

Meena

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.923 OF 2019

NILESH G. POLJI AND ANR. ...Petitioners

VS

SUDESH G. NAIK AND 29ORS. ...Respondents

Mr. Gaurish Agni, Advocate *for the petitioners.*

Mr. V. Shirodkar, Advocate *for the respondents.*

CORAM: MANISH PITALE, J

DATED: 18th November, 2021.

ORAL ORDER:

1. Heard learned Counsel appearing for the rival parties.
2. By this petition, the petitioners have challenged order dated 31/03/2018, passed by the Court of District Judge, Panaji, (hereinafter referred to as Appellate Court) thereby dismissing an appeal filed by the petitioners (original defendants). The Appellate Court slightly modified the order of temporary injunction granted in favour of the contesting respondents (original Plaintiffs).
3. The contesting respondents filed suit for declaration and injunction before the Court of Civil Judge Junior Division (hereinafter referred to as "trial Court"), claiming that Sale Deed

dated 09/02/2010, executed in favour of the petitioners was null and void and they further sought cancellation of the Sale Deed. The contesting respondents further sought an order of injunction, thereby restraining the petitioners from making construction on the suit road. In the said suit, the contesting respondents also moved an application for temporary injunction, whereby they sought a direction to restrain the petitioners from carrying on construction on the suit road or encroaching thereupon during the pendency of the suit.

4. The contesting respondents pleaded in the suit filed before the trial Court that the Sale Deed deserved to be declared null and void because it was a composite Sale Deed concerning two plots which were sought to be amalgamated. They also claimed that there existed a connecting road in between the plots, which were sought to be amalgamated by the petitioners and that this was the only way of access to the houses of the contesting respondents. It was further pleaded that the occupants of the said houses i.e. the contesting respondents had been using the said access way between the plots, openly and uninterruptedly since time immemorial.

5. The petitioners filed their written statement and reply to the suit and application for temporary injunction. They resisted the claims made on behalf of the contesting respondents. It was their case that no such access way existed and that when the contesting respondents had approached the Municipal Authorities for similar relief, the same was not granted. On the basis of the documents available on record, it was claimed that no prima facie case was made out on behalf of the contesting respondents.

6. The trial Court considered the rival contentions and concluded that the contesting respondents had made out a case for grant of temporary injunction and accordingly allowed the application. Aggrieved by the same, the petitioners filed the aforesaid appeal before the Appellate Court. By the impugned judgment and order, the Appellate Court found that the contesting respondents had failed to even prima facie support their case that a 3 meters wide access road existed between the plots in question that were purchased by the petitioners wherein they had undertaken the development and construction activities. Yet, the Appellate Court refused to interfere with the order of the trial Court and instead concluded that at least a pathway existed and, on this basis, the Appellate Court slightly modified the order of the trial Court by restraining the petitioners

from carrying out any construction on the pathway or obstructing the contesting respondents from using the pathway till the final disposal of the suit.

7. Aggrieved by the said judgment and order of the Appellate Court, the petitioners filed the present Writ Petition, wherein notice was issued and the contesting respondents appeared through Counsel.

8. Mr. G. Agni, learned Counsel appearing for the petitioners submitted that the trial Court had erred in allowing the application for temporary injunction and the Appellate Court also committed an error in only partly modifying the order passed by the trial Court. The learned Counsel appearing for the petitioners invited the attention of this Court to the pleadings of the parties and by referring to paragraphs 7 and 8 of the plaint, submitted that the contesting respondents had pleaded easement of necessity along with the easement of prescription, which was impermissible. It was further submitted that the pleadings on record were deficient to even prima facie show an easement of prescription in favour of the contesting respondents on the touchstone of the stringent test laid down by the Hon'ble Supreme Court in the case of **Justiniano**

Antao and Ors. v/s. Smt. Bernadette B. Pereira [2005 SCC 1 471] and the judgment of this Court dated 21/11/1997 passed in Second Appeal No.18 of 1991 [**Damodar Vasudev Shiroadkar and others v/s. Smt. Hirabai Vassant Kenkre**].

9. Apart from this, the learned Counsel appearing for the petitioners submitted that the survey plan of the relevant portion consisting of the suit property did not show any access way between the plots as claimed by the contesting respondents. It was further submitted that even the plans annexed to the Sale Deeds executed by the original owner in the years 2005 and 2010, show only a road between two plots without further showing the access way to the houses of the contesting respondents, as claimed in the plaint. Thereafter, the learned Counsel appearing for the petitioners invited attention of this Court to the proceedings undertaken by the contesting respondents themselves, prior to the filing of the aforesaid suit. It was brought to the notice of this Court that the contesting respondents had approached the Chief Officer of the concerned Municipal Council, seeking identical relief of access way of three meters wherein the concerned Officer had repudiated the claim of the contesting respondents and the opinion of the Municipal Legal Retainer also demonstrated that the contesting

respondents were required to prove their claim before the competent Civil Court. On this basis, it was submitted that since the pleadings were deficient and the material on record did not even make out a prima facie case in favour of the contesting respondents, the orders passed by the two Courts below deserved to be set aside.

10. On the other hand, Mr. Shirodkar, learned Counsel appearing for the contesting respondents submitted that since there were concurrent findings rendered by the two Courts below, this Court while exercising its writ jurisdiction ought not to re-appreciate the material on record to set aside the concurrent findings, only because a different view could be taken on the basis of the material on record. The learned Counsel further emphasised that even if the material on record did not show the existence of the 3 meters wide road as claimed by the contesting respondents, the Appellate Court had correctly concluded that a pathway indeed existed and that the contesting respondents would suffer grave inconvenience if the only access way available to them was blocked during the pendency of the suit. On this basis, it was submitted that the Writ Petition deserved to be dismissed.

11. Heard learned Counsel appearing for the rival parties and perused the material on record. There can be no quarrel that the proposition put forth on behalf of the contesting respondents that this Court while exercising writ jurisdiction ought to be slow in interfering with the findings rendered by the two Courts below and that this Court may not re-appreciate the entire material on record to form a different opinion.

12. A perusal of the material on record shows that when the case of the contesting respondents is essentially based on a claim of an easement, there is no prayer for a declaration in that regard. A perusal of the plaint shows that the contesting respondents have prayed only for declaring that the Sale Deed is null and void, further seeking cancellation of registration of the same and thereupon the said respondents have sought an injunction restraining the petitioners from carrying out construction on the alleged access way available to them. The absence of a specific prayer with regard to the easementary right claimed on behalf of the contesting respondents is a glaring deficiency in the pleadings before the trial Court. Apart from this, a perusal of paragraphs 7 and 8 of the plaint shows that while on the one hand, the contesting respondents have claimed easement by way of necessity, stating that the aforesaid alleged

access way is the only path available to them to access their houses, at the same time they have claimed easement by way of prescription in paragraph 8 of the plaint. Contents of the said paragraphs show that a general statement is made about the said respondents and their predecessors enjoying the alleged access way continuously and openly without any interference.

13. The learned Counsel appearing for the petitioners is justified in relying on the judgment in the case of **Justiniano Antao and Ors. v/s. Smt. Bernadette B. Pereira** (supra) wherein the Hon'ble Supreme Court has referred to the manner in which pleadings are to be placed on record before the Court, while claiming a right of easement by way of prescription. It is specifically laid down that the pleadings should categorically state a date since when the party is using the alleged access way for at least the past 20 years and that there has to be material on record to support such specific pleading. This Court in the case of **Damodar Vasudev Shirodkar and others v/s. Smt. Hirabai Vasant Kenkre**(supra) has emphasised upon the necessity to plead that such an access way is being used, leading to an easementary right without interruption, as a matter of right. Much emphasis is placed

on the necessity on the part of the party claiming such a right to show that the alleged access way has been used "as of right".

14. Applying the aforesaid test laid down by the Hon'ble Supreme Court and this Court to the pleadings in the present case, it becomes evident that the contesting respondents have relied upon the pleadings that are found to be prima facie deficient. Absence of a prayer for declaration in respect of the existence of such right is also a significant factor which the Courts below completely ignored.

15. Apart from this, the material on record does indicate that the survey plan does not show any such access way as claimed by the contesting respondents. The plans annexed to the Sale Deeds executed by the original owner in the years 2005 and 2010 only show a road between the two plots up to a certain point and not beyond as claimed by the contesting respondents. The site plan on record shows that on the South of the houses belonging to the contesting respondents there runs a road from which prima facie it appears that the contesting respondents do have access.

16. Therefore, on both counts pertaining to the easement by way of necessity and by way of prescription, the pleadings and material

on record do not show that the contesting respondents have made out a prima facie case in their favour.

17. The Appellate Court found, as a matter of fact, that the contesting respondents had failed to show the existence of a 3 meters wide access road. Despite rendering such a finding, the Appellate Court went on to hold that at least a pathway seems to have existed and, on that basis, dismissed the appeal of the petitioners by only slightly modifying the order of the trial Court. The Appellate Court in the impugned order has restrained the petitioners from obstructing the contesting respondents from using the pathway and from carrying out any construction on such pathway.

18. This Court is of the opinion that the findings rendered by the two Courts below are based on an erroneous appreciation of the material on record and in ignorance of the specific position of law as highlighted on behalf of the petitioners before this Court.

19. This Court is inclined to interfere with the orders passed by the two Courts below. In the present case, it cannot be said that there are concurrent findings rendered in favour of the contesting respondents. As noted above, the Appellate Court had indeed found

that even prima facie the contesting respondents failed to support their claim about the existence of a 3 meters wide access road. The Appellate Court erred in holding that at least a pathway was prima facie shown to be existing. The necessity of appropriate pleadings was ignored by the Courts below, particularly absence of a prayer for declaration in respect of the said easementary right claimed on behalf of the contesting respondents.

20. In view of the above, this Court finds that the petitioners have made out a case for interference in the impugned judgments and orders. Accordingly, the Writ Petition is allowed. The orders passed by the trial Court and the Appellate Court are quashed and set aside and the application for temporary injunction filed on behalf of the contesting respondents is dismissed.

21. At this stage, the learned Counsel appearing for the petitioners submitted that since an order has been operating in favour of the contesting respondents at least to the extent of access through the pathway, this Court may consider keeping the order passed today in abeyance for eight weeks. The learned Counsel appearing for the petitioner has vehemently opposed the aforesaid prayer made on behalf of the contesting respondents.

22. In the facts and circumstances of the present case, this Court deems it fit to direct that the order passed today by this court shall remain in abeyance for a period of four weeks from today. It is made clear that no further extension of time will be granted.

MANISH PITALE, J.

MEENA
VISHAL BHOIR

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