

IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO. 53 OF 2015.

1. Shri Danu Rayu Fernandes,
Son of Late Shri Rayu Battal
Fernandes, 42 years of age,
married, Resident of H. No.
E-25, Old Goa, Tiswadi Goa.
 2. Smt. Leela Rayu Fernandes,
Wife of Shri Damu Rayu
Fernandes, 41 years of age,
married, Resident of H. No.
E-25, Old Goa, Tiswadi Goa.
 3. Shri Tilu Rayu Fernandes,
Son of late Rayu Battal
Fernandes, 41 years of age,
married, Resident of H. No.
E-25, Old Goa, Tiswadi,
Goa.
 4. Trupti Tilu Fernandes, Wife
of Shri Tilu Fernandes, 38
years of age, married,
Resident of H. No. E-25, Old
Goa, Tiswadi Goa.
- Appellants.

Versus

1. Mrs. Girbani Mazumdar,
Major of age, Wife of Shri
Santosh Srivastava,
Resident of H. No.3, Ella
Farm, Old Goa, Tiswadi
Goa.
2. Mr. Santosh K. Srivastava,
Major of age, Son of late
Shivkumar Srivastava,

Resident of H. No.3, Ella Farm, Old Goa, Tiswadi, Goa.

3. Mr. Paulo Fernandes, Major of age, Resident of H. No. 263/1, A-3, Near Farmer Training Center, Government Quarters, Ella Farm, Old Goa, Tiswadi, Goa.
4. Mr. Ghanashyam Bhomkar, Major of age, H. No. 263/1, A-3, Near Farmer Training Center, Government Quarters, Ella Farm, Old Goa, Tiswadi, Goa.
5. Village Panchayat of Se-Old Goa, Through its Secretary, Old Goa, Tiswadi Goa.
6. State of Goa, Through its Chief Secretary, Secretariat, Porvorim, Bardez-Goa.
7. Town Planner, Town and Country Planning Department, Office of Town Planning, Tiswadi Taluka, Mala, Panaji-Goa.
8. Director, Directorate of Health Services, Primary Health Center Corlim, Tiswadi Goa.
9. Mrs. Paulo Fernandes, Wife of Shri Paulo Fernandes, Resident of H. No.263/1, A-

3, Near Farmer Training
Center, Government
Quarters, Ella Farm, Old
Goa, Tiswadi, Goa. Respondents.

Shri A. D. Bhobe, Advocate for the appellants.
Shri S. N. Joshi, Advocate for the respondent nos.1,2,3,4 and 9.
Shri S. Mahambrey, Advocate for the respondent no.5.
Shri P. Faldessai, Additional Government Advocate for the
respondent nos.6, 7 and 8.

Coram:- NUTAN D. SARDESSAI,J.

Reserved on:-21st July, 2016.

Pronounced on:-12th August, 2016.

JUDGMENT

Heard learned Counsels appearing for the respective
parties.

2. Admit.

3. Shri S. N. Joshi, learned Advocate waives notice on
behalf of the respondent nos.1, 2, 3, 4 and 9, Shri S.
Mahambrey, learned Advocate waives notice on behalf of the
respondent no.5 and Shri P. Faldessai, learned Additional
Government Advocate waives notice on behalf of the respondent
nos.6, 7 and 8.

4. The original plaintiffs are in appeal challenging the order passed by the Additional District Judge-I, Panaji whereby their application for injunction was dismissed. The parties would be referred to in their original status for brevity's sake hereinafter.

5. Shri A. D. Bhole, learned Counsel for the plaintiffs came to be heard who submitted that the suit had been filed with promptitude. A Stop Work Order dated 11.3.2013 was issued by the Statutory Authority and in view thereof no work could be done. Yet however the defendant nos.3 and 4 in particular had carried out the construction activities and whose conduct was relevant for the purpose of deciding the appeal. The contesting respondents had also covered the well during the pendency of the proceedings. He however relented that no injunction could be granted in the manner as prayed since the parties had changed the status quo even during the pendency of the appeal.

6. Shri S. N. Joshi, learned Advocate for the contesting defendant nos.1 to 4 and 9 adverted to the affidavit filed on the

record as also the additional affidavit filed with the leave of the Court apart from the complaint filed by the plaintiffs where there was no reference to any construction activities being undertaken by them. The suit as filed was frivolous and there was no challenge to the Sale Deed of the defendant. Assuming without admitting that there was any right in the plaintiffs it had stood extinguished in view of the Consent Decree dated 15.6.1993. Shri S. Mahambrey learned Advocate for the respondent no.5 and Shri P. Faldessai, learned Addl. Govt. Advocate for the respondent nos.6 to 8 made no specific submission on their stand vis-a-vis the issue at large in the appeal.

7. The plaintiffs had set out a case that they were owners of the property bearing Survey No.124/3-B consequent upon the Inventory proceedings initiated upon the death of Rayu Battal Fernandes and that one plot admeasuring 694 sq. mts surveyed under No.124/3-D was allotted to Regina Fernandes in terms of the decree dated 15.6.1993 in Regular Civil Suit No.20/1992/B. The said Regina who was their grandmother allotted the suit plot to the plaintiffs parents and therefore it was in their enjoyment and possession openly, peacefully and without any interruption from any person so much so that in 1979 their

family constructed a well and used the water for the domestic purposes. The plaintiff learnt upon the notice from the Office of the Deputy Collector that the Sale Deed had been executed by the defendant no.1 in respect of the suit property. During such time the plaintiffs learnt that the defendant no.1 with one Nigalye had executed a Sale Deed dated 11.11.1994 with their grandmother Regina followed by the Deed of Rectification dated 25.2.1997 which was registered on 28.2.1997 and then a Deed of Sale was registered on 15.9.2006.

8. It was the case of the plaintiffs that in January, 2013 they noticed some persons clearing the suit property and on enquiries learnt that the suit property had been attempted to be sold to the defendant nos.3 and 4 by the defendant nos.1 and 2. These Sale Deeds executed with the defendant nos.3 and 4 were fraudulent and executed with clear intention to usurp the suit plot and there were acts of interference by the defendant nos.3 and 4 and therefore they filed a suit for the relief of injunction, declaration and in the interregnum prayed for the interlocutory relief. The contesting defendants raised the preliminary objections to the maintainability of the suit, alleged that they were guilty of suppressing the material facts and averred that

Regina had sold 694 square metres i.e. the suit plot to the defendant no.1 and Nigalye vide the Sale Deed dated 11.11.1994 which was rectified by the Deed of Rectification dated 25.2.1997. Nigalye and his wife sold their undivided share to the defendant no.1 vis-a-vis the Sale Deed of September 2006 and the defendant nos.1 and 2 sold the suit plot to the defendant no.4 by the Sale Deed of 12.10.2009 and the Deed of Rectification dated 19.1.2010.

9. The defendants denied the plaintiffs' case that the well was constructed by the plaintiffs in the suit property and/or water from the well was used continuously by them. The plaintiffs were never in possession nor enjoyment of the suit property nor had any right to the well as also access to the well. It was the defence case that the plaintiffs were aware about the Sale Deeds in favour of the defendant nos.3 and 4 in March, 2010 when they started cutting the trees and the complaints were made by the plaintiffs at the Police Station. The plaintiffs had also not challenged the Sale Deed in favour of the defendant no.1 and Nigalye and had not entered the suit plot after 1994 and therefore the suit and the application were not tenable.

10. It was not particularly in dispute that the Town Planner had issued a Stop Work Order to the defendant no.4 based on the complaints of the plaintiffs who had made representation regarding the well and the well was seen existing in the suit plot. Apparently there was no revocation of this Order at the instance of the defendant no.8. The defendant no.8 had also issued a Technical clearance order dated 11.12.2012 valid for three years in favour of the respondent no.4 and which had admittedly expired on 10.12.2015. In so far as the Stop Work Order was concerned, Shri S. N. Joshi, learned Counsel appearing for the defendant nos.1 to 4 and 9 placed on record a letter of the defendant no.8 dated 25.1.2016 addressed to the defendant no.5 indicating that the Stop Work Order issued as on 11.3.2013 stood withdrawn. This would substantiate his case that the contesting defendant no.4 had carried out the construction in accordance with law and in view of the fact that the application for the temporary injunction stood dismissed at the instance of the Trial Court.

11. The contention therefore of Shri A. D. Bhole, learned Advocate for the plaintiffs that the defendants could not do the work till that date though legally correct would show that

the defendants had done the work thereafter and as submitted by him frustrated the relief of injunction claimed by them in the suit. Shri A. D. Bhobe, learned Counsel also invited attention to the complaints lodged by the plaintiff no.1 at the Police Station against the defendant no.4 and his labourers vis-a-vis the illegal construction carried out by them and more particularly that they had covered up the well using a JCB. However, these statements would not advance the case of the plaintiffs inasmuch as the defendant nos.3 and 4 had carried out the construction in the suit plot by taking advantage of the lifting of the Stop Work Order issued by the defendant no.8. Thus considering the change in the status quo pending the decision of the case, it is apparent that very purpose of seeking the relief of injunction in the appeal and challenging the Order before the Trial Court has to a material extent been watered down.

12. Shri A. D. Bhobe, learned Advocate fairly conceded that no injunction as sought could also be granted as the status had been changed by that time during the pendency of the appeal. Shri S. N. Joshi, learned Advocate for the respondent nos.1 to 4 and 9 had also furnished photographs for perusal from which it is apparent that the construction of the house of

the respondent no.3 had been completed interregnum while that of the respondent no.4 was under construction as fairly submitted by him. From this undisputed position too it is apparent that the respondent nos.3 and 4 who had come into the possession of the suit plot have not only carried out the substantial construction but have also changed the status quo of the suit property though to the chagrin of the appellants/plaintiffs. The respondent no.3 had otherwise brought on record by way of an affidavit that he was issued a construction license in the year 2013 to carry out the construction of the house in the suit property, that he had applied for its renewal on 1.1.2016 and the same was renewed pursuant to which he had carried out the construction as the Stop Work Order was withdrawn. He had also asserted to the authority that he had completed the construction of basement, stilt parking as well as slab for the ground floor.

13. Shri S. N. Joshi, learned Advocate for the respondent nos.1 to 4 and 9 also pointed out to the rejoinder filed by the appellant no.1/plaintiff no.1 showing that it was averred therein that the respondent nos.3 and 4 in total defiance and contrary to the directions issued by the Town Planner dated 11.3.2013

had carried out the construction activities in the suit property, that the respondent no.4 had illegally/unauthorisedly covered the well by filling up with mud/debris and he had undertaken the construction activities. It is another matter that the plaintiffs have initiated forgery proceedings against the respondents. Shri Joshi, learned Advocate for the respondent nos.1 to 4 and 9 had also invited attention to the complaint lodged by the plaintiffs at the Police Station dated 18.8.2015 where there was no reference whatsoever to any construction being done by the said respondents despite the fact that they had asserted the construction activities in the suit premises. His other contentions that the suit was frivolous or that there was no challenge to the sale deed would fall for scrutiny before the Trial Court on merits.

14. Suffice it to say that the material respondents having admittedly altered the status vis-a-vis the suit property and carried out the construction therein, no injunction of the nature prayed for by the appellants/plaintiffs could be granted in their favour. The learned Additional District Judge had not secured the appellants/plaintiffs with the relief of injunction and had dismissed the application which would not call for an interference in view of the admitted change in the status of the construction

in the suit property during the pendency of the proceedings. This is besides the fact that the appellants had otherwise not made out a case for any interference with the order under challenge. In the result, i do not find any merit in the appeal and hence pass the following:

O R D E R

The appeal is dismissed with no order as to costs.

NUTAN D. SARDESSAI J.

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