

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 112 OF 2014

1. Joao Andre da Costa,
78 years old and his wife
2. Mrs. Lina D'Costa,
67 years old, (deceased)
2(A) Mr. Cedric Isidor Da Costa,
s/o Mr. Joao Andre Da Costa,

2(B) Mrs. Lafira D'costa,
w/o Cedric Isidor Da Costa,

2(C) Mr. Clif Vito D'costa,
s/o Mr. Joao Andre Da Costa,

2(D) Mrs. Irene D'costa,
w/o Mr. Clif Vito D'costa,

2(E) Mr. Cristofer Diogunho D'costa,
s/o Joao Andre D'costa.

2(F) Mrs. Seana D'costa,
w/o Mr. Cristofer Dioguniho D'costa,
All are residents of H.No.61,
Novangully, Varcá, Salcete Goa.

2(G) Mrs. Jane Gina D'costa,
d/o Mr. Joao Andre D'Costa,

2(H) Mr. Nelson De Sa,
both residing at Balem,
Chinchinim, Salcete Goa.

2(I) Mrs. Sandra Fiona Gudinho,

2(J) Mr. Olzerio Gudinho,
Both residing at Dongri,
Majorda, Salcete Goa.

..... Appellants

V e r s u s

:2:

1. Querino da Costa (deceased)
and his wife
2. Marcelina Fernandes e Costa
both major, landlords,
r/at H.No.370, Reprovaddo
Varca, Salcete Goa.
Both Respondent nos. 1 and 2
since deceased through
their legal representatives
2(a) Mrs. Delma D'Costa,
major of age,

2(b) Mr. Averson Rodrigues
(deceased)

2(c) Mrs. Carmina D'Costa,
major of age,
all r/at Varca, Salcete Goa.
Respondent no.2(b) since
deceased through legal representatives

2(b)(i) Dr. Jandy Rodrigues,

2(b)(ii) Dr. Mario Fernandes,

2(b)(iii) Joviana Rodrigues

2(b)(iv) Jacketta Rodrigues
All r/at Pedda, Margao Goa

2(c)(a) Dylan D'Costa

2(c)(b) Denrich D'Costa

2(c)(c) Dranson D'Costa
All minors represented by
Carmina D'Costa,
r/at H.No.370,
P.O. Varca, Salcete Goa.
3. Vito D'Costa (deceased) and
his wife
4. Carmina D'Costa (Deceased)
both major, landlords,

:3:

r/at H.No.367, Reprovaddo,
Varca, Salcete Goa.
Respondent no.3 since deceased
through legal representatives

3(a) Ciana D'Costa and her husband

3(b) Donato D'Costa
Both r/of Orlim,
H.No.197, Orlim.

3(c) Esley D'Costa

3(d) Siona D'Costa
wife of Esley D'costa
r/o H.No.367,
Reprovaddo, Varca.

5. Belvy Janet Noronha e Costa
and her husband

6. Auxilio Noronha
both major,
r/at H.No.369, Reprovaddo,
Varca, Salcete Goa.

7. Gabriel D'Costa and his wife

8. Estela D'Costa
both major, r/at H.No.368,
Reprovaddo, Varca,
Salcete Goa.

9. The Village Panchayat of
Varca, Varca, Salcete Goa.

..... Respondents

Mr. N. N. Sardessai, Senior Advocate with Mr. Deep Shirodkar, Advocate for the Appellants.

Mr. S. S. Kantak, Senior Advocate with Mr. P. Talaulikar, Advocate for the Respondent no. 3(a) to (c).

:4:

Coram :- F. M. REIS, J

Date : 10th March, 2017

ORAL JUDGMENT

Heard Mr. Nitin Sardessai, learned Senior Advocate appearing for the Appellants and Mr. S. S. Kantak, learned Senior Advocate appearing for the Respondent no. 3(a) to (c).

2. The above Appeal came to be admitted on 24.06.2016, on the following substantial questions of law :

“(i) Whether the Respondents are entitled for the easementary right claim in the suit on the basis of the self destructive plea raised in the counter claim filed in the suit ?

(ii) Whether assuming that the Respondents were entitled to an access, the Courts below committed illegality in ignoring the mandate of 2310 of the Portuguese Civil Code, 1867, while granting a motorable access through the Appellants' property in a manner which bifurcates the Appellants' property rather than granting the same in the least onerous manner ?

3. Briefly, the facts of the case are that the Appellants who are the plaintiffs in the suit, inter alia, pray to restrain the Respondents from interfering with the suit property on the ground that the Appellants were the exclusive owners of the property surveyed under no. 56/13 having purchased from the original defendant nos. 1 to 4 by Deed of Sale dated 10.03.1971. The original Defendants who are the Respondents herein filed their written statement disputing the claim put forward by the Appellants and inter alia contended that they are co-owners of the property surveyed under no. 56/13 along with the Appellants and also prayed that there is an easementary right of way through the suit property and, consequently, filed a counter claim for a declaration of such easementary right. It was also contended that the said Sale Deed dated 10.03.1971 is illegal and a fraud. After issues were framed and recording of evidence, by Judgment dated 04.02.2009 partly allowed the suit thereby the Appellants were declared to be the owners of the suit property i.e. surveyed under no. 56/13 but, however, restrained the Appellants' right to block the access claimed by the original defendants. Consequently, the Counter Claim was partly allowed and declared that the Respondent nos. 3 and 4 had a right of motorable access through the suit property. The claim of the Respondents that they were the co-owners of the suit property was expressly rejected. Being aggrieved by the said Judgment, the Appellants preferred an Appeal before the learned District Judge, South Goa, at Margao. By Judgment dated 30.06.2009, the Appeal came to be dismissed. Being aggrieved by the said

Judgment, the Appellants filed a Second Appeal bearing no. 98/2009 before this Court which was partly allowed by Judgment dated 02.08.2013. It was held that the Courts below have failed to examine whether the ingredients necessary to claim a right of easement had been established or not. As such, the Judgment and Decree was set aside and the matter was remanded to the learned District Judge to decide the Appeal preferred by the Appellants afresh. Thereafter, an amendment application was filed by Respondent nos. 3 and 4 to amend the written statement and the Counter Claim, inter alia, contending that the usage of the access by the Respondent nos. 3 and 4 was as an easement as of right. The Application for amendment was rejected by the learned District Judge but, however, a Writ Petition was filed before this Court being Writ Petition no. 745 of 2013 which came to be allowed by Judgment dated 14.02.2014 and the amendment was allowed to be incorporated. The learned District Judge by Judgment dated 05.08.2014, dismissed the Appeal filed by the Appellants. Being aggrieved by the said Judgment, the Appellants have preferred the present Second Appeal.

4. Mr. Nitin Sardesai, learned Senior Advocate appearing for the Appellants, has pointed out that the learned District Judge has misconstrued the relevant provisions of the Easement Act to erroneously come to the conclusion that the Respondents had established their claim of easementary right over the property belonging to the Appellants surveyed

under no. 56/13. Learned Senior Advocate further submits that such rights have been given without any application of mind as, according to him, the alleged claim of the Respondents for a motorable access is in the middle of the property thereby bifurcating the property of the Appellants into two parts. Learned Senior Advocate further pointed out that even at the time of the filing of the Counter Claim, it was the belief of the Respondents that they continued to be the owners of the subject property and, as such, the question of contending that the Appellants were using any easementary right as a matter of right, is totally farfetched and deserves to be rejected. Learned Counsel further pointed out that in fact the subject property surveyed under no. 56/13, was part of a larger property partitioned between the Appellants, the Respondents and other co-owners and separate plots were allotted to the Appellants, the Respondents and their brothers. Learned Senior Advocate further pointed out that in fact a right of access has been reserved in the said Partition Deed for the benefit of the user of the Respondents as well as the other brothers to go to the main road. Learned Senior Advocate further pointed out that in such circumstances, as an easement of necessity has been reserved in the said Partition Deed, the question of claiming any right on the subject property of the Appellants is totally erroneous. It is further submitted that once a right of necessity has been reserved for the benefit of the Respondents, it is not open to the Respondents to now contend that they have an easementary right of three metres motorable access in the middle of the plot purchased by the

Appellants. It is further submitted that the Courts below have misconstrued the material on record and failed to note that mere user of access by no stretch of imagination can be treated as a matter of right. It is further submitted by the learned Senior Advocate that such right of access was beyond the plot of the Appellants and, as such, it is not open to the Respondents to claim any right over the property of the Appellants. It is further pointed out that in terms of the provisions of Article 2310 of the Portuguese Civil Code, it is always open to the Appellants to shift such access by causing minimum damage to the property of the Appellants and, as such, the Appellants are justified to shift such motorable access to the extreme side of the property assuming the Respondents have any right of access over the property of the Appellants. Learned Senior Advocate as such pointed out that the substantial questions of law be answered in favour of the Appellants.

5. On the other hand, Shri S. S. Kantak, learned Senior Advocate appearing for the Respondent nos. 3(a) to 3(c), has disputed the contention of the learned Counsel. Learned Senior Advocate further pointed out that merely because the Respondents have raised a defense which was found to be false, by itself cannot defeat the claim of the Respondents that they have an easementary right of prescription over the plot purchased by the Appellants. Learned Senior Advocate further submits that since the time the Respondent have put up a construction in the adjoining plot, the

Respondents have been using the disputed access to proceed to the main road as a matter of right which has resulted in an easementary right of prescription in favour of the Respondents. It is further pointed out that the location of the gate on the compound wall would itself suggest that the Respondents were using such disputed access as a matter of right. Learned Senior Advocate further submits that though an access has been reserved for the other brothers of the plots adjoining the plot belonging to the Respondents, nevertheless, according to him, such access is unusable. It is further pointed out that merely because such access has been reserved by Deed of Partition would not defeat the claim of the Respondents to use the disputed access to go to the main road. It is further pointed out that the Courts below have concurrently come to the conclusion that the Respondents have established their right of access over the disputed plot and there is no perversity in such findings which would require interference by this Court. Learned Senior Advocate further pointed out that merely because some inconsistent rights have been claimed by the Respondents, would not defeat their right to claim easementary right over the plot of the Appellants and, as such, the Appeal deserves to be rejected. Learned Senior Advocate further pointed out that as far as the second substantial question of law is concerned, there is no material on record nor any pleadings on the part of the Appellants to disclose the manner in which such access is being shifted and, according to him, such right to shift the access could not be determined in the present appeal.

6. In support of his submission, learned Senior Advocate has relied upon the Judgment of the Madras High Court reported in **(1999) 2 MLJ 242** in the case of ***Dhanu Pandaram vs. Kali Pandaram*** and ***A.I.R. (33) 1946 Bombay 266*** in the case of ***Raychand Vanmalidas vs. Maneklal Mansukhbhai***.

7. I have duly considered the submissions of the learned Senior Advocates and I have also gone through the records. Before I proceed to examine the rival contentions, I would like to put on record that during the course of the hearing of the above Appeal, considering the dispute was between the family members, an opportunity was given to the parties to amicably settle the dispute. In fact, the proposals were exchanged in order that an access could be provided to the Respondents partially through the property of the Appellants and partially through the reserved access in the Deed of Partition. But, however, after opportunities were given and inspections were carried out by the Counsels appearing for the respective parties, it was informed that no settlement could be arrived at and, as such, I have proceeded to examine the matter on merits.

8. On perusal of the Judgment passed by the learned Trial Judge dated 04.02.2009, it is to be noted that the learned Judge had framed three issues. While examining the first issue as to whether the Appellants as well as Respondents had inherited the property based on the Inventory

Proceedings bearing no. 24/1968, the learned Judge upon noting the admission of the Respondents, coupled with the certificate at exhibit Pw1/B collectively, came to the conclusion that the parties to the suit had inherited the properties through the said Inventory Proceedings bearing no. 24/1968.

9. Whilst examining the second issue, as to whether the parties had partitioned the property by Deed of Partition and sold a portion admeasuring an area of 350 square metres to the Appellants by Deed dated 10.03.1971, the learned Judge answered the said issue in favour of the Appellants herein. Whilst dealing with such issue, the learned Judge found that the allegation of the Respondents that they learnt about the Sale Deed only on receipt of the summons in February 2001, cannot be believed. The learned Judge noted that the Respondent no. 3 had admitted in the letter dated 16.03.2000 that the plot 'E' which is the subject matter of the suit was purchased by the Appellant no. 1 subsequent to the Partition Deed. The learned Judge also noted that said Lote 'E' was surveyed under no. 56/13. The learned Judge as such found that the Appellants have proved that the Respondent nos. 1 to 4 sold the said plot in favour of the Appellants admeasuring an area of 350 square metres. Whilst deciding issue no. 3 along with the additional issue framed in the Judgment, the learned Judge noted that Pw.1 had not denied the existence of an opening since the time of the construction of the compound wall which as per exhibit 33 is dated 06.10.1970. The learned Judge as such found that the

Respondent nos. 3 and 4 were using the access through the property surveyed under no. 56/13 openly and peacefully for the last more than thirty years. The learned Judge as such partly decreed the Suit and, inter alia, directed that the access be reserved for the Respondent nos. 3 and 4 shown in green in the plan at exhibit 46/C.

10. On perusal of the Judgment passed by the Lower Appellate Court dated 05.08.2014, the learned Lower Appellate Court, has also accepted the findings of the learned Trial Judge that based on the admission of Pw.1 of the existence of the opening to the compound wall constructed in the year 1970, the learned Judge found that such opening was made about thirty years back. The learned Judge further noted that Pw1 has also admitted in the cross examination that the access which is shown in the Partition Deed is not connected to any road and that the Respondent no. 1 had not kept any opening to the compound wall into the access as per the Partition Deed. The learned Judge consequently, dismissed the Appeal preferred by the Appellants.

11. The admitted position which stands established is that there was a Deed of Partition executed on 09.03.1971 wherein the whole property was divided into different Lotes and Lote 'A' having an area of 979 square metres was allotted to Vito D' Costa, the Respondent no. 3, Lote 'B' having an area of 1004 square metres was allotted to Querino D' Costa, the

Respondent no. 1, Lote 'C' having an area of 469 square metres was allotted to Joao D'Costa who is the Appellant no. 1 herein, Lote 'D' having an area of 860 square metres was allotted to Joao D'Costa and Lote 'E'; having an area of 350 square metres was allotted to Joao D'Costa, Querino D'Costa and Vito D' Costa. The dispute in the present appeal, is to the claim of the Respondent no. 3 who was allotted Lote 'A' and has claimed a right of access of prescription over plot 'E' which was originally allotted to the Appellant no. 1, the Respondent no. 1 and the Respondent no. 3. The fact remains that after the said Deed of Partition was executed by Deed of Sale dated 10.03.1971, the Respondent nos. 1, 2, 3 and 4 sold their respective right in the said Lote "E" in favour of the Appellant no. 1 and, consequently, the Appellant no. 1 became the exclusive owner of the disputed plot no. 'E'. The Courts below whilst examining the claim of easementary right of access by prescription sought by the Respondent no. 3, has noted that the right of user of access started from the time the construction was put up by the Respondent no. 3 in Lote 'A' allotted to him. The admitted position is that such construction was put up in the year 1970 which was jointly owned by the Respondent nos. 1 to 3 when in fact the property was still in co-ownership between the Appellant no. 1, the Respondent no. 1 and the Respondent no. 3. Keeping an opening to such compound wall leading to the subject plot in the year 1970 much before the execution of the Deed of Partition, cannot by itself lead to the conclusion that such opening was kept as a matter of right by the Respondent no. 3. In

such circumstances, the Respondent no. 3, who was also the co-owner of the subject plot 'E' when such opening was kept, was using such access at the most by an act of tolerance or permissive act of the other co-owners of the subject property. As such, the initial user of such access is naturally with the consent of the other co-owners as the construction was put up by the Respondent no. 3 apparently with the consent of the other co-owners. Once a person has been in permissive user of access, the burden is on him to establish when there was inversion to claim such right of access as a matter of right. There has to be repudiation of such right. In fact, in terms of Article 510 of the Portuguese Civil Code, unless this inversion of title is established, the question of claiming the user as a matter of right to claim a prescriptive right would not at all arise.

12 In the present case, on minutely going again through the impugned judgment of the Trial Court, I find that the learned Judge framed three issues. While deciding the first issue, the learned Judge found that the Appellants and the Respondents have jointly inherited the property pursuant to the Inventory Proceedings No.24/1968. The learned Judge while examining issue no.2 has come to the conclusion that after the execution of Deed of Partition, a portion of property admeasuring an area of 350 square metres was sold to the Appellants by Deed of Sale dated 10.03.1971. While dealing with issue no.3, the learned Judge noted that the original defendant nos. 3 and 4 who are now represented by their legal

representatives namely the respondent nos. 3(a) to (c) have raised the counter claim and as such framed an additional issue as to whether the said defendants prove that they have right of motorable access over the property surveyed under No. 56/13. The learned Judge noted that the construction licence dated 06.10.1970 was for the construction of the house and the compound wall. The learned Judge found that such document suggest that the original defendant nos. 3 and 4 are using the access through the suit property surveyed under No.56/13 since the time of its construction. The learned Judge also noted that while putting up the compound wall to the property surveyed under No.56/13 the said Respondents have left a gate towards the north without using the access reserved in the Deed of Partition. The learned Judge also noted that besides the said gate, there is no other opening to the compound wall. The learned Judge also noted that based on the construction licence of the Appellants the user of access by the respondent nos. 3 and 4 has been duly established. The learned Judge as such decided the additional issue in the affirmative in favour of the respondent nos. 3 to 4. The learned Judge as such found that the Appellants have proved that they are owners of the property surveyed under No. 56/13 and as such are entitled to put up compound wall but however, while constructing the said compound wall the Appellants shall not obstruct the access and/or gate of the respondent nos. 3 and 4. On plain reading of the said findings, there is no categorical finding by the learned Judge that there was any user of access as a matter

of right which is a pre-requisite requirement to claim a right of easement by prescription in terms of Section 15 of the Easement Act.

13. While perusing the judgment of the learned Lower Appellate Court passed in Regular Civil Appeal No.39/2009 which came to be disposed of on 05.08.2014 pursuant to remand by this Court by judgment dated 02.08.2013 passed in Second Appeal No. 98/2009, the learned Judge noted that the point that would arise for consideration was whether the respondent nos. 1 to 5 have established the right of way through the suit property bearing survey No.56/13 of Village Varca. While examining the said aspect, the learned Judge relied upon the judgment of this Court in **A.I.R. (33) 1946 Bombay 266** in the case of **Raychand Vanmalidas v/s Maneklal Mansukhbhar** as well as the judgment of the Apex Court reported in **(2009) 13 SCC 229** in the case of **L. N. Aswathama and another V/s P. Prakash** and noted that DW1 has admitted the signature of the respondent no.3 on the letter addressed to the Sarpanch at Exhibit 39/C (in cross) wherein the respondent no.3 has admitted that Lote "E" was purchased by the appellant no.1. The learned Judge further noted that initially when the written statement was filed, there was no pleading that the right of way was exercised as of right but thereafter the written statement was amended after the remand. But however, no evidence was permitted to be led in support of the said contentions by the defendants. The learned Judge further noted that PW1 admitted about the opening to

the compound wall which lies on the suit plot. It is also noted that PW1 admitted that such user of access was through the portion shown in the green colour in the plan prepared by Moniz. The learned Judge further noted that the respondent nos. 3 and 4 claimed that they were using such access from the year 1970. The learned Judge also found that it was admitted that the gate was in existence since the time when the construction was put up. The learned Judge as such found that the very fact that the gate was kept by the respondent nos. 3 and 4 in the compound wall as an access into the suit property bearing survey No.56/13 which indicate that the access has been used openly by the respondent no. 3 to the knowledge and acquiescence of the plaintiff. The learned Judge further found that as such the Respondents were entitled for an access as an easement in terms of Section 15 of the Easement Act. On perusal of the said judgment, there is no finding therein as to how the learned Judge came to the conclusion that such user was as a matter of right. It is to be noted that in the original written statement when the evidence was recorded, there was no averment in the written statement put forward by the respondent nos. 3 and 4 nor in the counter claim that the said Respondents were using such access as a matter of right. There is no evidence adduced on this count by the Respondents to substantiate their claim that such user was as a matter of right. It is only during the pendency of the First Appeal that the said Respondents were permitted to amend the written statement. The said Respondents have failed to adduce evidence in support of such

claim nor the evidence on record suggests such aspect. As such there was no material on record adduced by the respondent nos. 3 and 4 to substantiate their claim that such user of access was a matter of right.

14. As already pointed out herein above, mere user of access cannot be treated to be hostile user. In the present case, the undisputed fact disclosed that the subject gate put up by the respondent nos. 3 and 4 was in the year 1970 and at that point of time the suit plot bearing survey No.56/13 was in co-ownership between the Appellants and the respondent nos. 3 and 4 and other co-owners of the property. As such, the initial user of the land was permissive with the consent of the co-owners which include the Appellants herein. In such circumstances, it was incumbent upon the respondent nos. 3 and 4 to bring forward conclusive evidence to establish that they were using such access as a matter of right and that there was inversion of such user to the knowledge of the Appellants herein. There is no finding on that count rendered by the fact finding Court nor evidence pointed out by the learned Senior Counsel appearing for the respondent nos. 3 and 4 to the effect that such user of access was being used as an easement to the knowledge of the Appellants herein. There has to be a conscious exercise on the part of the person claiming right of prescription over the land of another person that he is using such access to the knowledge of the owners of the land to claim an easementary right of prescription. In the present case, there is no material on that count

produced by the said Respondents nor any pleadings in the plaint to substantiate such allegations.

15. In the Judgment reported in **1993(1) BCR 465** in the case of **Macario Antonio Francisco de Cunha & anr. vs. Alex Fred D' Souza & Ors.**, has observed at Paras 6, 14 and 15 thus :

“6. Having surveyed these provisions of the Indian Easements Act what therefore stands out is that when a party claims acquisition of an easement by prescription, qua a right of way, he must have not only enjoyed it peaceably and openly but as an easement as and of right without interruption for 20 years. What therefore further stands out is that if a party goes about the property of another even for a period longer than 20 years as long as he has not done it as an easement and as of right, there is no acquisition of easement by prescription. Insofar as the easement of necessity is concerned it is restricted only to cases of transfer and secondly when there is a partition of a joint property. It is therefore common ground that on the facts of this case

the original plaintiffs have not invoked the easement of necessity as spelt out in section 13.

14. I will now come to the right of way sought. In this connection, in the first place, I would like to remind myself that section 15 of the Easement Act makes it amply clear that to acquire an easement by prescription in respect of right of way it must not only be peaceably and openly enjoyed but as an easement and as of right without interruption for 20 years. Before embarking on further discussion on this matter, the original plaintiffs themselves say in para 1 of the plaint that the servient property is open on all sides. It is therefore clear that it is an open plot. A large number of authorities have been relied upon by Mr. Kakodkar to suggest as to how the courts have viewed no acquisition of easement over an open piece of land in this country in distinction with English view point.

15. Open pieces of land are being freely traversed by members of the public in this

country. In the light of the provisions of the Easements Act several matters came for consideration before various High Courts and let us succinctly have a look at them. In the authority of *Ramchandra Trimbak Joshi v. Hari Mortand Joshi*, a Division Bench decision reported in A.I.R. 1929 Bom. 144, on a claim under section 15 for right of way it is laid down that the user of the right of way to be open must raise presumption that it is to the knowledge of the owner of the servient property and that the owners acquiesced. It also lays down that the Court should consider the right of way, the character of the ground, the steps for which the right is claimed and the relation between the parties and what is more the circumstances under which the user takes place and whether such a user was as of right. What is however interesting is that the observation made in relation to the open lands in this country cannot be overlooked which are to this effect :

"In a country like India where the lands are usually unenclosed, before

a right of easement is declared to be established over them, the courts, in my opinion, must require strict proof that the plaintiff has satisfied the requirement of the section. "Referring to the decision in another case Khoda Buksh v. Rajuddin, what is extracted cannot be less overemphasized....." having regard to the habits of the people of this country, I do not think that it would be right to draw the same inference from mere user that would be proper and legitimate in a case arising in England. The question is always a question of fact and the propriety of the rule that the presumption from user should be that it is as of right, must depend upon the circumstances not only of each particular case but also of each particular country, regard being had to the habits of the people of that country."

In the case of Siti Kanta Pal and another v. Radha Gobinda Sen and others, reported in [MANU/WB/0347/1928](#) : AIR1929Cal542 it has been laid down with reference to section 15 that long user does not prove enjoyment as of right though an enjoyment as of right cannot be inferred as a matter of course from a finding only or for that matter long user. To same effect is the decision of Harisadha De and others v. Radhika Prasad Pandit and others, reported in [MANU/WB/0207/1937](#) : AIR1938Cal202 .

In the decision of *Salina Jitendra Lal v. Ram Charan*, reported in A.I.R. 1959 Pat. 47, it is observed that the question that merely because a land was fallow and not cultivated for some time and that there was a user of a pathway over the land by the villagers was held to be not giving the right to a presumption either in law or in fact that such a user by the villagers was as a matter of right. The reasoning which prevailed upon the Division Bench was that in India people view exclusiveness of landed property unlike other countries in the West and it is common for the owners as long as the land is lying waste not to raise objection to passage of strangers or other people. As early as 1959 a learned Single Judge of this Court in the decision of *Tukaram Rajaram Suple and others v. Sonaba Chindhu Mali*, reported in [MANU/MH/0023/1959](#) : AIR1959Bom63 , held that having regard to the habits of the people of this country it would not be right to draw the same inference from mere user to give rise to acquisition of easement or raise such a

presumption. The Court further observed that it is not in every case of right of way that the Court as soon as the plaintiff leads evidence to prove uninterrupted user of right of way for more than 20 years can straightaway draw the presumption that the user was as of right. A learned Single Judge of the Orissa High Court in the decision of Lambodar Panda and others v. Ramesh Chandra Panda and others, reported in [MANU/OR/0061/1958](#) : AIR1958Ori248 , went a little further and observed that a mere period of long user will not give rise to a presumption as it is common in this country and for that matter even customary that the owner of a piece of waste land would not raise any objection for the passage. When I said that the learned Single Judge went a little further he made an observation that the plaintiff has to establish the user as of right and despite objection from the owner of the servient property. Some more authorities have been relied upon by the learned Counsel which need not be referred to

to unnecessarily burden the judgment and suffice at the moment to succinctly record that in this country the owners look upon traversing their property as something not an act of aggression or encroachment as long as they are open pieces of land or waste pieces of land and secondly, a long user for the purposes of crossing over does not raise a presumption that the user has been as of right and this is so despite people making use of the land for a number of years even in excess of 20 years.”

The above observations of the learned Single Judge clearly show that to claim an easementary right of way by prescription, such person has to prove not only a mere user of access for the period specified but that he was using it as an easement and as a matter of right. In the present case, I find that there is no material shown by the learned Counsel appearing for the Respondent that such evidence has been brought on record to establish the claim put forward by the Respondent nos. 3 and 4. The fact that the subject plot bearing survey no. 56/13 was an open plot when the compound wall was put up by the Respondent nos. 3 and 4 is not in dispute. In such circumstances, I find that these crucial aspects to claim a right of way by prescription has not been examined by the fact finding

Courts below whilst disposing of the Counter Claim filed by the Respondent no. 3. As stated hereinabove, there is no material produced by the Respondent nos. 3 and 4 to show that the portion shown in grey colour in the plan at exhibit 46/C in the middle of the plot belonging to the Appellants was being used as an easement and as of right.

16. In fact, it is to be noted that the stand taken by the respondent nos. 3 and 4 was that the sale deed in favour of the Appellants in respect of the plot bearing survey No.56/13 was a nullity and that the respondent nos. 3 and 4 were not even aware about the alleged execution of such sale deed. In such circumstances, this would itself suggest that the respondent nos. 3 and 4 assumed that they still continued to be co-owners of the plot located in the property bearing survey no.56/13 through which the respondent nos. 3 and 4 are claiming a right of access and there was no conscious act by the respondent nos. 3 and 4 that such user was as a matter of right. In such circumstances, I find that the learned Judge was not justified to come to the conclusion that the respondent nos. 3 and 4 have established the right of user of a motorable access through the plot belonging to the Appellants surveyed under no.56/13. In fact, it is not in dispute that in the Deed of Partition executed way back in the year 1971, there was a way reserved also to the benefit of the plot allotted to the respondent nos. 3 and 4 towards the eastern side of the plot. Such motorable access reserved is in fact an easement of necessity which has

been reserved also for the benefit of the respondent nos. 3 and 4. This motorable access belongs in co-ownership to the Appellants and the respondent nos. 3 and 4. In such circumstances, when the motorable access leads to the northern portion of the property surveyed under no.56/13, the question of the Respondents contending that they have a motorable access in the middle of the plot bearing survey No.56/13 thereby bifurcating the suit plot is totally misplaced and unsustainable. A plea of right of way by prescription and of necessity reserved in a Deed of Partition cannot go together. Admittedly, a motorable access was reserved for the co-owners including the Respondent nos. 3 and 4 on the eastern side of the plot allotted to the Respondent nos. 3 and 4 in the Deed of Partition and, as such, the question of claiming a right of way in the middle of the adjoining plot now belonging to the Appellants bifurcating such plot into two parts, can by no stretch of imagination be said to be as an easement and, as of right which are the pre-requisite conditions to claim a right of way by prescription under Section 15 of the Easements Act. It need not be overemphasized that mere long user of an access will not give rise to a presumption that such user was as a matter of right. It is customary for the owner of a piece of open land not to raise objections for a passage to a stranger over such land in the circumstances prevailing in our Country. In this connection, the Apex Court in the Judgment reported in **(2005) 1 SCC 471 in the case of Justiniano Antao & Ors. vs. Bernadette B. Pereira**, it has been observed at para 9 thus :

“9. We have gone through the three judgments i.e. trial court, first appellate court and that of the High Court. We have gone through the evidence adduced. From this, it is more than clear that there is no specific averment in the plaint or in the statement of the witnesses showing that this access from the land of the defendants was used as of right for the last 20 years. The evidence very categorically shows that the plaintiff has an access on the south east side and this was being used by her for a long time. It was pointed out that only in the year 1984 the plaintiff has started using the access through the property of the defendants. It is also admitted that the defendants were during that time on board of ship and as soon as they came and saw the use of their land by the plaintiff, they put obstructions to it. Therefore, it is clear that it is not the case that the plaintiff has been using the access as of right through the property of the defendants for more than 20 years. Since the plaintiff has an access through the southern side of her property we see no reason why the property of other persons be used as an access to her house. If the plaintiff had no access to her house except through that of the property of the defendants then perhaps we would have considered appreciating as easement of necessity. But in order to establish a right by way of prescription

one has to show that the incumbent has been using the land as of right peacefully and openly and without any interruption for the last 20 years. There should be categorical pleadings that since what date to which date one is using the access for the last 20 years. In order to establish the right of prescription to the detriment of the other party, one has to aver specific pleadings and categorical evidence. In the present case, after going through the pleadings as well as the statement of the witnesses it is more than clear that the plaintiff has failed to establish that she has been using the access peacefully, openly as of right for the last 20 years. More so we find that material placed on record and especially the photographs which have been exhibited and marked as Ext.D.W.3/A in the court that there are two pillars showing the existence of a gate in southern side but it has been closed down by rubble stones. The defendants have put up a strong case that the plaintiff has an opening in the southern side and it is amply established that there exist two pillars showing the existence of a gate which has been covered by rubble stones in the southern side. It was also pleaded that the plaintiff was using the same and it is only after 1984 she got the gate constructed through the land of the defendants. Therefore, on the basis of the evidence and statement of the witnesses, we are satisfied

that the first appellate court has correctly approached the matter and the view taken by the High Court as well as the trial court does not appear to be based on correct appreciation of facts.”

17. In the present case, the evidence on record especially the Deed of Partition itself shows that a motorable access has been reserved also for the Respondent nos. 3 and 4 on the eastern side of the plot allotted to them to proceed to the northern portion of the property beyond the subject plot bearing survey no. 56/13 towards its eastern boundary. The Courts below were not justified as such to hold that the Respondent nos. 3 and 4 have established their right of way by prescription in terms of Section 15 of the Easements Act. Even on perusal of the pleadings in the Counter Claim, it is claimed that the Sale Deed executed in favour of the Appellants dated 14.03.1971 was not signed by the said Respondent nos. 3 and 4 willingly but unknowingly. It is also contended that Lote 'E' created in the Deed of Partition dated 10.03.1971 had an area of only 350 square metres and is surveyed under no. 56/13 and that the excess area is part of Lote 'A'; allotted to the Respondent nos. 3 and 4 surveyed under no. 56/18. Even after the amendment, what is incorporated is that the subject motorable access was being used as an easement as of right without any interruption for more than thirty years. But, however, as already pointed out herein above, the statement of the witnesses do not show any circumstances

which could even remotely establish that such mere user of the way was as an easement as a matter of right to claim a right of way by prescription. It is to be noted that the claim of the Respondent nos. 3 and 4 in the Counter claim is that their right of user started from the year 1970 when admittedly they were co-owners along with the Appellants of the subject plot surveyed under no. 56/13. The possession of one co-owner is on behalf of the other co-owner and, as such, in terms of Article 512 of the Portuguese Civil Code, the prescription acquired by a co-proprietor in relation to acts extendable to a property are benefited by the others. In such circumstances, when the Respondent nos. 3 and 4 trace their claim, of right of user as a right from the year 1970, the question of alleging that they have acquired a prescriptive right of way would not arise at all when there is no repudiation of such user to claim it as of right after the Deed of Sale was executed by the said Respondents in favour of the Appellants herein in the year 1971. The Courts below have failed to examine the legal inferences which emerge from the factual findings of the Courts below which would call for interference of this Court in the present Appeal under Section 100 of the Civil Procedure Code. The Judgment relied upon by Shri S. S. Kantak, learned Senior Advocate appearing for the Respondents reported in AIR 1946 Bombay 266 of the Full Bench of this Court would not be applicable to the facts of this case. The claims of access put forward by the Respondent nos. 2 and 3 in the original plaint was not in the alternative. Only thereafter, during the pendency of the Appeal, the prayer has been amended seeking

for an alternate relief without leading any further evidence. In the present case, the said Respondents claim a right of access to be as of right is when they built their house and the compound wall around their plot surveyed under no. 56/18, when said Respondents were also co-owners of the disputed plot bearing survey no. 56/13 along with the Appellants and, as such, such user started as an incident of their co-ownership rights over the suit plot. Apart from that, the Respondents have not brought any material to show their consciousness that they were using such right of way though it was belonging to the Appellants for the entire period as required to claim a right of way by prescription. It has been clearly held in the said Judgment that an easement by prescription is in fact an assertion of a hostile claim of certain rights over any man's property and in order to acquire such easement, the person has to assert a hostile claim and must prove that he had the consciousness to exercise that hostile right over the property which is not his own and where no such consciousness is proved, he cannot prove a prescriptive acquisition of a right. In the present case, there is no material on record nor any witnesses examined by the Respondents to establish that this element of consciousness to exercise such hostile right over the land of another has been established by the Respondent nos. 3 and 4. As such, the first substantial question of law is answered in favour of the Appellants herein.

18. Dealing with the second substantial question of law, it is the

contention of Mr. Sardessai, learned Senior Counsel appearing for the Appellants that in any event, the Appellants are entitled to shift the access in the side of the plot to cause minimum damage to the enjoyment of the plot by the Appellants. Though this aspect would not be required to be examined in the facts and circumstances of the case, but however, during the hearing of the above appeal the parties were given an opportunity to work out a settlement with regard to this aspect after exchanging the plans between the Appellants and the Respondents. Ultimately, the Appellants agreed to provide an access through their property surveyed under no.56/13 to lead to the plot belonging to the respondent nos. 3 and 4 surveyed under no.56/18. For this purpose the respondent nos. 3 and 4 may have to slightly shift the gate located on the northern side of their plot as identified in the plan. There was a dispute to the effect that on the northern side of the plot belonging to the Appellants surveyed under no.56/13 there were electrical lines which have been placed by the Electricity Department which would hamper and obstruct the movement of the respondent nos. 3 and 4 to the road existing on the northern side of the plot surveyed under no.56/13. The learned Senior Counsel for the Appellants upon instructions and with the consent of the Appellants has placed on record a crockie showing that the portion shown in the yellow colour in the property surveyed under no.56/13 would be kept unobstructed in order to enable the respondent nos. 3 and 4 to go to the main road located on the northern side of the plot belonging to the Appellants

surveyed under no.56/13. This was being agreed upon by the learned Senior Advocate appearing for the Appellants as the original Defendant no. 3 was a brother of the original Appellant. Besides that, on perusal of the plan, the Appellants have also provided sufficient area shown in yellow colour to avoid any obstruction in the movement of such Respondents on account of the electrical wires stated to be located in the subject plot bearing survey no. 56/13 which would facilitate the ingress and egress of the Respondent nos. 3 and 4 to proceed to their house located in the property surveyed under no. 56/18. As such, I find that the Appellants themselves have accepted to provide an access partially through their plot surveyed under no. 56/13 for the benefit of the Respondent nos. 3 and 4 in order that a motorable access could be provided to proceed to the property belonging to the Respondent nos. 3 and 4 surveyed under no. 56/18. Even otherwise, the plot of the Respondent nos. 3 and 4 surveyed under no. 56/18 is land locked and as such the Respondent nos. 3 and 4 are entitled to demand an access from the adjoining owner in terms of Article 2309 read with Article 2310 of the Portuguese Civil Code. Articles 2309 & 2310 of the Portuguese Civil Code read thus :

“Article 2309 – Easement of passage by operation of law- The owners of land locked properties, that is, those which do not have any access to the public road, may demand way or passage through adjoining properties, by

compensating for the loss which these way may cause. When, however these properties are of the kind mentioned in Article 456, the concerned owner may avoid these obligations by acquiring the landlocked property for the price that may be fixed judicially after previous valuation.

Article 2310 – Location of the passage –

Passage shall be given through the side causing minimum disadvantage to the owner of the servient property.”

19. The access provided by the Appellants as depicted in the plan/ croqui produced by the Appellants and marked 'X' for identification would minimize the grievances of the Respondent nos. 3 and 4 as far as their claim of access is concerned. In such circumstances, I find that the Judgments of the Courts below deserves to be modified to the extent that the compound wall allowed to be constructed by the Appellants would be by keeping the area shown in yellow colour in the plan marked 'X' for identification for the benefit of the Respondents including the Respondent nos. 3 and 4 herein as an access. The Appellants shall put such compound wall along their plot after 4 months from today so that the Respondent nos. 3 and 4 can shift the gate so as to lead into the area shown in yellow colour in the said plan marked 'X' for identification. The area shown in yellow

colour in the plan marked 'X' for identification shall be kept open and unobstructed for the benefit of the user of an access by the Respondent nos. 3 and 4 and the other Respondents. The ownership of such portion of the land shown in yellow colour shall continue to be that of the Appellants and the Appellants shall be responsible and keep indemnified the said Respondents of any claims of any third party over such portion of the land shown in yellow colour in the plan marked 'X' for identification. The second substantial question of law is answered accordingly.

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

O R D E R

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and decree dated 05.08.2014 passed by the learned Lower Appellate Court and the Judgment of the learned Trial Court dated 04.02.2009 stands modified whereby the appellants shall keep the area shown in yellow colour in the plan marked 'X' for identification open and unobstructed in the light of the observations made herein above. The remaining part of the Decree stands confirmed.
- (iii) The appeal stands disposed of accordingly with no order as to costs.

F .M. REIS, J.