

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 945 OF 2015**

Mr. Sitakant Kashinath Parab,
Major of age, Residing at F/3,
Peace Heaven 'B', Near Corporation
Bank, Porvorim-Bardez, Goa. Petitioner

Versus

1. The Goa Housing Board,
Through its Managing
Director, Porvorim, Bardez-
Goa.
2. Mr. Shajahan L., Major of
age, Resident of House No.
79, Defence Colony, Alto
Porvorim, Bardez, Goa. Respondents

Mr. Joaquim Godinho, Advocate for the Petitioner.

Mr. Hanuman D. Naik, Advocate for Respondent No. 1.

Mr. Gopal Kanekar, Advocate for Respondent No. 2.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 7th APRIL, 2016

PRONOUNCED ON:- 7th JUNE, 2016

JUDGMENT:

Rule. Rule made returnable forthwith. Mr.
Naik and Mr. Kanekar, learned Counsel, waive service on
behalf of respondent nos. 1 and 2 respectively. Heard
finally, by consent of the parties.

2. Although the dispute, out of which, this petition arises, is still at an interim stage, the same has acquired a checkered history.

3. The respondent no. 1-the Goa Housing Board had carried out an auction of a residential plot at Porvorim, Penha de Franca, Bardez, Goa, which auction was held on 30.08.2010. The petitioner, who is the original plaintiff was the highest bidder in respect of plot no. 19 admeasuring 335 square metres and had bidden for an amount of Rs.44,98,200/-. Accordingly, as per the order of allotment dated 26.11.2010, the said plot (hereinafter referred to as the suit plot) was allotted in favour of the petitioner, subject to payment of remaining amount of the price, within 25 days.

According to the petitioner, subsequent to the date of auction when he went to inspect the site, he found that the open space adjoining the suit plot (the 'said open space', for short) was encroached upon by erection of some hutments and was also littered with garbage. It appears that the petitioner and respondent

no. 1 exchanged some communications, in which the petitioner had asked respondent no. 1 to ensure that the hutments are removed and the open space is cleared of the garbage, however, to no avail.

4. Respondent no. 1 has claimed that the hutments and the disposal of the garbage was by Village Panchayat, Penha de Franca and as such, respondent no. 1 had no role to play, in the said matter. Be that as it may, the respondent no. 1 has also shown willingness to allot an alternate land admeasuring 1,000/- square metres out of survey no. 120/1 at Porvorim to the petitioner. This was communicated to the petitioner vide letter dated 03.06.2011, which intimated that the decision to allot an alternate land was taken in the meeting dated 19.03.2011. This also did not materialise. It is undisputed that although, the petitioner had sought extension of time to pay the balance price, till date, except the initial amount of Rs.1,00,000/-, nothing is paid to respondent no. 1 towards the price of the suit plot. Ultimately, on 21.10.2011, the allotment of the suit plot in favour of

the petitioner came to be cancelled.

5. The respondent no. 1 by a public notice dated 19.12.2011 proposed re-auction of the plot, in which the auction was to be conducted on 18.01.2012. However, vide public notice dated 15.01.2012, the same was deferred till 09.03.2012, on account of election code of conduct being in force. Ultimately, the suit plot has been allotted in favour of respondent no. 2 (the original defendant no. 2) for an amount of Rs.53,23,200/-. Undisputedly, respondent no. 2 has deposited the entire amount of price and has also obtained a construction license from the Village Panchayat, Penha de Franca for construction of a residential house on the suit plot.

6. The petitioner after the cancellation of the allotment in his favour filed Regular Civil Suit No. 1/2012/E on 03.01.2012, initially against the respondent no. 2 (as defendant no. 1) for declaration and permanent injunction. The petitioner *inter-alia* sought for declaration alongwith cancellation of the allotment

notice dated 21.10.2011 and about the allotment order dated 01.06.2012 being illegal and bad in law and further restraining the respondent no. 1 from re-auctioning the suit plot or creating third party interest in the same. Significantly, vide prayer clause (e) there was an alternate prayer for refund of Rs.1,00,000/- alongwith interest at the rate of 18% per annum from the date of institution of the suit till its payment. The petitioner has also sought temporary injunction restraining the respondent no. 1 from creating third party interest, in which the trial Court had granted ad-interim relief on 13.01.2012. However, ultimately, the application for temporary injunction came to be dismissed on 12.03.2012.

7. This was challenged by the petitioner before the learned District Judge in Miscellaneous Civil Appeal No. 31/2012, in which an ad-interim relief was sought for. The learned District Judge passed the following order in the appeal on 03.04.2012.

"Heard Adv. R. Chodankar.

Ad-interim ex-parte relief in terms of

prayer (a).

*Issue show cause notice r/on 04.06.2012
at 2:30 p.m."*

8. According to the petitioner, the said order was served on the respondent no. 1, through the bailiff on 29.05.2012 at 10:55 a.m. However here again, the appeal came to be dismissed on 21.05.2013. A perusal of the judgment of the appellate Court would make it clear that the learned District Judge found that all the three ingredients for grant of temporary injunction were in favour of the petitioner. The learned District Judge was however of the opinion that the suit was filed without waiting for the statutory period of 60 days in accordance with the notice under Section 109 of the Goa Housing Board Act, 1968 (the Act of 1968, for short). In short, the learned District Judge found that the suit was premature and the appeal came to be dismissed.

9. This was challenged by the petitioner before this Court in Writ Petition No.414/2013. It was before this Court that the respondent no. 1 placed on record the fact that the suit plot has already been allotted in

favour of respondent no. 2 on 01.06.2012. In such circumstances, this Court dismissed the petition with the following observations at paragraph 7 of the judgment:

"I have considered the submissions of the learned Counsel and I have also gone through the records. Taking note of the contention of Mr. H.D. Naik, learned Counsel appearing for the respondent to the effect that the suit plot has already been disposed of, in such circumstances without going into the legality of such action on the part of the respondent, I find that the question of interfering in the impugned order at this stage would not be justified. The petitioner would have to take appropriate measures to challenge such action on the part of the respondent and even amend the plaint if so advised in accordance with law. It is made clear that this Court has not gone into the correctness or otherwise of the action of the respondent pointed out by the learned Counsel appearing for the respondent."

10. Subsequent to this, the petitioner amended the plaint by addition of respondent no. 2 (as defendant no. 2) and also sought for declaration and that the allotment in favour of defendant no. 2 was illegal and *non est*. The said amendment was allowed, to which the respondent no. 1 filed an additional written statement. It was contended that the ex-parte order granted on 03.04.2012 was in operation till the next returnable date i.e. 04.06.2012 and the same was thereafter not extended or continued. Respondent no. 1 claimed that in any event, the appeal filed by the petitioner was dismissed and there was no injunction operating in favour of the plaintiff. It was thus denied that the allotment in favour of respondent no. 2 was in breach of ad-interim relief granted by the learned District Judge on 03.04.2012.

11. The respondent no. 2 filed a written statement and contended that the suit plot has been allotted in his favour for price of Rs.53,23,200/- and the entire amount has been paid.

12. The petitioner filed a second application for temporary injunction (Exhibit-41) seeking an order restraining the respondent no. 2 or anybody on his behalf from creating third party interest in the suit plot and/or from putting any construction on the same. The learned trial Court by order dated 08.10.2014 granted the said application. The learned trial Court found that, it was the second application for temporary injunction seeking relief only against respondent no. 2, who is a private party and therefore, the bar under Section 109 of the Act of 1968, would not be attracted. The learned trial Court also found that the finding given by the learned District Judge are only in respect of the case put up by the respondent no. 1 as at the relevant time, respondent no. 2 was not a party to the suit. Insofar as the allotment in favour of respondent no. 2 being in breach of the order dated 03.04.2012 is concerned, the learned trial Court noticed that the application for taking an action of contempt of the said order being C.M.A. No. 44/2013 was still pending, in which the petitioner had sought detention of the Managing Director (MD of respondent no. 1) in civil

prison and also for striking of the defence of defendant no. 1. The learned trial Court was of the opinion that if injunction is not granted, it would result into a situation where the decree, if passed, would be unexecutable and would only be "a paper decree". In that view of the matter, the respondent no. 2 or anybody on his behalf was restrained from creating third party interest or putting any construction on the suit plot. This was challenged by respondent no. 2 before the learned District Judge in Miscellaneous Civil Appeal No. 121/2014. The learned District Judge has allowed the said appeal vide judgment dated 23.11.2015. The learned District Judge has found that the trial Court has exercised its discretion in granting the application for temporary injunction, arbitrarily, thus requiring interference. The learned District Judge has articulated reasons for this conclusion, more particularly in paragraphs 28(a) to (f) of the judgment. What particularly weighed with the learned District Judge was that the respondent no. 2 was a bonafide purchaser in possession of the suit plot after payment of the entire amount of the price and who had obtained all the

necessary licenses for construction of the bungalow and on the contrary the petitioner was a defaulter, the allotment order in whose favour, has been cancelled by the respondent no. 1. The learned District Judge in paragraph 28(e) has specifically found that when the plot was allotted on 01.06.2012 in favour of the respondent no. 2, there was no injunction order operating against the defendants. In that view of the matter, the appeal came to be allowed and the application (Exhibit-41) has been dismissed. Feeling aggrieved, the petitioner is before this Court.

13. I have heard the learned Counsel for the parties. With the assistance of the learned Counsel for the parties, I have perused the record and the orders passed.

14. It is submitted on behalf of the petitioner that there was a genuine dispute about the encroachment and littering of the garbage in the open space adjoining the suit plot. It is submitted that the price for which the petitioner had bid was on account of the fact

that there was an open space abutting the suit plot. It is submitted that in the absence of the said advantage being available, the petitioner was justified in asking the respondent no. 1 to remove the encroachment and the garbage and restore the open space to its original condition and had asked for time to pay the remaining consideration. It is submitted that the respondent no. 1 without taking effective steps in this regard has arbitrarily allotted the suit plot in the favour of the respondent no. 2 and that too in breach of the order dated 03.04.2012. The learned Counsel has taken me through the judgment of the District Court in the earlier round of litigation i.e. Miscellaneous Civil Appeal No. 31/2012 in order to point out that the learned District Judge had found that all the three necessary ingredients about existence of *prima facie* case, balance of convenience and irreparable loss stood in favour of the petitioner and the suit was dismissed only on the ground that it was premature as the petitioner had failed to wait for a period of 60 days as required under Section 109 of the Act of 1968. The learned Counsel pointed out that this Court dismissed

the Writ Petition No. 414/2013, which has the effect of confirmation of these findings and has also observed that the petitioner may amend the plaint, which was accordingly done. The learned Counsel was at pains to point out that the learned trial Court has rightly considered this aspect and also the fact that the fetters of the requirement of notice under Section 109 of the Act of 1968, would not come in the way, insofar as the grant of relief in respect of respondent no. 2 (who is a private party), is concerned. He therefore submits that the learned District Judge was in error in interfering with the reasoned order of the learned trial Court. The learned Counsel has also pointed out that the order dated 03.04.2012 was served on the respondent no. 1 on 29.05.2012 and thus, subsequent allotment on 01.06.2012 would be *ab-initio* void.

Reliance in this regard is placed on the decision of this Court in the case of **Keshrimal Jivji Shah and Another Vs. Bank of Maharashtra, 2004(3) Mh.L.J. and Pralhad Jaganath Jawale and Others Vs. Sitabai Chander Nikam and Others, 2011(4) Mh.L.J.** Reliance is then placed on the decision of the Hon'ble

Supreme Court in the case of **Surya Vadan**an Vs. **State of Tamil Nadu and Others**, (2015) 5 SCC 450, in order to submit that no litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of the Court, merely because he or she is of the opinion that the order is incorrect. He therefore submits that the impugned judgment be set aside restoring the order passed by the learned trial Court.

15. On the contrary, the learned Counsel for the respondent no. 1 has pointed out that the dispute as to the encroachment on the open space was foreign to the dispute about allotment of the suit plot. It is submitted that the petitioner cannot rely on the said aspect of encroachment on the open space in order to justify the non compliance of the conditions including payment of the substantial amount of the price. He submits that there is also delay and laches, in as much as the suit plot is allotted in favour of respondent no. 2 on 01.06.2012, while the second application seeking temporary injunction was filed on 25.04.2014. He further submits that Miscellaneous Civil Appeal No.

31/2012 having been dismissed, ultimately the ground about allotment being in breach of ad-interim relief, would not survive.

16. The learned Counsel for the respondent no. 2 has supported the impugned order. He has referred to the conduct of the petitioner in failing to comply with the conditions of the allotment in contrast with a situation where the respondent no. 2 has deposited the entire amount of Rs.53,23,200/-. He thus submits that equitable considerations, would tilt the scales in favour of the respondent no. 2. The learned Counsel was at pains to point out that after payment of a huge amount of Rs.53,23,200/-, the respondent no. 2 has also taken license for construction/development on the plot from the concerned Panchayat on 02.07.2014 and thus cannot be restrained from putting up the construction. The learned Counsel has also adopted the submissions made by the learned Counsel for the respondent no. 1, insofar as delay and laches, are concerned.

The learned Counsel has relied on the decision in the case of **Smt. Bhawana Arbind Bapat and Another Vs.**

Navneet Bhojraj Lakhotia and Another, 2015(5) ALL MR 95; Claridges Infotech Private Ltd. Vs. Surendra Kapur and Others, AIR 2009 BOMBAY 1; M/s Ajay Enterprises P. Ltd. and Another Vs. M.C.D. and Others, AIR 2009 DELHI 133; M/s Mega Enterprises and etc. Vs. State of Maharashtra and Others, AIR 2007 BOMBAY 156; Sobha Developers Limited Vs. Ms. Lanka Sitaram Kamthe and Others, 2014(2) ALL MR 706. The learned Counsel has also pointed out that the petitioner was not justified in insisting on removal of the huts and garbage as a necessary pre-condition for payment of the price. The learned Counsel has pointed out that although, the petitioner claims that he learnt about the existence of huts and garbage after conduction of the auction, i.e. on 30.08.2010, the petitioner has paid an amount of Rs.1,00,000/- on 23.09.2010 and thus, the same cannot be accepted.

17. I have given my anxious consideration to the rival circumstances and the submissions made and I find that, save and except for the ground that the allotment in favour of the respondent no. 2 was in breach of the order dated 03.04.2012 in Miscellaneous Civil Appeal No.

31/2012, no case for interference would have been made out. *Prima facie* it appears that the petitioner has not complied with the necessary condition of the auction purchase and except Rs.1,00,000/-, the remaining amount of the price of Rs.43,23,200/- is unpaid, presumably on account of some co-lateral dispute about the encroachment of the adjoining open space. *Prima facie* it does appear that although, the petitioner is claiming that subsequent to auction, he found that the adjoining open space is encroached upon, the amount of Rs.1,00,000/- is deposited on 23.09.2010 i.e. after the auction, which was held on 30.08.2010. It further appears that the respondent no. 1 had intimated about the said encroachment and the erection of the hutments being by the concerned Village Panchayat and respondent no. 1 also showed willingness to allot an alternate land. Nothing of that sort ultimately materialised. *Prima facie*, I further find that although, the allotment in favour of the respondent no. 2 is on 01.06.2012, the second application for temporary injunction (Exhibit-41) was filed on 25.04.2014. This delay is sought to be justified on the ground that in the interregnum, the

plaint was required to be amended in as much as respondent no. 1 disclosed about the allotment in favour of respondent no. 2 for the first time during the pendency of the Writ Petition No. 414/2013. Be that as it may, considering the fact that the respondent no. 2 had parted with the substantial amount of Rs.53,23,200/- in contrast with the petitioner who has only paid Rs.1,00,000/-, no case for grant of injunction would have normally been made out, but for the allotment being, *prima facie*, in breach of the order dated 03.04.2012.

18. The Division Bench of this Court in the case of **Keshrimal Jivji Shah** (supra) after placing reliance on the decision of the Hon'ble Apex Court in the case of **Sujit Singh and Others Vs. Harbans Singh and Others, 1995 (6) SCC 50, Ramchandra Ganpat Shinde Vs. State of Maharashtra and Others, AIR 1994 SC 1673 and Satya Brata Biswal Vs. Kalyan Kumar Kisku and Others, AIR 1994 SC 1837**, has *inter-alia* held that the party cannot be allowed to violate the Court orders openly and with impunity. The Division Bench has further held that it

is time that we recognize the principle that transfer of immovable property in violation of an order of injunction or prohibition issued by Court of law, confers no right, title or interest in the transferee, as it is no transfer at all and the transferee cannot be allowed to reap advantage or benefit from such transfer merely because he is not party to the suit in which the order of injunction or other prohibitory direction or restraint came to be issued. It is further held that it is enough that the transferor is a party (as in the present case) and the order was in force. Once these two conditions are satisfied, the transfer must not be upheld.

19. The learned Single Judge of this Court in the case of **Pralhad Jaganath Jawale** (supra) held that there is distinction between the transfer of the subject matter of a suit, pendente lite, as contemplated under Section 52 of the Transfer of Property Act and a transfer made in violation of an order of injunction. It has been held that the transfer of immovable property made in violation of order of injunction issued by the

Court of law confers no right, title or interest on the transferee, as it is no transfer in the eyes of law.

In the case of **Surya Vadan**an (supra), the Hon'ble Apex Court has held that violation of an interim or an interlocutory order passed by a Court of competent jurisdiction ought to be viewed strictly, if the rule of law is to be maintained and no litigant can be permitted to defy or decline adherence to an interim or an interlocutory order of a Court merely because he or she is of the opinion that the order is incorrect and if as a general principle, the violation of an interim or an interlocutory order is not viewed seriously, it will have widespread deleterious effect on the authority of Courts to implement their interim or interlocutory orders or compel their adherence.

20. It would thus be necessary to examine, albeit, on a *prima facie* basis, whether the ground about allotment in favour of respondent no. 2 being in breach of order of injunction is made out or not. The order dated 03.04.2012 reproduced above would show that while granting ad-interim ex-parte relief in terms of prayer

clause (a), the notice was made returnable on 04.06.2012. Prayer clause (a) reads thus:

"(a) Pending the hearing and final disposal of the appeal for an order restraining the respondent, its successors, representatives, agents, person or persons acting through or under them from putting the suit plot for auction."

21. It can thus be seen that although, the prayer clause speaks about the suit plot being put for auction, the interim order must be taken to have prohibited creation of any further interest in the suit plot by the respondent no. 1. The copy of the bailiff report would show that the said order was served on the respondent no. 1 on 29.05.2012 at 10:55 a.m. If that be so, *prima facie*, the allotment which is done on 01.06.2012 would be in breach of the aforesaid order. A perusal of paragraph 7 of the additional written statement of respondent no. 1 would go to show that it is not disputed that an ex-parte order was in operation till the next returnable date i.e. 04.06.2012. In that view of the matter, *prima facie* at this stage, the finding

recorded by the learned District Judge in paragraph 28(e) would be *dehors* the record. Except a bare statement that "the suit plot was allotted to respondent no. 2 on 01.06.2012, on which date there was no injunction order operating against the defendants", there is not other discussion or reason to show the basis on which the learned District Judge had come to the conclusion on the date of allotment, the interim order was not operating. I am conscious of the limited powers of this court while examining the challenge to the impugned order in exercise of the supervisory jurisdiction under Article 227 of the Constitution of India, in which this Court would be slow in interfering with the discretionary orders and finding of facts and where two views are equally possible, this Court would not be justified in substituting its view, in the place which is recorded by the Courts below, on the ground that it is more plausible. However, where the finding is found to be without any basis and which results into miscarriage of justice, then certainly this Court can justifiably interfere. The learned District Judge has no occasion to consider the effect of the allotment

being in breach of order of injunction, obviously for the reason that the learned District Judge had found on the date of allotment, the order of injunction was not in force. However, once *prima facie* it is found that the order was served on respondent no. 1 on 29.05.2012, subsequent to which, there is an allotment order in favour of respondent no. 2, the law laid down by the Division Bench of this court in the case of **Keshrimal Jivji Shah** (supra) would stand attracted.

22. The Hon'ble Apex Court in the case of **Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil** reported in **(2010) 8 SCC 329**, has laid down the principles on the exercise of jurisdiction of this Court under Article 227 of the Constitution of India. The Hon'ble Apex Court in the case of **Waryam Singh Vs. Amarnath, AIR 1954 SC 215**, has held that the supervisory jurisdiction is expected to be exercised in order to keep the subordinate Courts "within the bounds of their authority". The power is discretionary and has to be exercised on the principles of equitability and the object of superintendence is to maintain efficiency,

smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into disrepute and to maintain public confidence in the functioning of the subordinate Courts.

23. In my humble opinion, the interference would be necessary for two reasons, (i) for the reason that the finding that the allotment is not in breach of order of injunction is *prima facie* against and contrary to the material on record and (ii) the effect of any such allotment, which is in breach of injunction has not been considered. I therefore find that the petition will have to be allowed restoring the order passed by the trial Court. However at the same time, I find that the suit is of the year 2012 in which the pleadings are completed and C.M.A. No. 44/2013 for taking an action for contempt is also pending. Considering the controversy, the evidence would be predominantly of a documentary nature. Considering the overall circumstances, it would be appropriate that the trial of the suit is expedited. I would further hasten to add that the observations made herein are essentially for

deciding the limited controversy at the interim stage and the trial Court would not be influenced by the same, while deciding the suit on merits.

24. In the result, the following order is passed:

O R D E R

(a) The petition is allowed.

(b) The impugned judgment and order dated 23.11.2015 is hereby set aside and the order dated 08.10.2014 passed by the learned trial Court in Regular Civil Suit No. 1/2012/E, is hereby restored.

(c) The trial Court shall decide the suit as expeditiously as possible and in any case within a period of six months from the receipt of this order.

(d) Parties to co-operate for early disposal of the suit.

(e) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.