

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 15 OF 2015

Mr. Carlos Tavora
Major of age,
Resident of
Trionora Apts, Panaji Goa 403 001

Appellant.

Versus

1. M/s. Boshan Developers Pvt. Ltd.
A Company registered under the Companies Act 1956
Having its office at
B/4 101, 1st floor, Boshan Homes,
Opp. Shri Boddgeswar Temple,
Mapusa, Bardez Goa
Through its Director
Shri Amir Sadashiv Gaitonde.

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

. Respondents.

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Shri Sudin M. Usgaonkar, Senior Advocate with Ms. V.
Palekar, Advocate for the appellant.
Shri Shivan Desai, Advocate for the respondent no.1.
None for the respondent no.2.

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Coram : Nutan D. Sardessai, J.

Date of Reserving the Judgment : 02.04.2016.

Date of Pronouncing the Judgment : 07.04.2016.

JUDGMENT :

1] Heard Shri Sudin Usgaonkar, learned Senior Advocate appearing on behalf of the appellant and Shri Shivan Desai, learned Advocate appearing on behalf of the respondent no.1. None appeared on behalf of the respondent no.2.

2] The dispute centers around even in this appeal relating to the exhaust chimney installed in the terrace of the premises in question.

3] A brief narration of the facts would be necessary to better appreciate the matter in controversy between the parties and to arrive at a conclusive finding on the issue at large arising for determination in this appeal at the instance of the original defendant.

The learned trial Court had disallowed the application of the appellant seeking the relief of variation of the injunction order under Order XXXIX Rule 4 of the Code of Civil Procedure, pursuant to which he had sought the protection of the learned trial Court to permit him to replace the blower and the chimney carving a case that although there was an earlier order passed in favour of the plaintiffs-respondents, he had not offered any challenge thereto as the blower and the chimney was still in a working condition but nonetheless he was constrained to move the application for a variance of the order primarily on the ground that one Shri Desmond D'Costa having his office on the third floor of the building "Dwarakhanath Centre" had complained about the vibrations caused by the blower existing on the terrace of the building and he was also faced with a complaint made by the said Shri Desmond D'Costa to the Goa State Pollution Control Board. In those set of circumstances, the appellant had set out a case that there was a change in circumstance necessitating the variance in the order earlier passed in the plaintiffs' favour.

4] Shri Usgaonkar, the learned Senior Advocate appearing for the appellant took me through the records of the file where he was initially saddled with an order of injunction dated 18/05/2006, the subsequent order dated 18.11.2008 at the instance of the plaintiffs themselves for variance of the earlier order and thereafter to the order in favour of the plaintiffs dated 15.02.2013 which had admittedly not been challenged at the instance of the defendant. He also invited my attention to the Inspection Report drawn at his instance and to the Rule 15 of the Goa, Daman and Diu Public Health Rules, 1987 to buttress his case that the intention of the appellant was primarily to replace the chimney and the blower which would be in the interest of all and avoid any vibrations and problems to the occupants entitling him to the relief of a variation in the order suffered by him. It was also his contention that the learned trial Court had not considered the vital aspect of change in circumstances or hardship which was being caused to him and had been carried away by the earlier order to hold that the present application was hit by the principles of *res judicata* or constructive *res judicata* as to deny him the relief.

The impugned order was a reflection of a total perversity on the part of the learned trial Court and, therefore, an interference was called for with the impugned order. Besides, he relied upon the judgment of this Court in the case of **Mrs. Shrimati Shrirang Naik and others Vs. Shri Vijaykant Sonu Naik and others** in Writ Petition No.519/2013 in support of his case that a variance of an order could be made in the circumstances of the case.

5] Per contra, Shri Shivan Desai, the learned Advocate appearing for the respondent no.1, adverted to the report of the Expert Committee dated 20.11.2015 and to the order of this Court dated 04.03.2015 to contend that there was ample scope for the appellant to install the blower and the chimney on the mezzanine floor. Merely because there was a possibility of reduction in his profits by usage of the mezzanine floor on account of such installation would not be a ground to vary the injunction particularly when the appellant was in private commercial business. Besides, it was his case that there was no capacity for the terrace to hold the unit and there was no challenge to this report drawn by the Expert Committee at the instance of this Court. He adverted to the initial order of injunction in his favour dated 18.05.2006, the subsequent order on his application for variance dated 18.11.2008 and the order dated 12.10.2012 when he was secured with the interim order qua the application of the appellant initially under Order XXXIX Rule 4 of the Code of Civil Procedure and the subsequent order dated 15.02.2013 to submit that there was a restraint order against the appellant which was binding on him for want of challenge.

6] Shri Shivan Desai adverted to the very same letter of the Collector and of the Goa State Pollution Control Board relied upon by the appellant to canvass his case that it was not open to the appellant to seek for the variance of the injunction order in the face of the report. Moreover, the application under Order XXXIX Rule 4 of the

Code of Civil Procedure did not at all indicate which order was sought to be set aside or varied apart from the fact that there was no change in circumstances much less any hardship to the appellant to seek such variance. The principles of *res judicata* strictly applied to the case at hand and the findings of the learned trial Court could not be faulted with on that count. He relied upon the judgment of the Hon'ble Apex Court in the case of **Ajay Mohan and Ors. Vs. H. N. Rai and Ors.** [2008 (2) SCC 507] and the judgment of this Court in the case of **M/s. Chheda Housing Development Corporation Vs. Bibijan Shaikh Farid and Ors.** [2007(3) All MR 780] while concluding his arguments and submitted that the impugned order did not justify any interference and the appeal was liable for dismissal. Shri Usgaonkar, the learned Senior Advocate in reply invited attention to the order of this Court dated 04.03.2015, and the report drawn by the Expert Committee to salvage his case that no hardship would be caused to the other stakeholders i.e. the occupants of the building and that the intention of the respondent no.1, was only to cause harassment to him and to seek his ouster from the premises.

7] i have considered their submissions at length, perused the records, the judgments relied upon (supra), paper book and in view thereof formulate points for determination and answers appropriately for the reasons recorded hereinafter:

Sr. No.	Points	Findings
1	Whether the learned trial Court was in error to hold that the application was hit by the principles of <i>res judicata</i> and/or constructive <i>res judicata</i> ?	... Negative.
2	Whether the learned trial Court had not considered the import of Order XXXIX Rule 4 of the Code of Civil Procedure and or change in circumstances purportedly carved out by the appellant while denying the relief in his favour?	... Negative.
3	Whether the impugned order is <i>per se</i> arbitrary and perverse as to justify interference?	... Negative.
4	What order	... As per final order.

Points 1 to 3:

8] The issues involved here in the present appeal can be dealt with in a narrow compass looking to the nature of the litigation, the objection primarily being to the installation of the chimney and the blower on the terrace of the building admittedly belonging to the respondent no.1 in which the appellant-defendant had admittedly purchased the premises for running his restaurant business. It is borne out from the records that the right of the appellant was restricted to the restaurant premises and that there was no right created in his favour qua the terrace of the building in question. A reference is made thereto, since it has been urged on behalf of the appellant that he has been having the chimney and the blower on the terrace of the building since the inception of the restaurant and almost over a period of ten

years without any objection or resistance from the respondent no.1.

9] The records bear out that the plaintiffs had filed a suit for injunction and claimed an order of temporary injunction with which they were secured pursuant to the order of the learned trial Court dated 18.05.2006 by virtue of which the appellant was directed to remove gas cylinders, ornamental vases placed in the parking area and further directed not to carry out any construction or digging or excavating in the suit property. It is equally a matter of record that the respondent no.1 had sought for a variation of this order by an application under Order XXXIX Rule 4 of the Code of Civil Procedure and they were secured by an order wherein an earlier injunction order directing the appellant to remove the gas cylinders was varied to remove the gas cylinders from the masonry cabinet constructed at a distance of one meter away from the suit premises within the suit property and maintaining the other conditions that he should not carry out any construction or digging or excavating in the suit property. These orders were apparently not challenged by the appellant.

10] The records reflect that the respondent no.1 in October 2012 sought for the relief of injunction to restrain the appellant from fitting or installing the blowers and a generator on the terrace or any portion of the building "A" of the suit property and the respondents were secured by an ad-interim relief in that regard. The appellant had thereafter made an omnibus application in reply to the application for

temporary injunction carving a case that he wanted to replace the old blower with the new one and to replace the chimney as they were not functioning properly due to the passage of time and praying for the reliefs accordingly. However, no relief was granted in the appellant's favour. The learned trial Court, by its order dated 15.02.2013 had restrained the appellant from fitting/installing the blowers and generator on the terrace or any portion of the Building "A" and directed him to remove the blowers and the generator kept in the suit property by way of mandatory temporary injunction.

11] The learned trial Court by another order dated 15.02.2013 disposed off the application of the appellant holding that there was no material on record to support the appellant's case that he had permission or licence for installing the blower and chimney on the platform of the terrace and that the plea of acquiescence canvassed on his behalf did not give any right to replace the blower and the chimney when he had no right to the terrace of the building and his right was restricted to the suit premises alone. This order too was not challenged at his instance and binding on him.

12] A detailed narration of the sequence of events has been warranted and precipitated in the face of the application under Order XXXIX Rule 4 of the Code of Civil Procedure moved at his instance and denied by the order under challenge. It would be apt to refer to, at this juncture, to a lot of hue and cry raised by the appellant that the

respondents no.1 were driven by vengeance to seek the ouster of the appellant from the suit premises and resistance to the installation of the blower and the chimney were directed in that regard. However, the application under consideration nowhere made any reference to any act on the part of the respondent no.1 to seek his ouster nor is it borne out from the records of the file. The application was supported by a letter of the Deputy Collector directing him to shift the exhaust fans from the terrace immediately and the letter of Goa State Pollution Control Board addressed to the Deputy Collector seeking a direction in that regard, apart from the complaint of Shri Desmond D'Costa, which according to the learned Senior Counsel Shri Usgaonkar, constituted sufficient change in circumstances to justify and precipitate the said application apart from the Inspection Report referring to the severe vibrations on the third slab and roof slab and also on the parapet wall, observed at the time of inspection.

13] Shri Usgaonkar, the learned Senior Advocate, in all his ingenuity pushed forth an argument that no hardship would be caused to the respondent no.1 as the appellant would carry out the installation of the blower and the chimney at his expense, therefore, considering the totality of the circumstances, he was entitled to the necessary reliefs. The Report drawn by the Expert Committee appointed by this Court has not been challenged at the instance of the parties to the proceedings and relied upon by both to canvass the irrespective cases. The Report dated 20.11.2015 reflects that the team of Experts on

Inspection had considered the suggestions on behalf of the respondents no.1 and the appellant, and found that the location of the blower on the terrace slab was ruled out from the structural point of view, as the actual loading due to the blower including its foundation exceeded the load carrying capacity of the terrace slab.

14] The Committee had suggested that the mezzanine slab was designed for an imposed loading of 300 kgs/per sq. mt. to 500 kgs/per sq.mt. depending on the proposed anticipated use of the slab and that although only 1/3rd of the shop area was legally permitted for the purpose of a mezzanine floor as per the relevant building bylaws, the loading on the beams from the mezzanine slab was not restricted to 1/3rd length of the beams and the beams supporting the mezzanine floor was normally designed to carry the loading from the mezzanine slab for its entire length. This Report had also made a reference to the absence of structural drawings and design calculations which made it difficult to calculate the exact loading for which the mezzanine level structure had actually been designed but it could be determined by conducting a load-deflection test.

15] The Expert Committee had also suggested an alternative of providing the blower on the outer side of the building with the independent foundation subject to the proposals being in compliance with the Building Rules & Regulations and other statutory compliances. There is no escape for either of the parties to the

proceedings from this Report drawn by the Expert Committee, which has not been challenged by them and considered from both their perspectives.

16] The learned trial Court had considered the case of the parties before it and recorded a categorical finding that the appellant had not obtained any license or permission to install the blower and chimney on the platform of the terrace and the claim of acquiescence on the respondents' part was to be decided on the merits of the case. The learned trial Court had clearly considered the order dated 15.02.2013 which had attained finality and that the application moved by the appellant for a variation of the order did not carve out any change in circumstances except for the support of an Expert Report, the complaint of an occupant and the notices issued by the Deputy Collector, S.D.M. and Goa State Pollution Control Board, which did not qualify as a change in circumstances. Rather the learned trial Court found favour with the case of the respondents no.1 that the appellant being visited with an order of injunction against the fitting or replacing the chimney and the blower and the said order having attained finality, he could not re-agitate his claim by another application for variation of the order and hit by the principles of *res judicata*.

17] In ***Mrs. Shrimati Naik and others*** (supra), a point arose for consideration before this Court was, whether the orders passed by the Courts below rejecting the petitioners' application seeking

permission to suitably modify the temporary injunction order were unreasonable and arbitrary. In the brief facts, the respondents 1 to 5 had filed a suit against the petitioners and the remaining respondents seeking a declaration that decree dated 16.12.2006 was null and void and also seeking perpetual injunction along with an application for temporary injunction pending the hearing of the suit. The trial Court had passed an order on 14.05.2008 which was accepted by the petitioners and the remaining respondents. However, subsequently, the petitioners felt that due to the order, they were not able to make convenient use of the suit house and sought permission of the Court to install a door frame and demolish a part of the wall which was opposed by the plaintiffs and the application came to be dismissed by the trial Court by an order dated 18.03.2011, challenged before the First Appellate Court and dismissed, giving rise to the appeal before this Court.

18] In ***Mrs. Shrimati Naik*** (supra), a plea was also canvassed on their behalf that both the Courts below had not taken into account the factor of hardship, as provided under Order XXXIX Rule 4 of the Code of Civil Procedure and both the Courts had only considered that there was no change in the circumstances and passed the orders which were arbitrary and unreasonable. It was contended on behalf of the respondents 1 to 5 that the circumstances which were in existence at the time of original order of temporary injunction also existed at the time of seeking its modification of temporary injunction

and therefore, no interference was called for with the order. This Court while deciding the appeal in the factual matrix found that there was hardship caused to the petitioners, and which was one of the grounds for variation of temporary injunction and as it was overlooked by both the Courts below, the impugned orders were perverse and arbitrary. However, this judgment is clearly distinguishable on facts and does not buttress the case carved on behalf of the appellant that his case stands on similar footing to entitle him to an order of variance of the injunction order.

19] In ***Ajay Mohan and Ors.*** (supra), Their Lordships of the Hon'ble Apex Court held that it was a trite law that the principles of *res judicata* applied in different stages of the same proceedings, while dealing with the appeal by leave at the instance of the appellants, who were aggrieved with the judgment passed in appeal from the order of a Division Bench of the Bombay High Court whereunder an appeal from an order passed by the City Civil Court, Bombay, rejecting an application for injunction filed by them was dismissed. In the brief facts of that case, the learned City Civil Court found that prima facie, the plaintiff's suit was not maintainable in the absence of any prayer for cancellation and setting aside of the agreement for sale. An appeal had been preferred by the appellants but the same was withdrawn and the order, therefore, attained finality and the Court became functus officio. The High Court, while allowing the appellant to withdraw an appeal passed an order of *status quo* but no reasons were assigned.

20] In **Ajay Mohan**(supra), the plaintiff preferred to file a fresh notice of motion but not an application for grant of injunction asking for an amendment of the plaint which was again withdrawn with liberty to file a fresh notice of motion. Their Lordships held that the plaintiffs had not brought out any new circumstances warranting the grant of injunction in their favour and only because a further prayer had been made in the suit upon amending the plaint by itself did not bring about a situational change warranting application of mind afresh by the learned City Civil Judge and dismissed the appeal.

21] In the case of **M/s. Chheda Housing Development Corporation** (supra), a Division of this Court held that where a view is taken by the trial Court, that would ordinarily have to be upheld, if it was a view capable of being taken, irrespective of the Appellate Court arriving at a conclusion that another view is probable which is a better view and as long as the findings based on which the view is taken are not perverse.

22] The records, therefore, amply bear out that the appellant had failed to bring out any change in the circumstances much less any hardship, which would be caused to them for varying or setting aside the injunction order. Moreover and last but not the least, as rightly submitted by learned counsel Shri Shivan Desai, the appellant had also not specifically carved out which order of injunction was actually sought to be varied or set aside by recourse to the application under

Order XXXIX Rule 4 of the Code of Civil Procedure. Though, this may sound hyper technical, nonetheless the records show that there were three orders passed in favour of the respondents no.1, dated 18.05.2006, 18.11.2008 and 15.02.2013. The appellant's case was, therefore, rightly held to have been hit by the principles of *res judicata* apart from the fact that no case was made out for variance of the order in the absence of any hardship being caused to him.

23] On a parting note, learned Advocate Shri Shivan Desai, has fairly submitted across the bar that the proceedings between the parties had almost come to a close inasmuch as the matter was finally heard and written synopsis were placed on record and it was only on account of the transfer of the Presiding Judge that the judgment was reserved. At this stage, considering the conspectus of facts, the appellant would also not be entitled to any variance in the order considering the stage of the suit which has reached its final culmination and ripe for judgment.

24] In the result, i do not find any merit in the appeal and pass the following order.

Order

The Appeal is dismissed, with no order as to costs. The trial Court is directed to dispose off the matter as expeditiously as possible

within a period of two months from the date of receipt of the order of this Court.

NUTAN D. SARDESSAI, J.

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