

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 363 OF 2015

- 1 Inacio Socorro Rodrigues (Deceased)
 2. Mr. Leonato Rodrigues alias Leo Rodrigues,
Aged 41 years,
Seaman,
Son of Inacio Socorro Rodrigues
and his wife
(Through his POA Petitioner no. 3).
 3. Ana Etelvina Alves,
Aged 32 years,
Both residents of House no. 60,
Sodovin, Verna,
Salcete, Goa.
(Original Plaintiffs/Appellants)
- Petitioners

V e r s u s

1. Mrs. Bella Rodrigues,
Aged 62 years,
wife of late Vicente Maria Rodrigues
Housewife,
and her son,
2. Mr. Agostinho Rodrigues,
Aged 39 years,
Son of late Vicente Maria rodrigues,
Service,
and his wife,
3. Mrs. Anceila Rodrigues,
Aged 32 years,
Housewife
4. Mr. Kelly Rodrigues,
Aged 30 years,
Son of late Vicente Maria Rodrigues,
Bachelor,
Service.
5. Mr. Ramson Rodrigues,
Aged 32 years,

Son of late Vicente Maria Rodrigues,
all residents of Sadowin,
Verna, Salcete, Goa.

6. The Sarpanch, Village Panchayat of Verna,
Verna, Salcete, Goa.
(Original defendants/respondents) Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. S. Correia, Advocate for the
Petitioners.

Mr. C. A. Coutinho, Advocate for the Respondent nos. 1 to 5.

Coram :- F. M. REIS, J

Date : 31st July, 2015.

ORAL JUDGMENT

Heard Shri S. D. Lotlikar, learned Senior Advocate appearing for the
Petitioners and Shri Coutinho, learned Counsel appearing for the Respondent nos.
1 to 5.

2. Rule. Heard forthwith with the consent of the learned Counsel.
Learned Counsel appearing for the Respondent nos. 1 to 5 waives service.

3. The above Writ Petition takes exception to seek for a direction of an
order to quash and set aside the Judgment and Order dated 29.11.2014 passed by
the First Appellate Court along with Order dated 15.05.2014 of the learned Addl.
Civil Judge, Senior Division, at Margao, and Regular Civil Suit No. 210 of 2012
granting the temporary injunction in favour of the Respondents herein.

4. Briefly, it is the case of the Petitioners that in the month of August

2012, the Petitioners filed a suit in the Court of the learned civil Judge at Margao, against the Respondents for a permanent injunction and other reliefs. The said suit was filed since the Petitioners were constantly being threatened by the Respondent nos. 1 to 5 in collusion with the Respondent no. 6 who were bent on interfering with the property of the Petitioners. The suit filed by the Petitioners was for injunction to stop the Respondent no. 1 from interfering with the property of the Petitioners. By an ex parte Order dated 18.08.2012, the learned trial Judge directed the Respondents to maintain status quo. The application for temporary injunction was heard by the learned Judge one filed by the Petitioners and the other filed by the Respondent nos. 1 to 5 and by two separate Orders, the learned Trial Judge granted the application for temporary injunction filed by the Petitioners as well as the Respondent nos. 1 to 5. The Respondent nos. 1 to 5 did not file an Appeal challenging the order of injunction granted in favour of the Petitioners but, however, the Petitioners preferred an Appeal against the Order passed by the learned Trial Court in favour of the Respondent nos. 1 to 5 and by the impugned Judgment and Order dated 29.11.2014, the Lower Appellate Court dismissed the Appeal preferred by the Petitioners. Being aggrieved by the Orders passed by the Courts below granting the application for temporary injunction in favour of Respondent nos. 1 to 5, the Petitioners have filed the above Writ Petition.

5. I have extensively heard Shri S. D. Lotlikar, learned Senior Advocate appearing for the Petitioners and Shri C. A. Coutinho, learned Counsel appearing for the Respondent nos. 1 to 5. By the impugned Order, a mandatory injunction is granted in favour of the Respondents, inter alia, directing an opening be made to

allow free flow of water into the drain allegedly located in the property of the Petitioners which is at lower level, which came to be confirmed by the above Lower Appellate Court.

6. When the matter was heard on earlier occasions, there were proposals exchanged between the parties to examine whether the dispute could be presently amicably resolved so that the suit filed by the Petitioners and the Counter Claim filed by the Respondents could be expeditiously disposed of. But, however, as the parties could not come to such interim arrangement, I have proceeded to examine the rival contentions and dispose of the above Writ Petition.

7. Upon hearing the learned Counsel, it is not in dispute that the injunction sought by the Petitioners against the Respondents not to interfere with the property belonging to the Petitioners has attained finality. But, however, the Respondents filed a counter claim as well as an application for temporary injunction whereby the Respondents sought a relief to direct the Petitioners to make an opening to the compound wall to enable free flow water emanating from the property of the Respondents to proceed into the property of the Petitioners which is located at a lower level and thereafter enter a drain located along the property of the Petitioners.

8. It is pointed out by Mr. Coutinho, learned Counsel appearing for the Respondent nos. 1 to 5, that such right to release water into the property of the Petitioners is claimed by the Respondents in terms of Section 7(b) of the

Easement Act. Learned Counsel has further pointed out that the learned Judge on the basis of the report of the Engineer Mr. Shirvoikar, given at the instance of the Respondents, had granted the injunction which is impugned in the present Appeal.

9. On the other hand, Shri S. D. Lotlikar, learned Senior Advocate appearing for the Petitioners, has brought to my notice that it is not the case of the Respondents that any water is entering into the property of the Respondents which has to naturally go into the property of the Petitioners. The learned Senior Advocate has also pointed out that the report relied upon by the learned Trial Judge is totally erroneous as, according to him, such report has no legal value merely because an affidavit was filed. Learned Senior Advocate has also pointed out that the report produced by the Petitioners has been erroneously discarded by the Courts below.

10. Taking note of the rival contentions, it cannot be forgotten that the interference of this Court under Article 227 of the Constitution of India in Orders passed while disposing of application for temporary injunction, are in exceptional circumstances where the Courts below have misconstrued the relevant provisions of law and have failed to examine the rival contentions to arrive at a prima facie findings on the basis of the factual foundations in the pleadings and the alleged claim of right in the disputed property by the Applicant.

11. In the present case, as pointed out by Mr. Coutinho, learned Counsel appearing for the Respondent nos. 1 to 5, the claim of right to seek directions to

make an opening to allow the flow of water into the property of the Petitioners is based on the provisions of Section 7(b) of the Easement Act. On perusal of the impugned Orders passed by the Courts below, I find that there are no prima facie findings by the Courts below to come to the conclusion that such right was in fact prima facie established by the Respondents. Merely because the property of the Respondents is located at a higher level by itself cannot permit the Respondents to claim a right to allow water emanating from the property of the Respondents to be released into the property of the Petitioners.

12. On perusal of the Counter claim filed by the Respondents, the only averment therein is that there has always been a hole on the southern side which was a water passage from the Respondents plot to the Petitioners plot as there is a descending slope from the southern to the northern side and taking into considering the topography of the two plots, the water was shown by the Respondents in the plan annexed to the exhibit. It is also alleged that there is an ascending slope from the northern to southern side and there is a traditional water way from plot 4A to 4E eastern side. Consequently, the Respondents have sought for a declaration and a direction to clear the blockade at the south eastern corner of the suit property.

13. On perusal of the impugned Order passed by the learned Trial Judge dated 15.05.2014, whilst disposing of the application filed by the Respondent nos. 1 to 5, the learned Judge has not at all examined the matter in the light of the provisions of Section 7(b) of the Easements Act whilst coming to the conclusion

that the Petitioners are liable to allow the rain water from the property of the Respondent nos. 1 to 5 into the property of the Petitioners.

14. Section 7(b) of the Easements Act 1882 reads thus :

7. Easements restrictive of certain rights.-

Easements are restrictions of one or other of the following rights (namely):-

(a) ...

(b) **Rights to advantages arising from situation.-**

The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.”

15. The pleadings nor the findings of the learned Judge would disclose that the Courts below have not examined the natural advantages arising from the situation of the plots of the respective parties. In fact, the claim, of the Respondents is that there is a traditional water course which leads into the property of the Petitioners. But, however, there is nothing on record to show from where this traditional water way starts or that any water enters into the property of the Respondent nos. 1 to 5 from the southern boundary of their property.

16. Shri Coutinho, learned Counsel appearing for the Respondent nos. 1 to 5, fairly accepts that there is no discussion on this aspect by the Courts below whilst coming to the conclusion that the Respondents have made out a prima facie case to grant a relief in their favour to make an opening so as to allow water from the property of the Respondent nos. 1 to 5 into the property of the Petitioners.

Hence, I find that unless the Court comes to the conclusion, prima facie, that such rights have been established by the Respondents in terms of the provisions of Section 7(b) of the Easement Act, no relief in the nature of mandatory injunction can be granted in favour of the Respondents. The Lower Appellate Court has also not examined such crucial aspect whilst dismissing the Appeal preferred by the Petitioners. Having failed to examine such aspects, while coming to the conclusion that the Respondents have made out a prima facie case, would itself call for interference by this Court under Article 227 of the Constitution of India.

17. As such, the impugned Orders passed by the Courts below deserve to be quashed and set aside and the learned Trial Judge be directed to decide the application filed by the Respondents for temporary injunction afresh after hearing the Petitioners in accordance with law.

18. In view of the above, I pass the following :

ORDER

(i) The impugned Order passed by the learned Trial Judge dated 15.05.2014 and the Judgment passed by the Lower Appellate Court dated 29.11.2014 are quashed and set aside.

(ii) The matter is remanded to the learned Trial Judge to decide the application filed by the Respondents dated 06.04.2013 afresh after hearing the parties in accordance with law.

- (iii) Rule is made absolute in the above terms.

F .M. REIS, J.

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