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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 144 OF 2013

1. Mrs. Jennifer Mascarenhas,
wife of Januario Mascarenhas,
major of age, business,
age 42 years, and her husband,
2. Mr. Januario Mascarenhas,
son of Santan Mascarenhas,
age 47 years, business,
Both resident of Amaralwaddo,
Taleigao, Tiswadi, Goa. ... Petitioners.

V e r s u s

1. Mr. Jose Antonio Domnic Dias,
S/o late Crisostomo P.C. Dias,
35 years, married, service,
r/o H. No. 68, Bondir,
St. Cruz, Tiswadi, Goa.
2. Village Panchayat St. Cruz,
Through its Secretary,
Office of V.P. St. Cruz,
St. Cruz, Tiswadi, Goa. ... Respondents

Mr. S. D. Padiyar, Advocate for the petitioners.

Mr. V. Shirodkar, Advocate for the respondent no. 1.

Mr. Purshottam Karpe, Advocate for the respondent no. 2.

Coram :- F. M. REIS, J

Judgment reserved on : 18th December, 2014

Judgment pronounced on : 13th March, 2015

J U D G M E N T

Heard Shri S. D. Padiyar, learned Counsel appearing for

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the petitioners, Shri V. Shirodkar, learned Counsel appearing for the respondent no. 1 and Shri P. Karpe, learned Counsel appearing for the respondent no. 2.

2. The above Writ Petition, inter alia, seeks to quash the Order dated 30.01.2013 passed by the Adhoc District Judge, North Goa, at Panaji, in Misc. Civil Appeal No. 116 of 2012.

3. The records reveal that the respondent no. 1 filed Regular Civil Suit No. 161 of 2011 in the Court of the Civil Judge, Junior Division, at Panaji, against the Petitioner and the respondent no. 2, inter alia, seeks for a permanent and mandatory injunction and other consequential reliefs. An application for temporary injunction was filed therein, inter alia, to restrain the petitioners from doing any construction activity in the suit property and/or from changing the nature thereof in any manner. A reply and written statement was filed in the suit by the petitioners and the respondent no.2. The Petitioner also filed a counter claim in the said suit. The learned Civil Judge by an Order dated 31.10.2012, dismissed the application for temporary injunction.

4. Being aggrieved by the said Order, the respondent no.1 filed an appeal before the Lower Appellate Court, which came to be

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disposed of on 19.11.2012 thereby allowing the Appeal and quashing and setting aside the Order of the learned Trial Judge dated 31.10.2012.

5. Being aggrieved by the said order, the petitioners have filed the present writ petition.

6. Shri S. D. Padiyar, learned Counsel appearing for the petitioners, has assailed the impugned Order on the ground that it is well settled that an Order of temporary injunction is within the discretion of the learned Trial Court and, as such, interference in such discretionary Orders by the Appellate Court is in very exceptional circumstances when there is perversity or erroneous exercise of discretion by Trial Court. Learned Counsel further pointed out that the learned Trial Judge upon appreciating the evidence on record rightly exercised the discretion in refusing the temporary injunction application and, as such, the Lower Appellate Court was not justified to interfere in the said Order in an Appeal under Section 104 of the Civil Procedure Code. The learned Counsel further pointed out that the findings and conclusion of the Appellate Court on the aspect of prima facie case balance of convenience and irreparable loss are misconceived in law and fact and, as such, cannot be sustained. Learned Counsel further

pointed out that the Lower Appellate Court has failed to examine the provisions of the Goa (Regulation of Land Development and Building Construction) Act, 2008 and Goa Land Development and Building Regulations, 2010 in their correct perspective whilst passing the impugned Order. The learned Counsel further pointed out that the Lower Appellate Court has failed to examine that the petitioners had obtained all the requisite permissions from the statutory authorities and, as such, the petitioners were entitled to put up the construction in their own property. Learned Counsel further pointed out that the respondent no. 1 himself has carried out an illegal development in his own plot adjoining to the disputed property and, as such, the respondent no. 1 was not entitled for any equitable relief. The learned Counsel further pointed out that the learned Appellate Court has also failed to note that the major part of the construction of the frame work and slab of the second floor was completed and, as such, grave injury would occasion to the Appellants by the impugned Order. The learned Counsel further pointed out that the learned Appellate Court had erred in refusing to rely on the Deed of Rectification dated 06.05.1999. The learned Counsel further pointed out that a conversion Sanad was also obtained by the petitioners herein. The learned Counsel has thereafter taken me through the technical clearance Order dated 11.10.2011 from the Planning Authorities and pointed out

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that the development activity is in accordance with law. The learned Counsel further submits that the inspection report of Shri Bhobe cannot be relied upon as it is self contradictory. The learned Counsel also pointed out that the report dated 29.11.2011 by the Planning Authorities clearly shows the extent of the construction put up by the petitioners which extends up to second floor. Learned Counsel has thereafter taken me through the Judgment of the Lower Appellate Court to point out that it cannot be sustained and deserves to be quashed and set aside. Learned Counsel also pointed out that the respondent no.1 has not shown any injury or inconvenience or irreparable injury in order to be entitled for a temporary injunction. Learned Counsel further pointed out that the construction put up by the petitioners has a value of more than Rs.50,00,000/- and, as such, the question of granting any interim reliefs without putting the respondent no.1 on terms is not at all justified. Learned Counsel further points out that no injury has been established by the respondent no.1 and only because the Respondent no.1 is an adjoining owner of the property in dispute surveyed under no. 416/7 the respondent no.1 is not entitled for a relief of injunction. Learned Counsel as such submits that the impugned Order be quashed and set aside.

7. On the other hand, Shri Shirodkar, learned Counsel

appearing for the respondent no. 1 has supported the impugned Order. Learned Counsel has pointed out that the Appellate Court has appreciated the evidence on record to come to the conclusion that the respondent no. 1 has made out a prima facie case and these findings of fact recorded by the Appellate Court cannot be re-appreciated in a Petition under Article 227 of the Constitution of India. Learned Counsel further points out that it is the case of the respondent no. 1 that his parents are owners of the property bearing survey no. 416/7 of Vilalge Calapur, Tiswadi Taluka by virtue of a compromise Decree dated 06.04.1988. Learned Counsel further submits that the the father of respondent no. 1 expired on 07.03.2009 and, as such, the respondent no. 1 and his other brothers and sisters acquired undivided rights to the property along with the mother. The learned Counsel further pointed out that property was thereafter divided into three equal parts and that the total area of the property surveyed under no. 416/7 is mentioned as 618 square metres but the measurements at the site did not actually tally with the graphical distance therein and, as such, according to him, the area at loco was 570 square metres. Learned Counsel further pointed out that the plot bearing letter no. 'C' was allotted to the parents of the respondent no. 1 and plots identified under no. 'A' and 'B' were allotted to Milagres Jose Santana Barretto and Santaninha Leonildes de Silva and

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further a strip of land having a width of 2.5 metres was reserved on the northern boundary of the property under survey no. 416/6 for the purpose of access in continuation of the two metre wide way existing on the northern boundary so that a road of 4.5 metres is provided to the respondent no. 1 in the property as owners thereof. Learned Counsel further pointed out that the petitioners have put up an illegal construction without maintaining the proper set backs and in breach of the statutory regulations which forced the respondent no. 1 to file the suit, inter alia, to stop such construction. Learned Counsel further pointed out that by the proposed construction, the Petitioner encroached into the access reserved between the two survey numbers and, as such, the necessary set backs have not been maintained by the petitioners. Learned Counsel further pointed out that the statutory permissions have been granted on an assumption that the petitioners have an area of 400 square metres under survey no. 416/3 at loco when, however, the area is only 344 square metres. The learned Counsel further points out that the Lower Appellate Court has come to the conclusion that the required set backs have not been maintained and rightly granted the injunction. Learned Counsel further pointed out that the Lower Appellate Court has relied upon the Judgment of this Court in the case of ***Fatima Joao vs. Village Panchayat of Mercas***, reported in ***2000(10) LJ***

SOFT 18, to come to the conclusion that the relief of injunction is to be granted. Learned Counsel as such pointed out that the above Petition be dismissed.

8. Shri Karpe, learned Counsel appearing for the respondent no. 2, has pointed out that the statutory authorities have already granted permissions after examining the relevant facts and circumstances of the case.

9. I have duly considered the submissions of the learned counsel and I have also gone through the records. It is the case of the respondent no.1 in the plaint that his parents are the owners of the property bearing survey No. 416/7 of Village Calapur. The father of the respondent no.1 expired on 07.03.2009 and consequently, the respondent no.1 along his other brother and sister acquired undivided right to the property along with their mother. The father of the respondent no.1 had acquired right to the property pursuant to the compromise decree dated 06.04.1988 passed by the learned Civil Judge Senior Division at Panaji in Special Civil Suit No. 180/80/A whereby the property bearing survey Nos. 416/6 and 7 were divided into three equal parts. As per the survey records, the total area of the said two survey holdings admeasure 618 square metres but according to the

respondent no.1 the measurement at the site do not tally with the graphical distances shown in the plan and as such the actual area found at loco is 570 square metres. The plot identified by letter 'C' was allotted to the parents of the respondent no.1 and plots identified by letters 'A' and 'B' were allotted to Milagres Jose Santana Barretto and Santaninha Leonildes de Silva. It is further his case that the strip of land having a width of 2.5 metres was reserved on the northern boundary of the property under survey No. 416/6 for the purpose of access in continuation of the two metres wide way existing on the northern boundary, so that a road of 4.50 metres is provided to the respondent no.1. This access according to the respondent no.1 should be enjoyed by the respondent no.1 and the petitioners. According to the respondent no.1, the plots 'A' and 'B' are surveyed under survey No. 416/6 of Village Calapur having an area shown as 406 square metres though in fact the area should have been 380 square metres and that the area reserved for access i.e. 36 square metres being 2.5 metres X 14.40 metres is not shown on the survey plan. Accordingly, it is the contention of the respondent no.1 that only an area of 344 square metres are available at the site. It is also his case that the area of plot no. C surveyed under survey No. 416/7 is shown as 212 square metres instead of 190 square metres as stipulated in the compromise decree but according to

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the respondent no.1, stones have been installed under the said compromise decree indicating the position of the respective plots. It is further the case of the respondent no.1 that by sale deed dated 07.01.1998 the said Milagres Jose Santana Barretto and Santaninha Leonildes de Silva sold an area of 330 square metres from the property surveyed under No. 416/6 to the petitioner no.1 and by deed of rectification dated 06.05.1999 the area of the plot under said sale deed was increased to 406 square metres from 330 square metres on the basis of an area shown in the survey record. It is further his case that such increase of area is without any right and that the petitioner no.1 filed a suit against the parents of the respondent no.1 for injunction and the said suit was contested by the said parents and finally it came to be dismissed for default. It is further his case that the petitioners started doing illegal construction in the property surveyed under No. 416/6 without keeping proper set back which the respondent no.1 noticed when he returned to Goa and immediately approached the respondent no.2 to find out whether any permission for construction was issued to the petitioners. It is further his case that on going through the licence granted by the respondent no.2 he learnt that the petitioner no.1 had projected herself as an owner of an area of 406 square metres and has thus misrepresented the fact before the competent authority and got

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the plans approved as also the construction licence which is in violation of the approved plans. It is also the contention of the respondent no.1 that as per the approval granted by the Town and Country Planning Department, vide letter dated 26.04.2011, the petitioner no.1 has to obtain conversion sanad prior to commencement of the construction but the petitioners have not obtained any such conversion sanad. As such, according to the respondent no.1 the entire construction undertaken by the petitioners is illegal and that upon the complaint the respondent no.2 directed the petitioners to stop the construction activity immediately and after stopping for some time the petitioners again started carrying out such construction and as no action was taken by the respondent no.2, the respondent no.1 approached the concerned police who observed that it was a civil dispute and as such the suit was filed for the aforesaid reliefs.

10. The pleadings of the petitioners disclose that the petitioners contend that the respondent no.1 has misrepresented the material facts and the suit is bad for non joinder of necessary parties. It is further their case that pursuant to the deed of sale dated 07.01.1998 along with deed of rectification dated 06.05.1999, the petitioners have become the owners of the property surveyed under no. 416/6 of Village Calapur. The said

sale deed was never challenged by the father of the respondent no.1 at any point of time despite of his knowledge in the year 2001 in Regular Civil Suit No. 82/2001. It is further their case that the property of the respondent no.1 and the suit property are separated by an access road of 1.50 metres which road is available in the property surveyed under no. 416/2 of village Calapur and that the petitioners have already filed an application for restoration of the said suit. It is also their case that the construction undertaken by the petitioners is carried on the already existing structure surveyed under no. 416/6 and as such there is no question of conversion. It is further their case that stop order issued by respondent no.2 is without any authority of law and is totally contrary to the provisions of Panchayat Raj Act, which the petitioners have independently challenged by preferring Panchayat Appeal No. 134/2011 and the same is pending adjudication. It is further their case that as far as the deviation are concerned such aspect would have to be examined under the provisions of the Goa Land Development and Building Construction Regulation Act, 2010 and in particular sub clause (b) to clause 3.8 whereby such revision can be obtained even at the time of applying for occupancy certificate.

11. The respondent no.2 has also filed the written

statement inter-alia contending that the said respondent has already issued a construction licence dated 10.08.2011 to the petitioners and there is no new construction licence issued. It is also stated that no prejudice or irreparable injury would be caused to the respondent no.1 in case an injunction is not granted.

12. The learned Trial Judge by order dated 31.10.2012 has prima facie held that the respondent no.1 was not an owner in respect of the property surveyed under No. 416/7 situated on the northern side of the property surveyed under No. 416/6. The learned Judge also noted that the property surveyed under No. 416/6 is purchased by the petitioners but the area of the said property as described by the respondent no.1 who stated that such area is 380 square metres whereas it is the case of the petitioners that the area is 406 square metres relying upon the sale deed and deed of rectification. The learned Judge as such after examining the record has held that the compromise decree has more weightage than the deed executed by the parties and therefore, the learned Judge took a prima facie view that the predecessor in title of the petitioners has a right to an area of 380 square metres only and not 406 square metres and they could not have sold an area more than 380 square metres. The learned Judge also noted that it is not the case of the respondent no.1 that there was any

encroachment carried out by the petitioners in the property belonging to the respondent no.1. The learned Judge also noted that the main contention of the respondent no.1 is that there is no proper set back of 3.5 metres from the southern boundary of property surveyed under No. 416/6 as according to the report of Mr. Bhobe, the set back is only 1.5 metres. The learned Judge also took note of the contention of the petitioners that the present construction is merely an extension to the existing ground floor in the suit plot bearing survey No. 416/6. The learned Judge took a view that the construction licence dated 10.08.2011 reveals that the petitioner no.1 was granted licence for the proposed extension to the existing ground floor and the proposed first and second floor in the property bearing survey No. 416/6 which refers to the plans approved by the Town and Country Planning Authority on 12.04.2011. The learned Judge as such noted that the said licence and the technical clearance order indicate that the structure was in existence in the suit property which the petitioners are intending to extend. The learned Judge also noted that the panchayat had granted a construction licence for service workshop in survey no.416/6 and occupancy certificate is dated 03.10.1998 which fortifies the case of the petitioners that a structure was already existing in the suit property. The learned Judge also noted that as far as the deviation is concerned, in terms of the Regulations of

2010 such deviations can be approved at the time of obtaining occupancy certificate. The learned Judge also noted that the suit construction has reached at the level of second floor and the plans were approved in October, 2011 which shows that the set back of four metres has to be maintained on the southern side of the suit construction. The learned Judge also noted that the joint inspection report discloses that the construction has been carried out up to the second floor and that the area covered by the construction is in accordance with the approved plans. It is also noted that the actual set back on the southern and western sides could not be measured as the exact boundary could not be ascertained at the site. The learned Judge as such noted that though the measurement of the set back could not be taken nevertheless, the report dated 29.01.2011 shows that the area covered by the suit construction is in accordance with the approved plans. The learned Judge also noted that the judgment in the case of ***Fatima*** (supra) is not applicable to the facts of the present case. The learned Judge also noted that the respondent no.1 have not established as to what injuries would be caused to them by the suit construction and accordingly, dismissed the application for temporary injunction.

13. In the appeal preferred by the respondent no.1, the

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learned Appellate Court while disposing of M.C.A. No. 116/12 by judgment dated 30.01.2013 has noted that there is no specific dispute of the fact that plots A and B came to be surveyed under No. 416/6 and plot C came to be surveyed under No. 416/7 of Village Calapur. The learned Judge also noted that the access of 2.5 metres width reserved on the northern side has not been excluded from survey no.416/6 and as such, the area available for construction is restricted to 344 square metres as claimed by the respondent no.1. The learned Judge further noted that the survey records are not documents of title and the vendors to the sale deed are entitled to transfer only an area which they owned and possessed. The learned Judge also noted that the technical permission was obtained based on the sale deed as well as the deed of rectification and that as per the technical clearance orders dated 12.04.2011 and 11.10.2011 obtained by the petitioners, they were required to obtain a conversion sanad under the Goa Land Revenue Code, 1968 which they have not obtained. But however, the learned Judge has noted that such conversion sanad dated 31.07.2012 has been produced in the Trial Court along with the additional written arguments. The learned Judge also noted that the application for temporary injunction is not hit by delay. The learned judge further found that the revised proposal for construction by the petitioners is pending with the respondent

no.2. The learned Judge noted that the inspection report of Mr. Bhobe dated 8.11.2011 supports the contention of the respondent no.1 that the construction undertaken by the petitioners is not in conformity with the approved plan. The learned Judge however noted that the joint site inspection report submitted by the Town and Country Planning Authority is not sufficient to rebut the report of Mr. Bhobe. The learned Judge also noted that the construction licence has been obtained without verifying the actual boundaries at the site. The learned Judge also found that the licence produced by the petitioners dated 03.04.1998 in respect of the service workshop was issued on the assumption that the area was 406 square metres. The learned Judge as such found that prima facie set backs have not been maintained. The learned Judge further noted that the Regulations of 2010 does not at all come to the aid of the petitioners since the petitioners had knowingly obtained the permissions from the concerned authorities on the basis of a deed of rectification which was executed by them on the basis of an area shown in the survey records without verifying the actual area available at loco and consequently found that the respondent no.1 has made out a prima facie case. The learned Judge further found that allowing such construction would cause injury to the respondent no.1. The learned Judge as such noted that the learned Trial Court had failed to appreciate the case of the

respondent no.1 in right prescriptive and without noting that the set back could not be verified by the Town Planner and that the learned Judge has erred in holding that the respondent no.1 has not pleaded and established the nature of injuries caused to him due to the said construction. The Appellate Court also found that the Trial Court has erroneously found that new construction was already in existence in survey No. 416/6 on the basis of the construction licence dated 03.04.1998 and consequently, allowed the appeal and granted an injunction.

14. On perusal of the judgment of the learned Lower Appellate Court, it is evident that the learned Judge has re-appreciated the evidence on record to come to the conclusion that the respondent no.1 had made out a prima facie case with regard to the subject construction. On going through the plan attached to the consent decree, I find that plots A, B and C are shown to have an area of 190 square metres each. It is not disputed that plot C belongs to the respondent no.1 whereas the plots A and B were sold to the petitioners herein. The survey records in respect of the property surveyed under No. 416/7 show the area therein as 212 square metres. Prima facie, the said area is not in accordance with the consent decree which otherwise discloses to be an area of 190 square metres only. The respondent no.1 has failed to explain

as to how the area exceeded as shown in the consent decree. The survey records in respect of the property surveyed under no. 416/6 show the area therein to be 406 square metres. The survey records have been duly promulgated. Apart from that, the Trial Court has found that the area of the petitioners prima facie should be considered to be 380 square metres as shown in the consent decree. On perusal of the licence granted by the respondent no.2 dated 10.08.2011, it clearly states that the licence is for a proposed extension to the existing ground floor of the first and second floor as per the plans approved by the Dy. Town Planner vide N.O.C. dated 21.07.2011. This clearly prima facie shows that the construction being put up by the petitioners is only an extension to the existing ground floor plinth area.

15. Mr. Padiyar, learned counsel appearing for the petitioners has in fact stated out that the petitioners have not extended the existing plinth area of the original service workshop which was approved way back in the year 1998. In such circumstances, the learned Trial Judge has noted that in the joint site inspection report the area covered by the construction is in accordance with the approved plans. This shows that from the year 1998 the set back from the southern boundary of the property surveyed under no. 416/6 is the same. In such circumstances, the

learned Lower Appellate Court was not justified to embark into the re-appreciation of evidence to come to any contrary findings on this count. Even on perusal of the inspection report of Mr. Bhobe, he has clearly stated that an area of 26 square metres has been excluded from the property surveyed under no. 416/7 and an area of 22 square metres has been excluded from the property surveyed under no.416/6 at the time of the actual Commissioner's report prepared at the time of the compromise decree. It is further pointed out that such strips are with the holders of the land surveyed under nos. 416/11 and 416/2. These findings of the report of Mr. Bhobe, prima facie are not in accordance with the area as shown in the survey records as pointed out herein above. On going through the area statement in the approved plan the net effective area of the plot is shown as 310.40 square metres. It further discloses that the existing covered area is 85.57 square metres and the proposed covered area is 31.59 square metres. It further shows that the total covered area is 117.16 square metres and as such the coverage consumed is 37.48 square metres. It also shows that the permissible coverage is 124.16 square metres and the permissible F.A.R. (80%) works out to 248.32 square metres. It also discloses that the total floor area (existing plus proposed) worked out to 199.36 square metres and the F.A.R. consumed is 64.23 percent. Taking the said noting into

consideration the findings of the learned Lower Appellate Court that the construction which being put up by the petitioners was not an extension of the existing structure is not in accordance with the material on record. At this prima facie stage, the findings in the said findings would have to be accepted. As such, the construction being put up by the petitioners does not totally consume the FAR nor the coverable area as permitted by the statutory authorities. In such circumstances, the findings of the learned Lower Appellate Court that proper set backs have not been maintained on the southern side, prima facie, does not appear to be correct. No doubt, in case the deviations carried out by the petitioners do not meet the statutory requirements, the authorities will not sanction the revised plans nor grant any occupancy certificate to the petitioners. The authorities will also ensure that the disputed construction is as per the statutory Regulations and the set backs are clearly available at the site before granting the completion certificate. Besides that the learned Trial Judge has rightly noted that it is not the case of the respondent no.1 that the petitioners have carried out any encroachment into their property. Apart from that, there is no irreparable injury prima facie established by the respondent no.1 which would entitle the respondent no.1 for an injunction at this stage. No doubt, any construction activity hereafter put up by the petitioners will be

subject to the result of the suit and the petitioners shall not be entitled to claim any equities on account of such development carried out in the property surveyed under No. 416/6.

16. The learned Trial Judge has rightly noted that the licences have been obtained from the statutory authorities as well as from the Town and Country Planning Authority. The conversion sanad has also been produced by the petitioners. The learned Trial Judge has also noted that the joint inspection report clearly discloses that the coverage of the construction is in accordance with the sanctioned plans. The original licence was obtained for the ground floor way back in the year 1998. In case of any misrepresentation in the approved plans by the petitioners, the statutory authorities can definitely examine this aspect while examining the revision of the plans and granting of the occupancy certificate. At this stage, taking note of the area as shown in the survey records, I find that the learned Lower Appellate Court was not justified to come to the conclusion that the respondent no.1 has established that there is discrepancy in the area as shown by the petitioners while obtaining the permission for the construction in dispute. The learned Trial Judge as such was justified to rely upon the joint site inspection report prepared by the statutory authorities to come to the conclusion that prima facie the

respondent no.1 has failed to prove his contention that the construction put up by the petitioners is illegal. It is also to be noted that even the Dy. Director of Panchayat by judgment dated 14.06.2013 directed the local panchayat to grant technical clearance in respect of construction licence to the petitioners herein in terms of the technical report dated 11.10.2011. Apart from that, admittedly, the construction has already reached the second floor level and the development by the petitioners is prima facie in accordance with the statutory licences. When the Court grants a relief in such circumstances, equity demand that such reliefs are granted by putting the parties on terms to avoid multiplicity of proceedings and do complete justice at the time of the final disposal of the suit on merits. As such in case the Court is inclined to grant a relief to stop an ongoing development which reached the second floor level, the party seeking such relief has to be put on terms to ensure that in case he does not succeed in the suit the aggrieved party would be adequately compensated. The learned Lower Appellate Court has not even examined this aspect whilst passing the impugned order.

17. The Apex Court in the judgment reported in **(2013) 9 SCC 221** in the case of **Mohd. Mehtab Khan and others V/s Khushnuma Ibrahim Khan and others** has observed at paras

20 to 22 thus :

"20. In a situation where the learned trial court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the appellate court could not have interfered with the exercise of discretion by the learned trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The appellate court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the appellate court was wrong in its conclusions what is sought to be emphasised is that as long as the view of the trial court was a possible view the appellate court should not have interfered

with the same following the virtually settled principles of law in this regard as laid down by this Court in *Wander Ltd. v. Antox India (P) Ltd.*

21. Para 14 of the aforesaid judgment which is extracted below would amply sum up the situation: (*Wander Ltd. case*, SCC p. 533)

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under

appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) (P) Ltd. v. Pothan Joseph*: (AIR p. 1159, para 9)

'9. ... These principles are well established; but, as has been observed by Viscount Simon in *Osenton (Charles) & Co. v. Johnston*: (AC p. 138)

"... The law as to the reversal by a Court of Appeal of an order made by [a] Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case."

The appellate judgment does not seem to defer to this principle."

22. Though the above discussions would lead us to the conclusion that the learned Appellate Bench of the High Court was not

correct in interfering with the order passed by the learned trial Judge we wish to make it clear that our aforesaid conclusion is not an expression of our opinion on the merits of the controversy between the parties. Our disagreement with the view of the Division Bench is purely on the ground that the manner of exercise of the appellate power is not consistent with the law laid down by this Court in *Wander Ltd.* Accordingly, we set aside the order dated 9-10-2012 passed by the Appellate Bench of the Bombay High Court and while restoring the order dated 13-4-2012 of the learned trial Judge we request the learned trial Judge, or such other court to which the case may, in the meantime, have been transferred to dispose of the main suit as expeditiously as its calendar would permit with the expectation that the same will be possible within a period of six months from the date of receipt of this order. The appeal shall stand disposed of in terms of the above.”

18. Taking note of the observations of the Apex Court, as the learned Trial Judge upon consideration of the respective cases of the parties and the documents laid before the Court was of the view that the entitlement of the plaintiffs to an order of injunction was seriously doubtful, the Appellate Court could not have interfered with the exercise of discretion by the Trial Judge unless such exercise was found to be palpably incorrect or untenable. The weightage given by the learned Trial Judge while refusing a relief to the respondent no.1 does not indicate that the view taken is not a possible view. In the present case, as pointed out herein above, the learned Trial Judge has relied upon the public documents including the survey records and the permissions granted by by authorities to come to the conclusion that the respondent no.1 has not made out a prima facie case. The learned Lower Appellate Court has re-appreciated the evidence and relied on the affidavits and reports which have to be otherwise proved in the trial to come to the conclusion that there was a discrepancy in the area which finding is contrary to the survey records as well as the other material produced by the parties as pointed herein above. Apart from that, it is not the case of the respondent no.1 that there is an encroachment in his property when in fact even his area is more than the area as shown in the compromise decree. In the face of such material on record, the learned Lower Appellate

Court was not justified to hold that the learned Trial Judge has not exercised the discretion in refusing the application for temporary injunction in accordance with law. No doubt, as pointed out herein above, any construction activities carried out by the petitioners will be subject to the result of the suit filed by the respondent no.1.

19. The reliance placed by the learned counsel appearing for the respondent no.1 in the case of ***Fatima*** (supra) is not applicable to the facts of the present case. The fact therein discloses that the plaintiffs therein inter-alia contend that she had a right of access through the plot belonging to the defendants who was putting up a construction in his property which would affect such right of access of the plaintiffs therein. However, in the present case the respondent no.1 does not claim that he has any right of access through the property purchased by the petitioners surveyed under No. 416/6. Apart from that, the sanctioned licence also do not disclose that the petitioners have consumed the total F.A.R. nor the total allowed coverage area. The main dispute between the parties with regard to the alleged access reserved on the northern boundary of the property surveyed under no. 416/6 which prima facie has not been affected. Merely leaving an access does not in any case divest the title of the owner over such area. Prima facie, there is no material produced by the respondent no.1

to show that there was any transfer of such reserved area in favour of the third party. Apart from that, such alleged access is not depicted in the survey records. The contention of the learned counsel appearing for the petitioners that this Court should not interfere in a writ jurisdiction on the findings of the learned Lower Appellate Court cannot be accepted in the facts and circumstances of the present case. As pointed out herein above, the learned Lower Appellate Court has erroneously exercised its jurisdiction in interfering with the discretion exercised by the learned Trial Judge while refusing the application for temporary injunction filed by the respondent no.1. In such circumstances, the said contention of the learned counsel appearing for the respondent no.1 cannot be accepted.

20. The learned Single Judge of this Court in the judgment passed in ***Appeal From Order No. 45 of 2012 dated 10.05.2013*** in the case of ***Mrs. Ema Moraes V/s The State of Goa and others,*** has observed at para 4 thus :

"4. Perusal of the plaint shows that it does not contain any averment to support the prayer of declaration of easementary right of light and air. There is not even an averment that such a right has been enjoyed by them at any point of time, much

less the manner of such enjoyment. The plaintiffs do not give description of their house in order to indicate the enjoyment of the easementary right and how the same has been obstructed by any act of defendant no.5. The entire plaint is seen to be devoted to the alleged violations by defendant no.5 of the provisions of Planning and Development Authorities Regulations, 2000 and Margao Municipal Building Bye laws, 1979 . Therefore, on a prima facie view of the matter there can be no objection to the construction carried out by defendant no.5 based on any easementary right of the plaintiffs.

21. In view of the discussions supra, I find that the learned Lower Appellate Court was not justified to interfere with the discretion exercised by the Trial Judge. In any event, when the party opts to file a suit, a permanent injunction can be granted in terms of Section 38 of the Specific Relief Act, 1963 which clearly provides that the Court may grant an injunction to the plaintiff to prevent a breach of an obligation existing in his favour whether expressly or by implication subject to other provisions contained in Chapter II. It further contemplates that the act of the defendant should invade or threaten to invade the plaintiff's right to the enjoyment of the property and the cases wherein such injunction

may be granted are clearly specified. In such circumstances, in the present case, the learned Trial Judge has rightly noted that the respondent no.1 has failed to prove the actual injury on account of development being carried out by the petitioners of putting up two floors on the existing ground floor structure in the property admittedly belonging to the petitioners. Apart from that, prima facie the respondent no.1 has failed to establish that the licence obtained by the petitioners is not in accordance with the statutory regulations. The dispute with regard to the area as claimed by the respondent no.1 is to be adjudicated on its own merits at the time of the hearing of the suit. No doubt, as pointed out herein above, any construction activity carried out by the petitioners will be subject to the result of the suit. The statutory authorities would be at liberty to take action against the petitioners in case of any infringement of the construction licence as well as any misrepresentation by the petitioners while obtaining such licence.

22. In view of the above, the impugned judgment passed by the learned Lower Appellate Court dated 30.01.2013 cannot be sustained and the same is quashed and set aside. Any development activity carried out by the petitioners in the disputed property surveyed under no.416/6 of Calapur village shall be subject to the result of the suit filed by the respondent no.1.

:33:

Needless to say that the findings arrived at herein are only prima facie findings and shall not influence the Court while deciding the suit on its own merits. Rule is made absolute in above terms. The petition stands disposed of accordingly.

F. M. REIS, J

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