

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 12 OF 2018**

Bhanwara Ram Godara

.... Appellant

Versus

Lucia Maria Lobo @ Lucia Lobo & 5 Others

.... Respondents

Mr. S.S. Kantak, Senior Advocate with Mr. Preetam Talaulikar,
Advocate for the Appellant.

Mr. Iftikhar Agha with Mr. Ketan Morajkar, Advocates for
Respondent Nos. 1 to 5.

CORAM: C. V. BHADANG, J.**RESERVED ON: 16th July, 2019****PRONOUNCED ON: 25th July, 2019****ORDER:**

The challenge in this Appeal is to the order dated 12.03.2018, passed by the learned Senior Civil Judge at Bicholim in Special Civil Suit No.22/2017/A. By the impugned order, the learned Trial Court has dismissed an application (Exhibit-D/3), filed by the appellant/plaintiff, seeking temporary injunction.

2. The brief facts necessary for the disposal of the Appeal may be stated thus:

That the appellant has filed the aforesaid suit, against the respondents for specific performance of a contract, declaration, cancellation of the sale deed, injunction and

consequential reliefs. Land survey no. 365/1 of village Thivim, admeasuring 7,225 square metres is described as "suit property" in the plaint, which is owned by the respondent no. 1. The appellant is carrying on business of buying and selling of marbles/granites in Goa from 1995 under the name and style as "M/s Annapurna Marble". Somewhere in the year 2007, the appellant was introduced through a mediator to the respondent no. 1 and according to the appellant, there was an agreement for leave and license between him and the respondent no. 1, in respect of part of the suit property and the appellant has been carrying on his business on the said portion of the suit property.

3. According to the appellant, owing to the cordial relationship between him and the respondent no. 1, he had advanced various amounts to the respondent no. 1 and in May, 2010, the respondent no. 1 expressed willingness to sell a part of the suit property alongwith her house (excluding the plots, which were already sold and one plot, which was proposed to be sold to one Ghanasham Aroskar), to the appellant for a total consideration of Rs.50 lakhs, which according to the appellant has been paid and has been received by the respondent no. 1. The respondent no. 1, however, subsequently expressed difficulty in finding another accommodation for her and

therefore, it was agreed that the respondent no. 1 shall execute a sale deed in respect of 2100 square metres of land in favour of the appellant and subsequently, the sale deed in respect of remaining land, which was subject matter of leave and license was to be executed.

4. Accordingly, by a sale deed dated 07.03.2011, land measuring 2100 square metres has been sold to the appellant, which is designated as plot no. A. As per the boundaries in the said sale deed, an area of 205 square metres is shown reserved on the northern side as the road widening area. It may be mentioned that out of 2100 square metres of land purchased by the appellant, the appellant has sold 1000 square metres of land to Mr. Ramesh Mantri vide sale deed dated 13.07.2012. The said two portions have been separately numbered as 365/1-C and 365/1-B. The portion 365/1-C comprises of 1100 square metres, while the portion 365/1-B is the portion sold to Mr. Ramesh Mantri.

5. It is the material case that in breach of the promise to transfer the remaining land, the respondent no. 1 executed three sale deeds for a total area of 1,390 square metres. The first of such sale deed is dated 09.03.2017, by which an area of

205 square metres (which was retained/reserved as a road widening area) has been sold to the respondent no. 2. By a subsequent sale deed dated 30.06.2017, an area of 980 square metres has been sold to the respondent no. 2 and vide a third sale deed dated 09.03.2017, yet another area of 205 square metres has been sold to the respondent no. 4.

6. Presently, we are only concerned with the sale deed dated 09.03.2017, by which, an area of 205 square metres has been sold to the respondent no. 2, which was shown as road widening area in the sale deed dated 07.03.2011, executed in favour of the appellant. According to the appellant, there was an attempt by the respondent nos. 2 and 4 to erect certain temporary structures in the “suit road widening area”, which prompted the appellant to lodge a complaint with the Village Panchayat and then, to file the suit as the appellant learnt about the execution of the three sale deeds as aforesaid.

7. The appellant filed an application for temporary injunction seeking following reliefs:

“That (a) this Hon'ble Court be pleased to grant the temporary injunction application till the disposal of suit.

That (b) defendant no. 2 to 5, their agents, servants, laborers and whatsoever claiming, acting, operating, engaging and doing any act directly or indirectly from restraining and or blocking, obstructing and or interfering the suit road widening area, putting up any compound wall or any fencing for the parts of suit land illegally purchased by them under suit documents in any way.

That (c) Defendants no. 2 to 5 be restrained from partitioning the plot illegally purchased under suit documents, to obtain NOC and or the house number for illegal suit structure from the defendant no. 6.

That (d) Defendants no. 1 to 5 be restrained from selling, alienating or creating any third party right and or disposing the suit land and the part of the suit land illegally purchased by defendants no. 2 and 5 in terms of suit documents.

That (e) any other order which this Court deems fit to grant."

8. The suit and the application for temporary injunction has been resisted on behalf of the respondent nos. 1 to 5. The respondent no. 1, in addition, has also raised a counter claim for declaration of the sale deed dated 07.03.2011, as null and void. Be that as it may, for the present, the material case set up

by the respondent no. 1 is that an area of 2,100 square metres was only agreed to be sold to the appellant for a consideration of Rs.32,00,000/-. It was denied that there was any leave and license agreement for an area of 3,717 square metres.

9. The respondent nos. 2 to 5 have also resisted the suit.

10. The learned Trial Court, by the impugned order, has dismissed the application, *inter alia*, on the ground that the alleged leave and license agreement, in respect of the land admeasuring 3,717 square metres has not been established by the appellant.

11. I have heard Mr. Kantak, the learned Senior Counsel for the appellant and Mr. Agha, the learned Counsel for the respondent nos. 1 to 5.

12. It is submitted by Mr. Kantak, the learned Senior Counsel for the appellant that presently, the dispute, is only pertaining to 205 square metres of land, which is referred to as the "suit road widening area". It is submitted that the first respondent was not justified in selling the said portion to the

respondent no. 2 under the sale deed dated 09.03.2017. It is submitted that the said land has to be kept open and without any obstruction or construction thereon. It is submitted that the learned Trial was in error in refusing to grant the temporary injunction on considerations, which are extraneous at this stage. The learned Senior Counsel was at pains to point out that the issue whether, the appellant is entitled to get 3717 square metres of land is not relevant, at this stage. It is submitted that the appellant never tried to make out any case of easementary right over the "suit road widening area". It is submitted that the claim is based on the representation of the respondent no. 1 in the year 2011 that an area of 205 square metres is retained as road widening area and the subsequent sale deed of the said area in favour of the respondent no. 2 was clearly illegal. The learned Senior Counsel has submitted that incidentally, the issue of the access cropped up, both before the Trial Court as well as before this Court and a Commissioner was appointed, who has stated that there is no alternate way available.

13. Mr. Agha, the learned Counsel for the respondent nos. 1 to 5 has supported the impugned order. It is submitted that there is no material to show that there was any leave and

license agreement in respect of 3717 square metres of land in favour of the appellant. It is submitted that the only agreement was to sell 2,100 square metres of land to the appellant for a consideration of Rs.32,00,000/-, which sale deed has been executed on 07.03.2011. It is submitted that the appellant has not made out any case of an access through the land, which is referred to as the "suit road widening area", sold to the respondent no. 2 and in any event, there is an alternate access available, to the land admeasuring 2,100 square metres, sold to the appellant. It submitted that although, a portion of the said land is shown to be sold to Mr. Ramesh Mantri, the entire portion admeasuring 2,100 square metres is in the possession of the appellant, where he is carrying on business of marbles/granites. It is submitted that the Commissioner's report has been objected to and in any event, the respondent no. 2 having purchased 205 square metres of land (which is referred to as the suit road widening area) by registered sale deed dated 09.03.2011, no case for grant of temporary injunction, as prayed, is made out.

14. Mr. Igha, the learned Counsel for the respondent nos. 1 to 5 has placed reliance on the decision of this Court in the case of **Damodar Shirodkar Vs. Smt. Hirabai Vasant**

Kenkre 1998(1) Goa L.T.2, Pundalik Xet Pednekar Vs. Augusto Fernandes, 2012(6) ALL MR 649 and the decision of the Delhi High Court in the case of **Jiwan Dass Rawal Vs. Narain Dass & Others AIR 1981 DELHI 291**, in order to submit that unless and until there are clear pleadings and proof that the access has been used and enjoyed as of right, *prima facie*, no case for grant of injunction is made out on the basis of such a claim for access.

15. I have considered the rival circumstances and the submissions made and perused record.

16. At this stage, the only issue is about whether, the appellant is entitled to injunction as prayed for in para 16(b) of the application i.e. pertaining to 205 square metres of land, which is referred to as the “suit road widening area”. A perusal of the impugned order passed by the learned Trial Court would show that the learned Trial Court has found that there is no *prima facie* case for grant of injunction, mainly, on three grounds (i) that the alleged leave and license agreement of the year 2007 and the alleged agreement for sale of the year 2010, are not established by the appellant, (ii) sale deed dated 07.03.2011 (which the learned Trial Court has referred to as

the star document of the appellant) does not show that the appellant is in possession of the “suit road widening area” and (iii) that there are no pleadings to show that the appellant is claiming access by way of an easement of necessity or prescription.

17. It is significant to note that in para 41 of the impugned order, the learned Trial Court has noted the submission on behalf of the appellant that the appellant is not claiming the right of way by easement of necessity or prescription. The said submission has been reiterated by the learned Senior Counsel for the appellant. Thus, the absence of pleadings, in that regard, to my mind, would be inconsequential. It is true that *prima facie*, the appellant has not shown the existence of the leave and license agreement or an agreement for sale, by which, the respondent no. 1, had agreed to sell the area admeasuring 3717 square metres to the appellant, for a consideration of Rs.50 lakhs. However, presently, the only question is whether, the first respondent having represented to the appellant in the said sale deed dated 07.03.2011 that the area of 205 square metres towards the northern boundary of the “suit road widening area” is reserved as a road widening area, could have sold the same to the

respondent no. 2, under the sale deed dated 09.03.2017.

18. The claim of the appellant is squarely based on the aforesaid aspect. The sale deed dated 07.03.2011 clearly shows that on the northern boundary of the plot sold to the appellant, an area admeasuring 205 square metres, was reserved as road widening area and therefore, the first respondent having represented to the appellant that the said area shall be reserved as a road widening area, would remain open. The respondent no. 2 having entered into the shoes of the respondents no. 1 and when he is claiming right to the suit road widening area through his predecessor in title i.e. respondent no. 1, *prima facie*, at this stage, the covenant held out by the respondent no. 1 would bind the respondent no. 2 also. The respondent no. 2 has not come out with any case that the suit road widening area was purchased by him, without the knowledge of the earlier sale deed dated 07.03.2011 and without the knowledge that the respondent no. 1 had earlier held out to the appellant that the said area is reserved as road widening area.

19. Once, the respondent no. 1 had represented to the appellant in the year 2011 that the said area of 205 square

metres shall be reserved as road widening area, the subsequent act of its sale to the respondent no. 2 and any attempt of the respondent no. 2 to effect any construction on the said land, would certainly *prima facie*, affect the rights of the appellant. In my considered view, although, the appellant has not *prima facie* shown that he is in possession of the suit road widening area, he is entitled to get injunction to keep the said road widening area open till the disposal of the suit. Any permanent construction, if allowed to be erected on the said area, would certainly create complications, affecting the rights of the appellant. At the same time, for the present, it is not necessary to direct removal of the temporary structure of a chicken centre, which is said to be erected in the said plot. However, the respondent no. 2 or any body on his behalf cannot be allowed to make further construction or to enclose the said area by a compound wall.

20. There cannot be any manner of dispute with the proposition that in a case where the plaintiff claims an easementary right by way of prescription, he has to show that the access has been used as of right continuously, openly and without obstruction for the prescribed period. However, as noticed earlier, it is not the case made out by the appellant that

he is claiming any right on the suit road widening area by prescription or otherwise.

21. In the case of **Jiwan Dass Rawal** (supra), the Delhi High Court has held that a contract for sale is the right created in personam and not in estate and a vendee under a sale deed cannot be prevented by injunction, at the instance of the person having previous agreement in his favour. I have noticed that *prima facie*, the appellant has not established the leave and license agreement or the agreement for sale of the year 2010 for an area admeasuring 3717 square metres and further, the appellant has not shown that he is in possession of the suit road widening area. However, the fact that in the year 2011, the area of 205 square metres was reserved as road widening area by the respondent no. 1, the appellant, till the suit is decided on merits, is entitled to injunction, so that the said area is kept open. To that extent, the appellant has made out a *prima facie* case. The balance of convenience would also lie in favour of the appellant for the grant of the said relief. It is made clear that no relief is being granted to the appellant, in respect of the portion of the land, which is purchased by the respondent no. 2, under the registered sale deed dated 09.03.2017 or the portion purchased by the respondent no. 4 under the registered sale

deed dated 09.03.2017.

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

O R D E R

- (i) The Appeal is allowed.
- (ii) The impugned order is hereby set aside.
- (iii) The application Exhibit-D/3 for temporary injunction is partly allowed, thereby restraining the respondent no. 2 or any body on his behalf from putting up any further construction or any compound wall or fencing on the suit road widening area, during the pendency of the suit.
- (iv) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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