

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 43 OF 2019**

ANANT R. SAWAIKER AND ANR.

... Appellants

Versus

SUDHA TUKARAM SHIRODKAR
@ JAYAMALA NAIK AND 36 ORS.

... Respondents

Shri Shirin V. Naik, Advocate for the Appellants.

Shri Sudin M.S. Usgaonkar, Senior Advocate with Ms. Tanvi Kamat
Ghanekar, Advocate for the Respondents.**Coram: - DAMA SESHADRI NAIDU, J.****Date: - 9th December 2019****ORAL ORDER:**

The appellants have filed the Civil Suit No.48 of 2016 before the District Judge, Panaji-2, sitting at Ponda. They filed that suit for a perpetual injunction. In that suit, they have also sought an *ad interim* injunction to restrain the defendants from, as they call it, encroaching upon a public nullah (canal).

2. On the appreciation of *prima facie* case and balance of convenience, the Trial Court has held that the plaintiffs could not prove that there has been any encroachment. In fact, the Trial Court based its findings on the report submitted by the Surveyor or Court Commissioner. Aggrieved, the plaintiffs have filed this appeal.

3. In the appeal, this Court had a Surveyor inspect the property and submit his report. Seen from the report, the nullah has not been uniform

in its width; it fluctuated. At any rate, either for the Trial Court or for this Court the nullah, its width, and the fluctuations are only *prima facie* observations.

4. In other words, the Court below has felt that the plaintiff could not place sufficient material for it to hold that there is any encroachment on the nullah. That said, the plaintiffs' options have not been closed. They can as well lead further evidence and convince the Trial Court otherwise.

5. Before the Trial Court, the defendants have first asserted that they have not encroached upon the nullah. That apart, they have also placed on record their willingness to be bound the findings of the Court finally, so they may, in the meanwhile, proceed with their construction. In fact, the undertaking reads as follows:

4. That these Defendants have already laid the foundation for undertaking retaining wall on the southern boundary of the nullah prior to the filing of the present suit and since the property is totally exposed to the water current in the monsoon, nullah being a storm water nullah, the southern portion of the property is likely to be washed out in the ensuing monsoon season thereby causing irreparable loss to the human being and property, in the circumstances these Defendants submit that these Defendants be permitted to complete the construction of the retaining wall on the southern boundary of their property under survey no.84/3A and further these Defendants undertake to abide by the judgment and final order that may be passed in the above suit and further undertake to reconstruct the retaining wall at their own cost, if it is found to be encroaching in the nullah as per the judgment and decree that may be passed in the above suit.

6. Under these circumstances, despite the strenuous efforts made by the appellants' Counsel, I could not convince myself that the Trial Court

has erred in exercising its jurisdiction under Order 39, Rules 1 & 2 of CPC.

I, accordingly, dismiss the Appeal From Order. And this dismissal is without prejudice to the plaintiffs' claims and contentions which may be proved in the course of trial before the Trial Court.

DAMA SESHADRI NAIDU, J.

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