

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.158 OF 2012**

Benedito Souza also known as
Benedito D'souza, son of Andre
D'Souza also known as Andre Souza,
aged 71, r/o H.No.227, Borla, Macasana,
Salcete, Goa. 403 709
represented by power of attorney
holder Mr. Dinesh D'Souza. ... Appellant

Versus

1. Caetano Rosario Estibeirol,
s/o Francisco Estibeirol,
aged about 45,
c/o Mrs. Amalia Fernandes Souza,
Tumbabhat, Macasana,
Salcete, Goa 403 709

2. Fatima Estibeirol,
wife of the Caetano Rosario Estibeirol,
aged about 39,
c/o Mrs. Amalia Fernandes Souza,
Tumbabhat, Macasana, Salcete Goa 403 709

3. Panchayat of Macasana,
Macasana, Salcete, Goa 403 709 Respondents

Mr. Nitin Sardessai, Senior Advocate with Ms. Gautami Kamat,
Advocate for the Appellant.

Mr. R. G. Ramani, Senior Advocate with Mr. Sahil Sardessai, Advocate
for Respondent Nos.1 and 2.

Coram: M. S. SONAK, J
Reserved on: 11th February 2021
Pronounced on: 17th February 2021

JUDGMENT

Heard Mr. N. Sardesai, learned Senior Advocate with Ms. Gautami Kamat for the Appellant and Mr. R. G. Ramani, learned Senior Advocate with Mr. S. Sardesai for Respondent Nos. 1 and 2.

2. Having regard to the orders made on 13th December 2012 and 5th February 2021, this Second Appeal involves the following substantial questions of law :-

- (i) Whether the impugned order suffers from non-application of mind in as much as it holds that the Respondents' structure could not be ordered to be demolished for lack of details in the plaint and the report, when the pleadings on record complied with the provisions of Order VII Rule 3 Code of Civil Procedure and the evidence on record clearly demonstrated that the set back line is a straight line from the common boundary, thus evidencing the portion to be demolished ?
- (ii) Whether the appellant who is the neighbour of the respondent can get a relief of permanent/mandatory injunction by merely establishing that there is breach of the requisite set backs under Section 38 and 39 of the Specific Relief Act ?
- (iii) Whether the Learned Appellate Court committed gross illegality by reversing the Decree for mandatory injunction, as granted by the Learned Trial Court, merely on grounds of delay and laches in the absence of any finding that the delay had led to inviting the bar of limitation ?
- (iv) Whether an adjoining owner has a right to seek demolition of the disputed structure on the ground that it has no licence from the statutory Authority ?

3. The Appellant is the original Plaintiff and the Respondents are the original Defendants in Regular Civil Suit No. 153/2004/II instituted in the Court of 2nd Additional Civil Judge Senior Division at Margao seeking the following substantive reliefs:

(a) By way of a decree of permanent injunction, the defendant 1 and 2, his family members, agents and servants, or whosoever be restrained from carrying out any construction within 3 mts. setback area of the said property of the Plaintiff and his family;

(b) The defendants 1, 2 and 3 be directed to demolish the part of the house as shown in the plan of the engineer attached and marked as inadequate setback it being illegal due to not keeping the said proper setback, within ten (10) days. Failure to comply with the same within the stipulated time of ten days, the Collector as executive authority of the district be ordered to demolish the same.

4. The Defendants filed their written statement denying the case pleaded by Plaintiff. Based on the pleadings, the learned Trial Judge framed and answered the following issues:

ISSUES	Findings
1 Whether the Plaintiff proves that the Defendants has carried out illegal construction within the 3 mts., set back area of the suit property belonging to the Plaintiff and his family ?	Affirmative
2 Whether the Plaintiff proves that he is entitled for the decree against the Defendant No.1 and Defendant No.2 restraining them from carrying on the	Affirmative

said illegal construction without the necessary set back ?

3 What order ? What relief ? As per order

ADDL. ISSUE

1 Whether the plaintiff proves that he is entitled for mandatory injunction directing the demolition of that part of the construction done by defendant no.1 and 2 within the setback area shown in the approved plan ? Affirmative

5. The Trial Judge vide judgment and order dated 31st March 2011 decreed the Plaintiff's suit by making the following order:-

“ This suit stands decreed with costs restraining the defendants and any other persons from carrying out any construction within 3 mtrs., setback area of the said property of the plaintiff and his family and defendants are also directed to demolish the part of the house constructed by the defendants in the setback area in violation of approved licence and plans as shown in the plan of the Engineer Glen Anthony Andrade at Exbt. 68/A-C Colly. Decree shall be drawn up accordingly.”

6. The Defendants appealed and Regular Civil Appeal No.96/2011 was disposed of by the First Appellate Court vide judgment and decree dated 13th July 2012, thereby reversing the Trial Court's decree and dismissing the plaintiff's suit. Hence, the present Second Appeal on the aforesaid substantial questions of law.

7. Mr. Sardesai, learned Senior Advocate for the Plaintiff

submitted that the pleadings in the plaint were quite clear and since this was not a case of encroachment as such, there was no requirement of attaching a sketch/plan to the plaint in terms of Order VII Rule 3 of Civil Procedure Code (CPC). He submits that in any case there was more than substantial compliance since a plan prepared by an expert was already included in the list of documents which were filed along with the plaint.

8. Mr. Sardesai also pointed out that the suit, in this case, was filed within the prescribed period of limitation and therefore, the First Appellate Court erred in non-suiting the Plaintiff on the ground of alleged delay and laches. He pointed out that the cause of action for instituting suit first arose on 8th May 2004 and the suit was instituted on 27th May 2004 and therefore, there was no delay or laches.

9. Mr. Sardesai has also pointed out that the First Appellate Court was not justified in holding that the Plaintiff lacks locus standi to institute the suit when admittedly the Plaintiff was the neighbour of the Defendants and the allegation was that the Defendants put up a construction in the setback area reserved for benefits of the neighbours like the Plaintiff. Mr. Sardesai pointed out that the reasoning of the First Appellate Court is in direct conflict with the reasoning expressed in *Fatima Joao Vs Village Panchayat of Mercas*¹, decided by the Division Bench of this Court.

¹ 2000(2) GLT 341

10. Mr. Sardesai, submitted that the adjoining owner has the right to seek demolition of the disputed structure on the ground that the same is not backed by a licence from statutory authorities like the Panchayat or is in breach of terms and conditions subject to which licence was granted by the Panchayat. He submits that even this issue is covered by the decision of the Division Bench in *Fatima Joao* (supra) and since the First Appellate Court has virtually ignored the ruling of the Division Bench, the impugned judgment and decree warrants interference.

11. Mr. Sardesai submits that based on the aforesaid, substantial questions of law as framed may be answered in favour of Plaintiff.

12. Mr. R. G. Ramani, learned Senior Advocate for the Defendants points out that the pleadings in the plaint are sketchy and based thereon no relief was due to the Plaintiff. He pointed out that there is no compliance whatsoever of mandatory provisions of Order VII Rule 3 of CPC and therefore, plaint ought to have been rejected at the threshold, or in any case the suit ought to have been dismissed.

13. Mr. Ramani submitted that even *Fatima Joao* (supra) lays down that the suit at the instance of a neighbour for a violation of Municipal plans or rules or bye-laws resulting in an invasion of their right to light, air, privacy, or a source of pollution or material injury. He

pointed out that there are no pleadings in the plaint about all these aspects and therefore, the First Appellate Court was justified in holding that the Plaintiff lacks locus standi to maintain a suit of this nature.

14. Mr. Ramani submitted that the relief of mandatory injunction is discretionary. He pointed out to the evidence of Plaintiff of having instituted suit when the construction had reached up to the ceiling level and submitted that there was delay and laches in the institution of the suit. He pointed out that such delay and laches is one of the valid considerations to deny discretionary relief of mandatory injunction. He relied on *S.S.V. Krishnan Pillai and others Vs Kilasathamma²*.

15. Mr. Ramani submitted that there is no error whatsoever in the view taken by the First Appellate Court and the substantial questions of law as raised by the Plaintiff do not arise or in any case, may be answered against the Plaintiff in this matter.

16. Mr. Ramani submits that for all the aforesaid reasons, this appeal may be dismissed.

17. The rival contentions now fall for my determination.

18. The Bombay amendment to Order VII Rule 3 of CPC *inter*

² AIR 1928 Madras 810

alia provides that where the subject matter of the suit is for the encroachment of immovable property, a sketch showing as approximately as possible, location, and the extent of encroachment shall also be filed along with the plaint.

19. In the present case, Plaintiff has not alleged any encroachment as such on his property by the Defendants. Plaintiff has however alleged that the Defendants extended their construction into the area reserved as a setback by the building regulations applicable in Panchayat areas. In such circumstances, it is doubtful whether the provisions of Order VII Rule 3, with all their rigor, will at all apply.

20. However, even if we have to proceed on the basis that this was a suit complaining of encroachment in the setback area which was reserved for the benefit of the Plaintiff who is admittedly the owner of the neighbouring plot, the material on record indicates that there was more than substantial compliance with the requirement of Order VII Rule 3 of CPC in the present case.

21. The Plaintiff in the first place had with substantial clarity described the nature of encroachment into the area reserved as a setback. This is evident from the pleadings in paragraphs 2, 4, and 5 of the plaint. Besides, along with the plaint, Plaintiff relied on a plan prepared by engineer C. N. Rebello in which the location and extent of

encroachment were made clear.

22. After the demise of engineer C. N. Rebello, Plaintiff engaged another civil engineer Glen Anthony Andrade who inspected the site, took measurements of the disputed part of the construction at the site, and placed on record a plan as well as a report dated 10th March 2008.

23. Even without going to the plan of 2008, it is sufficient to hold that the plaint had complied with the requirements of Order VII Rule 3 of CPC assuming that such requirements were attracted to a suit of present nature. Besides, if the written statement of the defendants is perused, it is clear that no such objection about non-compliance of provisions of Order VII Rule 3 of CPC was ever taken. The Defendants did not complain of any breach whatsoever on account of alleged non-compliance with the requirements of Order VII Rule 3 of CPC.

24. The First Appellate Court failed to read the plaint as well as the accompanying report/plan prepared by the engineer Rebello. The First Appellate Court also failed to determine whether this was indeed a suit for encroachment to which the provisions of Order VII Rule 3 of CPC were at all applicable. The First Appellate Court failed to consider that there was more than substantial compliance with the provisions of Order VII Rule 3 of CPC assuming that same were attracted to the suit

of this nature. The First Appellate Court also failed to appreciate that there was neither any complaint of prejudice made in the written statement nor was such prejudice ever demonstrated by the defendants in the course of their evidence. The First Appellate Court was therefore not justified in non-suiting the Plaintiff on the ground of alleged non-compliance with the provisions of Order VII Rule 3 of CPC. The first substantial question of law is therefore required to be answered in favour of the Plaintiff and against the Defendants in this matter.

25. From the pleadings, it is evident that the main grievance of the Plaintiff was that the Defendants had extended their construction into the area reserved as three meters setback. There is evidence on record that the Defendants had secured an approval from the concerned Panchayat and one of the conditions of the approval of the plan was that the Defendants maintained a setback of 3.5 meters on the eastern side of their plot surveyed under No.6/3-B towards the side of the Plaintiff's property surveyed under No.6/4. Plaintiff had pleaded that the Defendants instead of maintaining this 3.5 meters setback extended their construction leaving a setback of only one meter. Plaintiff has pleaded that even in terms of the rules, bye-laws a minimum setback of three meters had to be kept by the defendants and these rules/bye-laws have been observed by the Defendants, only in the breach.

26. The Plaintiff has led cogent evidence based on which the

Trial Judge concluded that there was indeed a breach of setback rules/bye-laws. Even the First Appellate Court has not recorded any finding that there was no breach of the setback rules/bye-laws that the Defendants' construction had left a setback of more than 3.5 meters or more than 3 meters. The evidence on record overwhelmingly establishes that the Defendants' construction has extended into the setback area thereby leaving a setback of hardly one meter towards the eastern side of the plot under survey No.6/3-B when in fact the setback had to be left 3.5 meters in terms of the approved plan or three meters in terms of the rules and bye-laws applicable in Panchayat areas.

27. The expert examined on behalf of Plaintiff has deposed clearly to the extent of extension. The circumstance that the plan prepared by this expert may not have been to the scale was no ground to discard his evidence or the plan prepared by him. The First Appellate Court failed to appreciate that the plan to scale has already been prepared by Rebello and the same was filed along with the plaint. The First Appellate Court failed to appreciate that since the engineer Rebello has expired, Plaintiff had to engage the services of engineer Andrade. This engineer deposed that he had the benefit of the plan prepared by the engineer Rebello and he concurred with the report and plan prepared by the engineer Rebello. The plan prepared by engineer Rebello was to scale. Thus, there was overwhelming evidence on record to indicate the extent of extension into the setback area and the First Appellate Court

without any justification has held otherwise.

28. The First Appellate Court went to the extent of holding that the Plaintiff has no locus standi to institute suit because Plaintiff has failed to plead that there was the invasion of his right to light, air, privacy or because the Plaintiff had failed to allege that the construction put up by the Defendants in the setback area had caused any material injury to the Plaintiff. The First Appellate Court, according to me has misread the ruling of the Division Bench in *Fatima Joao* (supra).

29. In the first place, if the plaint read in its entirety, it is not as if there are no pleadings sufficient to entitle the Plaintiff to a decree on proof of material facts pleaded therein. Secondly, in *Fatima Joao* (supra), the Division Bench of this Court, relying upon ***K. Ramdas Vs Chief Officer***³ and ***Bangalore Medical Trust Vs B. Muddappa***⁴ has held that making of a scheme, or bye-laws or building regulations is for the planned development of the area. It is for the benefit of the citizens residing in the area. A neighbour who is affected, therefore, by illegal construction, has an obligation in his favour based on which he can maintain a suit for perpetual injunction. The Division Bench, therefore, found no difficulty in holding that a neighbour would have the right to maintain a suit.

³ AIR 1974 SC 2177

⁴ AIR 1991 SC 1902

30. In *Fatima Joao* (supra), the Division Bench expressly overruled the view taken by the learned Single Judge in *Margarida Fernandes Vs Antonio Fernandes*⁵ and *Narayandas Kunugo Vs Saraswatibai D. Joshi*⁶ holding that a neighbour has no locus standi to maintain a suit on the ground that the construction has come up in violation of building bye-laws or Panchayat regulations. The Division Bench held that both these judgments of the learned Single Judge do not lay down good law firstly an obligation is created in favour of the neighbour and secondly because any construction contrary to the building bye-laws would be in violation of neighbour's right to live. The Division Bench saw no difficulty in upholding that jurisdiction of the Civil Court to entertain the suit of such a nature at the instance of a neighbour.

31. Despite the clear ruling of the Division Bench, the First Appellate Court has proceeded to hold that the Plaintiff lacked locus standi to institute suit of this nature. The First Appellate Court has misread the observations in paragraph 32 of *Fatima Joao* (supra). The observations nowhere laid down a proposition that the suit at the instance of a neighbour complaining about the violation of municipal plans or rules or bye-laws of Municipality or Panchayat will be maintainable only if the violation results in an invasion of neighbour's right to light, air, privacy or causes pollution or material injury. The

5 1991(2) GLT 222

6 1967(69) BLR 622

ruling has to be read in its entirety and no sentence can be read out of the context in which the same appears. This is precisely what the First Appellate Court has done in the present case.

32. If a neighbour establishes invasion of his right to light, air, privacy or if a neighbour pleads that the construction undertaken by his neighbour is a source for pollution or material injury then, such a neighbour is entitled to maintain a suit even without establishing the violation of Municipal or Panchayat rules, regulations or bye-laws. The Plaintiff may have some easementary rights which are being invaded by the Defendants based on permissions issued by the statutory authorities. In such a situation, it is open for Plaintiff to maintain a suit. Therefore, to say that ruling in *Fatima Joao* (supra) applies to a situation only where the neighbour alleges a violation of municipal plans, rules, or bye-laws coupled with the invasion of his right to light, air or privacy, etc., will not amount to the proper construction of ruling of the Division Bench.

33. In fact, ruling in *Fatima Joao* (supra) suggests that since the Panchayat regulations or municipal bye-laws are framed for the benefit of the residents of an area, any construction in breach of such regulations or bye-laws will affect the right to life of the residents in the area and neighbour will certainly be entitled to maintain a suit in such matters. The Division Bench in *Fatima Joao* (supra) has held that the building regulations or bye-laws create an obligation in favour of the neighbour

and any construction contrary to the building bye-laws would be a violation of neighbour's right to life.

34. Even Section 38 of the Specific Relief Act, 1963 provides that subject to the other provisions contained in or referred to by Chapter VII, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication. In *Fatima Joao* (supra) the Division Bench has clearly held that an obligation is created in favour of the neighbour by the building regulations or bye laws and a neighbour is certainly entitled to maintain a suit to prevent the breach of this obligation.

35. Similarly, Section 39 of the Specific Relief Act, 1963 provides that when, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

36. For all the aforesaid reasons, even the second substantial question of law is required to be answered in favour of the Plaintiff.

37. Now no doubt, the relief of mandatory injunction is discretionary. The discretion has to be exercised judiciously and in the

given case delay or laches may be a valid consideration to deny relief of mandatory injunction. However, in this case the Plaintiff had pleaded that the cause of action first arose on 8th May, 2004 when the Defendants started carrying on construction of illegal part in the suit property and complain of acts mentioned in paragraphs 2, 3, 4 and 5 of the plaint. The suit was instituted soon thereafter i.e. 27th May, 2004.

38. In paragraph 9 of the written statement, the Defendants simply denied that the cause of action arose on 8th May, 2004 or that no cause of action arose at all. The Defendants nowhere pleaded that there was any delay or laches in the institution of the suit or that the grant of illegal mandatory injunction will be inequitable in the circumstances.

39. The First Appellate Court has however gone by statement of the Plaintiff in his deposition that he filed a complaint before the Village Panchayat when the work of construction had reached upto ceiling. Mr. Sardessai pointed out that the Plaintiff had no issue with most of the construction being put up by the Defendants. The Plaintiff only had a issue with the portion of the construction which extended into the setback area on the eastern side of the Defendants' plot. The pleadings in paragraph 8 of the plaint suggests that the work of this extension commenced some time on or about 8th May, 2004 and the suit was instituted on 27th May, 2004. Before instituting the suit, the Plaintiff, complained of to the Panchayat and it is only because the Panchayat

failed to take immediate action the suit was instituted. Therefore, this is not some case of delay or laches based on which the relief of mandatory injunction would have refused to the Plaintiff.

40. Mr. Ramani relied on *S.S.V. Krishnan Pillai* (supra) was a matter which turned on its own facts. The High Court found that the structure in question had only covered the disputed passage so that sunlight and the pouring rain will not affect the user of this passage. It is in these circumstances, the Court found that though there may have been some infringement of the legal right of the plaintiff, such covering of the passage was not slightest source of inconvenience or discomfort to the plaintiff. Therefore, apart from some sentimental satisfaction there was no substantial benefit which was likely to accrue to the plaintiff by award of decree of mandatory injunction. The Court therefore vacated the order of mandatory injunction but by mandatory relief awarded damages of Rs.100/- to the plaintiff in lieu of mandatory injunction. At the same time, the Court upheld the mandatory injunction so far as the pial was concerned. In the present case, injury evident that the neighbour is in breach of prescribed setback of 3.5 metres or 3.00 metres proceeds to put up a construction leaving setback of only one metre. The Plaintiff in such a situation is entitled to insist that the setback which was intended for benefit is observed by the Defendants. Therefore, based on *S.S.V. Krishnan Pillai* (supra) the relief cannot be denied to the Plaintiff.

41. Though the grant or refusal of mandatory injunction is discretionary, it is necessary to note that the Plaintiff's complaint was that the defendants had breached statutory provisions like the building bye laws or the Panchayat regulations. This is not a case of some private disputes between the parties but this is a case where the Defendants are found to have breached statutory provisions. *S.S.V. Krishnan Pillai* (supra) was not a case which concerned the breach of any statutory provisions or statutory building bye laws. This is yet another reason as to why the ruling of the Madras High Court in *S.S.V. Krishnan Pillai* (supra) can be of no assistance to the Defendants in the present case.

42. In this case, there is no necessity to go into the issue as to whether the mandatory injunction can be denied on the grounds of delay and laches even though the suit may have been instituted within the prescribed period of limitation. This is because, on facts, there was no delay and laches on the part of the Plaintiff. The third substantial question of law is answered accordingly.

43. Similarly, it is not necessary to decide the fourth substantial question of law since the evidence on record does not suggest that the Defendants' entire structure had no licence whatsoever. This is a case where the Defendants appear to have had a licence but the part of the construction put up by them was in breach of terms of the licence or in

breach of the approved plans. As noted earlier, the approved plan requires the Defendants to maintain a setback of 3.5 metres but the Defendants maintained a setback of hardly one metre. Even the building regulations require maintenance of setback of three metres. The fourth substantial question of law is answered accordingly.

44. For the aforesaid reasons, this appeal is hereby allowed. The impugned judgment and decree dated 13th July, 2012 made by the First Appellate Court is hereby set aside and the judgment and decree dated 31st March, 2011 made by the Trial Judge is hereby restored. There shall be no order as to costs.

M. S. SONAK, J

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TARI AMRUT
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