

IN THE HIGH COURT OF BOMBAY AT GOA.**APPEAL FROM ORDER NO.43 OF 2016.**

1. Mr. Ramesh G. Kandolkar,
son of G. Kandolkar,
about 74 years of age,
Indian National,
r/o H.No.462,
Candolim, Bardez, Goa.
- 1(a) Shri Deepak Ramesh Kandolkar,
son of deceased
Major of age,
r/o H.No.463 A,
Candolim, Bardez, Goa.
(Already on second as Appellant No.2.
- 1(b) Shri Govind Ramesh Kandolkar,
Son of deceased
Major of age,
r/o H.No.463 A,
Candolim, Bardez, Goa.
- 1(c) Shri Dilip Ramesh Kandolkar
Son of deceased
Major of age,
r/o H.No.462,
Candolim, Bardez, Goa.
- 1(d) Mrs. Usha Uday Wadkar
Daughter of the deceased
Major of age,
r/o H.No.63, Gokulwadi,
Sanquelim Goa.
- 1(e) Mrs. Karishma Vasudev Goveakar
Daughter of the deceased,
Major of age,
r/o H.No.693,
r/o Mayem, Ardhwada,
Bicholim – Goa.
- 2 Mr. Deepak Ramesh Kandolkar,
(wrongly arrayed as Govind Ramesh Kandolkar)

son of Ramesh Kandolkar,
about 43 years of age,
Indian National,
r/o H.No.463 A,
Candolim, Bardez,
Goa.

Appellants/Defendants.

Versus

1. Mr. Nandlak Khemka,
major of age, Indian National,
r/o A-6, Kalindi, New Delhi
through his attorney,
Mr. Thomas Mathew
s/o K.V.Thomsa,
major of age, Indian National,
r/o 31, BDS Garden,
Bangalore.

Respondent/plaintiff

2. Village Panchayat of Candolim,
Through its Secretary,
Having office at the Panchayat Ghar,
Candolim, Bardez,
Goa.

Respondents/Def.no.3.

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Shri A.D.Bhobe with Ms. S.Bhobe, Advocates for the
appellants.

Shri Carlos A.Ferreira, Advocate for respondent no.1.

**CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON :28/06/2017.
PRONOUNCED ON :10/07/2017.**

JUDGMENT:

1. Feeling aggrieved with an order dated 22nd December, 2015 passed by the learned Senior Civil Judge, Mapusa, in Special Civil Suit No.18/2013/C, granting the application for temporary injunction, the original defendants have preferred this appeal under Order XLIII Rule 1(r) of the Code of Civil Procedure, 1908.

2. The parties shall be referred to as plaintiff and defendants as per their original status in the trial Court for the sake of convenience.

3. The plaintiff is the owner of the property known as, "WADI" bearing Survey no.136/14 of village Candolim admeasuring 5300 sq. mtrs. The plaintiff appears to have purchased the same, vide Sale Deed dated 13th June, 1995, for construction of a residential bungalow. The defendants are the adjoining owners of an open plot of land bearing no.136/13 where there is residential bungalow.

4. The plaintiff contends that he is the resident of New Delhi and, therefore, was not in a position to visit his plot frequently. The defendants took disadvantage of his absence and encroached upon his land where they have started illegal construction with an utmost disregard to the Byelaws, Rules and Regulations of governing the construction of building sans license from defendant no.3. There was no approval from the North Goa Planning Authority.

5. The plaintiff filed a complaint with defendant no.3 on 28th July, 2008. It is contended that since the defendants are influential and therefore, perhaps no action was initiated against

them by defendant no.3.

6. The plaintiff thereafter filed Panchayat Petition no.55/2010 before the Deputy Director of Panchayats under Section 66 (5) of the Goa Panchayat Raj Act, 1994. Pursuant to the same, the Block Development Officer conducted site inspection and submitted his report dated 2nd November, 2009.

7. The plaintiff contends that the defendants have carried out the construction of an illegal garage on the north side of the suit plot. The defendants have also constructed unauthorised house without maintaining the required setback which is referred to as "suit structure no.1". According to the plaintiff, the structure was erected without obtaining the construction license from the Competent Authority. It is also contended that the suit structure no.1 is located in "No Development Zone" and in violation of CRZ.

8. Defendants no.1 and 2 apart from the "suit structure no.1" erected construction on the boundary of the property i.e. "suit structure no.2". The defendants are constructing an additional floor without legal approval. As such, it is the contention of the plaintiff that due to suit structure no.1 and suit structure no.2 his easementary right of light, air and privacy is

affected. The plaintiff has, therefore, filed a suit for permanent injunction restraining further construction of suit structure no.2.

9. In the written statement and reply, defendants no.1 and 2 have come up with a case that there was no cause of action to the plaintiff to institute suit. The defendants have their house in said survey number since last 45 years. There is an unexplained delay to file the suit seeking relief of temporary injunction. The defendants have denied almost all the averments in the plaint including the alleged construction without obtaining permission from the Competent Authority. They also contend that the suit is bad for non-joinder of necessary parties and further that, vide permission dated 22nd September, 2012 by the Village Panchayat of Candolim, they have been permitted to make repairs of their properties.

10. I have heard the learned counsel appearing for the respective parties.

11. At the outset, the learned counsel appearing for the appellants/defendants submits that the structure is in existence over the suit premises for more than 46 years and the defendants are just effecting the repairs of the same after having duly permitted by the Competent Authority. The defendants have not

encroached upon the land of the adjoining owners and that there is no cause of action made out to institute the suit against them. It is further submitted that there is no pleading of easementary right as stated by the plaintiffs. It is further submitted that the learned trial Court has not framed the essential three points required to be framed while deciding an application for temporary injunction. It is not even the case of the plaintiff that the structure belongs to him. Shri Bhobe, learned counsel, therefore, prays for allowing the appeal by quashing the impugned order passed by the learned trial Court.

12. Shri Ferreira, learned counsel appearing for the plaintiff, at the outset, submits that false defence has been raised by the defendants in the written statement. The plaintiff had brought to the notice of Panchayat about illegal encroachment in the year 2008 itself which is evident from the report of the Block Development Officer. The permission, if any, granted to effect repairs is bogus one. The learned counsel drew my attention to an Authority of this Court reported in **2000 (2) Goa LT 341** in the case of Smt. Fatima Joao Vs. Village Panchayat of Mercas and others [2000 (2) Goa L.T.341].

13. An application for grant of temporary injunction is regulated by the Court and the cases in which it may be granted

is stated in Clauses (a), (b) and (c) of the Rule. It is the settled principle of law that the plaintiff must establish a prima facie case coupled with balance of convenience in his/its favour and irreparable loss in case of refusal of equitable relief of temporary injunction. The plaintiff also must establish that the irreparable loss would be such which cannot be compensated in terms of money. No doubt, sound judicial discretion is required to be exercised by the Court while granting the said equitable relief in which one important factor is the conduct of the applicant. If there is delay in approaching the Court, then the plaintiff/applicant would not be entitled for the said relief.

14. In the case at hand, the plaintiff's property bearing Survey no.136/14 which is a vacant land for constructing a residential bungalow was purchased by the plaintiff vide Deed of Sale dated 13th June, 1995. Undisputedly, the defendants have started some construction in the adjoining property Survey no.136/13 as they have sought permission from the Competent Authority to effect certain repairs. There is also no dispute that the defendants house property which is situated in Survey no.136/13 is in existence since more than 45 years which is evident from the Certificate issued by Secretary, Panchayat, Candolim dated 3rd March, 2008 depicting House numbers and the year of payment of tax which read thus :

<u>H.No.</u>	<u>Year of payment</u>
H.No.462 (38/5)	1968-1969
H.No.463	1989-1990
H.No.463 A	1989-1990

15. Even if it is presumed for the sake of argument that the defendants have started illegal construction or encroachment in an utmost disregard of the byelaws, Rules and Regulation, it is being done within the Survey no.136/13 and not in the adjoining survey number of the plaintiffs being survey no.136/14. It is evident from the report of the Block Development Officer dated 2nd November, 2009 wherein it has been specifically mentioned by the Block Development Officer in his letter addressed to the Deputy Director of Panchayats that when a survey was conducted with due intimation to the parties concerned by the Extension Officer including the representative of the complainant, it was noticed that Hanuman Kandolkar, Ramesh Kandolkar and Nitin Kandolkar had started illegal construction and necessary action against them under Section 66 (5) of the Goa Panchayat Raj Act, 1994 has been initiated. A panchanama to that effect was also drawn along with this report which reveals that the alleged illegal construction had commenced somewhere in the year 2008. As such, prima facie, it appears that the plaintiff was aware of the said construction in the year 2008 itself, however, he approached

the Court after a period of five years and, therefore, it cannot be said that he was diligent. He had not satisfactorily explained such a long delay.

16. The second important aspect is that if at all the defendants have carried out illegal structure or construction of garage on the northern side of the suit premises without maintaining the required setback would be an issue between the defendants inter-se i.e. defendant nos.1 and 2 on one hand and defendant no.3 on other hand which is the Competent Authority. This Court in case of Smt. Fatema (supra) specifically held in paragraphs no.10, 11 and 13, which reads thus:-

“10. The petitioner has also brought on record the circumstances for invoking writ jurisdiction of this Court. The petitioner apprehended ultimate dismissal of suit in view of several decisions of the Panaji Bench of this Court holding that non-compliance of Municipal Bye-laws or violation of Rules or Regulations of the Village Panchayat, or construction done in breach of sanctioned plan do not furnish cause of action for filing suit. In other words, adjoining owner has no locus standi to file suit for the purpose of enforcing the Municipal Bye-laws. He has also brought to our notice unreported judgment of this

Bench, in the matter of Pandurang Rogunath Shirodkar v. Ladu Rogunath Shirodkar in First Civil Appeal No. 98/79 delivered on 11-10-1983 (Per G.F. Couto, J.); wherein the suit for mandatory injunction; complaining violation of Municipal Bye-laws in relation to the construction impugned therein. The suit was resisted and the maintainability of the suit was questioned for want of cause of action. The locus standi of the plaintiff who was an adjoining owner, to maintain the suit, was also a subject matter of challenge. A contention was raised therein that the adjoining owner does not get right to enforce the Municipal Bye-laws as they are not meant for the benefit of the owners of adjoining land. As a sequitur of this submission, it was contended that if the adjoining owner has no locus standi, then no civil right accrues to the owner of the adjoining building to enforce compliance of the Municipal Bye-laws. Consequently, it was also contended that no civil liability accrues to the owner of building in order to comply with the aforesaid Bye-laws. The Learned single Judge of this Court was pleased to uphold the said contentions and held that the suit at the instance of adjoining owner to complain breach of Municipal Bye-laws, requiring developer to keep side set back of three metres was not tenable as the Municipal Bye-laws are not for the benefit of adjoining

owners. Breach thereof does not furnish cause of action to maintain suit at the instance of a neighbour.

11. The other judgment of this Court in the matter of Smt. Margarida Fernandes v. Shri Antonio Joaquim Fernandes, 1991 (2) GLT 222 (Per G.D. Kamat, J.) was also brought to our notice wherein it was held that a suit complaining breach of the Municipal Bye-Laws was not maintainable and while dealing with one of the Bye-laws in relation to the set back, the learned Judge concurred with the earlier view of the learned single Judge in the matter of Panduranga Rogunath Shirodkar v. Ladu Rogunath Shirodkar (supra) that keeping of the set backs is mainly for the benefit of the owner of the building and not for the benefit of the owner of the adjoining land.

13. The plaintiff, therefore, had to file a suit claiming decree for injunction to prevent construction as per the approved plan particularly within 10 feet space adjoining the western side of the suit property. Further the plaintiff had claimed a mandatory injunction against planning authority, directing them to perform their mandatory duty to consider the question of permission only in accordance (adjoining developer) not to make any

construction within 10 feet open space touching the boundary of the plaintiffs property. The said litigation marched into the revisional jurisdiction of the High Court and the question was raised as to whether the Civil Court possesses jurisdiction to try the suit for the relief as claimed. The Learned Single Judge finding no express bar ousting the jurisdiction of the Civil Court read ouster to the jurisdiction of the Civil Court by necessary implication, and held as under :

"Civil P.C. (5 of 1908), Section 9 --Jurisdiction of Civil Court -- Suit for injunction restrain ing a person to construct building as per plan.

-- Adequate remedy provided to any person interested under Scheme of Act -- Jurisdic tion of Civil Court ousted by necessary impli cation.

Maharashtra Municipalities Act (40 of 1965), Sections 189, 308, 304.

.....The building construction or development is highly technical and specialised branch. The Municipal Council being a Planning Authority is adequately invested with power to take drastic and coercive measures to enforce the compliance of the provisions of the Acts, rules and bye-laws.

. . . .Chapter XII of the Act of 1965 as regards building construction, no doubt creates a statutory obligation on the Municipal Council to

see enforcement and compliance of the provisions of the Act and bye-laws. The statutory obligation is for the public good. However, every individual wrong could not be enforceable. To redress the grievance in case of breach of statutory duty, the remedy as provided by the Act which creates a duty or obligation, can alone be availed. As a settled principle, Civil Court being a forum of general jurisdiction cannot be permitted to be approached. Under the scheme of Acts of 1965 and 1966, it is ordained to enforce the statutory duty in the manner specified therein, as discussed above. Under the scheme of the Acts, there is thus ouster to the jurisdiction of the Civil Court by necessary implication. The suit is, therefore, untenable and liable to be dismissed."

17. At this stage, detailed investigation and merits cannot be looked into. Suffice it to say that the adjoining owners i.e. the plaintiff herein has, prima facie, no locus standi to file a suit for the purpose of enforcing the byelaws in relation to the setback. Even the panchanama drawn by the Block Development Officer and other documents annexed therewith including the sketch does not prima facie indicate any encroachment in the Survey no.136/14. Thus, there is no prima facie case made out by the plaintiffs.

18. As regards balance of convenience, it is pertinent to note that that even presuming for a moment that the defendants have started illegal construction under the garb of repairs and are also proposing to construct illegal structure no.2 over the boundary wall, the plaintiff has not prayed for mandatory injunction in the plaint for demolition of the same. Secondly, how it can be said that the easementary right of light, air and privacy are affected sans any residential house over the survey no.136/14 of the plaintiffs. As on today, there is no question of affecting or infringement of the easementary right of the plaintiff and, therefore, the balance of convenience also does not tilt in his favour. It is significant to note that the Village Panchayat, vide its communication dated 22nd September, 2012 had permitted the defendants to repair the roof of its first floor which was damaged due to leakage and that it required urgent repairs like plastering, tilling etc. As such, in the light of the said material on record, the plaintiff has failed to establish the first two ingredients.

19. Shri Bhobe, learned counsel has placed reliance on an authority of this Court reported in **1999(2) Goa L.T.199** Ms. Eulain Colaco e Rodrigues and others Vs Mr. Gurudas Raikar and others wherein while dealing with revision application having similar set of facts it is held that Article 2314 of the Portuguese Civil Code enables the owner to carry out any construction upto

the boundary limit of his property and in terms of the provisions contained in Article 2325 the owner of the property is entitled to construct the wall of his building having opening like windows and doors facing neighbour's property by keeping a setback of 1½ mtrs. from the boundary line. In other words, construction of boundary limit with a dead wall is legally permissible in terms of the provisions contained in Article 2324. It is further held that Article 2324 makes a provision for the benefit of such owners of properties who construct their buildings on the boundary limit so that they can fruitfully enjoy the right under Article 2324. The ratio would be applicable to the present set of facts.

20. Turning to the last aspect of irreparable loss, it is to be seen that there is nothing on record by which it can be said that if the alleged construction is allowed to be continued, the plaintiffs would suffer irreparable loss which cannot be compensated in terms of money or in case of refusal of the equitable relief of temporary injunction.

21. The learned counsel appearing for the plaintiff has placed reliance on a case law reported in **[(2013) 5 SCC 336]** Dipak Kumar Mukherjee Vs. Kolkata Municipal Corporation and others, wherein the Hon'ble Supreme Court observed in paragraphs 8, 9 and 29, which reads thus:-

"8. What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structure not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorisedly constructed multi-storied structure raised by economically affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus

with the power corridors.

9. *We have prefaced disposal of this appeal by taking cognizance of the precedents in which this Court held that there should be no judicial tolerance of illegal and unauthorized constructions by those who treat the law to be their subservient, but are happy to note that the functionaries and officers of Kolkata Municipal Corporation (for short, 'the Corporation') have been extremely vigilant and taken steps for enforcing the provisions of the Kolkata Municipal Corporation Act, 1980 (for short, 'the 1980 Act') and the rules framed thereunder for demolition of illegal construction raised by respondent No.7. This has given a ray of hope to the residents of Kolkata that there will be zero tolerance against illegal and unauthorised constructions and those indulging in such activities will not be spared.*

29. *It must be remembered that while preparing master plans/zonal plans, the Planning Authority takes into consideration the prospectus of future development and accordingly provides for basic amenities like water and electricity lines, drainage, sewerage, etc. Unauthorized*

construction of buildings not only destroys the concept of planned development which is beneficial to the public but also places unbearable burden on the basic amenities and facilities provided by the public authorities. At times, construction of such buildings becomes hazardous for the public and creates traffic congestion. Therefore, it is imperative for the concerned public authorities not only to demolish such construction but also impose adequate penalty on the wrongdoer."

22. There is no doubt that illegal and unauthorised construction of the buildings which are in violation of the Municipal Byelaws, Rules and Regulations should be removed if they affect the various fundamental and constitutional rights of other persons. In the case at hand, the matter is not being finally disposed of on merits, but at the interlocutory stage, wherein merits cannot be gone into in a deep manner. The trial Court, therefore, without getting influenced with the observations, which are, prima facie in nature, shall decide the substantial rights of the parties on merits. The ratio of the judgment of the Hon'ble Supreme Court can be accordingly distinguished.

23. In the light of the discussion made hereinabove as well as from the material on record, it appears that the learned trial Court has lost sight of important aspects, which are required to be taken into account while granting an equitable relief of temporary injunction. The impugned order, therefore, needs to be set aside. Hence, I pass the following Order:

ORDER

The appeal is allowed. The impugned order dated 22.12.2015 passed by the learned Senior Civil Judge, Mapusa in Special Civil Suit No.18/2013/C is quashed and set aside and the application for temporary injunction stands rejected. Costs in cause.

PRITHVIRAJ K. CHAVAN, J.

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