

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 763 OF 2017**

1. Mr. Francisco Benedito Cardozo,
Son of late Minguel Cardozo,
Aged 45 years, married, business
and his wife;

2. Mrs. Angela Cardozo,
w/o Francisco Benedito Cardozo,
aged 40 years, married, housewife,
both resident of H. No.754/2,
Cutbona, Velim,
Salcete-Goa

.... Petitioners.

V e r s u s

1. Shri Caetano Cardozo,
S/o late Pedru Cardozo,
aged 65 years, married, business
and his wife;

2. Smt. Aveline Cardozo,,
w/o Caetano Cardozo,
aged 60 years, married,
housewife, Both residents of
H. No.757, Cutbona, Velim,
Salcete-Goa and 5 others.

..... Respondents.

Adv. Jagannath Jayant Mulgaonkar for the Petitioners.

Adv. Ryan Da Piedade Menezes for Respondents no.1 & 2.

Coram:- C. V. BHADANG, J.

Date:- 10th September 2018.

Oral Order:

The petitioners/plaintiffs are challenging the concurrent order of the

Courts below thereby dismissing their application for temporary prohibitory injunction.

2. The petitioners have filed Regular Civil suit no.62/2016/I against the respondents for permanent injunction restraining the respondents from obstructing the appellants from using the 1.50 metres wide access as depicted in the Sale Deed dated 6.1.1996. The appellants as well as the defendants no.1 and 2 have purchased their separate shares from out of survey no.152/7 of village Velim from the same owner. The defendants no.1 and 2 had purchased two separate plots shown as plot "A" and "B" totally admeasuring 1156 sq.mtrs. under a sale deed dated 8/5/1992. Subsequently the plaintiffs have purchased a land admeasuring 796 sq.mtrs. from the same owner vide sale deed dated 17/6/1996. According to the petitioners there is a plan annexed to his sale deed showing access of 1.5 metres wide through the plot no. "A" and "B" sold to the defendants no.1 and 2.

3. The appellants sought temporary injunction for restraining the respondents from interfering with the suit access as enjoyed by the appellant.

4. The learned trial court by an order dated 19/9/2016 has dismissed the application which has been confirmed by the learned District Judge vide

judgment and order dated 4/7/2017 passed in Miscellaneous Civil Appeal No.92/2016.

5. The learned trial court has found that the suit access is not shown in the survey plan. The sale deed by which the appellants have purchased the property is subsequent to the sale deed by which the original defendants no.1 and 2 have purchased their property and as such, the previous owner had no authority or right to concede any access through the land which was already sold to the defendants no.1 and 2. The learned District Judge has concurred with the said finding.

6. I have heard Shri Mulgaonkar, the learned counsel for the appellants and Shri Menezes, the learned counsel for the respondents. With the assistance of the learned counsel for the parties I have gone through the record.

7. It is submitted by Shri Mulgaonkar, the learned counsel for the appellants that the appellants' case is mainly based on easement of necessity. The learned counsel has referred to section 13(a) and 13(e) of the Easement Act in order to submit that inasmuch as the land originality belonged to the same owners, a prima facie case of easement of necessity arose particularly

looking to the fact that in view of obstruction by the defendants no.1 and 2, the land purchased by the appellants is now landlocked. It is submitted that both the Courts below have not properly considered the case of easement of necessity as set up. The learned counsel has also referred to the commissioner's report dated 3/8/2018 in order to submit that the commissioner has also found that although there are roads on the other side of the property purchased by the appellants, none of these roads touch the suit property.

8. On the contrary Shri Menezes, the learned counsel for the respondent nos.1 and 2 has supported the impugned order. It is submitted that the appellants have been unable to demonstrate prima facie case of easement of necessity particularly when the appellant had purchased the property from the erstwhile owner four years later than the respondents no.1 and 2. It is submitted that the appellants have other access and the appellants were never using the access as claimed by them in the suit.

9. I have carefully considered the circumstances and the submissions made. This Court by an order dated 3/8/2018 had appointed Advocate Shri Redkar as a Court Commissioner to visit the site and to report on the existence or otherwise of an alternate access. The Commissioner has

submitted his finding in paras 4 and 5 which read thus:

4. The undersigned inspected the site shown by the parties and following are the observations:

A. The undersigned proceeded via tar road which is towards the east side of the plaintiffs house, it is noticed by the undersigned that towards the east of the plaintiff house, there exists a tar road the distance between the tar road and compound wall of plaintiff is around 10 metres. I have also noticed that there is an opening in the compound wall around 1 to 1 ½ feet, which was closed by loose tin sheet. It was informed by the parties to the undersigned that, there are between the tar road and compound wall neither belongs to plaintiff nor defendants.

B. Since there was no opening in mentioned in above para the plaintiff took the undersigned through narrow passage and had to cross the compound wall by jumping above compound wall having height of around one ft. and then entered into plaintiff's property. It was informed that plaintiff are claiming as access on the front side of the plaintiff house, it can be seen that the said access is closed by the pucca compound wall and there is no access on the front side of the plaintiff house available.

C. During the site inspection the defendants informed the commissioner that plaintiff has an alternate access through the neighbouring property to reach the tar road, on inspection it was found that there exist a gate and same was locked.

D. The undersigned went on the other side of the property through a tar road which lead towards the chapel, it was also seen that exact opposite to chapel there is a small portion of tar road which lead

towards the plaintiff house but does not touch the plaintiff property. There exist an open space which according to defendant it belongs to uncle of the defendant, further there exist a compound wall with loose stones and there exist a small passage which is about one ft. in width which can be used to reach plaintiffs house. But it also important to note here that the portion of land between the tar road and loose compound wall belongs to third party as accepted by both the parties.

E. The undersigned also submits that tar roads on the both side does not touch the plaintiff's house.

5. The undersigned opined that there exist only one alternate access on the west of the house of the plaintiff, which about approximate of 1ft. in width which can be used to reach the tar road, it is an foot access only.

10. It is trite that the existence of an alternate access is a complete answer to a case of easement of necessity. The Commissioner has prima facie found in para 5 that there is an access of approximately 1 ft. which can be used to reach the tar road. The Commissioner has also noted in para 4A that there is an existing tar road on the east side of the appellant's house and there is a land admeasuring 10 meters between the tar road and the compound wall of the appellant which leads to an opening of around 1 to 1 1/2 feet in the compound wall which was closed by loose tin sheets. The Commissioner has also noted that the parties informed that the said area between the tar road and compound wall neither belongs to the plaintiff nor the defendants. Prima

facie at this stage no exception can be taken to the finding recorded by the Courts below that the previous owner had no authority to concede to any access through the land which was already sold to the defendants no.1 and 2 in the year 1992. Although the appellants claim that the said access was being used continuously, the same is not shown in the survey record. Considering the overall circumstances, I do find that the appellants have made out a prima facie case for grant of the relief as claimed. At one stage it was contended by Shri Mulgaonkar the learned counsel for the appellants that the appellants are claiming mandatory injunction at an interim stage. Although an mandatory injunction can be granted at an interim stage, the same can only be granted on a strong prima facie case being established which is absent in the present case. In the result, no case for interference is made out. The petition is dismissed with no order as to costs.

C. V. BHADANG, J.

ap/-