

IN THE HIGH COURT OF BOMBAY AT GOA.

Appeal From Order No. 39/2016

1. Mrs. Rukmini Baburao Fotto Dessai, wife of Shri. Baburao Srikant Fotto Dessai, major of age, housewife, Indian National, resident of Maad, Bansai, Cacora, Taluka Quepem, Goa.
2. Mr. Baburao Fotto Dessai, Son of Late Shri. Shrikant Fotto Dessai, major of age, businessman, Indian National, resident of Maad, Bansai, Cacora, Taluka Quepem, Goa. Appellants.

Versus

1. Curchorem-Cacora Municipal Council, having its office at Station Road, Curchorem, Taluka Quepem, Goa.
2. Chief Officer, Curchorem-Cacora Municipal Council, having its office at Station Road, Curchorem, Taluka Quepem, Goa.
3. Executive Engineer, Office of the Executive Engineer, Water Resources Department, Works Division XIV, Gogol, Margao, Goa.
4. Mamlatdar of Quepem Taluka, Office of the Mamlatdar of Quepem Taluka, Quepem, Goa.
5. The Chief Secretary, Government of Goa, Secretariat, Porvorim, Mapusa, Bardez, Goa. Respondents.

Shri I.Agha, Advocate for the appellants.

Shri S. Linhares, Addl. Govt. Advocate for the respondent nos.3, 4 & 5.

Shri A. D. Bhole, Advocate for the respondent nos. 1 and 2.

Coram :- Nutan D. Sardesai,J.
Reserved on:-26th August, 2016.
Pronounced on:- 21st October,2016.

Judgment

Heard.

2. Admit.

3. Heard forthwith with the consent of the learned Counsel appearing for the respective parties. The learned Counsel appearing for the respondents waive notice.

4. The original plaintiffs have taken exception to the order dated 1.2.2016 passed by the District Judge-3 pursuant to which the application for injunction was dismissed in the present appeal coming up for final disposal today.

5. Shri I. Agha, learned Advocate for the appellants came to be heard who contended that the application for temporary injunction was dismissed on the premise that there was no notice in terms of Section 289 of the Municipalities Act, 1968, there was a bar in terms of the Goa Land (Prohibition on

Construction) Act, 1995, that the appellants had failed to produce the licenses of the construction and for want of jurisdiction however the trial Court took a view and drew an adverse inference against the appellants. Shri I. Agha, learned Advocate sought leave of this Court to produce the additional documents by recourse to Order XLI Rule 27 of CPC which were in the nature of licenses to substantiate their case that the construction of the compound wall carried out by them was prior to the coming into force of the Goa Land (Prohibition on Construction) Act, 1995 and therefore, the said Act did not apply to their case. Shri I. Agha, contended that the provisions of the Goa Land (Prohibition on Construction), Act, 1995 did not apply to their case as the construction was carried out sometime in 1985 while the Act came into force w.e.f.14.9.1995. He adverted to Section 289(4) of the Municipalities Act, 1968 and submitted that the suit was maintainable. He referred to the order in the partition proceedings which was post acquisition and that dated 30.7.2003 to separate an area of 1360 sq. mts in the appellants' name apart from the Site Inspection Report to contend that the findings rendered by the learned Trial Court were based on conjectures and surmises. The compound wall in question was in existence for more than 30 to 35 years. The findings rendered by the trial Court were erroneous. He relied in M/s Lakhara and Co. Vs. Shivakaran Bhanwar Lal Kila,[AIR 1995

Raj 17] and prayed for the grant of injunction in their favour. The suit in any event could be expedited looking to the facts of the case.

6. Shri A. D. Bhobe, learned Advocate for the respondent nos.1 and 2 submitted that these respondents had informed the appellants that their land was acquired and that the encroachment made had to be removed. He urged that the bar under Sections 288 and 289 of the Municipalities Act were attracted and prayed for the dismissal of the appeal. Ms. S. Lilnhares, learned Addl. Govt. Advocate for the respondent nos.3, 4 and 5 contended that no notice was issued in terms of Section 80 of CPC. The said respondents had carried out the acquisition in 1995 and paid compensation to the original owners. The land was vested in the Government in terms of Section 16 of the Land Acquisition Act, 1894 and the suit was barred in terms of Section 52 thereof. There was no locus standi in the appellants qua the land and therefore the application apart from the suit had to be dismissed.

7. Shri I. Agha, learned Advocate for the appellants in reply submitted that the action of the respondent nos.1,2 and 3 was based on the complaint of Adel. An inquiry was necessary to find out when the construction was carried out i.e. before 1995

or later. There were no documents produced by the respondents to rebut the presumption of the documents in favour of the appellants. The objections on Sections 16 and 52 of the Land Acquisition Act were not raised before the Trial Court and therefore could not be looked into now as the construction was done in 1985 and the Goa Land (Prohibition on Construction) Act, 1995 came much later in 1995 which was not applicable to the appellants' case. No action was also taken against the appellants in the matter of mutation and therefore it was not open for the respondents to allege suppression. The appeal had therefore to be allowed.

8. M/s Lakhara and Company (supra), held that the jurisdiction of the Court was a mixed question of law and fact and could not be decided at the stage of deciding the application for temporary injunction and for that only averments in the plaint could be seen.

9. Section 4 of the Goa Land (Prohibition on Construction) Act, 1995, provides that no person shall on or from the date of the commencement of this Act undertake any work of construction of any structure or building, hut or other structure or any part thereof on any land belonging to the Government, a local authority or a Comunidade except under

the authority of written permission granted by the concerned authority. A plain reading of this Section would show that the bar under this Act would not apply to the appellants' case inasmuch as on a cursory perusal of the licenses produced on record with the leave of this Court, it is apparent that the appellants had carried out the construction of the compound wall pursuant to the licenses issued by the Village Panchayat as early as 1985 and 1988 alongwith the approved plans and therefore the bar under the Act would not apply.

10. Section 288 of the Municipalities Act 1968 bars the suit against the Councils, its officers, servants etc for acts done in good faith and intended to be done under the Act. Section 289 of the Municipalities Act, 1968 prescribes the limitation of the suits against the council, its committees, officers and servants for acts done in pursuance or execution of this Act which again reads that no suit shall lie against a council or against any committee constituted under this Act, or against any officer or servant of a council in respect of any act done pursuant to or in execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act. Sub-Section 4 however clearly reveals that clauses (a) and (b) of the Municipalities Act, 1968 bar the suit shall not apply to any suit under Section 38 of the Specific Relief Act,

1963 or under sub-section (1) or (2) of Section 92 of this Act. The suit as filed by the appellants was for the relief of injunction in terms of the Specific Relief Act, 1963 and therefore, by virtue of Section 289(4) of the Municipalities Act, 1968, the suit as filed is not barred contrary to the findings of the learned trial Court.

11. Section 16 of the Land Acquisition Act deals with the powers of the Collector to take possession when he has made an award under Section 11 of the Act and thereupon the property shall vest in the Government free from any encumbrances. The bar of Section 52 of the said Act shall not be applicable to the respondents inasmuch as such a plea was not taken up before the trial Court. It however needs to be seen whether there is a material on record to show that the appellants were at all given notice of the said acquisition from the Survey No.476/1 of which the appellants were in possession of a specified area of 1360 sq. mts. and identified by the distinct Survey No.476/1-A which upon resurvey and mutation stands in the name of the appellant no.1.

12. The appellants had otherwise relied upon the order passed by the Deputy Collector and SDO, Quepem pursuant to which he had allowed the predecessor-in-interest of the

appellants for partitioning and resurvey and ordered the Inspector of Survey and Land Records to partition the area of 760 sq. mts. and 600 sq. mts. from the Survey No.467/1 in favour of Laxmi Shrikant Fato Dessai therein i.e. the predecessor of the appellants herein. This order dated 3.9.2002 was apparently post acquisition. Furthermore, the Deputy Collector and SDO Quepem had directed the Inspector of Survey and Land Records, Fatorda Margao to effect the partition of the plot surveyed under No.467/1 and thereupon vide the order dated 30.7.2003 the Deputy Collector had confirmed the revised partition plan and entries and directed the Mamlatdar of Quepem to correct the Survey Records of the Survey No.476/1 making the entries as per the annexure "A".

13. The appellants had otherwise relied upon the Site Inspection Report drawn by the Surveyor who was a retired Government Surveyor and thereupon he had drawn the report dated 24.8.2015 alongwith the plan showing the location of the compound wall and enclosing the area of plot 1360 sq. mts. of the Survey No.476/1-A. Therefore considering all these aspects of the matter, the trial Court was in error to hold against the appellants who had established their claim to the suit plot and showed that the compound wall was in existence since prior to the coming into force of the Goa Land (Prohibition on

Construction) Act, 1995 and that the same was constructed sometime in or around 1984 pursuant to the licenses obtained from the Panchayat.

14. The learned trial Court had also made a reference to the appellants not having made a grievance as regards the acquisition and that if at all the appellants had any grievance as regards the acquisition, the remedy to the appellants was not before this Court but before the Hon'ble High Court in the proceedings under Article 226 of the Constitution of India. However, what was materially lost on the trial Court was that the appellants had carved out their right to the suit plot through their predecessor Laxmi and that there were subsequent proceedings even as late as 2003 when the plot was separated and surveyed in their names. Moreover, at the prima facie stage there was no justification for the learned trial Court to carry out the comparison with the plan annexed to the Sale Deed and that of the suit plot No.476/1-A and to hold that it was a part of the acquired land. There was no basis in the findings of the learned trial Court to invoke the provisions of the Goa Land (Prohibition on Construction) Act, 1995 against the appellants.

15. Ms. Linhares, learned Additional Government Advocate had attempted to obstruct the order in favour of the

appellants on the premise that the land in question was acquired in 1995 and that the original owner was paid the compensation. However, it was nowhere brought on record that the appellants' predecessor was given any notice of the acquisition assuming for a moment that a portion of the plot of 1360 sq. mts. was falling in the acquired area. The learned trial Court therefore was also not justified to apply the provisions of the Municipalities Act, 1968 to hold against the appellants that the suit and the application for temporary injunction were not maintainable. The appellants had therefore to be secured with the order of injunction having shown their rights to the property in question, that the respondents had failed to show that the appellants did had the knowledge of the acquisition and more particularly that a portion of their survey holdings bearing Survey No.476/1-A formed a part of the acquisition. Besides, the respondents had also not been able to show by cogent material that the portion of the compound wall around their plot was constructed in the acquired area.

16. In the result therefore, i pass the following:-

ORDER

- i. The appeal is allowed and the appellants are secured with the relief of injunction to restrain the respondents, their agents, servants, or any persons

claiming through them from taking any action with regard to the compound wall surrounding their property surveyed under Survey No.476/1-A of village Cacora of Quepem Taluka including its demolition or causing to demolish otherwise than in due course of law or in any manner interfering with the suit property bearing No.476/1-A, of village Cacora of Quepem Taluka.

- ii. The appeal stands disposed off accordingly.

NUTAN D. SARDESSAI, J.

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