IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 758 OF 2013

Shri. Chandrahas Jethalal Patel & Ors. ***...Appellants***

: Versus :

Smt. Nirmalaben Shambhuprasad Patel & Ors. ***...Respondents***

Mr. R.D. Soni, i/b Ram & Co., for Appellant

Mr. D.S. Mhaispurkar, for Respondent No. 2

Mr. Rajendra M. Haridas, for Respondent Nos. 5 & 6

CORAM: SANDEEP V. MARNE, J.

Reserved On: 5 OCTOBER 2026.

Pronounced On: 21 OCTOBER 2026.

Judgment:

1) The Appellants have filed the present Appeal under Section 100 of Code of Civil Procedure, 1908 **(Code)** challenging the judgment and decree dated 22 October 2013 passed by the Ad-Hoc District Judge-2, Kalyan dismissing Civil Appeal No. 38 of 2010 and confirming the judgment and decree dated 29 December 2009 passed by the Civil Judge

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Senior Division, Kalyan in Special Civil Suit No. 325 of 1997. The Trial Court has decreed the Suit by directing the Appellants/Defendants No.1 to 6 to deliver vacant possession of the suit property to the Plaintiff by demolishing the structure/construction standing thereon. The Trial Court has also restrained the Appellants/Defendant Nos. 1 to 6 from transferring the suit property or parting with possession thereof to the extent of their respective occupation, in favour of any third party.

2) Respondent Nos.1 to 4 are the original Plaintiffs, who instituted Special Civil Suit No. 325 of 1997 in the Court of Civil Judge Senior Division, Kalyan. Land bearing Survey No.1, Hissa No.3/3/C at Village-Mohone, Taluka-Kalyan, District-Thane is the "suit property". According to the Plaintiffs, the suit property was purchased by Mr. Shambhuprasad Patel, the husband of Plaintiff No. 1 and father of Plaintiff Nos. 2 to 4, along with Mr. C. G. Mahant, by way of registered Sale Deeds dated 25 November 1947, in respect of 9 gunthas, and dated 2 January 1948, in respect of 15 gunthas. A registered Partition Deed dated 26 January 1949 was effected, under which entire suit property comprising of Survey No.1, Hissa No.3/3/C admeasuring 9 + 15 gunthas came to the share of Mr. Shambhuprasad Patel. According to the Plaintiff, the office of City Survey measured the land and prepared a plan by assigning Chalta Nos. 447A to 452A, 453, 539, 594 and 403A to the land.

3) According to the Plaintiff, sister of Shambhuprasad, Smt. Maniben Jethalal Patel came to reside at Mohone with her two minor sons and 2 daughters in the year 1952 (*after the death of her husband in*

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1951). According to the Plaintiff, Maniben constructed a house adjoining the suit property on land now bearing Chalta Nos.457 and 459. Since Maniben was a family member, she started looking after the suit property after the death of Shambhuprasad on 29 July 1964. According to the Plaintiffs, Maniben took disadvantage of the trust and faith reposed by the Plaintiff in her and constructed one storey structure on the suit property without the knowledge and concurrence of the Plaintiff. Maniben passed away in the year 1985. In the proceedings filed before the Revenue Authorities being RTS Appeal No.49 of 1985, Defendant Nos.1 to 6 claimed title based on adverse possession in respect of the suit property. Plaintiffs accordingly filed Special Civil Suit No. 325 of 1997 seeking recovery of possession of the suit property from the Defendants and for various other reliefs.

4) The suit was resisted by Defendant Nos.1 to 6/Appellants raising a plea of acquisition of title in the suit property by adverse possession contending that the structure was constructed in the suit property in the year 1962 with full knowledge of Plaintiff/Shambhuprasad. The suit was also opposed on the plea of limitation. The suit was amended and additional written statement was filed by Defendant Nos.1 to 6. Defendant Nos.7 and 8, who are tenants inducted by Defendant Nos.1 to 6, also filed their written statement resisting the suit. Defendant No.9 also filed a separate Written Statement. Parties led evidence in support of their respective claims. After considering the pleadings, documentary and oral evidence, the Trial Court proceeded to decree the Suit by judgment and order dated 29 December 2009. The Trial Court directed Defendant Nos.1 to 6 to deliver

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vacant possession of the suit property to the Plaintiffs by demolishing the structure/construction standing thereon. They are also restrained from transferring the suit property or parting with possession thereof. The Trial Court also directed an inquiry into mesne profits under Order 20 Rule 12 of the Code.

5) Only Defendant Nos.1, 2 and 4 to 6 got aggrieved by the decree passed by the Trial Court and filed Civil Appeal No. 38 of 2010 in the Court of Ad-hoc District Judge, Kalyan. The Appeal is however dismissed by the Ad-hoc District Judge by judgment and decree dated 22 October 2013 by confirming the judgment and order of the Trial Court. Aggrieved by the concurrent findings recorded by the Trial and Appellate Courts, the Appellants, who are Original Defendant Nos.1, 2 and 4 to 6, have filed the present Appeal.

6) In the present Appeal, the interim protection granted by the First Appellate Court has been continued by this Court by order dated 20 December 2013. The said protection continues throughout the pendency of the Appeal.

7) By order dated 10 February 2015, the Appeal has been admitted by framing following substantial questions of law:

> (i) Whether the burden of proof would shift on real owner at any time in case of defence taken by the defendant of title by adverse possession?
>
> (ii) Whether the suit as filed for removal of encroachment and possession on the basis of title is maintainable in view of Order VII, Rule 3 Code of Civil Procedure?

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8) So far as the issue of limitation is concerned, this Court has not admitted the Appeal by framing a question of law relating to limitation. This is possibly because of the fact that limitation is a mixed question of law and fact. However, Mr. Soni has insisted that the additional issue of limitation be framed. Since both the parties have canvassed submissions on the issue of limitation, I deem it appropriate to frame a question to answer the issue of limitation. In his usual fairness, Mr. Mhaispurkar has consented for framing of additional issue. Accordingly, the additional issue of limitation is framed as under:

Q.3. Whether the Suit of the Plaintiff was barred by limitation?

9) Mr. Soni, the learned counsel appearing for the Appellants, submits that the Trial Court and the Appellate Court have erred in decreeing the suit filed by the Plaintiffs by ignoring the provisions of Order VII Rule 3 of the Code, which require not only a proper description of the suit property with necessary particulars but also the production of a sketch map where the suit alleges encroachment by a neighbouring owner. That since the suit was for removal of alleged encroachment, the same ought not to have been tried by the Court in absence of proper description of the suit property. That in the entire suit, there is no description of the portion of Hissa No.3/3/C which is alleged to be encroached by the Appellants. That the extent of alleged encroachment is not known. In such circumstances, the suit ought to have been dismissed by the Trial Court by having recourse to the provisions of Order 7 Rule 3 of the Code.

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10) Mr. Soni further submits that the Suit was *ex-facie* barred by limitation since house/structure has been constructed by Defendant Nos.1 to 6/Maniben in the year 1962. That in any case, Plaintiffs admitted acquisition of knowledge in respect of alleged encroachment in the year 1978. That the suit was filed beyond the period of limitation of 12 years as prescribed under Article 65 of the Limitation Act. He submits that since the Appellants raised the issue of limitation in the Written Statement, which is decided by the Trial Court and the Appellate Court, a specific question of law in that regard needs to be framed in the present Appeal as well. He submits that the evidence clearly indicates knowledge on the part of the Plaintiffs about occupation of portion of suit property by the structure constructed by Defendant Nos.1 to 6. That partition proceedings of 1985 are irrelevant and for the purpose of ascertaining the date of knowledge of possession, Defendant Nos.1 to 6 claimed title in the RTS proceedings based on adverse possession. Therefore, what may have been acquired by the Plaintiffs in the year 1985 is merely claim of title. However, the structure has been constructed right in front of the house of Shambhuprasad/his heirs in the year 1962. That no objection was ever raised relating to the construction. That the suit for recovery of alleged encroached portion is clearly barred by limitation.

11) Mr. Soni further submits that the Trial and Appellate Courts have grossly erred in not framing an issue/point relating to failure to properly describe the suit property. That the extent of encroachment is still unknown. Therefore, at the stage of execution of the decree, it would be difficult to ascertain which part of the structure is required to

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be demolished and which portion of the suit property is required to be handed over to the Plaintiffs. That even as of today, the exact area of encroachment has not been ascertained before this Court. So far as the issue relating to adverse possession is concerned, Mr. Soni submits that all the elements of adverse possession are clearly established in the present case. That the Trial and Appellate Courts have grossly erred in rejecting the plea of adverse possession. That once construction of house in the year 1962 by Defendant Nos.1 to 6 is established and knowledge on the part of the Plaintiffs about construction of the house is admitted at least in the year 1978, both the Courts ought to have accepted the defence of the Appellants about acquisition of title in the suit property by adverse possession. That the burden was on the Plaintiffs to establish that they had no knowledge of the Defendants' adverse possession on the suit property. That Plaintiffs have thoroughly failed to discharge the said burden and therefore it needs to be inferred that Plaintiffs always knew about possession of part of the suit property by Defendant Nos.1 to 6. On above broad submissions, Mr. Soni prays for setting aside the orders passed by the Trial and the Appellate Courts.

12) Mr. Haridas, the learned counsel appearing for Respondent Nos.5 and 6 supports the case of the Appellants and adopts the submissions of Mr. Soni. Additionally, he submits that Defendant Nos.1 to 6 are the landlords of his clients. That there is lawful creation of tenancy between the parties. That under the guise of arrangement, tenancy rights in favour of Respondent Nos.5 and 6 cannot be disturbed. That the aspect of tenancy rights on Respondent Nos.5 and 6 is totally

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ignored by the Trial and the Appellate Courts. He also prays for setting aside the impugned decree of the First Appellate Court.

13) *Per-contra*, Mr. Mhaispurkar, the learned counsel appearing for Respondent No.2, who is the original Plaintiff No.2 opposes the Appeal submitting that the suit property has been correctly described in the plaint. He submits that the Survey Map of the property was produced at Exh.83 and the City Survey Officer was also examined as a witness. He submits that the Plaintiff's title in respect of the suit property bearing Hissa No.3/3/C is fully established. That Defendants never created any dispute with regard to description of the suit property or the extent to which the same is encroached. That therefore the said issue cannot be permitted to be raised directly before this Court. That there are concurrent findings of fact recorded by both the Courts and there is no warrant for interference in such concurrent findings. He submits that Maniben being sister of Shambhuprasad was merely permitted to reside in the suit property. That, therefore, if she has carried out any activities in respect of the permissive use of the suit property, a claim of adverse possession cannot be raised or established. He submits that Maniben was merely looking after the suit property and that if she constructed any structure on the suit property, no claim for adverse possession can be raised. He further submits that the suit is well within the period of limitation, as held by both the Courts below. He submits that the case concerns permissive user indulging in the illegal activity of encroaching upon the land, she was permitted to occupy. That therefore the Suit for recovery of possession from permissive user can never be held to be

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barred by limitation. That in any case, the question of limitation is not framed by this Court. He accordingly prays for dismissal of the Appeal.

14) Rival contentions raised by the parties now fall for my consideration.

Question No.1

(i) Whether the burden of proof would shift on real owner at any time in case of defence taken by the defendant of title by adverse possession?

15) In the present case, the Plaintiff has alleged that Defendant Nos. 1 to 6 and Maniben took undue advantage of the trust and confidence reposed in them by the Plaintiff by constructing a structure on the suit property bearing Hissa No. 3/3/C. It appears that Maniben and Defendant Nos.1 to 6 are owners of adjoining piece of land bearing Hissa No.3/3/A. It is Plaintiff's case that since the suit property owned by them adjoins the property of Maniben/Defendant Nos.1 to 6, portion of the suit property is encroached upon by those Defendants while constructing their structure(s).

16) There is no dispute to the position that the suit property bearing Survey No.1, Hissa No.3/3/C was owned and possessed by Shambhuprasad, who was the husband of Plaintiff No.1 and father of Plaintiff Nos.2 to 4. The suit property bearing Hissa No.3/3/C were later allotted Chalta Nos. 447A to 452A, 453, 539, 594 and 403A.

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17) Maniben is the sister of Shambhuprasad. According to the Plaintiffs, Maniben's husband expired in the year 1951 and thereafter she shifted to Village Mohone in 1952 alongwith her children and started residing with her brother, Shambhuprasad as a family member. According to the Plaintiffs, they were residing at Mumbai and had reposed faith in Maniben who used to look after the suit property by collecting rent from the tenants. According to the Plaintiffs, Maniben took disadvantage of the trust and faith reposed in her and unauthorizedly constructed a structure(s) on the portion of the suit property. It appears that while constructing the houses/structures in her own property bearing Hissa No.3/3/A she encroached upon substantial portion of land bearing Hissa No.3/3/C which belongs to the Plaintiffs.

18) When the suit was filed seeking removal of the encroachment and demolition of the portion of the structures standing on the encroached land, Defendant Nos. 1 to 6 raised a defence that they had acquired title by adverse possession. By raising the defense of adverse possession, Defendant Nos.1 to 6 admitted two aspects. Firstly, they admitted that Plaintiffs are the owners of the suit property bearing Hissa No.3/3/C (*Chalta Nos. 447A to 452A, 453, 539, 594 and 403A*). Secondly and more importantly, Defendant Nos.1 to 6 admitted the position that they have encroached upon the suit property. Thus, raising of defence of adverse possession narrowed down the scope of inquiry about encroached land. Ordinarily, in a typical suit involving encroachment, the primary factual issue before the Court is whether there has been any encroachment and, if so, the extent of the encroached portion. This is because the Defendant would ordinarily deny having

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encroached upon the Plaintiff's property and contends that the portion in his possession forms part of his own property. Therefore, usually suits involving allegation of encroachment relating to boundary disputes, a fact finding inquiry needs to be conducted by the Court for ascertaining the allegation of encroachment. In the present case, however Defendants Nos.1 to 6 relieved Plaintiffs of burden of establishing encroachment since they have raised the defense of adverse possession. By raising the defense of adverse possession, they admitted having committed encroachment on Plaintiff's property.

19) Defendants however did not file any counterclaim for a declaration of acquisition of ownership in the encroached portion of the suit property. The plea of adverse possession was only raised as a defence to ensure dismissal of the suit. The plea of acquisition of title by adverse possession can also be raised by the Plaintiff to seek declaration of title. The Defendants however did not seek any such declaration. Upon being accused of encroaching upon Plaintiffs land, they sheepishly sought to raise the defence of adverse possession. Plaintiffs however established during the course of the trial in the suit that Maniben was merely permitted to occupy the suit property by Shambhuprasad since she was his sister. The case thus involves occupation of a suit property by a relative who was a permissive user. Neither settled possession can be claimed by permissive user nor claim of title adverse to the true owner can be raised by him/her. The Plaintiffs have successfully established that they had no knowledge of the activities of Maniben and her children in relation to the suit property, as they were residing in Mumbai.

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Maniben and her children took disadvantage of permission granted to them to occupy the suit property and constructed portion of structure thereon. Such activity does not entitle them to raise the plea of adverse possession.

20) Once permissive use is established, the plea of adverse possession fails. Since Maniben entered the suit property through the permission granted by Shambhuprasad, the plea of adverse possession could neither have been raised nor established in the facts and circumstances of the present case by Defendant Nos.1 to 6. Permissive use of the property is antithetical to a plea of adverse possession. This is because, to establish the plea of acquisition of title in the immovable property by prescription, it needs to be established that the claimant is in settled possession. A permissive user can never claim settled possession, as held by the Apex Court in ***Maria Margadia Sequeria Fernandes & Ors vs Erasmo Jack De Sequeria (D) Tr.Lrs.& Ors***[1]. It is held by the Apex Court in para-97 of the judgment as under:

> **97**. Principles of law which emerge in this case are crystallized as under:-
>
> **1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.**
>
> 2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

1 2012 (5) SCC 370

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> 3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.
>
> 4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.
>
> 5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.
>
> *(emphasis added)*

21) For establishing the plea of acquisition of title by adverse possession, it is necessary to fulfill all the three classic requirements of *nec-vi* i.e. adequate in continuity, *nec-clam* i.e., adequate in publicity and *nec-precario* i.e. adverse to the competitor, in denial of title and his knowledge. In ***Ravinder Kaur Grewal vs Manjit Kaur***[2] the Apex Court has held in paras-56 to 60 of the judgment as under :

> **56**. There is the acquisition of title in favour of Plaintiff though it is negative conferral of right on extinguishment of the right of an owner of the property. The right ripened by prescription by his adverse possession is absolute and on dispossession, he can sue based on 'title' as envisaged in the opening part Under Article 65 of Act. Under Article 65, the suit can be filed based on the title for recovery of possession within 12 years of the start of adverse possession, if any, set up by the Defendant. Otherwise right to recover possession based on the title is absolute irrespective of limitation in the absence of adverse possession by the Defendant for 12 years. The possession as trespasser is not adverse nor long possession is synonym with adverse possession.
>
> **57**. In Article 65 in the opening part a suit "for possession of immovable property or any interest therein based on title" has been used. Expression "title" would include the title acquired by the Plaintiff by way of adverse possession. The title is perfected by adverse possession has been held in a catena of decisions.

2 AIR 2019 SC 3827

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58. We are not inclined to accept the submission that there is no conferral of right by adverse possession. Section 27 of Limitation Act, 1963 provides for extinguishment of right on the lapse of limitation fixed to institute a suit for possession of any property, the right to such property shall stand extinguished. The concept of adverse possession as evolved goes beyond it on completion of period and extinguishment of right confers the same right on the possessor, which has been extinguished and not more than that. For a person to sue for possession would indicate that right has accrued to him in presenti to obtain it, not in futuro. Any property in Section 27 would include corporeal or incorporeal property. Article 65 deals with immovable property.

59. Possession is the root of title and is right like the property. As ownership is also of different kinds of viz. sole ownership, contingent ownership, corporeal ownership, and legal equitable ownership. Limited ownership or limited right to property may be enjoyed by a holder. What can be prescribable against is limited to the rights of the holder. Possession confers enforceable right Under Section 6 of the Specific Relief Act. It has to be looked into what kind of possession is enjoyed viz. de facto i.e., actual, 'de jure possession', constructive possession, concurrent possession over a small portion of the property. In case the owner is in symbolic possession, there is no dispossession, there can be formal, exclusive or joint possession. The joint possessor/co-owner possession is not presumed to be adverse. Personal law also plays a role to construe nature of possession.

60. The adverse possession requires all the three classic requirements to co-exist at the same time, namely, nec-vi i.e. adequate in continuity, nec-clam i.e., adequate in publicity and nec-precario i.e. adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. Animus possidendi under hostile colour of title is required. Trespasser's long possession is not synonym with adverse possession. Trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point in time. Possessor looks after the property, protects it and in case of agricultural property by and the large concept is that actual tiller should own the land who works by dint of his hard labour and makes the land cultivable. The legislature in various States confers rights based on possession.

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22) In my view, since Maniben's entry into the suit property as a permissive user has been established, the plea of adverse possession cannot be sustained. Therefore, merely because the Defendant has raised a defence of adverse possession, there is no question of shifting the burden of proof onto the true owner. The burden would continue on the shoulders of possessor to prove that possession is settled, is adverse to the title of owner and that the same was made known to the owner. Here the test of possession being adverse to the owner is not established since the same was permissive. Question No.1 is answered accordingly.

Question No.2.

(ii) Whether the suit as filed for removal of encroachment and possession on the basis of title is maintenable in view of Order VII, Rule 3 Code of Civil Procedure?

23) It is strenuously sought to be urged on behalf of the Appellants that the suit ought to have been dismissed for failure to establish the extent of encroachment in the plaint. Mr. Soni has taken me through the description of the suit property in the plaint in support of his contention that the exact portion of the suit property of which recovery of possession is sought, is not properly described in the plaint. He has relied upon provisions of Order 7 Rule 3 of the Code, which reads thus:

> **3. Where the subject-matter of the suit is immovable property.—** Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a

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record of settlement or survey, the plaint shall specify such boundaries or numbers.

24) Mr. Soni has also relied on Bombay High Court Amendment to Order 7 Rule 3 of the Code which reads thus:

> In Order VII, in rule 3, at the end, insert the words "In case of encroachment, sketch showing as approximately as possible the location and the extent of the encroachment shall also be filed along with the plaint." (w.e.f. 1-10-1983)

25) In paragraphs 1 and 3 of the plaint, the suit property is described thus:

> 1. The plaintiffs are the absolute owners and well sufficiently entitled to the immovable property situated at village Mohone, Taluka Kalyan, Dist. Thane bearing
>
> | Survey No. | Hissa No. | Area | Assessmant Rs. |
> |---|---|---|---|
> | 1 | 3/3/C | 9 Gunthas | 00-12 |
> | 1 | 3/3/C | 15 Gunthas | 00-22 |
>
> (hereinafter referred as the said property). The boundaries of the said property is as under
>
> North-Survey No. 1, Hissa No.3/3/A of defendants
> South-Gaothan.
> East Survey No. 1 Hissa No. 3/3/D(pt) of the plaintiffs
> West-Survey No. 1 Hissa No. 3/2.
>
> 3. The plaintiffs state that the District Land record officer & inquiry officer No 1 (City Survey officer) measured the said property & prepared the plan & decided chalta Nos. 447A to 452A, 453, 539, 594, & 403A (hereinafter referred as the suit property) are in Survey No 1, Hissa No. 3/33C i e, in the said property of the plaintiffs
>
> The boundaries of the suit property is as under:-
>
> North: Survey No. 1, Hissa No. 3/3/A own by the defendaves Nos. 142.
> South: Survey No.1, Hissa No.3/3/C own by the plaintiffs

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East: Survey No. 1, Hissa No. 3/3/C own by the plaintiffs
West: Survey No. 1, Hissa No. 3/3/C own by the plaintiffs

26) In their plaint, Plaintiffs had sought following prayers:

15. The plaintiffs, therefore, pray that this Hon'ble Court may be pleased-

(a) to order & decree the defendants Nos. 1 to 6 & 9 to remove at their own costs the building/structure standing on the suit property (City Survey chalta Nos 447A to 452A, 453, 539, 594, & 403A) & deliver vacant possession of the suit property to the plaintiffs

(b) to order & decree to each defendant Nos. 1 to 6 to pay Rs. 200/- per month for their use & occupation of saut property for 3 years prior (Rs 43,200/- to the filing of suits

(b-1) to order & decree to each defendant Nos. 1 to 2 to pay Rs. 5000/- per month from the date of said alleged interest created in favour of defendant Nos. 7 to 9 pending the suit in respect of suit property of chalta Nos. 594 & 403A till final realization of possession suit property.

(b-2) to order & direct to defendant Nos. 1 & 2 to pay &/or deposit in court the money received from the defendant Nos. 7 to 9 with 18% interest forthwith in respect of chalta Nos. 594 & 403A pending the suit

(c) to restrained permanently the defendants &/or their agents &/or their servants &/or their relatives &/or anybody acting in their capacity from transferring or parting with possession of the suit property in their respective possession/occupation to any third party by sub-letting &/or licensee &/or in any manner whatsoever

(d) to grant ad-interim injunction in terms of prayed (c)

(c) to order the defendants to pay full costs with 12% interest of this suit to the plaintiffs,

(f) And grant any relief/reliefs in favour of the plaintiffs as may be just & proper.

27) Thus, the portion of the building/structure constructed by Defendant Nos. 1 to 6 and 9, which stands on the suit property, was

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sought to be removed by way of prayer clause 15(a) of the plaint. It is pertinent to note that no objection regarding the absence of a proper description of the suit property was raised in the Written Statement. In paragraph 7 of the Written Statement, a vague plea was raised as under :

> ७. वादींचा दावा मोघम स्वरूपाचा असुन वादी म्हणत आहेत, त्याप्रमाणे या प्रतिवादींनी वादींचे तथाकथीत किती जागेवर, किती क्षेत्रफळाचे बांधकाम केले, केव्हां केले या बाबतचा कोणताही जरूर तो तपशील व खुलासा आपल्या दाव्यात केलेला नाही. सबब वादीचे दाव्यास दिवाणी व्यवहार संहितेचे तरतुदींची देखील बाध येत असल्याने वादींचा दावा खर्चासुध्दा रद्द करण्यात यावा.

28) The above objection in paragraph 7 is not with regard to the improper description of the suit property.

29) The objective behind Order 7 Rule 3 of the Code is to achieve clarity in respect of identification of the exact property in respect of which decree for removal of possession or removal of encroachment is sought. In the present case, the Defendants have admitted that their construction extends beyond the boundaries of Hissa No. 3/3/A and encroaches upon Hissa No. 3/3/C. The admission in the Written Statement about encroachment is in paragraph 16 of the Written Statement which reads thus :

> १६. खरी परिस्थिती अशी आहे की, मौजे मोहोने येथील स.नं.१ हि.नं.३/३/अ क्षेत्र सु.१ एकर २५ गुठे क्षेत्रफळ असलेली मिळकत प्रतिवादींचे मालकीची आहे. सदरची मिळकत प्रतिवादींचे पुरोगामी हक्कदार कै. जेठालाल पटेल यांनी त्यांचे हयातीत २ जानेवारी, १९४८ रोजी कायम फरोक्तखताने श्री. विठु लडकु व शंभु लडकु कोळंबे यांचेकडुन संपादन केली असुन त्यासंबंधीचा दस्तऐवज कल्याण येथील दुय्यम निबंधक साहेब, कल्याण यांचे कार्यालयात अनु.क्र.५ कडे नोंदण्यात आला आहे. सदर मिळकतीचे दक्षिण अगास लागुन सर्वे नं. १ हि.नं.३/३/ड ची मिळकत आहे. प्रतिवादी व त्यांचे पुरोगामी हक्कदार कै. मणिवेन पटेल यांनी आपल्या मिळकतीवर इमला मिळकतीचे बांधकाम करण्याचे ठरवुन त्या वेळचे ग्रामपंचायत मोहोने अस्तित्वात असतानांच बांधकाम करण्याचे काळात तळमज्याचे बांधकाम जानेवारी १९६२ मध्ये केले व त्यानंतर टप्प्याने टप्याने सु.१ वर्षाचे आत एक मजल्याचे बांधकाम पतिवादींनी केले परंतु सदर बांधकामाची आकारणी त्या वेळचे गामपंचायत मोहोने

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सन् १९६५-६६ चे सुमारास करून त्यांस वेगवेगळे घर नं. २४-अ, २४-ब, २४-क,२४-ड, २४-३, २४-एफ, २४-ज पडलेले आहेत. त्याप्रमाणे सदरचे बांधकामापैकी काही भाग हा सर्वे नं.१ हि.नं. ३/३/अ या मिळकतीवर येतो. ह्या काही भाग सर्वे नं.१ हि. नं. ३/३/क या मिळकतीवर येतो. प्रतिवादींनी केलेले बांधकाम हे वादींचे पुरोगामी हक्कदार के शभुप्रसाद पटेल हे हयात असतांना त्यांचे व वादींचे ममक्ष त्यांचे जाणिवेत त्यांना माहित असतांना उगड उगडपणे त्यांची कोणत्याही प्रकारची सदर बांधकामास हरकत न येता अथवा कोणाचीही कोणत्याही प्रकारची हरकत अडथळा न येता उघडउघडपणे केले आहे त्यावेळी म्हणजे शंभुप्रसाद पटेल हे हयात असतांना ते प्रतिवादींचे कुलमुखत्यारी म्हणुन काम बघत होते. या प्रमाणे प. वादींचे बांधकामचा जो भाग सर्वे नं.१ हि.नं. ३/३/क मध्ये येतो, त्यास सिटी सर्वे चा चालता नं. ४४७अ ते ४५२, ४५३, ५३९, ५९४ व ४०३अ असे पडलेले आहेत. सदरचे बांधकामा खालील जमीन या पतिवादींनी व त्यांचे पुरोगामी हक्कदार यांनी त्यांची मालकी नाकारून उघडउघडपणे व अट्टहासपणे सतत व वादींचे जाणीवेत बारा वर्षापेक्षा कितीतरी अधिक काळ मालकी हक्काने आपले वहिवाटीस असल्याने व जानेवारी, १९६२ पासुन ती त्यांचे कबजात असल्याने प्रतिवादी हे विरूध्द कब्जाने सदर चालता नं. चे जमीनीचे मालक झालेले आहेत. त्यामुळे वादींस मालकीच राहिलेली नाही. वादीस अशा प्रकारचा दावा आणता येणार नाही. वादीचा दावा मुदतीत नाही. कारण सदर दावा मिळकत प्र. वादींचे कब्जात गेली १२ वर्षा पेक्षा जास्त काळ व त्यांचे पुरोगामी हक्कदारांपासुन असल्याने व वादींनी १२ वर्षाचे आत दावा न केल्याने त्यांचा तथाकथीत हक्क केव्हांच नष्ट झाला आहे. त्यांना दावा मिळकतीसंबंधी मालकीच शिल्लक राहिलेली नाही. केवळ ७/१२ला त्यांची पोकळीस्त नांवे असण्याचा गैरफायदा घेऊन वादींनी हा खोटा दावा दाखल केलेला आहे. तो खर्चा सुध्दा रद्द करण्यात यावा.

30) The Defendants are thus fully aware about the exact portion of construction which juts into the suit property bearing Hissa No.3/3/C. It appears that the Plaintiff produced the survey map of the suit property at Exhibit 83. Even from the Map at Exh-83, the extent of encroachment is clearly visible.

31) Since Defendants did not have any qualms about description of the suit property, they did not raise any defence in that regard. Even in their Appeal, no grievance was made about improper description of the suit property. This is a reason why the Trial Court did not raise any issue about description nor the Appellate Court framed point for determination relating to description of the suit property. It is directly before this Court that the Appellants have sought to raise the issue about inadequate description of the encroached portion on the suit property.

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Even if this technical objection is to be momentarily ignored, it is seen that the encroachment is clearly understood by the Defendants and is otherwise visible from the measurement map. Therefore, the Suit cannot be held to be not maintainable under Order 7 Rule 3 of the Code.

32) Even otherwise, failure to not accurately describe the suit property in the plaint is a curable defect and can be rectified even in execution proceedings under Section 47 of the Code. In ***Pratibha Singh v. Shanti Devi Prasad***[3], the Apex Court has held thus:

> 17. When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by overlooking of provisions contained in Order 7 Rule 3 and Order 20 Rule 3 CPC is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 CPC depending on the facts and circumstances of each case — which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 CPC by the court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the executing court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case, we think it would be more appropriate to invoke Section 47 CPC.

33) I am therefore of the view that the Suit did not warrant dismissal on account of belated objection regarding the inaccurate description of the suit property sought to be raised at the second appellate stage. Question No.2 is answered accordingly.

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QUESTION NO.3

Q.3. Whether the Suit of the Plaintiff was barred by limitation ?

34) There are concurrent findings of the Trial and first Appellate Courts on the issue of limitation in filing the suit. The first Appellate Court has treated filing and decision of RTS proceedings as the date of acquisition of knowledge of adverse possession of the Plaintiffs. According to Mr. Soni, the RTS proceedings are relevant only for the purpose of acquisition of knowledge about claim of title by Defendants. He submits that for deciding the issue of limitation qua the prayer for recovery of possession, the issue of title is irrelevant and what needs to be taken into consideration is the factum of acquisition of knowledge about possession.

35) Under Article 65 of the Limitation Act, 1963, a suit for recovery of possession of immovable property based on title must be instituted within 12 years from the date on which the possession of the Defendant becomes adverse to the Plaintiff. In the present case, though Maniben was in possession of portion of the suit property, her possession was permissive in nature. A permissive user cannot, by virtue of such possession, acquire title by adverse possession against the owner. A permissive possessor occupies the immovable property with the permission of the owner and, so long as such permissive possession continues, he/she cannot ordinarily set up a claim of adverse possession. As observed above, plea of adverse possession can never be raised by a permissive user. Therefore, even if owner acquires knowledge about

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possession of immovable property by the permissive user, the same does not become adverse to the owner and therefore the period of limitation does not begin to run. In my view, therefore the suit filed by the Plaintiffs was perfectly within limitation. Question No.3 is answered accordingly.

36) In view of answer to the above 3 questions framed, there is no warrant for interference in the impugned decree of the first Appellate Court, which confirms Trial Court's decree. The Second Appeal is devoid of merits. It is accordingly **dismissed** with costs.

NEETA SHAILESH SAWANT
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[SANDEEP V. MARNE , J.]

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