

[Citation : RLW 1993(1) Raj. 212]

(Rajasthan High Court)

HON'BLE RAJESH BALIA, J.

**Bhim Singh and Another
Versus**

Bakhtawar Lal and Another

S.B. Civil Regular Second Appeal No. 142 of 1977, decided on 10.03.1993

- (a) Easement Act, Sec. 45 and 47 - Extinction of Elementary Right — In case of easement of absolute necessity of vertical support from the whole of ground floor for use and enjoyment of ownership of the first and second floor of the tenement including right to construct or reconstruct his share of the original tenement - There is a right of easement of vertical support from the servient heritage from the date the unit was divided by partition — Suit is within limitation. (Para 34)

1/2 I d[kpkj vf/kfu; e & /kkj 45 o 47 & I d[kpkj ds gd dk foLrkj & I d[kpkj dh vkr; frd vko'; drk dh fLFkr ea l kjh ry efty l s m/ol l gkjk gksxk ftl l s igyh rFkk ml jh eftyka ds Lokfero dk ykHk fy; k tk l ds ftl ea bu ea jgs Lokfero ds eny vdkka 1/2 fgLI k% ds fuekZk vkj iqu% fuekZk dk gd Hkh fufgr gS & tc ml ifj l j dh bdkbZ fgLI ka ea ca/h] rc ds fnuad l s vud oh l Eifr l s I d[kpkj dk gd m/ol l gkjs dk ikr gks x; k & okn ifj l hek ea l fLFkr gqvk gA 1/4 n l a; k 34 1/2

- (b) Easement Act, Sec. 24 and Sec. 25 — The dominant owner is authorised to do all acts necessary to secure the full enjoyment of the easement without detriment to the dominant owner — Unless the right of easement enjoyed by the dominant heritage is adversely affected by any act of the serient owner the serient owner is not liable for maintenance and upkeep of serient heritage — In case of necessity of verticle support he is not entitled to any compensation or damages for repair and carrying out such reconstruction of walls lending verticle support to his tenement — Decree of injunction for restoring verticle support cannot be passed. (Para 37)

Appeal allowed.

1/2 I d[kpkj vf/kfu; e] /kkj 24 o 25 & I d[kpkj l s i w k z ykHk yus dk vf/k" Bk; h & Lokh dks gd gS fd ftl gsrq og l kjs vko'; d dr; djsxk tks ml ds foijhr ugh gks & tc rd vf/k" Bk; h Lokh dk I d[kpkj Hkksxus dk gd] vud oh Lokh ds fdl h dr; l s foijhr ugh gS rc rd vud oh Lokh ij dkbZ ftEepknh ugh gS fd og m/ol l gkjs dh ns[kHkky dja vkj vud oh l a fr dks Bhd j [ks & m/ol l gkjs dh vko'; drk iMus ij og ftEepkj ugh gS fd og ifrdj vFkok upl kuh ikr djs ; k m/ol l gkjs dks cuk, j [kus ea ifj l j dh fnokyka ds fuek.kz ea gqvk [kpl ogu djs & m/ol l gkjs dks mi yC/k djkus gsrq 0; knsk dh fMdh ikfjr ugh dh tk l drh gA 1/4 n l a; k 37 1/2

vi hy LohdkjA

Case Law Referred

(1) Makhan Lal vs. Indra Prasad (AIR 1967 Allahabad, 302)

B.R. Mehta, *for Appellant*

None Present, *for Respondents in spite of service.*

Hon'ble BALIA, J.—This second appeal is directed against the judgment and decree dated March 30, 1977 passed by the Civil Judge, Udaipur in Civil Appeals No. 29 of 1973 and 21 of 1973 dismissing the suit for injunction reversing the judgment and decree passed by the Additional Munsif and Judicial Magistrate, No. 2, Udaipur on December 18, 1972 in Civil Original Suit No. 1 of 1971.

(2) The facts in brief are that House No. 221 in Ward No. 9 situated at Udaipur was an ancestral property of plaintiff-appellant Padam Singh and the defendants Bakhtawar Lal son of Gopal Lal and Shanti Lal son of Bakhtawar Lal. On a partition, the ground floor became the property of defendants and the upper storey consisting of first floor and second floor became the property of plaintiff Padam Singh. As a result of this partition of one property, plaintiff became entitled to verticle support of walls of building on ground floor. It appears that the building was in dilapidated condition, there was a notice from the Municipal Council, Udaipur for demolishing of the house. As a result of which the first and second floors belonging to the plaintiffs were demolished, according to plaintiffs in 1950 and according to defendants in 1947.

(3) The ground floor, though had not been demolished but has also been stated to be in dilapidated condition and is not sufficiently strong enough to give support to the reconstruction of the upper storeys which the plaintiff wants to make. While the rooms A and B shown in Ex. 5 site-plan annexed with plaint is admitted to exist, it is alleged by the defendant that roofs of ovri and padsal also fell down after demolition of storeys belonging to plaintiffs somewhere in 1950. Plaintiff claims that roofs etc. have been constructed in 1961. The plaintiff demanded of defendants to repair and reconstruct the ground floor so that he can make reconstruction on his portion of his house. Having failed to get response from the defendants, he has filed the suit for permanent injunction against the defendants that they may be directed to construct ground floor or allow the plaintiff to construct it and to recover the costs of such construction of the defendants and if the plaintiff is not permitted to construct the ground floor, such construction may be made through Public Works Department at the costs of the defendants. Prayer for special costs was also made.

(4) The defendants admitted that the property was of the joint property of the parties and that first and second floor belongs to the plaintiff whereas ground floor belonged to the defendants. However, they further claim that since 1948 first floor and second floor did not exist and therefore, plaintiff has lost his right of easement of verticle support from the ground floor building belonging to the defendants and therefore, he is now not entitled to reconstruct the first and second floor after a lapse of 20 years. Nor the plaintiff can seek a mandatory injunction that defendants reconstruct the part of their first floor which has fallen down. It is not disputed that the remaining construction of the

ground floor is also not in good condition. The defendants claimed the dismissal of the plaintiff's suit.

(5) The trial court framed the following issues: —

1. क्या विवादाग्रस्त सम्पत्ति के उपर की दूसरी व तीसरी मंजिल कोई विद्यमान होकर वादी के स्वत्व व आधिपत्य की थी और इसका क्या प्रभाव है?
2. क्या वादी ऊपर की मंजिलों व छत को सन् 1961 तक लगातार बीस वर्षों से अधिक समय से निर्विरोध उपयोग करता रहा है जिससे उसे सुखाचार प्राप्त हो गया और इसका क्या प्रभाव है?
3. क्या छत के नीचे का भाग डोमिनेन्ट हेरिटेज के विनिष्ट होने से सुखाचार का शमन हो गया और साथ नष्ट हो गया इसका क्या प्रभाव है?
4. क्या कोई वाद उत्पन्न नहीं होता?
5. क्या नीचे की मंजिल जीर्ण अवस्था में है जिसे सुपुष्ट करने को प्रतिवादीगण को अधित किया जा सकता है और इसका क्या प्रभाव है?
6. क्या वाद समयावधि से परे है?
7. प्रतिकार

(6) On Issue No. 1, the trial court found that the first and second floor existed on the disputed building prior to year 1947 and so long as these storeys are reconstructed within 20 years after their demolishing, the plaintiff has got a right of support from the ground floor.

(7) On Issue No.2, it was held that the plaintiff has got right of vertical support from the servient heritage as an easement of necessity. Therefore, its existence does not depend on the prescriptive period of 20 years.

(8) On Issue No.3, it was held that the right of support was not completely extinguish but was merely suspended and the plaintiff has got a right to revive it by reconstruction and this right he had got only on the two rooms shown as A & B in site-plan Ex. 5 and not on the ovri and padsal shown as C & D in Ex.5 because they have got no roof and no walls and are in the shape of a platform.

(9) Issue No.4 was decided against the defendant. It was held that present case falls under S.45 of the Easement Act and the rights could be revived within 20 years under S. 51 of the said Act.

(10) On Issue No. 5, the court held that though the plaintiff is entitled to do all necessary acts for full enjoyment of easement but he is not entitled to recover the costs of repairing and reconstruction from the owner of servient heritage, unless the right of easement has been affected by any overt act of the servient owner and that defendants are not duty bound to keep the servient tenement in good repairs and maintain it for the benefit of dominant tenement.

(11) On Issue No.6, the court held that since the building is said to be reconstructed within 20 years of its demolition, the suit is not barred by time. Moreover, it held that the right of easement in question is giving rise to continuous cause of action as and when the plaintiff wants to make use of such

easement and he is denied of the same. Hence for any fresh denial new cause of action arise to give fresh start of period of limitation.

(12) On these findings, the plaintiff's suit was decreed partially. The plaintiff was allowed to repair and reconstruct the walls and roof of rooms A and B belonging to Shantilal and then construct the first and second floor as it existed prior to 1950. But relief to construct anything on Padsal 'D' and ovri 'C' was denied.

(13) It was further held that the plaintiff shall not be entitled to get any compensation for the construction done on rooms A & B in site-plan Ex.5. The defendant's were restrained from obstructing the plaintiffs in carrying out the construction as directed by the decree.

(14) Aggrieved with the aforesaid judgment and decree both the plaintiffs as well as defendants, preferred appeals. Appeal No. 21 of 1973 was filed by the defendant whereas Appeal No. 29 of 1973 was filed by the plaintiffs.

(15) The first appellate court allowed the defendants appeal and dismissed the plaintiffs appeal by its judgment and decree dated March 30,1977 holding that the suit was barred by time and also that the plaintiffs have no right to repair the ground floor and construct the first floor. The plaintiffs suit was dismissed in toto.

(16) This court while admitting the Second Appeal framed the following substantial questions of law arising in the appeal : —

1. Whether in the facts and circumstances of the case the lower Appellate Court was right in holding that the suit was barred by time?
2. Whether in the facts and circumstances of the case the plaintiff has acquired the right of easement of vertical support from the servient heritage before the storeys were removed and he was entitled to vertical support from the servient heritage for reconstruction of his second and third storeys on the date of suit?

(17) No one appeared on behalf of the respondent inspite of service. It may also be noticed that while Bakhtawar Lal defendant No. 1 had expired during the pendency of first appeal and his L.R.'s were brought on record in the first appeal, the plaintiff-appellant Padam Singh as well as defendant No.2 respondent Shanti Lal died during the pendency of this Second Appeal. Their respective L.R.'s were also brought on record.

(18) Both the courts below have examined the case from the point of view that the case is covered by Ss. 45 and 51 of the Indian Easements Act, 1982 and in arriving at the conclusion about the question whether the suit is within limitation or not by applying the test whether the first floor and second floor, in respect of which easement of verticle support was claimed, was in existence within 20 years before the filing of the suit. While the trial court has categorically held that the suit is file within 20 years of the demolition of the first and second floor on dominant heritage, the first appellate court without arriving at any finding, decided the suit by saying that the suit has been filed

beyond limitation. The judgment of the first appellate court is a monumental, non-speaking order while reversing the decree passed by the trial court.

(19) Be that as it may, before I examine the Issues in detail, suffice it to say that even assuming that the case is covered by Ss. 45 and 51 of the Indian Easement Act, the plaintiff in his Para-3 of the plaint has stated that he has received notice of removing the upper storeys and he removed them in 1950. In reply to that, the defendant in para-3 have stated that the upper storeys were demolished prior to July 1950. In Para-4 of the written statement, the defendant has stated that first and second floors did not exist after 1948 before the room of ovri was removed in 1950. On pleadings of the parties, it is apparent that the defendant himself stated that the first floor and upper storeys were in existence up to 1948, if not up to 1950. The suit has been filed in March 1967 within 20 years of the approximate date of the demolition of the upper storey, as admitted by the defendant in the written statement. Thus on the envil of S. 45 read with S. 51 of the Indian Easement Act, the suit has been filed within 20 years of the demolition of the upper storeys and claiming relief of the repair and reconstruction of servient tenament within 20 years, must be held to be within limitation.

(20) However, in my opinion, the courts below have not examined the Issue from its proper prospective by taking into consideration that the nature of the right claimed by the owner of the upper storeys as a dominant heritage, is entitled to vertical support from ground floor as an easement of absolute necessity and that plaintiffs ownership to upper storeys of buildings were not denied.

(21) It would be profitable to refer to relevant sections of the Easement Act:-

"S.13. Easements of necessity and quasi-easements: —

Where one person transfers or bequeaths immovable property to another,—

(a) If an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the

testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,—

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the later as it was enjoyed when the partition took effect, he shall, unless the different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clause (a), (c) and (e), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

ILLUSTRATION : (m) Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

S. 24. Right to do acts to secure enjoyment: — The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

S. 25. Liability for expenses necessary for preservation of easement, — The expenses incurred in constructing works or making repairs, or doing and other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

S. 27. Servient owner not bound to do any thing, — The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement; but he must not do any act tending to restrict the easement or to render its exercise less convenient.

S.41. Extinction on termination of necessity. — An easement of necessity is extinguished when the necessity comes to an end.

S.43. Extinction by permanent change in dominant heritage. — Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished unless -

- (a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or
- (b) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or
- (c) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

S. 44. Extinction on permanent alteration of servient heritage by superior force. — An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement;

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage; and the provisions of Section 14 apply to such a way.

S. 45. Extinction by destruction of either heritage. — An easement is extinguished when either the dominant or the servient heritage is completely destroyed. S. 46. Extinction by unity of ownership. — An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

S.47. Extinction by non-enjoyment. — A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

An easement is not extinguished under this section: —

- (a)
- (b)
- (c) When the easement is a necessary easement.

S. 51. Removal of Easement. —An easement extinguished under Section 45 revives (a) when the destroyed heritage is, before twenty years have expired restored by the deposit of alluvion; (b) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site and (c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under S. 46 revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under S. 47."

(22) S. 13 envisages how an easement of necessity comes into existence which discloses in unequivocal terms that easement of necessity comes into existence not as a result of any prescriptive right but as a result of severance of ownership of one tenement into two or more tenements. Illustration (m) to the Section 13 declares that if as a result of partition of a joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it, A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

(23) Section 14 deals with the right of servient tenement in the case of easement of necessity to a right of way, to set out the way, which must be reasonably convenient for a dominant owner.

(24) Mode of extinction of an easement of necessity is provided under S. 41 which states that an easement of necessity is extinguished when the necessity comes to an end. In this connection it may also be noticed that S.43 which provides for extinction of easement by any permanent change in dominant heritage, materially increasing the burden on the servient heritage, excludes the easement of necessity from the operation of the said provision. It is also to be noticed that nothing in S.43 applies to an easement entitling the dominant owner to support of the dominant heritage.

(25) In the like manner S. 47 provides where a continuous easement is extinguished when it totally ceases to be enjoyed for an unbroken period of twenty years, or a discontinuous easement is extinguished when, for a period of twenty years, it has not been enjoyed. However, easement of necessity is excluded from the operation of S. 47.

(26) The other provisions of Easement Act which provide for various modes of extinguishment of easement and their revival have to be read in the light of specific provisions made regarding an easement of necessity particularly an easement of necessity of vertical support to which a dominant owner is entitled for the subsistence of his tenement in exercise of his right of ownership itself. As we are concerned in the present case with an easement of vertical support claimed by the plaintiff which has come into existence as a result of partition and is squarely covered by Illustration (m) of S. 13.

(27) The circumspect analysis of the above provisions would reveal that an easement of necessity stands on altogether different footings than an easement acquired through enjoyment of any benefit through servient tenement for a prescribed period by the dominant tenement. The necessary concomitant of an easement of necessity is that they arise on severance of tenement which was once a one unit. It may be noticed that right of vertical support to a building is an easement of absolute necessity, as withdrawal of support not only affects the enjoyment of dominant tenement but results in destruction of dominant tenement itself affecting the ownership right of the dominant owner. It is also to be noticed that right to vertical support from the lower storey is a part of easement of necessity and right to construct on the dominant heritage by the owner thereof is not in exercise of easementary right but is a right of the ownership. The right of construction or reconstruction of

storeys belonging to plaintiff is not a right of easement which can be affected or extinguished by an act or omission of the servient heritage. If that is kept in view, it is apparent that easement of necessity can come to an end only in one circumstance that is to say when the necessity of such easement is extinguished and that is the provision made in S. 41 of the Easement Act. So long as the severance of tenement, which once constituted as single unit, exists, the necessity of the owner of dominant heritage to draw vertical support from the ground floor or the floor beneath also exist and is necessary adjunct to the right of ownership to upper storeys notwithstanding that the upper floor may not be existing for the present. Removal or non-existence of vertical support of the ground floor or the floor beneath the dominant heritage not only affects the right of enjoyment but also affects right of ownership of upper storeys. It may also be seen from the various provisions quoted above, that Sections 43, 44 and 47 will show that any permanent change in dominant heritage, any permanent change in servient heritage, even by non user of an easement of necessity for any prescribed period does not result in extinguishment of an easement of necessity. The provisions of S. 47 is a complete answer to the defendants' plea that because the upper storeys have not been constructed by the plaintiff for over a period of twenty years, thereby, the plaintiff has lost his easement of vertical support of ground floor for raising construction of floors on space which belongs to him. According to S. 47, easement of necessity is not extinguished even if it is totally ceased to be enjoyed as such for an unbroken period of twenty years. Likewise S. 45 also cannot be held applicable to right of dominant heritage to have support of vertical walls in order to keep intact his dominant heritage.

(28) So long as the land exists, on which the ground floor and the upper storeys can be constructed, the owner of first floor and second floor have a right to reconstruct the floor/storey at space of his ownership and so long as that right exists, necessity to have vertical support from the ground floor also exists. By demolition of building, the right of ownership to have their building reconstructed on the first floor or second floor is not extinguished. This is also the conclusion if one look at S. 47 which does not envisage loss of easement of necessity even if they are not continuously used for a period of twenty years or more. Therefore, really, the present case is not an extinguishment of easement and its revival, but is a case where a right was never extinguished but its user is co-extensive with exercise of right of ownership as an owner of dominant ownership. Since, in the present case, the ownership of the plaintiff of the first and second floor has never been denied and it is also not the case that right of the plaintiff for carrying construction above the ground floor have ever been lost the fact that it was not used for twenty years or more has no bearing on the question on the existence and extinguishment of easement of necessity and consequently, the question of limitation for filing suit in exercise of such right also does not arise, in the present case.

(29) Right of easement of necessity is not capable of being lost by non-user for a particular period, the question of its extinguishment and its revival within the prescribed period also does not arise. The true position is that an easement which is depending on severance of tenement, which was once a one

tenement, continuous to exist so long as status of severance exists and is extinguished only, when the same person became entitled to hold both the dominant and servient heritage as envisaged in S. 46 of the Act.

(30) Even for the sake of argument of it is assumed that demolition of ground floor amounts to destruction of heritage within the meaning of S. 45, it can be invoked only in the case of complete destruction of the heritage and not otherwise. As is apparent from the pleadings of the parties, servient heritage is not completely destroyed inasmuch as rooms A and B shown in Ex. 1 continue to exist. Nor the dominant heritage is completely destroyed in as much as on the part of the servient heritage there are existing roofs over which the plaintiff in exercise of his right of ownership has right to construct.

(31) In *Makhan Lal vs. Indra Prasad* (1) in a like situation, it was held while interpreting S. 47, as under: —

"A resume of this section would show that the plaintiff had a right of vertical support from the walls of the defendant's room. Now it has to be considered as to whether this right of his has been lost on account of the falling of the western and the southern walls of the defendant's room. In my opinion that right subsists and is not lost. The argument of the learned counsel for the appellant loses sight of the facts of the case. Before we can apply section 45 of the Easements Act there must be a finding to the effect that there is a complete destruction of the dominant or servient heritage. This is not the case here. Dominant heritage in this case is the house ABCD of which the room standing on the defendant's room CEFG is a part. It cannot be said in this case that there was a complete destruction of the dominant heritage and on the facts of this case and admission of the defendant it is also proved that there is neither complete destruction of servient heritage also.

Therefore, there is no question of the applicability of section 45 of the Easement Act. Consequently, it is not necessary to notice Section 51 of the Easements Act which deal with the revival of the extinguished easements under Section 45 of the Easements Act."

(32) The trial court has rightly held that exercise of such right to easement of absolute necessity of like vertical support of all walls on the ground floor by a owner of dominant heritage existed on first and upper floors furnishes the owner of continuous cause of action and on each occasion such right gives fresh cause of action giving a fresh start of limitation.

(33) From the pleadings of the parties it is also apparent that the overi and padsal had fallen after the demolition of first and second floor of plaintiff's tenements and the plaintiffs had a right of vertical support even on such overi and padsal, at the time of demolition of the upper storeys. That right of ownership still exist and the right to reconstruct the demolished portion of ground floor, necessary to draw vertical support for the upper storeys is not extinguished, and therefore, the plaintiffs right of easement to draw vertical support from the full servient tenement as it existed before demolition, remain unaffected.

(34) As a result of aforesaid discussion, I hold that the plaintiffs had an easement of absolute necessity of vertical support from the whole of ground floor for use and enjoyment of his ownership of the first and second floor of the tenement including his right to construct or reconstruct his share of the original tenement. The plaintiff has acquired a right of easement of vertical support from the servient heritage from the date when the whole tenement which was once a one unit was divided by partition and was converted into two heritages. The owner of the first floor and second floor being the owner of dominant heritage acquired the right of easement of vertical support of the servient heritage of the ground floor. Removal of the upper storeys did not affect the existence of right of that easement and plaintiff was therefore, entitled to vertical support from the servient heritage for the reconstruction of the second and third storeys (first and second floors on the date of the suit). The suit filed by plaintiffs is within limitation.

(35) Now it may be examined as to what is the right that dominant owner in respect of easement of necessity enjoys. A combined reading of Ss. 24, 25 and 27, reproduced herein above leaves no room of doubt that so far as position in India is concerned where the rights and obligation of dominant heritage and servient heritage are governed by statute, the servient heritage owner is not bound to do anything for dominant heritage and he is entitled to use the servient heritage in any way consistent with the enjoyment of easement.

(36) This is also clear from the Illustration (e) of S. 27.

(37) S. 24 which authorises the dominant owner to do all acts necessary to secure the full enjoyment of the easement, without detriment to the dominant owner. The Scheme is clear that unless the right of easement enjoyed by the dominant heritage is adversely affected by any act of the servient owner, servient owner is not liable for maintenance and upkeep of servient heritage. However, if on account of any act of servient owner, the right of enjoyment of easement is affected, the dominant owner is entitled to damages. Since, in the present case, it is not even the case of the plaintiff that by any overt-act of servient owner-defendant the right to vertical support of walls has been affected, rather is the case of the plaintiffs himself that due to non-maintenance and weather effects the ground floor has fallen into disuse so as to lend any vertical support necessary for beneficial enjoyment of his tenement. In such cases, the plaintiff is entitled to enter and restore the vertical support of wall to which he is entitled to for enjoyment of dominant heritage, including the reconstruction of the first and second floor, but he is not entitled to any compensation or damages for repair and carrying out such reconstruction of walls lending vertical support to his tenement nor he is entitled to a decree of mandatory injunction against the defendants for restoring vertical support to the plaintiffs. This is clear from the provisions of S. 25 of the Act.

(38) As a result of the above discussion, the appeal is allowed. Judgment and decree passed by lower appellate court is set aside and plaintiffs suit is decreed in following terms.

(39) It is declared that the plaintiffs have an easement of absolute necessity to draw verticle support from the ground floor described in the plaint and shown in site-plan Ex.5 for reconstruction of first floor and second floor over the ground floor, which were of ownership of the plaintiff. In order to secure that verticle support, the plaintiff is further entitled to do all necessary acts including carrying out repairs or restoring the walls of ground floor lending verticle support to the plaintiffs tenament of the upper storeys to the extent, he was entitled to such support from the servient tenament at the time of severance of original tenament in respect of properties described in para-2 of the plaint and detailed in site-plan Ex.5 attached to the plaint over the rooms, ovri and padsal marked A,B,C, & D. However, such repair and restoration work shall be done by the plaintiff at his own costs. The defendants are further restrained from interfering with or obstructing in carrying out of such repairs and reconstruction work by the plaintiffs.

(40) There will be no order as to costs of appeal.
