

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 61 of 2014**

1. Jaison Dias,
Major,
Residing at House No.1504,
Orda, Candolim, Bardez, Goa .. Appellant

V/s

1. Mr. Ramesh Ramchandra Pawar
Major,
r/o Aradi, Candolim,
Bardez, Goa.
2. Mr. Luis Dia,
Major,
Residing near St Sebastian Chapel,
Orda, Candolim, Bardez-Goa
- 2a. Mr. Pedro Dias,
Major, Indian National,
s/o late Antonio Carmino Dias,
R/o Orda, Candolim, Bardez, Goa.
- 2b. Mr. Angelo Dias,
Major, Indian National,
s/o late Antonio Carmino Dias,
r/o Orda, Candolim, Bardez, Goa.
3. Mrs. Philomena Silveria,
Major,
r/o Simer Candolim,
Bardez-Goa
4. Mr. Devendra M. Gohar,
Major,
R/o Tonca, Camara Bhat,
Caranzalem-Goa.
5. Mr. Sameer S. Dessai,
Major,
r/o Calangute, Bardez Goa

- 5a. Mr. Mohan Krishna Kudalkar,
r/o House No.2/224/A
Naikvaddo, Calangute,
Bardez, Goa.
6. Mr. Bryan Romauldo Cosme Dias,
Major,
And his wife,
7. Mrs. Maria de Fatima Perpetua,
Socorro Reverdo,
Both residing at Jessma Apartments,
Xettia Waddo,
House No.295(5)5,
Duler, Mapusa, Bardez, Goa.
8. Mr. Anil Ramu Sutar,
Major, Residing at Orda,
Candolim, Bardez Goa
9. Mr. Joao Luis Silveira,
Major,
Residing at Simer, Candolim,
Bardez-Goa
10. Mrs. Delilah Pereira,
And husband
11. Anthony Jaques,
Major,
Both residing at H.No.84
Ullem Bhat, Batim,
Goa Velha, Tiswadi, Goa.
12. Mrs. Bharati H. Belicatti,
Major and
13. Mrs. Sunita A. Shirgaonkar,
Both residing at Orda,
Candolim, Bardez-Goa.
14. Mr. John Victor J.
Major,
Residing at Orda,
Candolim,

Bardez-Goa.

15. Mr. Anthony X. N. Rebello
Having its office at Saldanha Building
Behind O Heral Office,
Panaji-Goa.
16. Mr. Saluzinho Soares,
residing near St. Sebastiao
Chapel,
Orda Candolim, Bardez Goa.
17. Mr. Anant C. Parshekar,
Notary Public,
having office behind Samrat Theatre,
Panaji Goa
18. Village Panchayat of Candolim,
through its Secretary,
Candolim, Bardez Goa
19. State of Goa,
through its Chief Secretary,
Secretariat Building,
Alto Porvorim,
Bardez, Goa.
20. Town & Country Planning
Department
through Chief Town Planner,
Dempo Towers, Patto,
Tiswadi Goa.
21. Calangute Police Station,
through its Police Inspector,
Calangute, Bardez goa.
22. Mamlatdar of Mutations,
at Mapusa, Bardez, Goa. .. Respondents

Mr. C. Padgaonkar, Advocate for the appellant.

Mr. G. Agni, Advocate for the respondent nos.2, 2a, 2b and 16.

Mr. Anthony Rebello, Advocate for the respondent nos.1, 8, 10, 11

and 14.

Mr. G. Panandikar, Advocate for the respondent no.18.

None present for the respondent nos.19 to 22.

CORAM :- C. V. BHADANG, J.

Date : 16th July, 2015

ORAL JUDGMENT :

This is an appeal by the original plaintiff against the judgment and order dated 06/06/2013 passed by the learned District Judge, North Goa, Panaji in Civil Suit No.51/2007. By the impugned judgment, the learned District Judge has rejected the plaint against the respondent / original defendant nos.19 to 22 under Order VII, Rule 11(a) and (d) of the Code of Civil Procedure (C.P.C., for short).

2. The brief facts, necessary for the disposal of the appeal, can be stated thus :

That the appellant claims to be the co-owner of properties bearing Survey No.82/2, 82/7 and 82/12 situated at Orda, Candolim, Bardez, Goa. The appellant claims that he is in peaceful possession and enjoyment of the said property along with

the co-owners. Sometime in August, 2006, illegal tree and hill cutting operation was carried out in the said property by some unknown persons/ migrants, without the permission of the appellant or the other co-owners. It was contended that the hill cutting is prohibited under Section 17A of Goa, Town and Country Planning Act, 1974 (Act of 1974, for short) and the same is punishable under Section 17B as a cognizable offence.

3. Joaquim Dias, the late father of the appellant had reported the matter on 02/08/2006 to various authorities, namely the Director of Mines and Industries, Panaji, Goa, Block Development Officer and the Town and Country Planning Department, Mapusa, Goa. The Senior Town Planner, Mapusa, Goa, had accordingly, issued a letter dated 04/08/2006 to P.I., Calangute Police Station asking to intervene in the matter. However, the illegal hill cutting activities, continued unabated and the appellant found that some of the migrants had also built houses in a portion of the property. On enquiry, the Secretary, Village Panchayat, Candolim, had informed on 29/09/2006 and 21/04/2007 that no permission/ licences were granted for construction of the houses in the said properties. However, subsequently, the appellant learnt that the Village Panchayat had allotted house numbers and had also issued N.O.C. for obtaining

electric / water connection for the said illegal houses.

4. Further, according to the appellant, on enquiry with the migrants, it was learnt that they had purportedly purchased the properties, which prompted the appellant to obtain Form No. I and XIV and he found that the names of the migrants/ occupants are recorded along with original owners. On obtaining of extract of register of mutation, maintained by the Talathi of Calangute, it was found that certain portions of the said property were shown to be sold to the said applicants, in pursuance of the documents executed/ registered before the Sub-Registrar, Bardez at Mapusa. They were purportedly executed by one Mr. Paul Dias, the alleged Power of Attorney of the original owners. According to the appellant, the power of attorney was forged and even the person, who purportedly acted on the strength of the power of attorney, was not real Paul Dias, but some one, who impersonated him. In short, it was contended that Paul Dias has neither executed the sale deeds nor had signed or put his finger impression and photographs to the sale deed.

5. On 18/07/2007, when the appellant along with one Damian Telles went to the properties with Surveyor Mr. Sebby Pinto, the respondent nos.1 and 3 with their accomplices, abused

the plaintiff and other co-owners and he was manhandled and threatened with life. That was reported by the appellant on 23/07/2007 to Police Station, Calangute. According to the appellant, the respondent nos.20 and 21 being State Authorities/ Officers, ought to have acted in the matter of illegal hill cutting, once the same was brought to their knowledge. It was also contended that the respondent no.22 ought to have verified the authenticity of the power of attorney before acting on the same and recording the mutation. It was contended that the respondent no.22 failed to discharge his obligation, resulting into a fraud being perpetrated upon the appellant and the other co-owners.

6. In such circumstances, the appellant filed Civil Suit No.51/2007 before the learned District Judge with the following prayers :

“a) For a Judgment and Decree of declaration to the effect that the Deed of Sale dated 4-4-2003 registered under No.890; Deed of Sale dated 13-2-2003 registered under No.340; Deed of Sale dated 03/02/2003 registered under No.266; Deed of Sale dated 25-4-2002 registered under No.968; Deed of Sale dated 4-4-2003 registered under No.765; Deed of Sale dated 16-4-2003 registered under No.895; Deed of Sale dated 23/07/2004, registered under

no.507; Deed of Sale dated 07/06/2005, registered under no.2429, Deed of Sale dated 03/02/2003, registered under No.3, Deed of Sale dated 28/06/2006, registered under No.34, to be illegal, null and void.

b) For a judgment and decree of cancellation calling upon the Office of the Civil Registrar cum Sub-Registrar Bardez, Mapusa, Goa to produce and deliver the original Deeds of Sale referred in prayer a) and after examining the legality of the same be pleased to cancel the aforestated Deeds of Sale.

c) For a judgment and decree of declaration to the effect that the 2 Power of Attorneys both dated 20/01/2003 in favour of Mr. Paulo Dias and Mr. Luis Dias, the Defendant No. 2, executed before Notary Public, Mr. Anant Panshekar, the Defendant No. 17, be declared as illegal, null and void.

d) For a judgment and decree of mandatory injunction directing the Defendant Nos. 1, 3 to 14 and/or the Defendants 18 and 20, to demolish the illegal constructions built by them in the abovesaid properties, bearing survey nos. 82/2, 82/12 and 82/7, Orda, Candolim, Bardez, Goa and to deliver and hand over vacant and peaceful possession of the abovesaid properties in their original condition and also direct the Defendant Nos. 1, 3 to 14 to pay onto the plaintiff damages @ Rs. 200/- per square metre, for the respective portions of the suit properties purchased by them alongwith interest @ 12% p.a., from the date of filing the present suit until actual payment.

e) For a judgment and decree of permanent injunction restraining the Defendant Nos. 1, 3 to 14, their agents or servants or any person acting on their behalf from alienating, transferring or creating a charge or creating any encumbrance or creating any third party rights or changing the nature of the abovesaid properties or carrying on any further constructions in the abovesaid properties.

f) For a judgment and decree of mandatory injunction directing the Office of the Mamlatdar of Mutation to correct the survey records, by deleting the name of the Defendant Nos. 1, 3 to 14 from the Form I and XIV of the abovesaid properties bearing Survey Nos. 82/2, 82/7 and 82/12.

g) For a judgment and decree of permanent injunction, restraining the Defendants 18 and 20 from respectively issuing any construction license/ regularizing structures or sanctioning/ approving any plans for construction of structures in the abovesaid properties bearing Survey Nos. 82/2, 82/7 and 82/12.

h) For a judgment and decree of permanent injunction restraining the Defendant No. 22 from carrying out any mutation of names in the Form I & XIV of the abovesaid properties bearing Survey Nos. 82/2, 82/7 and 82/12 directly or indirectly on the basis of the Deeds of Sale referred in prayer a) above.

i) For a judgment and order of temporary injunction restraining the Defendant Nos. 1, 3 to 14, their agents or servants or any person acting on their behalf from alienating, transferring or creating a

charge or creating any encumbrance or creating any third party rights or changing the nature of the abovesaid properties or carrying on any further constructions in the abovesaid properties, pending hearing and final disposal of the present suit.

j) For an order directing the Bailiff of this Hon'ble Court or such other person as this Hon'ble Court deems fit and proper, with the assistance of the Bailiff to inspect the abovesaid properties bearing Survey Nos. 82/2, 82/7 and 82/12, Orda, Candolim, Bardez, Goa and take proper measurements of the illegal structures existing thereon and to submit his report before this Hon'ble Court.

k) For a judgment and decree, directing the Defendants 15-17, to pay to the plaintiff, a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs only), as compensation towards mental shock, agony and tension, caused in executing the Power of Attorney dated 20/01/2003."

7. It appears that when the suit had reached the stage of recording evidence, the learned District Judge, suo moto examined the question whether the suit would be maintainable against the respondent / defendant nos. 19 to 22 under Order VII, Rule 11 of C.P.C. The parties were put to notice accordingly. It appears that the appellant filed an application exhibit D-21 for amendment of the plaint, which was rejected by the learned District Judge. The

learned District Judge, on hearing the parties, came to the conclusion that the plaint deserves to be rejected under Order VII, Rule 11 (a) and (d) of C.P.C. In that view of the matter, the plaint came to be rejected against the respondent nos.19 to 22 and it has been returned to the plaintiff to be presented before the proper Civil Court (insofar as rest of the defendants are concerned).

8. Feeling aggrieved, the appellant is before this Court.

10. I have heard Shri Padgaonkar, the learned Counsel for the appellant, Shri Rebello, the learned Counsel for the respondent nos.1, 8, 10, 11 and 14, Shri Gaurish Agni, the learned Counsel for the respondent nos. 2, 2A, 2B and 16, Shri Panandikar, the learned Counsel for the respondent no.18.

9. It is submitted by Shri Padgaonkar, the learned Counsel for the appellant that the learned District Judge erroneously came to the conclusion, at a preliminary stage, that the respondent nos.19 to 22 had acted in good faith. It is submitted that such a conclusion could not have been reached at the outset, particularly when at the stage of considering whether the plaint needs to be rejected under Order VII, Rule 11 of C.P.C., the Court can only look into the contents of the plaint, as they

stand. It is submitted that the appellant had clearly set out a case that, had the Statutory authorities/ Officers acted promptly and taken action, the other respondents/ occupants could not have succeeded in defrauding the appellant and other co-owners. It is contended that the learned District Judge ought to have seen that the appellant and his late father had lodged written complaints/ representations to the authorities and as such, it could not be said that the claim was based on illusory grounds. It is contended that in the face of the pleadings in the plaint, the same could not have been rejected at the threshold, as the question of lack of cause of action or legal bar, if any, can be decided at the stage, after commencement of trial. It is contended that the immunity granted to the officers/ parties under Section 121 of the Act of 1974, presupposes that they have acted in good faith, which would mean that they have acted with due care and caution. It is submitted that the appellant had clearly come with a case that the respondent no.22 had failed to verify the genuineness of the power of attorney, on the basis of which the registered post cards were received conveying no objection for mutation. It is submitted that thus, the impugned order deserves to be set aside.

10. The learned Counsel for the respondent nos.1, 2, 2a, 2b, 8, 10, 11 and 14, 16 and 18 have supported the impugned

order on similar grounds and submissions.

11. In view of rival circumstances and submissions made, the following points arise for my determination in this appeal. I have recorded my findings against the same, for reasons which follow :

(i) *Whether the plaint deserves to be rejected on the ground that it does not disclose a cause of action ?*

(ii) *Whether the plaint deserves to be rejected on the ground that the suit is barred by any law ?*

12. At the outset, it may be mentioned that there was no formal application filed on behalf of any of the respondent nos.19 to 22 claiming that the plaint be rejected under Order VII, Rule 11 of C.P.C. The learned District Judge has placed reliance on the decision of the Allahabad High Court in the case of **Umesh Chandra Saxena Vs. Administrator General**, reported in AIR 1999 Allahabad 109, in order to hold that the exercise of power under Order VII, Rule 11 of C.P.C. does not require any application being filed and that it can be examined at any stage of the suit. It has been held that it is the duty of the Court to reject

the plaint, if the reasons therefor are found existing from a reading of the plaint. The learned District Judge has then placed reliance on a decision of this Court in ***M. V. "See Success I. Vs. Liverpool and Loondoon Steamshsip Protection and Indemnity Association Ltd.,*** reported in AIR 2002 Bombay 151, in which it has been held that the plaint can be rejected against some of the defendants.

13. There cannot be any dispute with the proposition that in appropriate case, if the plaint does not disclose cause of action against some of the defendants or when it is barred under any law against the said defendants, it would be open to the Court to reject the plaint qua these defendants and it is not necessary that in such a case, the entire plaint should be rejected. In this case, the learned District Judge has acted *suo motu* in the matter and had proceeded to examine the plaint and had found that it deserves to be rejected under Order VII, Rule 11(a) and (d) of C.P.C. When this exercise was adopted, the suit had reached the stage of recording of evidence. It is now well settled that while exercising power under Order VII, Rule 11 of C.P.C., the Court has to confine itself to the allegations in the plaint and the documents, if any, produced and cannot have recourse to any defence actual or probable. Thus, the plaint, as it stands, should appear to be

lacking, cause of action or barred by any law. In view of this, no enquiry or assessment of the material is contemplated at this stage.

14. Insofar as the defendant no.20 i.e. the Town and Country Planning Department is concerned, the learned Trial Court has placed reliance on Section 121 of the Act of 1974, which reads thus :

“121.Bar of legal proceedings - No suit or other legal proceeding shall be maintained against the Government, Planning and Development Authority or any of its officers or persons duly appointed or authorised by it in respect of anything in good faith done or purporting to be done under the provisions of this Act or the rules or regulations made thereunder.”

15. The Court has then went upon examining the meaning of the term 'the act' as defined under Section 3(2) of the General Clauses Act, 1897 to find that the term 'act' used with reference to an offence was a civil wrong and it shall include a series of acts and words, which refer to acts done, extend also to illegal omissions. Thus, the Court has found that the word 'act' under the General Clauses Act would cover illegal omissions also and the bar

under Section 121 of the Act of 1974 would be attracted.

16. I do not find that the construction and reliance as placed can be accepted. At the outset, it needs to be mentioned that the term 'act' as defined under Section 3(2) of the General Clauses Act, is with reference to an offence or a civil wrong. Thus, when it comes to an act, which amounts to an offence or civil wrong, not only some positive acts, but some illegal omissions would also be covered. The Act of 1974 is enacted to provide for planning and development and use of rural and urban land in the then Union Territories of Goa, Daman and Diu and for purposes connected therewith. Thus, it is obvious that the object of the Act is to have a planned and regulated development. For the purposes of the said object, the Act has created some authorities, including the planning and development authority. Section 17A prohibits cutting of hilly lands and filling low lying land etc. and Section 17B provides for penalty for contravention of Section 17A. Thus, the Act not only prohibits, but also penalises illegal hill cutting *inter alia* amongst other things. The Town and Country Planning Department is entrusted with the duty to ensure the enforcement of the Act. For instance, Section 52 of the Act of 1974 gives power to require removal of unauthorised development, Section 53 gives power to stop unauthorised development and Section 54 gives

power to require removal of unauthorised development or use. Thus, there are powers invested in the Authorities created under the Act, to ensure that the objectives of the Act are achieved. Section 121 of the Act of 1974 has to be read in the context of the object of the Act and the nature of the powers with which the authorities created under the Act are clothed. The provisions similar to Section 121 of the said Act are found in several other legislations, where the officers, while acting bonafide in exercise of their powers conferred, are granted immunity from legal proceedings. This is to ensure that such authorities act without fear or favour in discharge of their duties. If we were to hold that such provisions which grant immunity to the officers/ authorities also for illegal omissions, that would frustrate the very purpose of the Act and also would run counter to the objective of clothing such officers/ authorities with immunity. For example, if under a particular legislation, an authority is invested with powers and also with duty to take action with immunity for acting or purporting to act under the provisions of the said legislation, it cannot be gainsaid that said immunity would also be applicable in the matter where the authorities omit to do what the authorities are otherwise expected to do under the Act. I would hasten to add that this Court is not expressing any opinion as to whether, in the present case, the concerned authorities had acted with or without

good faith. This question would essentially turn upon and can be decided and gone into at the trial of the suit. However, the reasonings articulated by the learned District Judge for rejecting the plaint as against the respondent no.20, based on Section 121 of the Act of 1974, in my considered view, cannot be accepted.

17. Insofar as the respondent no.22, namely the Mamlatdar of mutations is concerned, the learned District Judge has relied upon Section 106 of the Goa, Daman and Diu Land Revenue Code which reads as under :

“106. Bar of suits.— No suit shall lie against the Government or any officer of the Government in respect of a claim to have an entry made in any record or register that is maintained under this Chapter or to have any such entry omitted or amended.”

18. The Trial Court has found that the appellant had sought for deletion of the names of the original defendant nos.1, 3 to 14 and as such, the bar as provided under Section 106 of the Code would be attracted.

19. Section 106 as reproduced above, would clearly show

that no suit shall lie against the Government or any officer of the Government in respect of the claim to have an entry made in any record or register that is maintained under this Chapter or to have any such entry omitted or amended. It would appear from prayer clause 48(h), which is reproduced above in paragraph 7, that insofar as the original defendant no.22 is concerned, the appellant is seeking a decree in the nature of permanent injunction, thereby restraining the original defendant no.22, Mamlatdar of Mutations from carrying out any mutation of names in the Form No.I and XIV of the properties, which are subject matters of dispute. This relief, in my view, would clearly fall within the ambit of Section 106 of the Land Revenue Code as reproduced above. Thus, so far as the question of the original defendant no.21, namely Calangute Police Station is concerned, the submission is that the act of breach of the provisions of Section 17-A of the Goa, Town and Country Planning Act is a cognizable offence under Section 17-B of the said Act. For this reason alone, the defendant no.21 may not be retained as a party defendant in the suit. The fact that the act, which is alleged, is an offence, would not per se afford cause of action to file the suit against the respondent no.21. No relief is claimed against the respondent no.21. This will not preclude the appellant from taking recourse to appropriate remedy in criminal law against the persons allegedly committing breach of Section

17A of the Act of 1974, if so advised. Thus, the points are answered partly in the affirmative as regards the respondent nos.21 and 22 are concerned. In such circumstances, the following order is passed :

ORDER

1. The appeal is partly allowed.
2. The impugned order, to the extent rejecting the plaint as against the respondent nos.19 and 20 (original defendant nos.19 and 20) is hereby set aside.
3. Consequently, the order, returning the plaint is also set aside. The suit is restored on the file of the learned District Judge-1, Panaji.
4. Parties to appear before the Trial Court on 07/08/2015.
5. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

SMA