

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO.22 OF 2018

- 1) Mr. Edgar Melo Furtado
s/o Alberto Melo Furtado,
major, married, retired,
R/o. H. No.3219/1 "LAR",
vivend Melo Furtado, Namoxim,
Behind Libdoran Hotel,
Caranzalem- Panaji
Goa.
 - 2) Mr. Thomas Aquina Pereira,
Major, R/o. 6839, Fairway
Street, McLean, VA. 22101
U.S.A. Represented by Power of
Attorney Holder Mr. Edgar Melo Furtado
(Appellant No.1 hereinabove)
- Appellants
(Original Plaintiffs)
- Versus
- 1 State of Goa,
Through its Chief Secretary,
Having office at the Secretariat,
Porvorim- Goa.
 - 2 Executive Engineer,
Water Resource Department
Div-I, Panaji,
Goa.
- Respondents
(Original Defendants)

Shri Shivan Desai, Advocate for the appellants.

Shri Amogh Prabhudessai, Additional Government Advocate for the State.

CORAM: NUTAN D. SARDESSAI, J.

RESERVED ON : 1st August, 2018.

PRONOUNCED ON : 10th August, 2018.

JUDGMENT :-

1. Heard forthwith with the consent of the learned Advocate for the parties.
2. Admit.
3. Shri Amogh Prabhudessai, learned Additional Government Advocate waives service of notice on behalf of the respondents.
4. The original plaintiffs aggrieved by the order dated 26/3/2018 passed by the learned Ad-hoc District Judge- I, FTC, Mapusa dismissing their application for temporary injunction is in appeal under Order XLIII rule 1 CPC against the respondents who are the defendants before the Trial Court. The parties would be referred to as the plaintiffs and defendants for brevity's sake hereinafter.

5. It was the case of the plaintiff No.1 that he was the co-owner of the property bearing Survey No.76/1-B2 admeasuring 8102 sq.mts. being a part of the large property known as 'Odlem Sorgul' situated at Pilerne while the plaintiff No.2 was the co-owner of the plot No.'A' admeasuring 17100 sq mts. forming a part of the same property bearing Survey Nos.76/1-B which are the suit properties for brevity's sake hereinafter. Their names were recorded in the Survey records as co-owners. There was no public road demarcated in the survey plan of the said property nor was there any nullah passing through the said properties as per the survey plan. The plaintiff No.1 visited the suit properties on 25/10/2016 and was shocked to notice the construction work carried out by the defendants No.2 through its contractor who had excavated a part of the suit properties indicating that the defendant No.2 had started a construction of the nullah through the suit properties. The plaintiffs were shocked to learn of the said development as the part of the suit properties were neither acquired by the defendants nor was their consent obtained for carrying out the work of the construction of the nullah. The contractors of the defendant No.2 continued to carry on the work despite the request for which they were constrained to lodge a police complaint

highlighting the act of illegal encroachment and trespass. The Assistant Engineer in the course of the inquiry informed that the work was carried out at the instance of the Village Panchayat of Pilerne–Marra which had made a representation that the properties belonged to the Comunidade of Pilerne and it had given an NOC for carrying out the works in the suit properties.

6. The plaintiffs were constrained to file a Writ Petition bearing Stamp No.3558/2016 challenging the illegal construction carried out by the defendant No.2 and by an order dated 01/12/2016, the petition was disposed off as withdrawn with the directions to file appropriate proceedings. The plaintiffs filed a suit for permanent and mandatory injunction to restrain the defendant No.2 from constructing the nullah without following the due procedure of law in their property and violating their proprietary rights. They had also filed an application for temporary injunction seeking ex-parte ad-interim relief. The defendants filed their written statement seeking the dismissal of the suit apart from the reply to the temporary injunction. The learned District Judge on hearing both the parties was pleased to dismiss the temporary injunction

application which was liable for interference on grounds that it was contrary to law and patently illegal, suffered from a total non-application of mind inasmuch as the learned District Judge had misconstrued the material on record while holding that the plaintiffs were not entitled to the grant of temporary injunction.

7. The District Judge failed to take into consideration the survey plan where there was no existing nullah demarcated therein. The learned District Judge completely misdirected itself by mechanically relying upon the written statement of the defendants contrary to the survey records clearly establishing the ownership and possession of the plaintiffs as well as the non-existence of any nullah in the suit property. The learned District Judge failed to take into consideration that there was no express or implied consent given by the plaintiffs to the defendants or any other person to carry out the construction. The learned District Judge fell in error on such and similar grounds taken in the appeal memo and therefore the impugned order was liable for interference.

8. Heard Shri Shivan Desai, learned Advocate for the plaintiffs who submitted that the plaintiffs were the owners in possession of the Survey holding 76/1B-2 and 76/1B at Pilerne

which was amply demonstrated from the survey records form I and XIV apart from the Deed of Partition. The defence taken by the defendants was that a nullah was existing and besides they were supported by the NOC issued by the Comunidade of Pilerne in respect of the Survey No.76/1 which was admittedly not the subject matter of the suit. The plaintiffs were the co-owners in possession and enjoyment of the Survey holding No.76/1B and 76/1B-2 which did not in any manner relate to the property of the Comunidade bearing Survey No.76/1. He adverted to the impugned order and submitted that the learned District Judge had placed overmuch reliance on the NOC of the Comunidade while disbelieving the case of the plaintiffs. Admittedly, there was no acquisition of the plaintiff's property and therefore they could not do any work of excavation which amounted to an act of interference with their proprietary rights. He placed reliance in **Tukaram Kana Joshi and others v/s. Maharashtra Industrial Development Corporation and others** [(2013) 1 SCC 353].

9. Shri A. Prabhudessai, learned Additional Government Advocate for the defendants adverted to the impugned order, submitted that a tender notice was issued on 20/04/2015 and

the work started in May, 2016. The suit and the application for injunction suffered from delay and laches and on that ground too the appeal had to be dismissed. This Court had to consider the impact on public projects and in that context he placed reliance in **Mahadeo Savlaram Shelke and others v/s. Pune Municipal Corporation and another** [(1995) 3 SCC 33] and pressed for the dismissal of the appeal. Shri Shivan Desai, learned Advocate for the plaintiffs in reply submitted that the Civil Suit was filed in January, 2017 and prior to that he had approached this Court in a Writ Petition which was disposed off with a direction to pursue appropriate remedies. Moreover he was secured with the order of status quo before the Trial Court. The acts of the defendants were highhanded and in colourable exercise of powers and on all these counts the appeal had to be allowed and the impugned order had to be quashed and set aside.

10. i would consider their submissions, the judgments relied upon and the records relevant to the case and in the light thereof decide the appeal appropriately without overlooking the settled principles culled out in **Wander Ltd. And another v/s. Antox India Pvt. Ltd.** [1990 (Supp) SCC 727] holding that

being an appeal in principle, the Appellate Court would not substitute its discretion for that exercised by the Trial Court only because a different view is possible.

11. The Survey records produced by the plaintiffs clearly show their names recorded as occupants in respect of the Survey holding No.76/1B-2 and 76/1B with no name of the Comunidade of Pilerne either recorded as a co-occupant or in the other rights column in respect of any of these Survey holdings. The Survey Plan produced in respect of these two Survey holding No.76/1B-2 and 76/1B also does not show the existence of any nullah to substantiate the case of the respondents on the existence and on continuity of the nullah through the property of the plaintiffs so as to entitle them to continue with the construction activities carried out therein. The basic premise on which the defendants assert the right to carry on the construction activity of the nullah in the suit property stems from the Certificate issued by the Comunidade of Pilerne dated 15/11/2014 pursuant to which its attorney had certified on going through the records of the Comunidade that the land bearing **Survey No.76/1** of village Pilerne was under the ownership of Comunidade and as proposed by the

Panchayat, the Comunidade had no objection under the Government of Goa under the Water Resource Department for cleaning of the nullah with RCC slab covering the existing nullah starting from the Jivottam Math to the house of Chipkar. Therefore to all intents and purposes, the NOC issued by the Comunidade of Pilerne cannot at all support the case of the defendants to carry out the construction in the plaintiffs' properties surveyed under No.76/1B-2 and 76/1B when the NOC pertains to the Survey No.76/1.

12. There was also no dispute that there was no acquisition of the property of the plaintiffs by the defendants and therefore carrying out any construction/excavation activities in order to lay the nullah cannot be sought to be legalised on the premise that it would impact a public project. In **Mahadeo Shelke** (supra), a two Judge Bench of the Apex Court held that the plaintiff seeking injunction must show a prima facie case, triable issue and the balance of convenience for granting the injunction. In the facts of that case the Pune Municipal Corporation had undertaken the widening of the road to remove traffic congestion and initiated proceedings under Section 4(1) of the Land Acquisition Act, 1894 for acquiring two storied

building belong to N.H. Naik at Kotwal Chowk and after its publication in the Gazette an award was passed by the Land Acquisition Officer on 14/12/1970 and compensation was deposited and paid to the owner. Pursuant thereto possession was taken on 13/03/1971 by the competent Officer and handed over to the Corporation. However, the appellant/tenants who entered into the leave and license agreements with the Corporation were allowed to get into possession and after the expiry of the said period, proceedings were initiated for their eviction and an order in that behalf came to be passed. They called the order of eviction in question and went in appeal and Writ Petition but were unsuccessful. The Court ultimately, confirmed the order of eviction. Subsequently, they filed a petition and sought permanent injunction from dispossession and for ad-interim injunction which the Civil Court refused to grant by his order dated 27/04/1973. The Joint Judge however in appeal allowed the same and granted injunction pending the disposal of the suit which was set aside by the High Court under Article 227 of the Constitution giving rise to the appeal by special leave.

13. In **Mahadeo Shelke** (supra), the Apex Court considered

another two Judge Bench judgment in **Dalpat Kumar v/s. Prahlad Singh** [(1992) 1 SCC 719] which reiterated the three predicates for the grant of injunction namely “prima facie case”, “balance of convenience” and “irreparable loss and injury” and being not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in the given facts and circumstances and should always be hedged with the sound exercise of judicial discretion to meet the ends of justice. Considering the factual matrix the Apex Court observed at paragraph 14 that “It would thus be clear that in a suit for perpetual injunction, the court should enquire on affidavit evidence and other material placed before the court to find strong prima facie case and balance of convenience in favour of granting injunction otherwise irreparable damage or damage would ensue to the plaintiff. The court should also find whether the plaintiff would adequately be compensated by damages if injunction is not granted. It is common experience that injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with the execution of or implementing scheme of public utility or granted contracts for execution thereof. Public interest is, therefore, one of the material and relevant considerations in

either exercising or refusing to grant ad interim injunction.”

14. Mahadeo Shelke (supra), further held at paragraph 15 that Public purpose of removing traffic congestion was sought to be served by acquiring the building for widening the road. By orders of injunction, for 24 years the public purpose, was delayed. As a consequence execution of the project had been delayed and the costs now stood mounted. It was in that context the Apex Court observed that the Courts in the cases where injunction are to be granted should necessarily consider the effect on public purpose thereof and also suitably mould the relief. This judgment is clearly distinguishable on facts inasmuch as there was acquisition of the property by the Government unlike the present case where there has been no acquisition at the instance of the defendants and quite on the contrary based on same NOC issued by the Comunidade, the defendants have undertaken the work of carrying out the construction of the nullah in the property of the plaintiff, much to their chagrin.

15. In **Tukaram Joshi** (supra), the Ho’ble Apex Court observed at paragraph 8 that even after the right to property ceased to be a fundamental Right, taking possession of or acquiring the property of a citizen most certainly tantamounts

to deprivation and such deprivation can take place only in accordance with the law. Such deprivation can be only by resorting to a procedure prescribed by a statute. The same cannot be done by way of an executive fiat or order or administration caprice. It held at paragraph 9 that "The right to property is now considered to be, not only a constitutional or a statutory right, but also a human right, although, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment etc. Now however, human rights are gaining an even greater multi faceted dimension. The right to property is considered, very much to be a part of such new dimension." In the case at hand there had been no acquisition and the question that emerges for consideration is whether, in a democratic body polity, which is supposedly governed by the Rule of Law, the State should be allowed to deprive a citizen of his property, without adhering to the law. The matter would have been different had the State pleaded that it has right, title and interest over the said land. It however, concedes to the right, title and interest of the appellants over such land and pleads the doctrine of delay and laches as grounds for the

dismissal of the petition/appeal. This judgment squarely supports the case of the plaintiffs that the defendants are not entitled to interfere with the plaintiffs possession without the acquisition of the land assuming that the work undertaken is for a public purpose.

16. In so far as the plea of delay and laches is concerned, the plaintiffs had pursued their remedy in Writ Petition and it is only when the petition came to be disposed off with a direction to pursue their remedies by filing appropriate proceedings did the plaintiffs file the suit seeking the relief of injunction amongst others. The learned District Judge however in her wisdom proceeded to hold for no explicable reason that the Survey Plan did not reflect the existence of the nullah due to same technical mistake grossly believing the case of the defendants unlike that of the plaintiffs who had shown their proprietary right to the suit properties and established the non-existence of the nullah in question. The learned Judge also for no reason proceeded to hold that the question of taking the plaintiffs NOC or consent did not arise as the defendants had obtained the consent of the owners when it was otherwise shown that the Certificate issued by the Comunidade dated

15/11/2014 pertained to a totally different Survey holding No.76/1 unlike the suit property surveyed under Nos.76/1-B2 and 76/1B. The learned Judge found favour with the case of the plaintiffs that their names stood recorded in the occupants column for 76/1B and 76/1-B2 and that the Family Deed of Partition also placed on record showed their rights to the said properties. However for no reason, the learned Judge went on to hold that the plaintiffs were not the absolute owners of the said property and held quite on the contrary that the documents produced by the defendants were on a better footing since they had placed an affidavit cum irrevocable NOC from the land owners in respect of the property bearing Survey No.76/1. The learned Judge proceeded off at a tangent and was carried away by the Certificate issued by the Comunidade to hold against the plaintiffs. The impugned order is therefore fraught with illegalities and perversity and therefore the intervention of this Court is required to set right the same considering also the principle laid down in *Wander* (supra). In the result, therefore I pass the following:

O R D E R

The appeal is allowed and the impugned order denying the relief of injunction in the plaintiffs favour is quashed and set

aside and the plaintiffs secured by an order of injunction as prayed for.

NUTAN D. SARDESSAI J.

mv