

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.1136 OF 2018

JAIWANT D. GHADI & 13 ORS. ... PETITIONERS

Versus

MANOHAR B. GHADI & 13 ORS. RESPONDENTS

Mr. Gaurish Agni, Advocate for the Petitioners.

CORAM: M. S. SONAK, J.

DATE : 25th AUGUST 2022

ORAL ORDER :

1. Heard Mr. Gaurish Agni for the petitioners. Some of the respondents are present in person and they seek some time to engage an advocate because they have discharged their earlier advocate from appearing in this matter.

2. Challenge in this appeal is to the concurrent orders made by the Trial Court and the First Appellate Court granting a temporary mandatory injunction requiring the petitioners to remove the barricades and the obstructions erected by them on the access to a common family burial ground.

3. Mr. Agni whilst admitting that the plaintiffs and the defendants are co-owners submitted that the mere existence of a *prima facie* case is not sufficient for the grant of a temporary mandatory injunction. He submitted that even a final relief in this suit seeks the removal of barricades and obstructions. He points out that both the Courts have accepted that when the mother of plaintiff no.7 - Yashodha Ghadi expired, her funeral procession was taken from the South Western side of Survey No.103 and this establishes the existence of alternate access. He submits that in such circumstances no case was made out for grant of temporary mandatory injunction.

4. Having considered Mr. Agni's submissions, I do not think that this is a case that warrants interference with the concurrent orders made by the two Courts requiring the petitioners to remove the barricades and obstructions so that there is access to the common burial ground.

5. Admittedly, neither of the parties claim any exclusive right to either the common burial ground or access to such a common burial ground. All parties are admittedly co-owners and therefore presume to be in joint possession unless established otherwise. Access to a common burial ground is undoubtedly a necessity and none of the co-owners is co-possessors and can prevent others

without any justifiable cause. Simply because on a solitary occasion and possibly due to the obstructions created by the petitioners, the funeral procession of Yashodha was taken from the South Western side does not establish that the alleged access from the South Western side was the mandatory access to this burial ground. The fact that the petitioners cited only this solitary instance does not support the case of the plaintiffs and militates against the cause of the petitioners/defendants. Both the Courts have been extremely conscious of the principle that the temporary mandatory injunction is not to be granted merely on making out of a *prima facie* case. It is only after consideration of this aspect that such relief which is normally to be granted in exceptional circumstances came to be granted. Since this was an issue of access to a burial ground that has been used by the parties possibly for several generations, an exceptional case was made out by the plaintiffs justifying the grant of relief.

6. In any case, this is a matter where two Courts have recorded the concurrent, though *prima facie*, findings. The two Courts have exercised their discretion. Such exercise is neither perverse nor unreasonable. Therefore, considering the scope of writ jurisdiction in such matters no case is made out to interfere with the impugned orders.

7. In the case of *Wander Ltd. & Anr. V/s. Antox India P. Ltd.*¹, the Hon'ble Supreme Court of India has made the following observations on the nature of jurisdiction to be exercised in dealing with challenges to interlocutory orders:

“The appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

8. Accordingly, this petition is liable to be dismissed and the same is hereby dismissed.

9. The interim order, if any, is hereby vacated. The petitioners are directed to forthwith remove the barricades and obstructions. The petitioners should file a compliance report before the Trial Court within ten days from today.

¹ 1990 Supp SCC 727

10. If the Trial Court finds that there is no compliance, the Trial Court is at liberty to take out appropriate proceedings against the petitioners. However, the Trial Court should also appoint a suitable Commissioner at the petitioners' cost to actually remove the barricades and the obstructions. The concerned police authorities are also directed to assist in the implementation of this order should the petitioners create any obstruction in the implementation of the same. The Trial Court is also directed to expedite the hearing of the suit.

11. This petition is accordingly dismissed without any order for costs.

M. S. SONAK, J.