

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO.71 OF 2016**

Mr. Digamber Yeshwant Harmalkar
Aged 61 years, son of late Yeshwant Harmalkar,
Married, Business,
Resident of H.No.119A/2,
Kumya Morod, Guirim, Bardez-Goa.

....Appellant

V/s

1. Mr. Rama Gajanan Gadekar,
Major of age, Son of late Gajanan Gadekar,
Business, Married, resident of Kumya Morod,
Guirim, Bardez-Goa.
2. Mr. Rajendra Gajanan Gadekar,
Major of age, son of late Gajanan Gadekar,
Business, married, resident of Kumyo Morod,
Guirim, Bardez-Goa.
3. Village Panchayat of Guirim,
Through its Sarpanch/Secretary,
Having office at Guirim, Bardez-Goa.
4. The Deputy Collector & S.D.O
Mapusa Sub-Division, Mapusa-Goa.
5. The Deputy Town Planner,
Town & Country Planning Department,
302, Govt. Buildg. Complex Bardez-Goa.
6. The Chief Secretary,
Secretariat, Porvorim, Bardez-Goa. Respondents

Shri Amay Arjun Phadte, Advocate for the Appellants.
Shri G. Agni, Advocate for the Respondents No.1 & 2.
Shri V. Sardesai, Additional Government Advocate for the
Respondents No.4 to 6.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 12th JUNE, 2017

Pronounced on : 22nd JUNE, 2017

ORDER :

Heard at the admission stage itself with the consent of the learned Counsels appearing for the parties.

2. The original plaintiff is in appeal challenging the order passed by the learned Adhoc District Judge-1, Mapusa dated 30/09/2016 pursuant to which the learned Judge dismissed the application for temporary injunction in a suit filed by him for permanent and mandatory injunction.

3. Shri A. Phadte, learned Advocate for the appellant came to be heard on behalf of the appellant who first adverted to the survey plan, submitted that the paddy field bearing Survey No.25/5 being a suit paddy field was belonging to the respondents no.1 & 2 while he was the tenant of the paddy field bearing the distinct Survey Nos.25/6,7,8,9 & 11 lying on the southern side of the suit paddy field. The respondents no.1 & 2 had carried out an illegal construction in the suit property bearing Survey No.25/5 which was accepted by the respondent no.3. The Authorities namely the respondents no.4 & 5 had not granted either conversion or approval for such illegal construction and

which was also borne out from the written statement filed in defence. The respondent no.5 in particular had lodged proceedings before the Mapusa Police to initiate action against the respondents no.1 & 2 under Section 17 of the Town and Country Planning Act. He relied in **Smt. Fatima Joao V/s. Village Panchayat of Merces & Ors. [2000 (2) GLT 341]** to substantiate his case that he was entitled to maintain the proceedings against the adjoining owner and that in **Onkar Nath V/s. Ram Nath Gupta & Ors. [AIR 1985 Delhi 293]** to substantiate his case that the Trial Court ought to have granted injunction against the unauthorised construction no matter who had sought for the injunction. The learned District Judge held that he was not the owner of the Survey No.25/5 when he had not claimed any right therein but had urged that the illegality carried out therein was affecting his property.

4. Shri A. Phadte, learned Advocate for the appellant further adverted to the written statement filed by the respondent no.4 in which there was a clear assertion on the illegal filling done by the respondents no.1 & 2 and the show cause notice issued to them. He also adverted to the report

of the Mamlatdar where there was a clear assertion on the land filling done by the respondents no.1 & 2 and pictorially shown in the sketch annexed to the paper book. The appellant had clearly made out a case for the grant of injunction which the learned Adhoc District Judge had not considered and hence it was a fit case to interfere with the impugned order and secure him with the order of injunction.

5. Shri G. Agni, learned Advocate for the respondents no.1 & 2 reverted to the pleadings in the plaint and submitted at the outset that the suit paddy field belonged to the Comunidade and which was held by them on tenancy through their late father. It was also not the case of the appellant that any proceedings had been initiated by the Comunidade against the respondents no.1 & 2 for infringing their proprietary rights. Though the appellant had claimed that the respondents no.1 & 2 had done illegal filling of the low lying land and illegal construction of the structures in the suit paddy field, he had not spelt out any particulars of the hardships faced by him in carrying out cultivation in his property. The record of rights clearly showed that the cultivation was done last sometime in 1985-1986 i.e. there

was no cultivation in the last 25 to 30 years and the land was fallow. On that premise alone the appellant was not entitled to the relief of injunction.

6. Shri G. Agni, learned Advocate for the respondents no.1 & 2 next invited attention to the pleadings at para 21 and submitted that though the appellant had alleged invasion of privacy and causing pollution, there were no pleadings in what manner there was invasion and/or pollution. The appellant had sought for the relief of temporary injunction but had not spelt out what was the nature of the construction activity being carried out by the respondents. In any event, the respondents had completed the construction and therefore the relief was infructuous. There were no pleadings at his instance that the fields were low lying and/or inundated due to the filling of the land by the respondents no.1 & 2.

7. Shri G. Agni, learned Advocate for the respondents no.1 & 2 then referred to his pleadings in defence and submitted that there was a clear assertion that there was no cultivation being done by the adjoining tenants as their fields were low lying and there was water logging. None of the

tenants had cultivated the paddy field for the last more than 20 years and they were kept fallow and as uncultivated lands. The appellant also had no locus standii to file the suit and claim the relief of injunction. There was no basis in the appellant's case that they had done filling of the low lying land by dumping mud in the suit paddy field and therefore no question arose of obtaining the permission from the respondents no.4 or 5. They had not controverted any of the provisions of the Act and in any event and assuming that they had violated such provisions, it was for the concerned Authorities to take appropriate action and the appellant could not make a grievance about it.

8. Shri G. Agni, learned Advocate for the respondents no.1 & 2 further contended that the appellant was a former Panch of the Panchayat who had personal knowledge that a major portion of the suit paddy field to the extent of 400 sq. mts. was used for the road widening in 2007 and that the respondents no.1 & 2 had parted with the portion of their tenanted land in the larger interest of their community and for widening of the road abutting the suit property. The road was widened and constructed on the demand of the local

residents. The mud was dumped by the contractor while digging the road and carrying out the excavation. The contractor laid the mud alongside the remaining portion of the paddy field so as to make the public road aligned with and in level with the adjoining portion of the property for the use of the pedestrians. There was no averment in the affidavit in rejoinder that the appellant had carried out cultivation from 1985 onwards till now or that the fields were not fallow despite the clear case in defence. The respondent no.2 was granted an NOC for a mobile cart in the Survey No.25/5 while the respondent no.3 had granted NOC for the construction of a pump house in their property. The respondents no.1 & 2 were also given NOC for electricity connection by the respondent no.3 in respect of the suit field bearing Survey No.25/5 and after site inspection the respondents had carried out the improvements in their property in the nature of pump house. There was no perversity spelt out in the finding rendered by the learned Adhoc District Judge and hence the appeal had to be dismissed.

9. Shri V. Sardessai, learned Additional Government Advocate on behalf of the respondents no.4 to 6 submitted

that the matter was subjudice before the respondents no.4.

10. i have considered therein submissions in the light of the pleadings and therefore proceed to determine whether the learned Adhoc District Judge was in error to deny the relief of injunction to the appellant/plaintiff. The appellant had carved a case that the suit property bearing Survey No.25/5 was a paddy field belonging to the Comunidade of which the respondents no.1 & 2 were the tenants and that he was a tenant of the paddy fields bearing the Survey Nos.25/6,7,8,9,10 & 11 which were on the southern boundary of the suit paddy field and lying at a lower level. The Survey Plan produced on record forming a part of the paper book also shows the position of the suit property being on the northern side of that of the appellant, there being no dispute between the parties on the gradient of the lands being low lying of the appellant and of the respondents no.1 & 2 lying at a higher gradient. The appellant had broadly alleged that the respondents no.1 & 2 had done filling of the low lying land by dumping mud and which was without obtaining any permission from the respondents no.4 & 5 as required under the law. It was also his case that the respondents no.1 & 2

had carried out the illegal construction on 6 cement poles with roofing of asbestos sheets in which commercial business was carried out and in one room business of horticulture was carried out by the respondents no.1 & 2. The appellant broadly stated that these illegal constructions were done without spelling out the point of time when exactly these activities were done by the respondents no.1 & 2. It was otherwise his case that due to the said illegal filling and the illegal construction of the structures the paddy fields were affected and he could not carry out any cultivation therein.

11. The undisputed survey records Form I and XIV referred to by Shri Agni reveal that the last cultivations were done sometime in 1985-1986 and there was no cultivation done thereafter in any of the paddy fields of the appellants. The respondents no.1 & 2 had categorically averred that no cultivation of the paddy fields was done in the adjoining lands by the owners or by the tenants including the appellant herein and that the lands were lying fallow since the last 25 to 30 years. Although the appellant had filed his affidavit in rejoinder there was no categorical denial of the survey record Form I and XIV and the clear assertion of the respondents

no.1 & 2 that there was no cultivation done in the paddy fields of the adjoining owner and tenants including the appellant and the these fields were lying fallow for the last 25 to 30 years. Moreover, the respondents no.1 & 2 had made a clear assertion that during the tenure of the respondent no.1 as a Pancha, a portion of the suit paddy field to an extent of 400 sq. mts. was used for widening of the local panchayat road in 2007 and that in that process the contractor had dumped the mud while making the road and excavated it and laid it alongside the remaining portion of the paddy field so as to make the road in alignment with the level of the adjoining portion of the tenanted property for the use of the pedestrian. The appellant did not at all rebut this specific assertion despite filing an affidavit in rejoinder in support of his case.

12. In **Fatima Joao** (supra), a Division Bench of this Court held that a suit by a neighbour for violation of the municipal plans or rules or bye-laws resulting in an invasion of their right to light, air, privacy or causing pollution, causing material injury, would furnish a cause of action. However, the appellant had failed to show from the material on record that the land filling was done by the respondents no.1 & 2 in the

suit paddy field and that on account thereof, his paddy fields were inundated with water and/or that he was unable to do cultivation therein. The judgment therefore does not in any manner support his case in the factual matrix.

13. The judgment in **Onkar Nath** (supra), that a Court shall grant injunction against unauthorised construction, no matter who sought for that injunction also does not buttress the contention of Shri Phadte, learned Advocate for the appellant that he is entitled to the relief of injunction on the basis of the sketchy pleadings. Assuming at the highest that the respondents no.1 & 2 have carried out some construction in the suit paddy field, the appellant had failed to show that it was affecting him or his right as held in **Smt. Fatima Joao** (supra), to have the locus to question the action of the respondents no.1 & 2.

14. The other contention of Shri Phadte, learned Advocate for the appellant that the survey records Form I and XIV were public records and that the appellant could not be taken to task as he did not show the cultivation beyond 1985-1986, also does not stand to reason inasmuch as it was for

the appellant to get the records updated if at all he was cultivating the paddy field and making the declarations to the Government from time to time. Besides, it is not open to the appellant to canvass that the respondents no.1 & 2 have admitted of water logging by tearing a sentence out of context when it has been their specific plea that water logging is for last more than two decades and that none of the adjoining owners or tenants have been cultivating the paddy fields. Moreover, the appellant has also not been able to show that any construction activity was in progress and quite on the contrary it was shown by Shri Agni, learned Advocate for the respondents no.1 & 2 that the concerned Authorities were seized of the matter and which was otherwise confirmed by Shri V. Sardessai, learned Advocate for the respondents no.3 to 6.

15. No doubt the learned Adhoc District Judge has fallen in error to hold that the appellant had not established his right to the suit paddy field 25/5 when it was never his case that he was the owner or tenant of the suit paddy field 25/5. To that extent the finding of the learned Adhoc District Judge is fraught with perversity but otherwise there is no

reason to find fault with the reasons assigned by the learned District Judge while declining to exercise jurisdiction and securing the appellant with the equitable relief of injunction. The learned Adhoc District Judge had rightly held that the appellant had failed to establish a prima facie case and that the balance of convenience was also not in his favour. No question arose of any hardship being caused to him as to secure him with the relief of injunction. This finding of the learned Adhoc District Judge does not call for any interference. Considering also the principle laid down in **Wander Ltd. V/s. Antox India (P) Ltd. [1990 (Supp) SCC 727]** the Appellate Court will not interfere with the discretion exercised by the Trial Court in an appeal on principle merely because a different view is probable. There is thus no merit in the appeal and in view thereof the appeal stands dismissed.

NUTAN D. SARDESSAI, J.

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