

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 847 AND 845 OF 2018

WRIT PETITION NO.847 OF 2018

1. Smt. Shobha P. Prabhu Dessai
and others ... Petitioners

V e r s u s

1. Mr. Augustinho Menezes & anr. ... Respondents

A N D

WRIT PETITION NO.845 OF 2018

Mr. Francisco Fernandes
alias Bikru Fernandes ... Petitioner

V e r s u s

1. Mr. Augustinho Menezes
and 3 Ors. ... Respondents

Mr. C. Padgaonkar, Advocate for the Petitioners.

Mr. R. G. Ramani and Mr. P. Shenvi Kakodkar, Advocates for
the Respondents.

Coram :- C. V. BHADANG, J.

Date : 3rd July 2019

ORAL ORDER

1. Both these petitions are between the same parties and arise out of an order dated 07.04.2018 passed by the learned Trial Court in RCS No.71/2017/A which order has been confirmed by the learned District Judge by common judgment

dated 15.06.2018 in MCA no.33/2014 and MCA no.34/2018. As such, these petitions are being disposed off by this common order.

2. The brief facts are that the first respondent has filed the aforesaid suit against the petitioners for declaration, mandatory and permanent injunction. For the sake of convenience, the parties are referred to in their original capacity as plaintiff and defendants.

3. The case made out in the plaint is that the plaintiff is the owner of a land surveyed under no.69/2 admeasuring 3400 square metres situated at Village Cottombi, Quepem Taluka. the plaintiff has acquired the said property by virtue of a Sale Deed dated 06.02.1979 and the said property is a garden land. The material case made out is that the said property is an enclaved plot and the only access to the said property is passing through the adjacent land surveyed under nos.68/4 and 68/3. The major portion of the access which runs east-west, is part of survey no.68/3 and also covers a small portion of survey no.68/4. The plaintiff has been using the said access since last more than 35 years.

4. On 10.11.2017, the defendant no.1 started illegally digging pits over the suit access in order to raise a foundation for extension of his residential house thereby obstructing the suit access. This led the plaintiffs to file the aforesaid suit, inter alia, for a declaration that the property of the plaintiff is an enclaved property within the meaning of Article 2309 of the Portuguese Civil Code, (Code for short). The plaintiff sought an order for appointment of a commissioner to determine the purchase price of the right of way and for a further declaration that the plaintiff has an easementary right over the suit access as described in para 8 of the plaint and for an order of permanent injunction, restraining the defendants or anybody on their behalf, from obstructing or interfering or making any construction over the suit access and for mandatory injunction against the defendant no.1 to remove the iron bars raised in the pits and whatever construction raised so far and to restore the suit access to its original condition.

5. The plaintiff filed an application, exhibit 4, for temporary injunction.

6. The application was opposed on behalf of the defendant. It appears that an exparte ad-interim relief was granted on

application, exhibit 4, filed by the plaintiff for temporary injunction.

7. The defendants filed an application, exhibit 16, for vacating the exparte order. The learned Trial Court decided both these applications by order dated 07.04.2018. The learned Trial Court allowed the application, exhibit 4, and thereby restrained the defendant no.1 or anybody on his behalf from doing any construction on the suit access or continuing with the construction work or from obstructing the use of the suit access by the plaintiff and from interfering with the suit access in any manner. The defendant no.1 has also been directed to remove the obstruction and to restore the access to the original condition.

8. Feeling aggrieved, the defendant no.1 filed MCA No.33/2018 while the defendant nos.2 to 4 filed MCA No.34/2018 before the learned District Judge. Both these appeals have been dismissed by the learned District Judge by a common judgment and order dated 15.06.2018. Feeling aggrieved, the defendant no.1 has filed Writ Petition No.845/2018 while the defendant nos.2, 3 and 4 have filed Writ Petition No.847/2018.

9. I have heard Mr. Padgaonkar, the learned Counsel for the petitioners and Mr. Ramani, the learned Counsel for the respondents. Perused Record.

10. Mr. Padgaonkar, the learned Counsel for the petitioner has raised certain submissions based on The Goa, Daman and Diu (Extension of the Indian Easements Act) Act, 1978 in order to submit that Article 2309 of the Code stood repealed on coming into force of the aforesaid Act. It is submitted that even assuming that Article 2309 is attracted, as per Article 2310 of the Code, the access should be such that it is least inconvenient to the owner of the dominant heritage which in the present case is not. The principal contention raised on behalf of the petitioners is that there is an alternate access available to the plaintiffs which causes least inconvenience to the dominant heritage.

11. The record discloses that on 18.12.2018, after hearing the parties, this Court found that a Commissioner may be appointed to ascertain the existence of any other alternate access as proposed by the petitioners. This Court found that if there is any such access available, the entire dispute could be resolved.

12. In that view of the matter, Advocate Shailesh Redkar, was appointed as a Commissioner who after visiting the site, has filed his report dated 03.05.2019. The Commissioner has found that there is no alternate access which is available on the site as suggested by the petitioners. Both the Courts below have concurrently found that the first respondent/plaintiff has shown existence of prima facie case and the other requisites namely the balance of convenience and irreparable loss for grant of injunction. It also transpired during the course of the arguments at bar that the defendant no.1 has no valid license/permission for the construction undertaken. The learned Trial Court has found and, to my mind, rightly so, that there was an inspection carried out by the Village Panchayat and there is a stop work notice issued which, prima facie, shows that the construction undertaken is illegal. Both the Courts below have also found that the land of the plaintiff is landlocked. The learned Trial Court on the basis of the photographs produced has found that the construction undertaken is a new construction which would obstruct the access.

13. In that view of the matter, no case for interference is made out in the concurrent finding of fact properly recorded by the Courts below on the basis of the appreciation of

material on record. Prima facie, at this stage, the alternate access as proposed by the petitioner is found to be not in existence as per the report of the Commissioner. The grounds raised on behalf of the petitioners including the ground based on the applicability or otherwise of Article 2309 of the Code can be gone into by the learned Trial Court at the trial of the suit. Although the relief of mandatory injunction at the interim stage is a drastic relief, the Court is not bereft of jurisdiction to grant such a relief, in an appropriate case, particularly when the issue is about restoration of status quo ante, as in the present case. At the cost of repetition, it needs to be emphasised that admittedly the defendant no.1 is not having any permission/construction license from the competent authority to undertake the construction which the Courts below have found to be obstructing the suit access.

14. In that view of the matter, no case for interference is made out in the exercise of supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

15. Both the petitions are accordingly dismissed. However, the Trial Court shall not be influenced by any of the observation herein at the trial of the suit.

16. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

arp/*