

Aura

IN THE HIGH COURT OF BOMBAY AT GOA

Appeal From Order No. 15 of 2021
With
Civil Application No. 29 of 2021

Shri Deo Mahadeo Devasthan,
Devasthan governed under the
Devasthan Regulation Act,
Having its Office at
Mahadev Temple at Deulsai,
Cacora, Curchorem, Quepem, Goa,
through its Attorney,
Shri Rajendra Pandhari Swant Dessai,
Resident of House No.2235,
Madhegal, Cacoda, Quepem, Goa.

Appellant/Original
Plaintiff

Versus

1. The State of Goa,
Through its Chief Secretary,
Secretariat, Porvorim, Goa.
2. The Office of Dy. Town Planner,
Town and Country Planning Officer,
Quepem, Goa.
3. The Curchorem Cacora Municipal
Council, Curchorem, Goa.
4. The Chief Officer,
Curchorem Cacora Municipal Council,
Curchorem, Goa.
5. Mr. Irfan M. Shaikh,
Son of Mutalib Shaikh,
Aged 50years, business,
Married, Indian National,

Resident of Shaikh Mansion,
Pontemol Road, Cada Hall,
Curchorem, Goa.

Respondents/Orig
Def. no.1 to 5

Mr. Sudesh Usgaonkar with Ms. R. Pereira, Advocates for the Petitioners.

Mr. S.P. Munj, Additional Government Advocate for the Respondent no.1 and 2.

Mrs. Annelise Fernandes, Advocate for the Respondent no.3 & 4.

Mr. V. A. Lawande with Mr. Redkar, Advocates for Respondent no.5

CORAM: MANISH PITALE, J
Closed on: 6th October, 2021
Pronounced on: 14th October, 2021.

ORDER:

1. This appeal arises out of Order dated 23/12/2020 passed by the Court of District Judge-2, South Goa, Margao, whereby, an application for temporary injunction filed on behalf of the appellant (original plaintiff) has been rejected.

2. The facts leading to filing of the present appeal are: that according to the appellant, the respondent no.5 has been illegally using part of property belonging to the appellant in survey no.448/8 at village Cacora Taluka Quepem to access his property at survey no.448/11, while undertaking construction of a residential project. It is contended that there is no access to the said property in survey no.448/11 available to the respondent no.5 through the aforesaid small portion of the property belonging to the appellant in survey no.448/8. The appellant had approached this Court by filing Writ Petition No.511 of 2019,

since its complaint with regard to the aforesaid grievance was not being decided by the concerned authority. This Court disposed of the said Writ Petition on 23/7/2019, by directing the concerned authority to consider the complaint of the appellant and to dispose of the same after hearing the rival parties. The concerned authority i.e. the respondent no.2-Deputy Town Planner heard the rival parties and passed an order dated 29/8/2019, holding that there was no illegality in the construction undertaken by respondent no.5 as it was approved by the Town and Country Planning department and subsequently by the Municipality by issuance of construction licence. With regard to the dispute raised by the petitioner regarding access, it was directed that the grievance could be raised before the competent authority for redressal.

3. It is in this backdrop that on 27/12/2019, the appellant filed a suit for declaration, permanent and mandatory injunction against the respondents herein. The appellant sought declaration in respect of orders dated 11/1/2018, 29/8/2019 and 16/12/2019, passed by the respondent-authorities as being illegal, null and void. It was contended that the said orders approving the plans while granting permission for construction project and also disposing of the complaint of the appellant were illegal and unsustainable. Consequently, the appellant sought injunction restraining the respondent no.5 from carrying out construction in the property at survey no.448/11, by using access from the property of the appellant at survey no.448/8. The appellant also sought a declaration that the respondent no.5 did not have any easementary right of way through the property belonging to the appellant in survey no.448/8. In this suit, the appellant also filed

an application for temporary injunction, seeking an order restraining the respondent no.5 from using any part of the property in survey no.448/8, to access its property at survey no.448/11, for the purpose of construction.

4. The suit as well as the application for temporary injunction were resisted by the respondents. The respondent no.5 contended that all valid permissions were available for carrying out the construction project and that the appellant nowhere claimed that the said respondent was undertaking construction in any portion of survey no.448/8. The appellant as well as the respondent no.5 relied upon reports of their respective experts. The respondent no.5 placed on record photographs in order to claim that 820 sq. mtrs. of land in survey no.448/8 was admittedly acquired by the Government for construction of road and that the portion through which the respondent no.5 was having access for the construction project in survey no.448/11 was through the said portion acquired by the Government, thereby demonstrating that the appellant was not entitled to the order of temporary injunction. The respondent nos.1 to 4 being the State and the Municipal authorities also opposed the prayer made on behalf of the appellant.

5. The Court below took into consideration the material on record to arrive at prima facie findings on the rival contentions raised by the parties. Upon appreciating the pleadings and the material available on record, the Court below found that the appellant had failed to make out a prima facie case in its favour. The Court also found that the construction project was virtually complete and therefore, the aspects of balance of convenience and

irreparable loss were also not in favour of the appellant. On this basis, the application for temporary injunction stood rejected.

6. Aggrieved by the same, the appellant has filed the present appeal.

7. Mr. Sudesh Usgaonkar, the learned counsel appearing for the appellant submitted that the Court below erred in all the three aspects concerning the question of grant of temporary injunction i.e. prima facie case, balance of convenience and irreparable loss. The learned counsel invited attention of this Court to the contents of the plaint as well as written statement filed by the respondents. Attention of this Court was also invited to the statutory requirements to be satisfied when the construction project as undertaken by the respondent no.5 is to be granted clearance. It was submitted that in the plans submitted for approval, the respondent no.5 was required to show access to the property where the construction was being undertaken, which was not shown. It was further submitted that the authorities had granted permissions and construction licence without insisting upon mandatory statutory requirements to be complied with. By inviting attention to the sale deed executed in favour of respondent no.5, it was submitted that the document did not show existence of any access to the property at survey no.448/11 through the property of the appellant in survey no.448/8. A perusal of the boundaries of the appellant would show the existence of the property of the appellant on the boundary of the property of respondent no.5, which belied the claims of the respondent no.5 as regards availability of access. It was submitted that even respondent nos.1 to 4, being the State and Municipal

authorities had not followed the mandatory requirements while illegally issuing permissions and construction licence in favour of respondent no.5.

8. The learned counsel further submitted that the report of the surveyor/expert appointed by the appellant clearly showed a strip of land between the road and the property of respondent no.5 in survey no.448/11 and that the said strip of land belonged to the appellant. By relying upon the provisions of the Land Acquisition Act, 1894, it was submitted that so long as the respondent/State authority was unable to show that possession of the said strip of land was taken pursuant to the acquisition proceedings, the said land did not vest in the State and its ownership and possession continued with the appellant. On this basis, it was submitted that a sufficiently strong prima facie case was made out on behalf of the appellant, which the Court below failed to appreciate. As regards the reliance placed on photographs by the Court below, it was submitted that aerial photographs would have shown the correct picture, which the Court failed to appreciate. The learned counsel submitted that the Court below was not justified in observing that the appellant had failed to join the Public Works Department as a party defendant because the acquisition of the land was by the State, which was already arrayed as defendant no.1 in the suit. On this basis, it was submitted that the impugned order deserved to be set aside and the application for temporary injunction deserved to be allowed.

9. On the other hand, Mr. V. A. Lawande, the learned counsel appearing for the contesting respondent no.5, submitted that construction was started in the year 2019 itself. This was pursuant

to valid permission and construction licence issued by the respondent nos.1 to 4. There was no order from the said respondents to intervene in the process of construction and therefore, the construction was undertaken in a legal manner. It was submitted that in the plaint there was not a single statement made by the appellant that it was in possession of the strip of land from where the respondent no.5 was and is having access to the property in survey no.448/11. It was submitted that the permissions and construction licence were never cancelled and that the predecessor in title of the property of survey no.448/11 was using the same portion for access to the existing house in the property. It was further submitted that the construction project was now complete.

10. The respondent no.5, as recorded in order dated 4/10/2021, without prejudice to his rights and contentions, had offered to purchase the strip of land from the appellant at more than the market value, to put an end to the entire litigation. It was submitted that the aforesaid offer was made even earlier to the appellant but, there was no positive response.

11. The learned counsel appearing for the respondent authorities submitted that the approvals and construction licence issued in favour of respondent no.5 were in accordance with law.

12. Since in the present appeal, this Court is concerned with the entitlement of the appellant for grant of temporary injunction pending the suit, it would be necessary to examine whether the appellant has made out a prima facie case. As noted above, the

Court below has held that the appellant failed to make out a prima facie case in its favour.

13. The appellant in the suit has challenged the permissions and construction licence granted to respondent no.5 and it has also sought a declaration that the respondent no.5 cannot claim any easement of access through the aforesaid strip of land for access through the property in survey no.448/11. Whether the orders passed by the respondent no.1 to 4 i.e. the State and the Municipal Authorities, in pursuance of which the respondent no.5 undertook construction of the project in the property at survey no.448/11, are valid or not are the subject matter on the suit pending before the Court below. The parties would have to lead evidence in support of their respective claims before the Court below to arrive at a conclusion as to whether the appellant is justified in seeking annulment of such orders passed in favour of respondent no.5. In order to successfully claim an order of temporary injunction, the appellant would have to show that such orders and permissions issued by respondent nos.1 to 4 in favour of respondent no.5 are prima facie illegal and wholly unsustainable.

14. In order to analyse the same, the Court would have to look at the pleadings and the material available on record at this stage. Indeed, the Court below has considered the pleadings in the form of the plaint/written statement application for temporary injunction and replies filed thereto. The respondent nos. 1 to 4 have supported their orders in pursuance of which the respondent no.5 has undertaken the construction activity by access to the property through the aforesaid strip, which the appellant claims

to be in ownership and possession. Much emphasis is placed on behalf of the appellant on the mandatory statutory requirements to be satisfied by the respondent no.5, while submitting plans for approval and for seeking construction licence. It is claimed that there were glaring defects, which the respondent nos.1 to 4 glossed over and issued orders in favour of the appellant. It is claimed that even in the order passed by the respondent no.2 in pursuance of the direction issued by this Court while disposing of the Writ Petition no.511 of 2019, the actual grievance of the appellant was not addressed.

15. The learned counsel for the appellant took this Court through the details of how the surveyor/expert appointed by the appellant had demonstrated by drawing sketches and maps that the said strip of land was still in ownership and possession of the appellant and that therefore, the respondent no.5 had no way of access from the property of the appellant in survey no.448/8.

16. But, the most crucial aspect of the present matter is that part of the property in survey no.448/8 admeasuring 820 sq. mtrs. was acquired by the respondent-State and the appellant received compensation for the same. The appellant did not state this fact in sufficient detail in the plaint. There was oblique reference made to the same while concentrating on the finding of the expert/surveyor appointed by the appellant itself. The property being that of the appellant, the fact regarding acquisition of 820 sq.mtrs from survey no. 448/8 and its extent ought to have been stated in the plaint itself. This was admittedly not done. Instead, the appellant has repeatedly harped upon the failure of the respondent authorities to demonstrate as to which portion of

the property from survey no.448/8 admeasuring 820 sq. mtrs. was acquired. The entire burden has been placed on the respondent authorities to demonstrate that the strip of land in question formed part of 820 sq.mtrs of land, which was acquired and upon which road was constructed. On this basis, it has been argued that since the respondent State has failed to show that the possession of said strip of land was actually taken, there was no vesting of the same with the respondent-State.

17. This Court is unable to appreciate the said approach of the appellant, particularly when relief of temporary injunction is sought on its behalf. The report of the surveyor/expert appointed by the appellant is countered by report of the expert appointed by the respondent no.5, who has stated that he actually visited and measured the disputed portion and found that the portion of land acquired by the State included the strip of land up to the property in survey no.448/11 and that the road was actually constructed on the said strip of land. It was therefore reported by the expert that the access being used by the respondent no.5 to undertake construction in survey no.448/11, was through the Government acquired land and not remaining land belonging to the appellant in survey no.448/8.

18. It is in this backdrop that the Court below observed that there were two conflicting expert reports and that the Court was required to look at photographs. The said approach of the Court below has been criticised on behalf of the appellant and it has been contended that the photographs were of no use, particularly because such disputes required aerial photographs to bring out the truth of the matter. It is an admitted position that the

appellant has made no efforts to place on record aerial photographs and the appellant placed no photographs at all before the Court below. It is in such a situation that the Court below concluded against the appellant as regards prima facie case for the grant of order of temporary injunction.

19. This Court has considered the material on record, particularly the reports of the experts appointed by the rival parties. The stand of the respondents nos. 1 to 4 authorities is also on record. It is also an admitted position that the appellant has not stated in detail about the extent of 820 sq. mtrs. land from survey no.448/8 acquired by the State in respect of which the appellant admittedly received compensation. The entire claim of the appellant at this stage appears to be in a cloud of doubt, which can be cleared only by way of evidence and completion of proceedings in the suit pending before the Court below. It is also an admitted position that the respondent no.5 has been accessing the property at survey no.448/11, for the construction activity started in the year 2019, following construction licence issued in his favour. The construction activity has been completed. The appellant has failed to demonstrate that such activity was in the teeth of any interim order brought to the knowledge of respondent no.5, which could be said to have been wilfully violated by the said respondent. Therefore, it cannot be said that the Court below committed any grave error in refusing to grant the application for temporary injunction moved on behalf of the appellant.

20. It is significant that the respondent no.5, without prejudice to his rights and contentions, at various stages during the

arguments before this Court offered not only market value, but more than twice the market value for the aforesaid strip of land admeasuring 19.20 sq. mtrs, which in turn is crucial for the respondent no.5 regarding access to the said construction project. The said offer was rejected by the appellant and a counter offer was made, which was not acceptable to the respondent no.5. The entire litigation could have been put to rest if the rival parties had accepted the offers made to each other. Be that as it may, this Court is of the opinion that on the touchstone of the tests for grant of temporary injunction, the appellant has not been able to demonstrate sufficient material in its favour and therefore, the present appeal is found to be without any merit.

21. Accordingly, the appeal is dismissed. It is made clear that the dismissal of this appeal shall not come in the way of the appellant and the respondent no.5 from exploring the possibility of settlement, so that the entire litigation is put to rest. Civil Application, if any, stands disposed of.

MANISH PITALE, J.

MARIA
AURA
PEREIRA
Digitally signed
by MARIA AURA
PEREIRA
Date: 2021.10.14
17:19:51 +05'30'