

IN THE HIGH COURT OF BOMBAY AT GOA
MISC.CIVIL APPLICATION NO. 905 OF 2019.
IN
APPEAL FROM ORDER NO. 12 OF 2018.

BHANWARA RAM GODARA., ... Applicant.
Versus
LUCIA MARIA LOBO @ LUCIA
LOBO AND 5 ORS., ... Respondents.

Shri Preetam Talaulikar, Advocate for the applicant.
Shri Ketan Morajkar, Advocate for the respondents.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 8th January 2020.

ORAL ORDER

The applicant filed Special Civil Suit No.22/2017/A before the Senior Civil Judge, Bicholim. In that suit he has sought various reliefs, such as declaration, specific performance, cancellation of sale deeds, injunction. He has also filed an interlocutory application, Exh.D-3, under Order 39 Rule 1 of CPC, seeking a temporary injunction, among other things, to restrain the defendant nos. 2 to 5, their agents, and so on from blocking, obstructing, or interfering with the suit road widening area, from putting up any compound wall or any fencing on the part of the suit land illegally purchased by them.

2. The Trial Court, through its order dated 12.3.2018, dismissed that interlocutory application. Aggrieved the applicant has filed this Appeal from Order.

3. Through its Order, dated 25.7.2019, this Court allowed the

Appeal from Order in part. In the operative portion the Court also held thus:

- (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 anybody 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.

4. Later, the applicant has filed this application for speaking to the minutes; he wanted the order clarified. To support that plea, Shri P. Talaulikar has submitted that this Court has expressly observed that, pending the appeal, the applicant will have free access to his property through Plot B, which is the suit subject. According to him, the owner, from whom the applicant earlier purchased a piece of property, assured the applicant that she would be selling Plot B to the applicant. For that plot is located between the land the applicant had purchased from same landlady and the main road, providing the only access. In fact, even in the sale deed through which the applicant purchased from the owner, there was a specific mention about the land the owner kept apart for road widening and, thus, providing access to the applicant from the main road.

5. According to Shri Talaulikar, there was an oral agreement between the owner and the applicant concerning Plot B. But the owner

negated that contract and sold the property to the second respondent. And that occasioned the suit. In the end, he has submitted that unless the applicant is provided free passage through Plot B to reach his land on which he has been carrying granite business, this Court's interim order, dated 25.7.2019, serves no purpose.

6. In other words, Shri Talaulikar submits that though this Court has, in the body of the order, clearly spelt out that the applicant should have access to its plot from the main road through Plot B, that has not been clearly reflected in the operative portion of the order. So he wants the Court to clarify the scope of the order or modify the order, in the interest of justice.

Respondents:

7. On the other hand, Shri K. Morajkar, the learned counsel representing all the respondents, submits that this Court has only directed the respondents to keep the passage unblocked. It has never mandated that the applicant should be provided the passage. To elaborate, Shri Morajkar has submitted that the applicant, in the first place, has neither pleaded in the plaint nor in the interlocutory application that he has been using Plot B for accessing his land from the main road and that pending the suit his passage should remain unobstructed.

8. On the contrary, the applicant, as Shri Morajkar stresses, has required the Court only to keep the passage free of any construction.

That was in the face of the allegation that the 2nd respondent, the purchaser, had been trying to raise structures. According to Shri Morajkar, under the guise of clarification or modification, the applicant cannot seek any fresh relief beyond the pleadings.

9. Shri Morajkar has also drawn my attention to the particular portion of the plaint and also to the order now sought to be clarified: This Court has clearly observed that the applicant has never claimed any prescriptive or easementary right over the property. So the question of the applicant's having passage, according to Shri Morajkar, through Plot B, even pending the suit, does not arise. In the end, he has urged the Court to dismiss the application "for speaking to the minutes."

10. Heard Shri P. Talaulikar, the learned counsel for the applicant; and Shri K. Morajkar, the learned counsel for the respondents.

Clarification:

11. The suit is pending, and the trial Court is the forum where all issues, in the first place, have to be resolved. At an interlocutory stage, it is inadvisable for this Court to dwell upon into the controversy. For this reason, earlier this Court in its order, now sought to be clarified, only considered the prima facie case. Indeed, Courts are guided by the prima facie observations and balance of convenience, besides hardship to either party, as its criteria for deciding an application for ad interim injunction.

12. Here we cannot say that the applicant has not sought the

relief of having a passage through Plot B, pending the litigation. True, neither in the plaint nor in the interlocutory application has the applicant spelt out such requirement in explicit term. But, that said, he wanted the Court to restrain the defendant nos. 2 to 5, from blocking, obstructing, or interfering with the suit road widening area.

13. This Court felt that the only question to be considered would be whether the owner represented to the applicant in the sale deed, dated 7.3.2011, that the area of 205 square metres on the northern boundary of the plot sold to the applicant, an area admeasuring 205 square metres, was reserved "as a road widening area" and whether it could have been sold to the second respondent. In paragraph 18 the Court has also observed thus:

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 applicant that the said area is reserved as road widening area."

14. That sale deed, dated 7.3.2011, through which earlier the applicant purchased from the same owner a piece of property, clearly shows that on the northern boundary of the plot sold to the applicant, an area of 205 square metres was reserved as a road widening area. For that reason, this Court has ruled the area, that is Plot B, should

remain open. The Court has also noted that the purchaser, claiming through the owner, is bound by the sale deed, dt.07.03.2011. Eventually this Court in paragraph 19 has held thus:

In my considered view, *although, the applicant 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 applicant.

(italics supplied)

15. Then in paragraph 21 the Court has also held that till the suit is decided on the merits, the applicant is entitled for injunction, and the Plot B area should be kept open.

It's no Pound of Flesh:

16. Portia, as a legal stickler, tells Shylock, the resentful revenger, that the bond refers to flesh, not blood, and says that if Shylock sheds a drop of Antonio's blood while executing the bond, he will not be protected by the bond and, therefore, will be guilty of murder.¹

17. Commenting on the play, Richard Posner says the legal aspects of *The Merchant of Venice* are on one level absurd. He relates the play to the modern times and says "today a penalty clause—that is, a contract provision that specifies an amount of damages to be awarded in the event of a breach of the contract that exceeds a reasonable estimate of the loss likely to be caused by the breach— is

¹ For an analytical account of the interplay between the law and the literature, refer to Richard A. Posner's *Law and Literature*. 3rd Ed (2009), Harvard University Press, Cambridge, Massachusetts.

unenforceable.” Posner speaks of equity of redemption, too.

18. Shylock could have countered Portia’s hyper-technical argument by asserting that the bond must implicitly have authorized him to shed Antonio’s blood, since otherwise he could not get his pound of flesh—the doctrine of implied powers. He could have as well argued that if Antonio were killed by him it would be by operation of law; he has no intention of killing Antonio unless the Court rules that he is legally entitled to do so. Indeed, “bad motives would not invalidate a lawful act.”²

19. Here, the respondent’s argument reflects Portia’s ploy: “We keep the land clear of all obstructions, but it does not mean you can use it, least of all, as a passage.” I am afraid Portia was hailed for her hyper-technical arguments to ensure that the letter of the law does not kill the spirit of the law. According to Posner, “hyper-technical arguments may seem the antithesis of equity, but they can actually be complementary to it. Both are devices for circumventing bad laws, whether bad because they are too strict or bad because they are riddled with loopholes. . . . So if a judge or lawyer wants, for reasons of equity, to kill a law (in this case the legal principle of enforcing contracts however savage they may be), literalism may be his best weapon, as it was Portia’s.”³

² Id., p.144

³ Id. p.144

Win without Gain:

20. As is rightly contended by the applicant's counsel, this Court has found *prima facie* merit in the applicant's favour, besides the balance of convenience. That said, as readily agreed by the respondents' counsel, if respondents keep Plot B vacant or open, clear of any construction, but without actually permitting the applicant to use that, it may amount to a hollow victory for the applicant—a win in the name but nothing to gain. A relief from a Court of law is not ritualistic; it must serve some purpose. The whole litigation is founded on the bedrock of access to property through the adjacent property.

21. I reckon direction no. 3 in the order implies that, pending the suit, the applicant should use the passageway through Plot B. So I clarify. But I add that this clarification does not affect the merits of the matter, nor does it enlarge the applicant's right beyond his merely using the passage through Plot B to reach his land, for carrying on his day to day business activities, including transportation of the marble.

22. The order is not modified; it is clarified. So the original order, dt.25.7.2019, needs no correction. That order, however, is to be read along with this order of clarification.

Thus, the Miscellaneous Civil Application stands disposed of. No order on costs.

DAMA SESHADRI NAIDU, J.