

Vinita-Esha

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 276 OF 2022

1. Mr. Lawrence Santan Pereira, Major,
Indian National, Residing at House
No.(not known) Mercurium, Agassaim,
Tiswadi, Goa, Since deceased through his
L. R. Widow Mrs. Luizinha Pereira, 72
years r/o (same address as deceased)
2. Mr. Salvador Pereira alias Salu Pereira,
49 years of age S/o Lawrence Santan
Pereira, r/o Mercurium, Agassaim,
Tiswadi, Goa. ... Petitioners

V e r s u s

1. Mr. Assis Piedade Fernandes, 72 years of
age, Major, Indian National, Service.
2. Mrs. Rozai Fernandes, 66 years of age,
Both residing at House No. 497, St.
Lawrence, Mercurium, Agassaim,
Tiswadi, Goa.
3. The Village Panchayat of St. Lawrence,
through its Secretary, Having office at
Agassaim, Tiswadi, Goa.
4. Fabrica de Igreja de Corlim, Through its
Parish Priest, Corlim, Tiswadi, Goa. ... Respondents

Mr. J. E. Coelho Pereira, Senior Advocate *with Mr. Bernard Fernandes and Mr. V. Braganza, Advocates for the Petitioners.*

Mr. Pranav Shenvi Kakodkar, Advocate for Respondent No. 2.

Mr. John Abreu Lobo, Advocate for Respondent No. 4

CORAM: B. P. COLABAWALLA, J.
RESERVED ON: 21st FEBRUARY 2023
PRONOUNCED ON: 3rd MARCH 2023

JUDGMENT:

1. Rule. With the consent of Parties, Rule made returnable forthwith and heard finally.

2. By the present Petition, the Petitioners [who are original Defendant Nos. 1(a) and 2 in Regular Civil Suit No.76/2009/C] take exception to the judgment and order dated 11.05.2022 (“**the impugned order**”) passed by the learned District Judge-3, North Goa, at Panaji in Miscellaneous Civil Appeal No.60/2020 [for short, “**the Appellate Court**”]. By the impugned order, the Appeal preferred by Respondent Nos. 1 and 2 herein [the original Plaintiffs] was allowed and the Appellate Court restrained the Petitioners herein [Defendant Nos. 1(a) and 2] from carrying out any construction within the setback area of 3 metres from the compound wall of Respondent Nos. 1 and 2 herein [original Plaintiffs].

3. By the impugned order, in effect, what the Appellate Court did was to set aside the order dated 23.11.2020 passed by the learned Civil Judge, Junior Division, “C” Court at Panaji [for short **“the Trial Court”**] under which the Application for temporary injunction filed by Respondent Nos. 1 and 2 herein [original Plaintiffs] was dismissed by the Trial Court.

4. As mentioned earlier, Respondent Nos.1 & 2 herein were Plaintiff Nos. 1 and 2 before the Trial Court. The Petitioners herein were Defendant Nos. 1(a) and 2 before the Trial Court. Respondent Nos.3 and 4 herein were Defendant Nos.3 and 4 before the Trial Court. For the sake of convenience, I shall refer to the parties as they were arrayed before the Trial Court in Regular Civil Suit No. 76/2009/C.

5. Brief facts giving rise to the present controversy are this. The Plaintiffs instituted Regular Civil Suit No. 76/2009/C *inter alia* seeking a permanent injunction to restrain Defendant Nos. 1(a) and 2 from carrying out any construction activities in the property bearing Survey No. 37/11 of Mercurim, Agassaim Goa (for short **“the suit property”**). The Plaintiffs and Defendant Nos.

1(a) and 2 are neighbours and the house of the Plaintiffs is situated on the property bearing survey No.37/11-A which is adjoining to the suit property.

6. In brief, it is the case of the Plaintiffs that in the year 2003, Defendant No. 1 (now deceased), constructed two structures along the compound wall of the Plaintiffs. However, at that time it did not affect their proprietary rights. Thereafter, on 13.08.2009, Defendant No. 1 commenced construction activities in the suit property and which according to the Plaintiffs was affecting the proprietary rights of the Plaintiffs. According to the Plaintiffs, Defendant No. 1, through his labourers, began demolishing the structure being used for running a liquor Bar business and started digging a new foundation at about $\frac{3}{4}$ th metres from the northern compound wall of the Plaintiffs' property bearing Survey No. 37/11-A. According to the Plaintiffs, Defendant No. 1 was doing illegal construction without any permission and without keeping proper setbacks. Subsequently, the Plaintiffs impleaded Defendant No. 2 and amended the plaint also contending that the suit construction constitutes an obstruction to the source of light and air/ventilation to the Plaintiffs' house on its northern side and constitutes an invasion of the Plaintiffs' privacy.

7. Be that as it may, after the death of Defendant No. 1, Defendant No. 1(a) was brought on record and Defendant No. 2 filed his written statement contending that the two structures in the suit property were in existence prior to 1961 and that he was carrying on a liquor Bar business in one of the structures. It is the case of Defendant No.2 that the structure where he was carrying on the liquor Bar business required repairs/ renovations, and, therefore, he made an application dated 29.07.2009 to the Panchayat. According to Defendant No. 2, he had to carry out repair works to the said structure to arrest the collapse of the structure. Since the Panchayat failed to communicate its reply, Defendant No. 2, started the work of repairs/renovation.

8. Be that as it may, the Plaintiffs in the above suit filed an application seeking an injunction to restrain Defendant Nos. 1(a) and 2 from carrying out any construction on the suit property for the reason that Defendant No. 2 had no permission from the concerned Authorities and had not maintained the required setback. After hearing the parties, the learned Trial Court, by its order dated 30.09.2011, granted an injunction in favour of the Plaintiffs and restrained Defendant Nos. 1(a) and 2 from carrying

out construction on the suit property. This injunction was granted on the ground that Defendant No. 2 had no permission from the concerned Authorities to carry out any construction.

9. The said order of the Trial Court dated 30.09.2011 was challenged in Appeal by Defendant Nos. 1(a) and 2 before the Hon'ble District Court by filing Miscellaneous Civil Appeal No. 113/2011. This Appeal was also dismissed vide order dated 20.07.2012. Being aggrieved by this dismissal, Defendant Nos. 1(a) and 2 challenged the said order by filing Writ Petition No. 716/2012 before this Court. During the pendency of the said Writ Petition, Defendant Nos. 1(a) and 2, pursuant to the judgment and order dated 04.12.2015, passed by the Joint Mamlatdar of Tiswadi, obtained a declaration as Mundkars of the structure standing on, as well as for an area of 300 square metres, in Survey No. 37/11 of Village Agassaim [suit property]. Subsequent to this, Defendant Nos. 1(a) and 2 filed a purchase Application before the Joint Mamlatdar of Tiswadi Taluka at Panaji, and which was allowed by judgment dated 23.02.2017. The purchase price was accordingly fixed and the Mundkarial area of 300 square metres in the said Survey No. 37/11 was also demarcated through the Surveyor. This was then purchased by Defendant Nos. 1(a) and 2 and the Deputy

Collector issued a certificate of purchase dated 19.09.2017. Pursuant to this, the name of Defendant Nos. 1(a) and 2 were mutated in the occupant's column of the suit property and Defendant No.2, thereafter, applied for permissions from the concerned Authorities to construct their Mundkarial dwelling house on the Mundkarial plot purchased by them. Accordingly, the Town and Country Planning Department, the Village Panchayat of St. Lawrence, Agassaim, and the Directorate of Health Services, granted the necessary permissions to Defendant No. 2 to construct the Mundkarial house. After obtaining all the above permissions [for construction], Defendant Nos. 1(a) and 2 made an application in the said Writ Petition No.716/2012 to carry out construction as per the approvals/permissions granted by the Authorities. In the said Writ Petition, this Court by its judgment dated 17.02.2020, set aside the orders impugned in the Writ Petition and remanded the matter back to the Trial Court to enable it to re-consider the injunction Application in the light of documents now produced by Defendant Nos. 1(a) and 2. As a matter of abundant caution, this Court observed that until the Trial Court decides the interlocutory Application, Defendant Nos. 1(a) and 2 shall not indulge in any construction.

10. Accordingly, Defendant Nos. 1(a) and 2 amended their written statement and also filed an additional reply to the injunction Application and brought on record the above subsequent events/facts. The Plaintiffs also amended the plaint in view of the subsequent developments wherein they contended that the approvals/permissions granted by the Authorities to Defendant Nos. 1 (a) and 2 are not binding on them as the same were obtained behind their back. Though it is not really relevant, for sake of completion of the narration of facts, I must mention that in the meanwhile, Defendant No. 4 also filed Special Civil Suit No.43/2018/B before the Civil Judge, Senior Division, Panaji seeking a decree to set aside the Mundkarship declaration acquired by Defendant Nos.1(a) & 2 inter alia on the ground that it was obtained by perpetrating a fraud. I must also mention that this Court, in its order dated 17.02.2020 [in Writ Petition No. 716/2012], clarified that with respect to Defendant No. 4, the said order would be subject to the outcome of the suit filed by Defendant No.4.

11. Accordingly, as per the directions of this Court passed in Writ Petition No. 716/2012, the Trial Court heard the injunction Application filed by the Plaintiffs and dismissed the same *inter alia*

on the ground that no *prima facie* case was made out for granting an injunction. The Trial Court further held that the balance of convenience was in favour of Defendant Nos. 1(a) and 2 and that irreparable loss would be caused to Defendant Nos. 1(a) and 2 if the injunction sought for was granted. In this light, the Applications for a temporary injunction (Exhibit D-4 and Exhibit D-39) were dismissed by the Trial Court vide its judgment and order dated 23.11.2020.

12. Being aggrieved by this decision, the Plaintiffs preferred Miscellaneous Civil Appeal No. 60/2020. The learned Appellate Court, after hearing the parties, by its judgment and order dated 11.05.2022 (the impugned order), set aside the order dated 23.11.2020 passed by the Trial Court and restrained Defendant Nos. 1(a) and 2 from carrying out any construction within the setback area of 3 metres from the compound wall of the Plaintiffs' property bearing Survey No. 37/11-A. Being aggrieved by this order, the present Writ Petition is filed.

13. In this factual backdrop, Mr. Pereira, the learned Senior Counsel appearing on behalf of Defendant Nos. 1(a) and 2 [the Petitioners herein], submitted that the impugned order is bad

in law, arbitrary and perverse, and discloses complete non-application of mind to the pertinent and important facts of the present case. Mr. Pereira took me through the order passed by the Trial Court [which is a very detailed one], and submitted that the Trial Court, after exhaustively considering the facts of the case as well as the arguments canvassed by the parties, correctly came to the conclusion that the Plaintiffs have not made out any *prima facie* case for grant of an injunction in their favour. He submitted that even on the aspect of the balance of convenience and irreparable loss, the Trial Court gave its findings in favour of Defendant Nos. 1(a) and 2. Mr. Pereira submitted that the detailed order passed by the Trial Court has been interfered with by the Appellate Court in a very perfunctory and casual manner completely ignoring the law laid down by the Hon'ble Supreme Court in the case of **(i) Wander Ltd. & Another Vs. Antox India P. Ltd. [1990 (Supp) SCC 727]**; and **(ii) Mohd. Mehtab Khan & Others Vs. Khushnuma Ibrahim Khan & Others [(2013) 9 SCC 221]**. Mr. Pereira submitted that in these decisions, the Supreme Court has clearly held that an Appeal, from either granting or refusing to grant an order of temporary injunction, is an Appeal on discretion and unless the Appellate Court finds that the discretion exercised by the Trial Court is either perverse or contrary to the well settled

principles of law, the said discretion ought not to be interfered with by the Appellate Court merely because the Appellate Court, on the given set of facts, might come to a different conclusion. Mr. Pereira submitted that in the impugned order, the Appellate Court has not even come to any finding whatsoever that the discretion exercised by the Trial Court was either perverse or was exercised against the settled principles of law. The Appellate Court has merely substituted its view in place of that of the Trial Court. This being the case, Mr. Pereira submitted that the Appellate Court clearly exceeded its jurisdiction by interfering with the order passed by the Trial Court. He, therefore, submitted that the impugned order clearly suffers from an error apparent on the face of the record and is required to be quashed and set aside under Article 227 of the Constitution of India.

14. On the other hand, Mr. Kakodkar, the learned Counsel appearing on behalf of Respondent No. 2 [original Plaintiffs], as well as Mr. Lobo, the learned Counsel appearing on behalf of Respondent No.4 [original Defendant No.4], supported the impugned order. Both the learned Counsel submitted that the impugned order takes all the facts into consideration and thereafter, comes to the conclusion that the Plaintiffs have made out

a *prima facie* case for the grant of an injunction restraining the Defendants from carrying on any construction activities on the suit property. Both the learned Counsels pointed out that the Appellate Court framed four issues, all of which were answered in the affirmative in favour of the Plaintiffs, and that too after recording detailed reasons which can be found in the impugned order. They submitted that there is nothing in the impugned order which would even remotely suggest that the same suffers from any error apparent on the face of the record and which would require interference under Article 227 of the Constitution of India. Consequently, they submitted that Writ Petition is devoid of any merit and the same ought to be dismissed with costs.

15. I have heard the learned Counsel for the parties at length. I have also perused the papers and proceedings in the above Writ Petition. I have also given my careful consideration to the order passed by the Trial Court dated 23.11.2020 as well as the order of the Appellate Court dated 11.05.2022. The short question before me is whether the Appellate Court was justified in interfering with the discretion exercised by the Trial Court when it refused to grant a temporary injunction in favour of the Plaintiffs. The reasoning of the Trial Court for refusing the injunction starts from

paragraph 12 onwards. The Trial Court first examined whether the Plaintiffs had made out a *prima facie* case. The Trial Court noted that the Plaintiffs have not stated the setback measurements and plinth when the structure existed [before its demolition] for the Court to compare it with the present construction. The Court opined that even the photographs produced show partly demolished structures. There was a Bailiff's report which was also taken into consideration by the Trial Court which noted that the Bailiff took measurements at loco along with photographs which *inter alia* indicate that Defendant Nos. 1(a) and 2 are constructing their property with a setback of 1.5 metres from the property of the Plaintiffs. The Trial Court took note of the fact that the concerned Authorities had approved the construction plan only after confirming that proper setbacks are kept and the proposed construction is as per Building Regulations contained in *the Goa (Regulation of Land Development and Building Construction) Act, 2008* and *the Goa Land Development and Building Construction Regulations, 2010*. The Trial Court noted that the Plaintiffs have merely pleaded that there is a reduction of light and their privacy is affected by the close proximity of the construction, but there was no proper description of the structures to ascertain the amount of light, air and ventilation the Plaintiffs received prior to the construction.

The Trial Court also noted that the construction of the two structures by Defendant Nos. 1(a) and 2 in the year 2003 did not affect the rights of the Plaintiffs when it pleaded that the structures were constructed along the compound wall of the Plaintiffs' way back in 2003. The Trial Court thereafter also noted that one of the structures was a Bar even prior to the suit and that the Authorities have given approvals and permissions, and therefore, it is to be presumed that these aspects were considered by the Authorities before any permissions were granted. The Trial Court further opined that Defendant Nos. 1(a) and 2 will have to adhere to the approved plans. It, therefore, came to the conclusion that the Plaintiffs have not been able to show that their right to air, light, ventilation and privacy is violated by the proposed construction in terms of the approved plans. The Trial Court noted that since Defendant Nos. 1(a) and 2 had obtained all the permissions from various Authorities, the scales of justice would tilt in favour of Defendant Nos. 1 (a) and 2 and not in favour of the Plaintiffs.

16. Thereafter, the Trial Court considered the argument of the Plaintiffs that the required statutory side-setback of 3 metres as contemplated under Regulation 4.4.2 [of *the Goa Land Development and Building Construction Regulations, 2010*] is not

complied with. It noted that according to the Plaintiffs, Regulation 4.4.2 required the minimum side-setback of any building to be 3 metres. I must immediately mention that this is not a ground raised in the plaint/pleadings for seeking a permanent injunction to restrain Defendant Nos. 1(a) and 2 from carrying out any construction activities. Be that as it may, the Trial Court considered this argument in paragraphs 35 to 37 of its order dated 23.11.2020. The Trial Court noted that the Town and Country Planning Department, by Technical Clearance orders dated 20.03.2018 and 03.08.2018, granted Technical Clearances for the construction of the Mundkarial house of Defendant Nos. 1(a) and 2 and accordingly, it is so mentioned in the said orders. The Village Panchayat of St. Lawrence, Agassaim, granted construction licences to Defendant Nos. 1(a) and 2 dated 29.03.2018 and 18.08.2018 to construct the Mundkarial house, and it is accordingly so mentioned in the said construction licences issued by the Panchayat. The Directorate of Health Services also gave no objections dated 11.04.2018 and 28.09.2018 for the construction of the Mundkarial house. Looking at all these documents, the Trial Court opined that Defendant Nos. 1(a) and 2 had thus obtained all the necessary permissions to construct their Mundkarial house. Thereafter the Trial Court noted the provisions of Regulation 4.7 of *the Goa Land*

Development and Building Construction Regulations, 2010. This Regulation applies *inter alia* to the construction of a Mundkarial house on the Mundkarial plot. After considering the provisions of Regulation 4.7, the Trial Court came to the conclusion that under this Regulation [i.e. Regulation 4.7], for construction on the Mundkarial plot, the side set-back would be 1.5 metres, allowing for normal light and ventilation, provided the construction was limited to ground and one upper floor and that no projection is permitted except a weatherboard, sun shades, roof projections or any architectural features not exceeding 30 centimetres. The Trial Court also considered the argument of the Plaintiffs that since Defendant Nos. 1(a) and 2 have now purchased the Mundkarial plot [from the Bhatkar] under the provisions of *the Goa Mundkars (Protection from Eviction) Act, 1975*, they could not take advantage of Regulation 4.7 of *the Goa Land Development and Building Construction Regulations 2010*. This argument was negated by the Trial Court in paragraph 46 of the order *inter alia* holding that even though the Mundkar purchases the property and may step into the shoes of the Bhatkar, the benefit that was available to the dwelling house of the Mundkar cannot be taken away. The Trial Court in fact held that if such an argument was accepted, then, any Mundkar who purchases a house after carrying out the construction [with the

permission of the Bhatkar], will be in an altered position after such purchase for not having kept the 3 metres setback as required under Regulation 4.4.2. The Trial Court held that there is a legislative intent in granting such benefit/concession.

17. Thereafter, the Trial Court also examined the argument canvassed by the Plaintiffs that the dwelling house of Defendant Nos. 1(a) and 2 is not a “*single dwelling unit*” as contemplated under Regulation 4.7. This argument was also negated by the Trial Court by *inter alia* holding that the approved construction plan shows that the ground floor consists of living/dining, kitchen, two bedrooms and toilets and a shop for Defendant Nos. 1(a) and 2 to carry on their existing liquor Bar business. The Trial Court noted that there is no partition wall to the said shop and the said shop is connected to the rest of the house and further, there is no partition wall to show that there are two units. The Court noted that it is an admitted fact that Defendant No. 2 has been running the liquor business. Thereafter, the Trial Court went on to examine the definition of “dwelling house” as set out in Section 2(i) of the *Goa Mundkars (Protection from Eviction) Act, 1975* and came to the conclusion that the structure wherein Defendant Nos. 1(a) and 2 are carrying on their liquor Bar business,

ex-facie forms part and parcel and is included in the definition of the words “*dwelling house*”. The Court also took note of the definition of the words “*dwelling unit*” in Regulation 2(50) and came to the conclusion that Defendant Nos. 1(a) and 2 being Mundkars, would be governed by the provisions of the *Goa Mundkars (Protection from Eviction) Act, 1975* and the definition therein would prevail over the definition under the Regulations.

18. The Trial Court also examined the argument canvassed by the Plaintiffs that the Technical Clearance orders dated 20.03.2018 and 03.08.2018 issued by the Village Panchayat are not absolute but subject to the conditions mentioned therein. It was argued on behalf of the Plaintiffs that condition No.6 of the Technical Clearance order required procurement of a conversion sanad under the Goa Land Revenue Code, 1968. This was admittedly not obtained. This argument was dealt with in great detail by the Trial Court in paragraphs 51 to 57 of its order. The Trial Court thereafter took note of the fact that the Authorities had approved the construction plan which ex-facie appears to be by following due process as laid down by law and according to the building bye-laws in force. The Court noted that the said approved plan was not challenged and all that was stated by the Plaintiffs was

that the same was not binding on the Plaintiffs. The Court noted that there was nothing to show that the said plan was illegal. After considering all the arguments canvassed by the Plaintiffs as well as Defendant Nos. 1(a) and 2, the Trial Court came to the conclusion that no *prima facie* case was made out for the grant of an injunction restraining Defendant Nos. 1(a) and 2 from carrying out construction on survey No.37/11 [suit property] as per the approved plans.

19. After this, the Court also examined the question of balance of convenience and irreparable loss in paragraphs 62 and 63 of its order dated 23.11.2020. The Court noted that the balance of convenience is in favour of Defendant Nos. 1(a) and 2 as they were Mundkars and had every right to use the Mundkarial plot pursuant to the order passed by the Joint Mamlatdar of Tiswadi at Panaji. The Court noted that Defendant Nos. 1(a) and 2 are also entitled to construct their dwelling house on the Mundkarial plot according to the permissions granted by the Authorities. The Trial Court was of the opinion that if the injunction was granted, prejudice and loss would be caused to Defendant Nos. 1(a) and 2 which could not be compensated in terms of money. This was for the simple reason that Defendant Nos. 1(a) and 2 had obtained all

permissions from the concerned Authorities and if an injunction was granted, it would take away the right of Defendant Nos. 1(a) and 2 to construct their dwelling house even after obtaining all the necessary permissions.

20. Even on the question of irreparable loss, the Trial Court came to the conclusion that in case Defendant Nos. 1(a) and 2 are enjoined from carrying out the construction despite the required approvals and permissions being obtained, they would suffer irreparable loss as they would not be able to construct the dwelling house despite purchasing the Mundkarial plot and taking into consideration that part of the erstwhile structures were already demolished. Taking all these factors into consideration, the Trial Court dismissed the Application for temporary injunction filed by the Plaintiffs.

21. To put it in a nutshell, the Trial Court examined all the aspects of the matter and passed a very detailed order by giving cogent reasons on all aspects of the matter and after considering the arguments canvassed by the Plaintiffs as well as Defendant Nos. 1(a) and 2. To put it in other words, after considering all the material placed on record, the Trial Court exercised its discretion not to

grant any temporary injunction in favour of the Plaintiffs.

22. As mentioned earlier, being aggrieved by the order of the Trial Court, the Plaintiffs approached the District Judge-3, North Goa at Panaji, [the Appellate Court] by filing Miscellaneous Civil Appeal No. 60/2020. The Appellate Court reversed the order passed by the Trial Court. The reasoning given for setting aside the Trial Court order starts from paragraph 16 of the impugned order. Firstly, the Appellate Court framed the following issues:

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| “(i) Did the Ld. Civil Judge, Junior Division, “C” Court, Panaji err in holding that there is no prima facie case ? | In the Affirmative |
| (ii) Are the defendants doing construction within the setback area of the plaintiff's property ? | In the Affirmative |
| (iii) Did the Ld. Civil Judge, Junior Division, “C” Court, Panaji err in holding that the plaintiffs would not suffer irreparable loss and injury if the application is not granted ? | In the Affirmative |
| (iv) Did the Ld. Civil Judge, Junior Division, “C” Court, Panaji err in holding that the balance of convenience is not in the favour of the plaintiffs ?” | In the Affirmative |

23. As far as the issue of whether the Plaintiffs had made

out a *prima facie* case for grant of an injunction [point No.(i) above], the Appellate Court, from paragraphs 16 to 21 noted the arguments of the parties and the documents forming the subject matter of the dispute. Thereafter, the only finding given on whether a *prima facie* case was made out, can be found in paragraph 22 of the impugned order. For the sake of convenience, paragraph 22 is reproduced hereunder:

“22. If the plaintiffs proves all the facts alleged in the plaint they would succeed. The defendants no. 1(a) and 2 will succeed if they prove all the facts alleged in their written statement. The plaintiffs and defendants no.1 (a) and 2 are at dispute as to whether defendants no.1(a) and 2 are carrying out construction within the setback area from the plaintiffs property. They are also at dispute as to whether the declaration of mundkarial rights, the purchase certificate, the mutation in the record of rights, the technical clearance order, revised technical clearance order by Dy. Town Planner and NOC from the Urban Health Centre, Panaji are binding on the plaintiff. I find bonafide contentions between the plaintiffs and defendants no. 1(a) and 2. Triable issues will arise in this case. Therefore there is a prima facie case. Hence, I hold point of determination no.1 in the affirmative.”

(Emphasis supplied)

24. As can be seen from the aforesaid reproduction, the Appellate Court opined that if the Plaintiffs prove all the facts alleged in the case, they would succeed. It further opined that Defendant Nos. 1(a) and 2 would succeed if they prove all the facts

alleged in the written statement. The Court noted that the Plaintiffs and Defendant Nos. 1(a) and 2 are in dispute as to whether Defendant Nos. 1(a) and 2 are carrying out construction within the setback area of the property. They are also in dispute as to whether the declaration of Mundkarial rights, the purchase certificate, the mutation in the Record of Rights, the Technical Clearance order, the revised Technical Clearance order, and the NOC from the Urban Health Centre, Panaji, are binding on the Plaintiffs. All that the Trial Court does is that it holds that triable issues would arise in the case and therefore, there is a *prima facie* case. This finding, in my opinion, is not a finding at all. The Trial Court has, in a very detailed judgment, after discussing all the aspects of the matter, come to the conclusion that the Plaintiffs have not been able to establish a *prima facie* case. Merely because the Appellate Court was of the opinion that triable issues would arise, would not lead to the inference that a *prima facie* case is made out. In these circumstances I have no hesitation in saying that the Appellate Court has reversed the findings given by the Trial Court [on the issue of *prima facie* case], in a very perfunctory manner and without giving any reasons whatsoever. If the Appellate Court was of the opinion that the findings of the Trial Court (on *prima facie* case) were not justified, it ought to have given proper and cogent

reasons rather than setting aside the order of the Trial Court on this issue in such a casual manner.

25. Even on point No.(ii) framed by the Appellate Court, namely, whether Defendant Nos.1(a) & 2 are doing construction without keeping the proper setback from the Plaintiffs' property, I find that the Appellate Court had absolutely no reason to interfere with the detailed reasons and findings given by the Trial Court. The discussion of the Appellate Court on Point No. (ii) can be found in paragraphs 23 to 35 of the impugned order. The Appellate Court noted the arguments of the Plaintiffs and Defendant Nos. 1(a) and 2 in paragraphs 23 to 26. Thereafter, the Appellate Court sets out Regulation 4.7 in paragraph 27 and in paragraph 30 comes to a finding, without any reasons, that the building allegedly belonging to Defendant Nos. 1(a) and 2 has a Bar in it and therefore, is a commercial cum residential unit. It, therefore, holds that it cannot be a "*single dwelling unit*" as contemplated in Regulation 4.7. It consequently holds that Regulation 4.7 cannot be applicable for the purposes of setback and the structure under construction [of Defendant Nos. 1(a) and 2] require a setback of 3 metres on either side.

26. I must note that it was pointed out to the Appellate Court that Defendant Nos. 1(a) and 2 had obtained a construction license together with the approved plans and which were produced before the Appellate Court. The Appellate Court noted that the approved plans provided only for 1.5 metres setback from the boundary of the Plaintiffs' property. However, in a very perfunctory manner, the Appellate Court simply holds that the plans have been approved contrary to *the Goa Land Development and Building Construction Regulations, 2010*. What is important to note is that the plans which have been approved by the competent Authorities have not been challenged in the suit filed by the Plaintiffs. The construction was being carried on as per the approved plans, and if Defendant Nos. 1(a) and 2 deviate from the approved plans, it was always open to the Plaintiffs to complain of such deviation to the concerned Authorities who would then take the necessary action. The Trial Court, after giving detailed reasons came to the conclusion that in facts of the present case, *prima facie*, Regulation 4.7 of *the Goa Land Development and Building Construction Regulations, 2010*, would apply to the construction carried on by Defendant Nos. 1(a) and 2. In fact, even the Authorities granting permission/license to construct, also applied the very same provision. In such a situation, I find that the Appellate Court was

wholly unjustified in reversing what the Trial Court had held, and in one stroke of the pen, came to the conclusion that the approved plans are contrary to *the Goa Land Development and Building Construction Regulations, 2010*. Firstly, I am not able to agree with the Appellate Court's finding that merely because the structure of Defendant Nos. 1(a) and 2 has a Bar, the same would not be a “*single dwelling unit*” as contemplated in Regulation 4.7. When one reads the definition of the words “*dwelling unit*” [Regulation 2(50)], it only means an independent housing unit with separate facilities for living, cooking and sanitary requirements. There is no provision within that definition which prohibits a commercial activity within that dwelling unit. Take for example, an Advocate [who is a Mundkar] having one room in his dwelling unit as his office. Merely because an advocate uses one room in his dwelling unit as his office would not mean that it isn't a “dwelling unit” as defined in Regulation 2(50) and neither would it cease to be a “single dwelling unit” as understood in Regulation 4.7. In the facts of the present case, the Trial Court in fact examined the plans of the structure under construction and came to a factual finding that there are no two separate rooms, and the business of the Bar is carried on from the same single unit. Once this was the position, the Appellate Court could not have set aside this finding on the specious ground

that the construction carried on by Defendant Nos. 1(a) and 2 is not a “single dwelling unit” merely because a part of that unit was being used for the purposes of running a liquor Bar business.

27. One cannot lose sight of the fact that as of date, Defendant Nos. 1(a) and 2 have been declared as Mundkars, and under Regulation 4.7, are putting up construction on the Mundkarial plot. “Dwelling house” has been defined under *the Goa Mundkars (Protection from Eviction) Act, 1975*, meaning the house in which the Mundkar resides with a fixed habitation and includes the land on which the dwelling house is standing and the land around and appurtenant to such dwelling house, subject to a maximum limit of 5 metres, if the land is within the jurisdiction of a village panchayat, and 2 metres, if it is not within such jurisdiction, from the outer walls of the dwelling house, as well as a cattle shed, stable, pig-sty, workshop or such other structure connected with the business or profession of the Mundkar. Further, Section 8 of *the Goa Mundkars (Protection from Eviction) Act, 1975* categorically contemplates that the Mundkar shall use his dwelling house primarily for his residence, but he shall have the right to utilize a portion of his dwelling house without shifting his residence, for any trade or vocation or business as may be permissible under the laws

in force from time to time. When one construes the provisions of the *Goa Mundkars (Protection from Eviction) Act, 1975* [as set out above] with Regulation 4.7 of the *Goa Land Development and Building Construction Regulations, 2010* [which specifically deals with relaxations given for construction *inter alia* on the Mundkarial plot], I am unable to agree with the Appellate Court's finding that merely because there is a liquor Bar business being carried on by Defendant Nos. 1(a) and 2 [who are Mundkars] from the premises that are being constructed, it would not be a "single dwelling unit" as contemplated under Regulation 4.7 of the said Regulations. I therefore find that even on this ground, the Appellate Court was wholly unjustified in interfering with the order of the Trial Court.

28. Even on the issue of balance of convenience and irreparable loss, I find the reasons given by the Appellate Court to be wanting. As noted earlier, the Trial Court gave proper and cogent reasons as to why the balance of convenience, as well as irreparable loss, was not in favour of the Plaintiffs and that irreparable loss would be caused to Defendant Nos. 1(a) and 2 as they would then have to live in a partially demolished structure. The Appellate Court in a very casual manner held that since Defendant Nos. 1(a) and 2 are doing the construction within the setback area from the

property of the Plaintiffs, they would suffer irreparable loss. What irreparable loss the Plaintiffs would suffer has not even been mentioned by the Appellate Court. In these circumstances, I find that the Appellate Court has dealt with the issue of balance of convenience and irreparable loss also in a very casual manner and cannot be sustained.

29. There is one more important issue over here and which is why I am inclined to interfere with the order of the Appellate Court. It is now well settled that to grant or to refuse to grant a temporary injunction is at the discretion of the Trial Court. An appeal against the exercise of discretion is said to be an Appeal on principle. The Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below, if the one reached by that Court was reasonably possible on the material. The Appellate Court would normally not be justified in interfering with the exercise of discretion under appeal 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 judicious manner, the fact that the Appellate Court would have taken a different view, would not justify interference with the Trial

Court's discretion. In other words, unless the Appellate Court finds that the discretion exercised is arbitrary or capricious or perverse or where the Court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions, the Appellate Court should not interfere with the discretion exercised by the Trial Court. This has been clearly laid down by the Hon'ble Supreme Court in the case of **Wander Ltd. & Another Vs. Antox India Private Ltd. (supra)**. Paragraph 14 of this decision reads thus:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, 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 if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal 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. After referring to these principles Gajendragadkar, J. in **Printers (Mysore) Private Ltd. Vs. Pothan Joseph [AIR 1960 SC 1156]**

“... These principles are well established, but as has been observed by Viscount Simon in **Charles Osenton & Co. Vs. Jhanaton [1942 AC 130]** “..... the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case”.”

The appellate judgment does not seem to defer to this principle.”

(Emphasis supplied)

30. This proposition has once again been reiterated by the Supreme Court in **Mohd. Mehtab Khan & Others Vs. Khushnuma Ibrahim Khan & Others (supra)**. The relevant portion of this decision reads thus:

“20. In a situation where the learned Trial Court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the Appellate Court could not have interfered with the exercise of discretion by the learned Trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned Trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The Appellate Court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order.

While we must not be understood to have said that the Appellate Court was wrong in its conclusions what is sought to be emphasized is that as long as the view of the Trial Court was a possible view the Appellate Court should not have interfered with the same following the virtually settled principles of law in this regard as laid down by this Court in **Wander Ltd. Vs. Antox India (P) Ltd.**"

(Emphasis supplied)

31. I find that the Appellate Court, whilst interfering with the discretion exercised by the Trial Court, has not even come to the conclusion that either the discretion was exercised capriciously or arbitrarily or perversely or that it had ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. What the Appellate Court has simply done is to substitute its opinion in place of the opinion of the Trial Court. This is wholly impermissible as laid down by the Apex Court in the decisions referred to by me above. Even otherwise, after going through the order of the Trial Court as well as the order of the Appellate Court, I am clearly of the view that there was absolutely nothing that was arbitrary, capricious or perverse in the exercise of discretion by the Trial Court in not granting an injunction in favour of the Plaintiffs and nor was it against the settled principles of law governing the grant or refusal of interim injunctions. I find that the Trial Court has discussed every aspect of the matter in great detail, and it is a

well-written order giving proper and cogent reasons. The Appellate Court, in my opinion, therefore, ought not to have interfered with the order passed by the Trial Court.

32. In view of the foregoing discussion, the impugned judgment and order dated 11.05.2022 passed by the District Judge-3, North Goa at Panaji in Miscellaneous Civil Appeal No. 60/2020 is quashed and set aside, and the order of the Trial Court dated 23.11.2020 is restored. Consequently, Defendant Nos. 1(a) and 2 are permitted to carry on with their construction strictly in accordance with the permissions granted and the plans approved by the statutory Authorities.

33. Rule is made absolute in the aforesaid terms and the Writ Petition is disposed of in terms thereof. However, there shall be no order as to costs.

34. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

B. P. COLABAWALLA, J.