponda, Goa.
5. Mrs. Maria de Ceu Rodrigues
(daughter) ;
6. Mr. Fernando Alvaro Sales de Andrade
(son-in-law);
Both resident of Shantal Building,

Ground Floor, Old Market, Opp.
Old Court, Margao, Goa.

..... Respondents.

Mr. G. Panandikar, Advocate for the appellants.

Mr. S. D. Lotlikar, Senior Advocate with Ms. Neelam Patil, Advocate for the respondents.

CORAM :- F.M. REIS, J.

Date : - 6th July, 2017

ORAL JUDGMENT :-

Heard Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellants in Second Appeal No. 38/1998 and for the respondents in Second Appeal No. 5 of 1999 and Mr. G. Panandikar, learned Counsel appearing for the respondents in Second Appeal No.38/1998 and for the appellants in Second Appeal No. 5/1999.

2. Second Appeal No.38/1998 came to be admitted by an order dated 9th July, 1999, on the following substantial questions of law :

1. Whether in view of the fact that in the plan annexed to the plaint the respondents No.1 and 2 had laid a claim to a particular property as having been acquired by them by prescription, the trial Court could have granted the

declaration of acquisition of the right of way in favour of the respondents no.1 and 2 without specifying as to which of the multiple ways the respondents no.1 and 2 had acquired such right by prescription ?

2. Whether in the absence of any issue on the aspect whether the respondents no.1 and 2 had acquired an easementary right of way through the property of the appellants by way of prescription as also in the absence of any finding being recorded by the Courts below that the respondents no.1 and 2 had acquired the right of way by way of prescription through the property of the appellants, whether the declaration to that effect that the respondents no.1 and 2 have acquired such a right could be granted ?

3. Whether the Courts below could have declared that the respondents no.1 and 2 had acquired easementary right of way through the appellants' property by prescription merely on the basis of the finding that property of the respondents no.1 and 2 was enclaved and there was no other way for respondents no.1 and 2 to come to the main road, except through the property of the appellants ?

4. Whether a suit for right of way on the basis of acquisition of such right under Art. 2309 of Portuguese Civil Code as well as by way of prescription is maintainable, in the absence of relief on the basis of two such different grounds being made in the alternative to each other ?

3. Second Appeal No.5/1999 came to be admitted by an order dated 9th July, 1999, on the following substantial questions of law :

(1) Once the trial Court renders the finding that the plaintiffs' property is landlocked and the Appellate Court does not reverse the said finding, could the plaintiffs be denied the relief as sought for in prayer (b) of the plaint which was based on the provisions of Article 2309 of the Portuguese Civil Code which in turn gives the right of onus to the landlocked property, acquiring right of way over the servient property ?

(2) Whether the Appellate Court has directed itself and wrongly interpreted the provisions of Article 2309 while holding that the plaintiffs could not claim right under Article 2309 of the Portuguese Civil Code over the defendants' property as such access was used by others also ?

4. Shri S. D. Lotlikar, learned Senior Counsel appearing for the appellants, in support of the appeal preferred by the original defendants-appellants herein, points out that the claim of the respondents-original plaintiffs is that they have acquired prescriptive right of access through the property belonging to the defendants surveyed under No. 140/1 of Village Betora, Ponda Taluka to enter

their property which is landlocked on the southern side of Survey No.127. The learned Senior Counsel further points out that it is the contention of the plaintiffs that the property of the plaintiffs will be landlocked and, as such, they have a right of access to go to the main road which is located on the western side of the said property, after entering the property of one Shri Vaidya surveyed under No.145. The learned Senior Counsel further submits that to lead into the property of said Shri Vaidya, there is a nallah, separating the property of the defendants, running from north to south, which creates impediments in the movements of the vehicles or any other means of access and, as such, the Courts below erroneously granted the relief of right of way. The learned Senior Counsel further points out that for better enjoyment of the property belonging to the defendants surveyed under No.140/1, the defendants have constructed a culvert over such nallah, only after filing of the suit and, as such, the question of the plaintiff claiming any access as a matter of right to pass through the said nallah, is totally misplaced. The learned Counsel has, thereafter, taken me through the pleadings in the plaint to point out that the location of such a right of access claimed by prescription has not even been identified, nor any croqui produced to substantiate such claim. It is

further pointed out that the plaintiffs have produced a plan at Exhibit J, which shows multiple accesses through the property of the defendants which itself shows that the claim itself is vague and the pleadings do not contain any particulars to claim such a right of prescription. The learned Senior Counsel has thereafter gone through the Judgment passed by the learned Trial Judge to point out that the learned Judge has erroneously come to the conclusion that merely using an access periodically to collect some fruits can be treated to be as a matter of right to claim the right of prescription in terms of Section 15. The learned Senior Counsel further submits that looking into the pleadings of the plaintiffs and considering that there are no particulars therein would itself disentitle the plaintiffs to claim the prescriptive right of access over the property of the defendants which has been erroneously granted by the Courts below. The learned Senior Counsel further submits that the Courts below have in fact granted the relief to the plaintiffs on the basis of a right of necessity to go to the main road and not on the basis of the pleadings in the plaint, wherein it is the contention of the plaintiffs that they have a prescriptive right of access in their favour through the property of the defendants. The learned Senior Counsel further points out that the defendants have purchased

the property somewhere in the year 1972 and the plaintiffs themselves have admitted that the defendants were seen in the property carrying out their activities five years before the filing of the suit which, itself, would suggest that the claim of the appellants of the right of pre-emption is itself barred by law of limitation and the right to use such access has not been established by the plaintiffs by any cogent evidence. As such, it is submitted that the Courts below were not justified to grant the relief of the right of way over the property of the defendants. It is further pointed out that the relief granted by the Courts below is itself vague as, according to him, the access reserved for the plaintiffs has not been clearly demarcated or shown in any plan. It is further pointed out that as such, the substantial questions of law framed in the appeal preferred by the defendants are to be answered in favour of the defendants. The learned Senior Counsel has also pointed out that presently there is a public tar road constructed adjoining the property of the plaintiffs which also shows that the claim of the plaintiffs of the right of necessity no longer survives.

5. On the other hand, Mr. G. Panandikar, learned Counsel appearing for the respondents-original plaintiffs has pointed out that

both the Courts below have concurrently come to the conclusion that the property of the plaintiffs is landlocked. The learned Counsel further points out that once it is so established, the Courts below were justified to grant the relief of the right of way through the property of the defendants. The learned Counsel further submits that for the last more than 30 years the plaintiffs have been using such a road as a matter of right without any obstruction from any one, including the defendants herein which itself has created an easementary right of prescription over the property of the defendants. The learned Counsel further points out that on perusal of the evidence of PW.1 and other witnesses examined by the plaintiffs the access claimed by the plaintiffs has been clearly defined. It is further pointed out that the plaintiffs are not claiming any right of access through the culvert constructed by the defendants, but, however, it is the case of the plaintiffs that the plaintiffs used to use such access through the nallah into the property of said Vaidya who had never obstructed the plaintiffs from using such means of access. It is further pointed out that on perusal of the evidence on record it clearly reveals the plaintiffs' use of the property as the property of the plaintiffs is landlocked wherein an impediment has been created for the plaintiffs to use it to go to the

main road. It is further pointed out that presently the plaintiffs are using a footpath access to go to the main road as, according to him, the plaintiffs are not claiming any right through the culvert constructed by the defendants. The learned Counsel further submits that there are concurrent findings of fact that the property of the plaintiff is landlocked, and no infirmity can be found in the Judgments passed by the Courts below. The learned Counsel further points out that in any event, considering that the plaintiffs are the dominant owners of the property surveyed under No.127 and the defendants are servient owners of the property surveyed under No.140/1, the plaintiffs are entitled for a right of pre-emption of the sale deed executed in favour of the defendants. The learned Counsel further points out that once the fact finding Courts have rendered a finding that the property of the plaintiffs is landlocked, the consequences as provided under Article 2309 of the Portuguese Civil Code would flow in favour of the plaintiffs and, as such, the plaintiffs are entitled for the relief of pre-emption of the property which was the subject matter of the sale deed executed in favour of the original defendants. The learned Counsel further submits that as such, the substantial questions of law framed in the Second Appeal No.5/1999 have to be answered in favour of the

appellants. The learned Counsel has, thereafter, taken me through the substantial questions of law framed in both the appeals to point out that the questions so framed have to be answered in favour of the appellants in Second Appeal No.5/1999.

6. Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellants in SA No.38/1998 (original defendants) has pointed out that in terms of Article 2309 of the Portuguese Civil Code, the suit for pre-emption has to be filed within six months from the date of the execution of the sale deed. It is further pointed out that the sale deed is of the year 1973 and the claim for pre-emption was introduced by the plaintiffs only in the year 1979 which claim is hopelessly barred by limitation. It is further pointed out by the learned Senior Counsel that as the plaintiffs have not established the right of access over the property of the defendants, the question of claiming any pre-emptive right over the property would not arise at all. The learned Senior Counsel further points out that the plaintiffs have no right of any access over the property of the defendants and, as such, the question of granting any relief which has been concurrently rejected by the Courts below would not at all be justified. The learned Senior Counsel, as

such, submits that the appeal preferred by the original plaintiffs be accordingly rejected.

7. I have considered the submissions of the learned Counsel and I have also gone through the records. As rightly pointed out by Mr. Lotlikar, learned Senior Counsel appearing for the defendants, the claim of the plaintiffs in the suit is for a right of prescription. In order to claim right of access by prescription which, in fact, creates right of access in the property of the adjoining owner, it is incumbent upon such claimant to bring cogent and reliable evidence on record to substantiate his claim of right of prescription over the said property. On perusal of the findings of the Courts below, I find that the Courts below have misdirected essentially with the contention that the property of the plaintiffs is landlocked, without examining whether there is any material on record to grant the relief of an easementary right of access by prescription as claimed by the plaintiffs. In such circumstances, the Courts below were not justified to proceed to grant the relief which does not emerge either from the pleadings of the plaintiffs, or from the material on record. Apart from that, on perusal of the relief granted by the Courts below, I find that such relief, so

granted is vague and, as such, the implementation of such relief by itself would not be possible. In the background of the concurrent findings arrived at by the Courts below that the property of the plaintiffs is landlocked, I find that considering that it is not disputed that earlier the properties of the plaintiffs and the defendants were essentially paddy fields, a right to proceed to such paddy fields can at the most be a footpath access which would lead to such properties. In such circumstances, without examining such aspect, the Courts below were not justified to grant the motorable right of access over the property of the defendants.

8. The learned Counsel appearing for the plaintiffs, however, points out that though the claim of the plaintiffs in the plaint is an easement by prescription, nevertheless, looking into the findings arrived at by the Courts below, it would clearly emerge that the right of access granted by the Courts below is essentially in the context of a right of necessity for just enjoyment of the property belonging to the defendants. It is not disputed that the plaintiffs are presently using a footpath access to go to their property through the property belonging to the defendants. According to the plaintiffs, in the said property,

there are multiple accesses, in different directions. As such, considering the overall facts and circumstances of the case, and in the peculiar circumstances of this case, considering that the Courts below have found that the plaintiffs would have no other access to go to the main road, I find that the right of way reserved by the Courts below is to be clarified to be the right of necessity, reserved for the benefit of the plaintiffs herein which shall be located on the western boundary of the property belonging to the defendants under Survey No.140/1 upto the nallah, which separates the property of the defendants and the property of said Vaidya survey No.145. Needless to say, taking note of the contention of Mr. Lotlikar, learned Counsel appearing for the defendants that presently, a public road is also touching the property of the plaintiffs which the learned Counsel appearing for the plaintiffs disputes, I find that such a right of necessity reserved would stand extinguished in terms of Section 41 of the Easements Act, immediately after the necessity no longer survives. This would mean that in case the property of the plaintiffs is surfaced by a public road, touching any portion belonging to the plaintiffs, such right of necessity as reserved in the present case, would stand automatically extinguished.

9. With regard to the contention of the learned Counsel appearing for the plaintiffs to claim the right of pre-emption in terms of Article 2309 of the Portuguese Civil Code, I find that the Courts below have refused such a relief to the plaintiffs. In the present case, perusal of the provision clearly provides that such right of pre-emption has to be exercised within six months from the date of the execution of such sale deed. In the present case, such claim was put forward only in the year 1979; whereas the sale deed was executed in the year 1973. Though it is the contention of the learned Counsel appearing for the plaintiffs that the plaintiffs got the knowledge of the sale deed only six months prior to the filing of the suit, nevertheless, there is no cogent and reliable evidence on record to substantiate such case. On the contrary, the evidence on record shows that the plaintiffs had found the defendants in enjoyment of the property surveyed under No.140/1, five years prior to the filing of the suit. In such circumstances, besides the reasons recorded by the Courts below to refuse such relief to the plaintiffs, I find that on this count also the claim put forward by the plaintiffs to claim a right of pre-emption, cannot be granted as it is barred by limitation. The cause of action, as claimed, has not been established by any evidence on record.

In view of the above, all the substantial questions of law framed in the above appeal are answered accordingly.

In view of the above I pass the following :

O R D E R

1. The appeal preferred by the plaintiffs stands dismissed.
2. The appeal preferred by the defendants is partly allowed. The relief granted by the Courts below is modified and the right of access of 1.5 meres is reserved on the western boundary of the property survey No.140/1 belonging to the defendants leading to the nallha, which separates the property of the defendants and the property of said Vaidya. Such right would be in operation in the light of the observations made herein above.
3. Both the appeals stand disposed of accordingly, with no order as to costs.
4. Decree in the above terms.

F.M. REIS, J.

ssm.