

**IN THE HIGH COURT OF BOMBAY AT GOA.****APPEAL FROM ORDER NO. 2 OF 2016.**

Smt. Manicabai N. Tendulkar,  
resident of House No.154/A-2,  
Duler Mapusa Bardez,Goa.

.....Appellant/Original Plaintiff.

Versus

The Chief Officer,  
Mapusa Municipal Council,  
Mapusa Bardez, Goa.

.....Respondent/Original defendant.

Mr. V. P. Thali, Advocate appearing for the appellant.

Mr. S. D. Padiyar, Advocate appearing for the respondent.

**Coram:- K. L. Wadane, J.**

**Reserved on:- 25<sup>th</sup> February, 2016.**

**Pronounced on:- 26<sup>th</sup> February, 2016.**

**JUDGMENT**

Heard Mr. V. P. Thali, learned Advocate appearing for the appellant and Mr. S. D. Padiyar, learned Advocate appearing for the respondent.

2. Admit.

3. Heard forthwith with the consent of the learned counsel appearing for the respective parties.

4. Mr. S. D. Padiyar learned Counsel waives notice on behalf of the respondent.

5. This appeal challenges the order dated 9.10.2015 passed under Order 39 of the CPC by the District Judge-II at Mapusa in Regular Civil Appeal No. 127/2014.

6. Brief facts of the may be stated as follows:-

In the year 1904, an open land admeasuring 21.96 square metres was allotted to the father of the Shri Namdev F. Tendulkar, namely Shri Fondu Rahgunath Tendulkar by the then local body i.e. "Camara Municipal de Bardez" under Portuguese Decree No. 43525. Shri Fondu R. Tendulkar was running a hair cutting saloon during his lifetime and regularly paying ground rent to the municipalities. After the death of Fondu Tendulkar in the year 1953, suit shop was run by his elder son Namdve F. Tendulkar i.e husband of the appellant. On 15.7.1968, a licence was granted to make a permanent construction and Namdev F. Tendulkar was regularly paying the ground rent to the respondent council till his death on 14.3.2003. After the death of Namdev, the appellant came in possession over the suit shop.

7. On 20.3.2009 the plaintiff/appellant filed a Regular Civil Suit no. 49/2009/E in the Court of Civil Judge, Junior Division, at Mapusa against the respondent for permanent injunction. The appellant deposited the disputed amount of Rs.17,082/- in the trial Court. The trial Court has granted temporary injunction restraining the respondent from sealing the appellant's shop. Subsequently the suit

filed by the appellant/plaintiff came to be dismissed on 31.10.2014. The appellant presented the appeal bearing no. 127/2014 before the District Court at Panaji. It is further averments of the plaintiff that the respondent council illegally sealed the appellant shop pending the Regular Civil Appeal No. 127/2014, therefore, the appellant has filed the application for interim relief during the pendency of the present appeal to remove the seal put on the shop of the appellant.

8. On the application for interim relief, the learned trial Court after hearing both sides passed the impugned order which reads as follows:-

“Perused the written submissions. The suit property admittedly belongs to the respondents. This Court has to decide on merits whether the appellant is the lessee of the suit property and whether the trial Court had jurisdiction to try the suit and also whether the suit was maintainable in absence of the mandatory notice under Section 289 of Goa Municipalities Act. Hence, at this stage no interim relief as prayed by the appellant can be granted.”

9. During the course of the arguments, Mr. Thali, learned Counsel appearing for the appellant has argued that admittedly the appellant was in possession over the suit shop, the learned Trial Court, considering the prima facie case, issued injunction against the respondent. However, on the conclusion of the trial the learned Trial

Court has dismissed the suit holding that the suit of the plaintiff/appellant is not maintainable for want of mandatory notice under Section 289 of the Goa Municipalities Act. According to Mr. Thali, learned Counsel the suit of the plaintiff/appellant was dismissed on 31.10.2015, immediately the appellant filed an appeal on 29.11.2014 and during the pendency of the above said appeal before the First Appellate Court, the respondent put a lock to the subject shop. Mr. Thali, learned Counsel further submitted that the appeal is in continuation of the suit. The interim relief was operating during the pendency of the suit, therefore, high handed action of the respondent to put the lock to the suit shop is absolutely illegal and therefore, during the pendency of the appeal, the respondent can be directed to remove the lock by issuing mandatory injunction, and such, relief is necessary in the interest of justice. Mr. Thali, further argued that the learned First Appellate Court without considering the merit of the rival contentions of both sides has passed cryptic order that too without reasons. Therefore, the same is liable to be set aside.

10. As against this, Mr. Padiyar, learned Counsel appearing for the respondent has argued that firstly the suit of the plaintiff is not maintainable considering the prayers of the plaintiff/appellant and secondly the suit of the plaintiff is not maintainable for want of issuance of mandatory notice under Section 289 of the Goa Municipalities Act before institution of the suit. Therefore, Mr. Padiyar has supported the impugned order. Alternatively, he submitted that if

at all the impugned order is set aside then he is ready to argue the application for interim relief within a week time.

11. Mr. Thali, learned Counsel appearing for the appellant has relied upon the following Authorities:-

- i. Baban Narayan Landge Vs. Mahdadu Bhikaji Tonchar and others, AIR 1989 Bombay 247*
- ii. Tanjusree Basu and others Vs. Ishani Prasad Basu and others,.(2008)4 SCC 791*
- iii. Vidyawati Gupta and others Vs. Bhakti Hari Nayak and others, AIR 2004 Cal. 258*
- iv. Morto Manohar Agashikar Vs. Shamsunder P. Naik, 1989(1) GLT 327*
- v. Shri Mussa Aga Vs. Union of India and others, 1989(1) GLT 339.*

12. By referring to the observations of the above cited authorities, he argued that the Civil Court has ample powers to grant mandatory injunction in an appropriate case and according to Mr. Thali this is a fit case in which this Court has to exercise the powers to issue mandatory injunction directing the respondent to open the lock since the suit premises is the only source of earning to the appellant/plaintiff.

13. There cannot be a dispute about proposition laid down in the

cases cited, however, from the order passed by the First Appellate Court, it appears that the First Appellate Court has not given reasons for not granting interim relief as prayed by the appellant. It has been observed by the First Appellate Court that the suit property is admittedly belongs to the respondent, therefore, the First Appellate Court has to decide on merit whether the appellant is the lessee of the suit property or whether the trial Court had jurisdiction to try the suit and also whether the suit is maintainable in the absence of the mandatory notice under Section 289 of the Goa Municipalities Act. The above aspects of the First Appellate Court appear to be cryptic that too without any reasons. Still, the First Appellate Court has not given any reasons for refusal of the interim relief. It is expected from the First Appellate Court to consider the rival contentions of both sides with documentary evidence on record and then either to allow the application or reject it. The learned First Appellate Court has not recorded any reasons and only has expressed that legal aspects involved in the matter are to be decided on merits.

14. In view of the above circumstances, the impugned order dated 9.10.2015 passed in the Regular Civil Appeal No. 127/2014 is liable to be set aside and appeal bearing no. 2/2016 deserves to be allowed. The Appeal from Order is allowed. The Order dated 9.10.2015 is hereby set aside. The learned First Appellate Court is directed to hear the application for interim relief afresh within 15 days after giving an opportunity of hearing to the learned counsel appearing for the

respective parties. Parties are directed to appear before the First Appellate Court on 1.3.2016 dated 10.00a.m.

15. Appeal stands disposed of accordingly.

**K. L. WADANE, J.**

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