

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO.40 OF 2005

1. Mrs. Inacinha Telles
2. Miss Carol Telles
3. Miss Christine Telles,
4. Master Clive Telles,
5. Master Claude Telles,

All major of age,
 All residents of
 House No.22/7,
 Rajwado, Mapusa,
 Bardez-Goa.

... Appellants

V e r s u s

1. Mr. Gajanand Vishwas Vishnu Signepurkar,
 (since Deceased) represented by his legal heirs:
 1(a) Mr. Vishal G. Signapurkar,
 1(b) Miss Varsha G. Signapurkar,

 Both r/o. Rajwado, Mapusa,
 Bardez, Goa.
2. Mrs. Deepa Gajanand Vishnu Signepurkar,
3. Mrs. Seema Shamrao Signepurkar,
4. Mr. Sunil Signepurkar
5. Miss Tara Signepurkar
 (In view of order dt.21.12.13
 appeal as against respondent no.5
 is restored).
6. Mast. Rajesh Signepurkar
7. Mr. Dhilip Bvishnu Signepurkar (Expired)

All residents of Rajwado,
Mapusa, Bardez, Goa.

... Respondents

Mr. S.D. Lotlikar, Senior Advocate with Mr. N. Amonkar, Advocate for the Appellants.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. V. Palyekar, Advocate for the Respondent nos.2 to 6.

<u>Coram :-</u>	<u>C. V. BHADANG, J.</u>
Reserved for Judgment on :-	<u>10th April, 2019.</u>
Pronouncement of Judgment on :-	<u>3rd June, 2019</u>

JUDGMENT

1. The appellants are the original plaintiffs while the respondents are the defendants. The appellants filed Regular Civil Suit No.32/1992/D against the respondents for permanent, prohibitory and mandatory injunction and for recovery of possession. The subject matter of dispute is a room bearing house no.22/7 situated in a property known as "Horta" surveyed under chalta no.31 of P.T. Sheet No.148 at Mapusa which is more specifically described in plaint para 2.

2. The appellant no.1 is the widow of late John Mathias Telles, while the appellant nos.2 to 5 are their children. The respondent nos.1 and 7 are the sons of late Vishnu Signepurkar. The respondent no.2 is the wife of the respondent no.1, respondent no.3 is the widow of Shyamrao Signepurkar, (late son of Vishnu Signepurkar), while the respondent nos.4, 5 and 6 are the children of Shyamrao and Seema Signepurkar.

3. The material case made out in the plaint is that a portion of the suit house was leased/rented to one Thomas D'Souza and the remaining portion continued to be in possession of the appellants. It appears that late Vishnu Signepurkar, the husband of the appellant no.1 had initiated Eviction Proceedings against Thomas D'Souza, before the Rent Controller sometime in the year 1982. For the present, it is not necessary to set out the details thereof. The dispute in the present appeal pertains to the alleged construction/extension of a room made by Shyamrao Signepurkar by encroaching upon the land chalta no.31 of P. T. Sheet No.148. According to the appellants, taking undue advantage of the fact that the appellant no.1 and her late husband were employed at Bombay, Shyamrao carried out illegal construction and extension of a room towards the southern side of the property by committing an act of trespass sometime in the year 1980. The construction at the relevant time admeasured about 3 x 4 metres and was consisting of mud walls, with mangalore tiled roofing. It appears that on the basis of a complaint lodged with the Mapusa Municipal Council, a demolition notice was issued which was challenged by Shyamrao. The matter had reached this Court in Civil Revision Application No.24/1983 and this Court after noticing the fact that the demolition was ordered without issuance of any show cause notice, had set

aside the order of demolition. According to the appellants, inspite of repeated complaints to the Municipal Council, no action was taken against the illegal construction. It was contended that the respondents carried out renovation of the illegal construction sometime in December 1988. It is the further case that the illegal construction was further renovated and the construction fell partly in the suit property i.e. in chalta no.31 of P.T. Sheet no.148 and partly in chalta no.33 of P.T. Sheet no.148. The total area of the encroachment construction, according to the appellants is 14.25 square metres. The plaint came to be amended and it was claimed that three months prior thereto, the defendants had kept one Tulsi vrindavan and three flower pots on the northern side of the suit structure i.e. in the property of the appellants. In such circumstances, the appellants filed the suit for the following substantive reliefs :

“a) The defendants be directed to demolish the suit construction as shown in the sketch annexed to the plaint, and restore the suit property to its original state and condition.

b) The defendants be directed to hand over vacant and peaceful possession of the land occupied by the suit construction to the plaintiffs.

b1) The defendants be directed to demolish the suit construction and to remove the Tulxi and the flower pots kept in the suit property.

b2) The defendants be permanently restrained from interfering in any manner whatsoever with the suit property.

c) The defendants be directed to pay mesne profits at the rate of Rs.300/- (Rs. Three hundred only) per month, for the illegal occupation of the portion of the suit property by the suit construction from 27.05.91 till 27.01.1992 amounting to Rs.2,400/- (Rs. Two thousand four hundred only) and further mesne profits at the rate of Rs.300/- (Rs. Three hundred only) per month, till Decree and effectual payment.

d) The defendants be restrained from carrying out any construction of whatsoever nature in the suit property."

4. The respondents filed written statements and raised a counter claim. It was denied that the suit construction was made by encroaching on the property of the appellants. It was contended that the said construction was in existence for more than 30 years and the respondents were in lawful, exclusive, open, peaceful and uninterrupted possession of the said room which was adjacent to their residential house situated in land

under chalta no.33 of P.T. Sheet no. 148. It was denied that there was any extension of the said construction made or there was any encroachment made in the property of the appellants.

5. It was further contended that the respondents have been using the access in front of the said room leading to the tar road and had acquired an easementary right to the said access. It was contended that there was inter se dispute between the respondent nos.1 and 2 on one hand and the respondent nos.3 to 7 which constituted a different family unit and a part of the residential house has been allotted to the respondent nos.1 and 2 and the remaining part of the residential house with the suit structure/construction is allotted to respondent nos.3 to 7. It was contended that the respondent nos.1 and 2 have constructed a wall thereby partitioning the said residential house where under the respondent nos.1 and 2 could gain access from the road to the said room and the defendant nos.1 and 2 have maintained the suit access as their only access. It was contended that the respondent nos.3 to 7 could not use the door of the said room to gain access to the main road. It was also contended that the appellants had demolished their old house and have

encroached on the suit access and have thereby reduced the size/length of the suit access.

6. The appellants filed written statements to the counter claim denying the claim of the respondents.

7. On the basis of the rival pleadings, the learned Trial Court framed the following issues :

"1. Whether the plaintiff proves that the defendants no.1 and 7 and Shyamrao Signepurkar carried out illegal construction/extension of a room in the suit property as alleged in the plaint ?

2. Whether the defendants prove that the suit construction has been in existence for more than last 30 years and that they are in adverse possession of the same ?

3. Whether the defendants further prove that they have acquired easementary right over the access in front of the suit room ?

4. Whether the plaintiffs prove that the defendants also constructed a wall of 5 metres east-west further encroaching on suit property and facilitating construction of the room ?

5. Whether the defendants acquired ownership right over the suit room ?

6. Do the defendants prove that the suit is barred by limitation ?

7. What relief ? What order ?

Additional Issues :

1. Does the plaintiffs prove that the defendants put one Tulshi Vrundavan and 3 flower pots in the plaintiffs property towards the northern side of the suit structure ?

2. Do the plaintiffs prove that the defendants have done further construction in 1996 and encroached into the suit property to an extent of 14.25 square metres ?

3. Whether the defendants prove that they are entitled to permanently restrain the plaintiffs from doing any work of construction in the suit access including casting, footings, thereon ?

8. The appellants examined Carol Telles (Pw.1) along with Philip D'Sa (Pw.2) and a Surveyor Mr. Prazeres Gonsalves (Pw.3) and produced documents.

9. The respondents examined Seema Signepurkar (Dw.1) along with Sunil Signepurkar (Dw.2), Ramesh Asodekar (Dw.3), Gajanand Signepurkar (Dw.4) and Ashok Yellapa Shanke (Dw.5) and produced certain documents.

10. The learned Trial Court answered issue nos.1 to 6 and the additional issue no.1 in the affirmative. The learned Trial Court answered the additional issue no.3 partly in the affirmative and additional issue no.2 in the negative and partly decreed the suit on 19.04.2003 as under :

ORDER

"The suit is partly decreed. The defendants are permanently restrained from doing any further construction in the suit property without the consent and permission of the plaintiffs. The plaintiffs are also permanently restrained from doing any construction work of permanent nature over the suit access and also from blocking the suit access except for a limited period for doing repairing/renovation/reconstructing the plaintiffs house situated in the suit property. Parties to bear their own costs. Decree to be drawn up accordingly."

11. Feeling aggrieved, mainly on account of the refusal to grant mandatory injunction for demolition of the suit structure,

the appellants challenged the same before the learned District Judge in Regular Civil Appeal No.116/2003. The First Appellate Court framed the following points:

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether respondents are liable to demolish the suit construction and restore the suit property to its original state ?	Negative
2. Whether respondents without prejudice to their defence of denial of carrying out suit construction have acquired right to suit construction by prescription and adverse possession ?	Negative
3. Whether respondents have been using the suit access openly peacefully, uninterruptedly, lawfully, exclusively for last 30 years being the only access and have acquired easementary right over the same ?	Positive

12. The First Appellate Court answered the point nos.1 and 2 in the negative and point no.3 in the affirmative and proceeded to dismiss the appeal vide Judgment and Decree dated 19.11.2004. Hence this appeal.

13. I have heard Mr. Lotlikar, the learned Senior Counsel for the appellants and Mr. Usgaonkar, the learned Senior Counsel for the respondents. Perused record.

14. Mr. Lotlikar, the learned Senior Counsel for the appellants submitted that the suit which was essentially for removal of encroachment by demolition of the illegal construction and restoration of land to its original condition ought to have been decreed in its entirety particularly when the factum of encroachment was admitted and even otherwise it is amply proved on record. It is submitted that the ownership of the appellants over the property under chalta no.31 of P.T. Sheet no.148, is not disputed. It is submitted that the appellants had examined the surveyor Mr. Gonsalves and have produced the plan on record clearly establishing the factum of encroachment. The learned Senior Counsel has taken me through the findings recorded by the Trial Court wherein the issue no.1 has been answered in the affirmative. It is submitted that even the First Appellate Court in para 18 of the judgment has found that though the respondents are in possession of the suit structure, the same exists in the property of the appellants. It is thus submitted that in the face of such clear finding of fact, the relief of mandatory injunction for demolition of the illegal construction could not

have been refused. It is submitted that once the ground of adverse possession has been negated, the suit could not have been dismissed on the ground of limitation. It is submitted that the issue of limitation is closely connected with the plea of adverse possession as raised on behalf of the respondents. It is submitted that once the illegal structure goes, the claim of the easementary right of access would not survive. The learned Senior Counsel has taken me through the observations of the First Appellate Court where the First Appellate Court has found that there is case of easement of necessity made out in favour of the respondents. It is submitted that the said finding is clearly perverse as no case of easement of necessity could arise in the facts and circumstances of the case. It is submitted that this is not a case where there is either a piece meal sale or partition of the property leaving one of the co-owners/sharers without any access. It is thus submitted that the finding that the respondents are entitled to the easement of necessity is clearly perverse and not borne out of record. On behalf of the appellants, reliance is placed on the decision of the Supreme Court in the case of **M. Durai vs. Madhu and Ors. (2007) 3 SCC 114** and **Ram Nagina & Ors vs. Deo Kumar Rai and Ors. & ors. 2018 (10) SCJ 533.**

15. On the contrary, Shri Usgaonkar, the learned Senior Counsel for the respondents has submitted that the alleged construction/encroachment is made, even according to the appellants, somewhere in October 1980 and thus the suit having been filed in the year 1992, was clearly barred by limitation. It is pointed out that the respondents had not filed any counter claim for declaration of title by adverse possession and only limited counter claim was filed. It is submitted that in this case the issue of limitation is an independent issue and not necessarily connected with the plea of adverse possession as raised on behalf of the respondents. It is submitted that the point no.1 framed by the First Appellate Court includes an issue of limitation also. It is submitted that even assuming that the respondents have failed in their defence of adverse possession, the plaintiff cannot succeed in the suit. It is pointed out that under Section 3 of the Limitation Act, the Court has to independently look into the issue of limitation. It is submitted that the substantial question of law as framed on 29.09.2005, does not arise in this appeal. The learned Senior Counsel has placed reliance on the decision of the Supreme Court in the case of **N. Balkrishnan vs. M.Krishnamurthy (1998) 7 SCC 123.**

16. The learned Senior Counsel has pointed out that at no point of time, the respondents had claimed an easement of necessity and what was claimed was easement by prescription under Section 15 of the Easement Act read with Section 25 of the Limitation Act. The learned Senior Counsel has taken me through para 8 of the written statement in order to submit that the claim, was of an easement by prescription. It is also pointed out that there was no issue or point about easement of necessity framed. It is submitted that only because the First Appellate Court has made certain observations on the basis of easement of necessity, the judgment could not stand vitiated as otherwise the appellants cannot succeed on account of any such erroneous observation which pertain to a claim of access made by the respondents. It is submitted that the appeal does not raise any substantial question of law and deserves to be dismissed.

17. In reply, Mr. Lotlikar, the learned Senior Counsel for the appellants has submitted that the Appellate Court has not even recorded a finding of easement by prescription and the Appellate Court has misconstrued the suit to be one for mandatory injunction when the suit was essentially for possession on the basis of title. It is thus submitted that the suit ought to have been decreed in its entirety

18. I have considered the circumstances and the submissions made. On 29.09.2005, the present Appeal was admitted on the following substantial question of law :

“Whether, in view of the findings recorded by the First Appellate Court, that the respondents had failed to establish that they had acquired right to the encroached portion of the suit property by adverse possession, the First Appellate Court could have held that the suit instituted by the appellants to remove the said encroachment, as being barred by limitation, as even assuming while not admitting that they had not established the act of trespass that was committed in the year 1980 and thereafter ?

19. During the course of the hearing of the Second Appeal, following additional substantial questions of law were framed on 01.04.2019 and the parties were put to notice that the appeal shall be heard on such substantial questions of law in addition to the one framed on 29.09.2005 :

“(A) Whether, the mere fact that on account of an internal partition of the adjoining property, one part of the property or the house situated therein is unable to access a public road, an easement of necessity would arise entitling the occupant/owner of the portion of the property or the house

rendered inaccessible to an easement of necessity over the property belonging to someone else ?

(B) In view of the fact that the access which the defendants claim through the property of the plaintiff emanated from the construction that they had illegally put up by encroaching on the property of the plaintiffs, they could claim an easement of necessity or easement of any other nature to the property of the plaintiff and whether the claim for such an easement would automatically fall if the encroachment is ordered to be removed ?

20. The parties have accordingly been heard and the appeal is being disposed off on all the aforesaid substantial questions of law.

21. The substantial question of law framed on 29.09.2005 pertains to the first part of the dispute as to the removal of the alleged construction/extension of the room, the tulsi vrindavan and the flower pots, while the additional substantial questions of law framed on 01.04.2019 pertain to the later part of the dispute, as to the access claimed by the respondents.

22. I would first propose to deal with the dispute as to the claim of mandatory injunction for demolition of the construction admeasuring 14.25 square metres and removal of tulsi vrindavan/flower pots. The case made out by the

appellants is that initially, the construction/encroachment by the respondents, was to the extent of 3 x 4 metres, which was made sometime in October, 1980 and there are two additions made to the said structure in April 1991 and in the year 1996. Thus, the total encroachment made by the respondents, according to the appellants, is to the extent of 14.25 square metres. The respondents have not disputed the existence of the structure, as has been noticed by the Courts below. The case made out by the respondents is that the structure was in existence since prior to more than 30 years (from the date of filing of the written statement on 10.04.1997). The respondents have set up a sort of an alternate case about the respondents having perfected their title by adverse possession, as according to the respondents, they have been openly and peacefully occupying the said structure without obstruction, continuously for a period of more than 30 years.

23. The learned Trial Court has found that the respondents have carried out construction of the structure/room, including a wall of 5 metres, east west for facilitating the construction of the room, as also have placed the tulsi vrindavan and flower pots in the suit property towards the northern side. The learned Trial Court has further noticed that the appellants are

the owners in possession of the suit property i.e. land chalta no. 31 of P.T. sheet no. 148 of Mapusa. The learned Trial Court on the basis of the evidence of DW-1 has found that the construction was extended from time to time and the claim made by DW-1 that the bigger room was gifted by the landlord and a hut abutting the room was purchased by the brother-in-law, was vague and was not supported by any document. It can thus clearly be seen that the learned Trial Court has accepted the, case about late Shyamrao Signepurkar having made illegal construction and has also refused to accept the version of DW-1 that the larger room was gifted by the landlord and the hut abutting the room was purchased by the brother-in-law, as being vague and not supported by any documents. This part of the finding to my mind cannot be faulted with. Having held so, the learned Trial Court has then went upon, considering the case of the respondents, as to adverse possession and has found that not only the respondents have proved that the suit structure has been in existence for more than 30 years and they are in adverse possession of the same, it is also admitted (which is evident from the averments made in the plaint) that the trespass was committed by Shyamrao Signepurkar somewhere in 1980. The learned Trial Court has found that except lodging a complaint with Municipal Council, no other legal action was

taken against the respondents. Thus, in short, the learned Trial Court has accepted the case of the respondents having perfected their title to the suit structure by adverse possession. Thereafter, the learned Trial Court has found that the suit being one for mandatory injunction ought to have been filed within three years from the date of the accrual of cause of action, (presumably as per Article 113 of the Limitation Act), which is not so filed. It is in these circumstances that the learned Trial Court has granted limited relief of injunction, restraining the respondents from doing further construction in the suit property, while refusing to grant mandatory injunction for demolition of the suit structure.

24. The First Appellate Court has disbelieved the case of adverse possession set up by the appellants. The First Appellate Court has accepted that the respondents are in possession of the suit structure. However, it has been found that it exists in the property of the appellants. The First Appellate Court after appreciating the oral and documentary evidence, including the complaint dated 25.10.1980 and the legal notice dated 22.05.1991, has found that the appellants have not proved as to on which date the construction was made. Thus, although, the First Appellate Court has reversed

the finding of the learned Trial Court, to the extent of the claim by the respondents of adverse possession, it has concurred with the Trial Court that the suit for demolition, having not been filed within a period of three years from the date of cause of action, was liable to be dismissed.

25. It is trite that a civil dispute of the present nature, has to be decided on the touchstone of preponderance of probability. Both the Courts have found that the ownership of the appellants over the land chalta no. 31 of P.T. sheet no. 148 is not disputed. The Trial Court as well as the First Appellate Court has found that the construction is existing in the land belonging to the appellants. The relief of mandatory injunction has been refused only on the ground of the suit having been filed beyond a period of three years. It would thus be necessary to see whether, the suit is governed by Article 64/65 or the residuary Article 113 of the Limitation Act. This is in the context of the question whether, once the case of adverse possession set up by the respondents was negated by the First Appellate Court, the suit could have been dismissed on the ground of limitation.

26. Article 64 of the Limitation Act pertains to a suit for possession of immovable property based on previous

possession, when the plaintiff while in possession of the property has been dispossessed. The period of limitation in such a case is twelve years from the date of dispossession.

27. Article 65 of the Limitation Act provides for a suit for possession of immovable property or on an interest therein, based on title, where the period of limitation is again twelve years, “when the possession of the defendant becomes adverse to the plaintiff”.

28. In this regard, a useful reference may be made to the decision of the Supreme Court, in the case of **M. Durai** (supra) wherein it has been held that in terms of Article 65 the starting point of limitation, is from the date, the defendants' possession becomes adverse to that of the plaintiffs (see para 29 of the judgment).

29. Article 113 of the Limitation Act, which is the residuary article pertains to a suit where no period of limitation is provided anywhere in the schedule, such a suit has to be brought within three years from the date when the “right to sue accrues”.

30. In the present case, a bare perusal of the plaint shows that it was a suit for mandatory injunction, prohibitory injunction as well as for possession. The appellants claim to be the owners of the land chalta no. 31 of P.T. sheet no. 148 and it is the specific case made out that taking undue advantage of the fact that the appellant no. 1 and her late husband were employed at Mumbai, late Shyamrao Signepurkar carried out illegal construction of the said room in October, 1980 to the extent of 3 x 4 metres, which was extended twice i.e. in April, 1991 and thereafter, in 1996. Both the Courts below have accepted the ownership of the appellants over land chalta no. 31 of P.T. sheet no. 148 and that the said construction is existing in the land belonging to the appellants. If that be so, the dispute squarely turns on the aspect as to whether, the respondents could substantiate their case of adverse possession, which the First Appellate Court has negated and to my mind rightly so.

31. There is no acceptable evidence that the respondents were occupying the suit structure as of right and adverse to the real owners, which is an essential requirement for the defendants to perfect their title by adverse possession. The First Appellate Court has noticed and to my mind rightly so that even according to the respondents, the suit structure was

renovated in the year 1996, for which the respondents had sought permission of the Advocate of the appellants. It is not necessary to go into the question as to whether, the Advocate of any party would be competent to give such consent. However, the act and the conduct of the respondents, in seeking such permission has to be looked into for the limited purpose of seeing the intention of the defendants and the required animus to hold the structure adverse to that of the real owners. Had the respondents had any such animus, there was no reason for the respondents to seek such permission. I have carefully gone through the observations of the First Appellate Court while negating the case of adverse possession by the respondents and I do not find that the finding suffers from any infirmity.

32. The First Appellate Court has thereafter noticed the decision of the Supreme Court in the case of **India Vs. Arumugam AIR 1999 SC 1549** holding that in a suit for possession, filed on the basis of title, the plaintiff cannot be non-suited, unless the respondent proves adverse possession for the prescribed period. The First Appellate Court has found that the ratio would be clearly applicable in this case and the burden lies on the respondents, which the First Appellate Court, on facts, has found that they have failed to discharge.

Once having held so, the First Appellate Court could not have dismissed the suit on the ground of limitation. In my considered view, the case was clearly governed by Article 65 of the Limitation Act and not the residuary Article 113 of the Limitation Act. The finding by the First Appellate Court about the appellants having failed to specify the date on which the encroachment was made, cannot be accepted, considering the fact that the respondents have failed to establish their case of adverse possession on preponderance of probability. The case of the appellants about the encroachment having been made somewhere in 1980, ought to have been accepted. A complaint about the construction was lodged on 25.10.1980, which would be further evident of the fact that the encroachment was made somewhere in October, 1980. The suit is filed on 29.12.1992 i.e. within twelve years. It is true that, in the plaint the cause of action, is shown to have accrued on 31.01.1992 (when the period, within which the respondents were called upon by legal notice dated 22.05.1991 to remove the construction, had expired). However, that may not be decisive of the matter. The Courts are required to intelligibly read the case made out by the plaintiff, in order to find out whether, there is cause of action for filing the suit and if yes, the date on which it can be said to have accrued and further whether, the suit is filed within

limitation.

33. The learned Senior Counsel for the respondents has placed reliance on the following observations in para 11 of the judgment of the Supreme Court in the case of **N. Balakrishnan** (supra):

"Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. the object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly.

The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.”

34. There cannot be any manner of dispute with the proposition that the law of limitation, which is founded on public policy, fixes a lifespan for availing a legal remedy for the redress of the legal injury so suffered. The question in the present case, however is whether, once having negated the case of the respondents for removal of encroachment, as to adverse possession, the suit could have been dismissed as being barred by limitation. I have already held that it could not have been done, in the facts of the present case.

35. In the case of **Ram Nagina Rai** (supra), it has been held that Article 65 of the Limitation Act presupposes that the limitation starts only if the defendants prove the factum of adverse possession affirmatively from a particular time, which they have failed to prove in this case.

36. There may be a case where the reliefs claimed in a suit are governed by two separate articles. However, in such a case, the Court ought to look at the main substantive relief, by which, the limitation for filing the suit would be governed. It is true that the suit is for mandatory injunction, but essentially the case made out is that the respondents have made an

encroachment in the property of the appellants by constructing the suit structure. Thus, in my considered view, once, the First Appellate Court had negated the case of the respondents of having acquired the right to the structure by adverse possession, the suit could not have been dismissed as being barred by limitation, at least, in the present case. The point is accordingly answered in the affirmative.

37. This takes me to the substantial questions of law, as framed on 01.04.2019. The case of the respondents as to the right of access is ancillary to the existence of the suit structure. Once it is found that the suit structure is illegal and is by way of encroachment and is standing in the property of the appellants and is liable to be demolished, the case as to the easementary right or otherwise of access need not be gone into. However, considering the fact that the substantial questions of law are specifically framed and the parties are heard on these substantial questions of law, I find it appropriate to record my findings on these points also.

38. Insofar as the claim of access is concerned, the case made out by the respondents is that an additional room was acquired by them in land chalta no. 33 of P.T. sheet no. 148, which is abutting the road on the western side. It is the

specific case that a new door abutting the road on the western side was opened. However, subsequently, there were disputes between respondent nos. 1 and 2 on one hand and respondent nos. 3 to 7 and a portion of the suit structure, including the additional room (acquired from land chalta no. 33, P.T. sheet no. 148) was allotted to the respondent nos. 1 and 2 and the respondent nos. 3 to 7 have been separated into residence and mess. It is also claimed that the respondent nos. 1 and 2 have erected a wall, separating the portion allotted to them, on account of which the respondent nos. 3 to 7 are unable to use the access and are therefore, using the access from the land of the appellants.

39. It is significant to note that the case made out by the respondents has all along been based on prescription and not on easement of necessity. There is no specific finding recorded by any of the Courts below that the respondents have the right of access by way of prescription. The First Appellate Court on the contrary has found that the access claimed by the respondents, is by way of easement of necessity, which in my considered view, cannot be accepted. The easement of necessity arises when there is piece meal sale or transfer of property, leaving a particular portion landlocked and without access. Such easement of necessity

cannot arise on the land of a third party, as in the present case. It is significant to note that the respondents have not made out any case of easement of necessity. There is a distinction between easement by prescription and easement of necessity and the First Appellate Court was not justified in making out a case of easement of necessity in the favour of the respondents in the absence of any pleadings and on the basis of the evidence on record. The finding of the First Appellate Court about the easement of necessity, to my mind, is patently illegal and cannot be sustained. In such circumstances, the substantial questions of law framed on 01.04.2019 are answered in the negative.

40. In the result, the following order is passed:

O R D E R

- (i) The appeal is allowed.
- (ii) The impugned judgment of the First Appellate Court is hereby modified.
- (iii) The suit is decreed. The respondents/defendants are directed to demolish the suit construction, as shown in the sketch annexed to the plaint and to remove the flower pots and to restore the property to its original condition and to hand over the vacant and peacefully possession of the land to the appellants, within a period of three months, failing which the appellants will be entitled to get it done through the intervention of Court

machinery.

- (iv) The respondents or anybody on their behalf are permanently restrained from interfering in any manner, whatsoever in the suit property.
- (v) An enquiry into future mesne profits under Order XX, Rule 12(2) of CPC, shall be conducted.
- (vi) The counter claim filed by the respondents/defendants is dismissed.
- (vii) In the circumstances, there shall be no order as to costs.
- (viii) Decree be drawn accordingly.

C. V. BHADANG, J.

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