

Esha

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 539 OF 2023

1. Shri. Yashwant Sukaji Naik, 68 years of age, son of late Sukaji Naik,
2. Smt. Yashoda Yashwant Naik, 65 years of age, wife of Yashwant Naik,

Both Residents of House No. 70/A, Dandoswada, Mandrem, Pernem, Goa.

... PETITIONERS

Versus

1. Shri. Kashinath Jaidev Naik, major of age, son of late Jaidev Naik,
2. Shri. Krishna Laxman Naik, major of age, son of Laxman Naik,
3. Shri. Narendra Laxman Naik, major of age, son of Shri. Laxman Naik,

All Residents of Dandoswada, Mandrem, Pernem, Goa.

... RESPONDENTS

Mr. Ashwin D. Bhobe with Ms. Shaizeen Shaikh, Advocates for the Petitioners.

Mr. Amay Phadte with Mr. Austin D'Souza, Advocates for Respondent Nos. 1 and 2.

CORAM: BHARAT P. DESHPANDE, J.

DATED: 1st APRIL 2024

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel for the parties.

2. The Petitioners/Plaintiffs are challenging the order passed by the first Appellate Court, thereby reversing the order passed by the Trial Court, granting temporary injunction, thereby restraining the Respondents/Defendants from parking their vehicles in front of the shops occupied by the Petitioners/Plaintiffs.

3. Mr. Bhobe, learned Counsel appearing for the Petitioners would submit that first of all, a reasoned order was passed by the learned Trial Court on 07.05.2022 and more particularly, the observations in paragraph 4 thereby considering the case of the Petitioners with regard to obstruction of free flow movement towards the shops of the Petitioners. It is submitted that only on this ground, the learned Trial Court granted relief in favour of the Petitioners.

4. Mr. Bhobe would submit that the learned first Appellate Court without considering the above facts, reversed the said order, thereby accepting the survey report placed on record by the

Respondents/Defendants and ignoring the plan of the Survey Department. He submits that the learned first Appellate Court without observing that the order passed by the Trial Court is in any way perverse, interfered with the said order. Mr. Bhobe submits that the discretionary order passed by the learned Trial Court was on the basis of obstruction of the movement in front of the shops, which admittedly belongs to the Petitioners. However, the learned first Appellate Court without discussing on such an aspect, reversed such order.

5. Mr. Phadte, learned Counsel appearing for the Respondents would submit that the Plaintiffs approached the Trial Court with most unclean hands and by suppressing the material facts. He submits that the shops occupied by the Petitioners are illegally constructed and the Petitioners failed to produce any document to show the title over the said shops. He submits that the first Appellate Court has rightly considered this aspect and interfered with the impugned order passed by the Trial Court.

6. Rival contentions fall for determination.

7. It is a well-settled proposition of law that Order XXXIX Rules 1 and 2 of CPC gives discretionary powers to the Court either

to grant or refuse an injunction. Such discretion has to be exercised on well settled propositions such as *prima facie* case, balance of convenience and irreparable loss.

8. The learned Trial Court in the order dated 07.05.2022 considered the survey record as well as the plan produced by the Petitioners/Plaintiffs and observed that the area of 3.80 square metres in front of two shops in possession of the Plaintiffs is blocked by parking the vehicles by the Defendants. This fact is not disputed by the Respondents/Defendants. Besides, photographs placed on record depict that the vehicles are parked exactly in front of the shops of the Plaintiffs, thereby obstructing free flow movement into the shops.

9. The survey record shows the name of the brother of the Petitioner No. 1 as one of the occupants. It is no doubt true that the names of the Defendants also appear in the survey records, however, the plan produced by the Petitioners including the survey plan shows that Survey No. 375/41 is separated with some space in between the said survey holding and Survey No. 376/42. Admittedly, there is a drain passing through Survey No. 375/41. The shops belonging to the Plaintiffs exist in Survey No. 375/41. The drain which is shown in the survey records is in front of the

shops. The disputed land is over the drain and beyond it towards the South. The photographs show parking of four-wheelers and two-wheelers exactly in front of the shutter of the shops.

10. The learned Trial Court in paragraph 4 of its order considered this aspect and found that by parking such vehicles exactly in front of the shops of the Plaintiffs, there is blockage of access and free flow movement outside the shops. Only on this ground, the learned Trial Court considered the prayer for the grant of injunction.

11. The Respondents/Defendants challenged such an order before the first Appellate Court by filing a Miscellaneous Civil Appeal. The learned first Appellate Court though discussed about the shops and the area of 3.80 square metres in front of both the shops, practically accepted the report of the Surveyor relied upon by the Respondents/Defendants, thereby ignoring the survey plan as well as the plan produced by the Petitioners/Plaintiffs. The learned first Appellate Court observed that the portion of land existing between the shops and the road does not belong to the Petitioners/Plaintiffs. This observation of the first Appellate Court requires interference for the simple reasons that the survey record and the plan before the Court, shows the name of the brother of

Petitioner No. 1 as a co-occupant. Similarly, there is no dispute that the shops existing in Survey No. 375/41 are in possession of the Petitioners and they are operating business activities from these shops. Thus, by parking the vehicles exactly in front of the shops thereby blocking free flow movement, certainly prohibits the Petitioners from carrying out their business activities.

12. The contentions raised by the Respondents/Defendants about the illegal construction of the shops will have to be decided by the competent Authority, however, the fact remains that such shops exist and the same are in possession of the Petitioners/Plaintiffs.

13. The learned first Appellate Court while interfering with the order passed by the learned Trial Court, failed to consider this aspect. Similarly, there is no observation in the first Appellate Court's order that the discretion exercised by the Trial Court is arbitrary or otherwise illegal in order to interfere under the discretionary powers. The first Appellate Court is duty bound to first of all observe that such discretion was exercised arbitrarily or by ignoring the settled proposition of law.

14. The contentions raised before the Courts below and the order passed by the Trial Court would clearly go to show that such discretion was exercised correctly, however, the same has been disturbed by the first Appellate Court, without observing that the discretion is found to be arbitrarily exercised.

15. Thus, the impugned order passed by the first Appellate Court needs to be quashed and set aside and the order of the Trial Court needs to be restored. Accordingly, Rule is made absolute in the above terms. Parties shall bear their own costs.

BHARAT P. DESHPANDE, J.

ESHA SAINATH
VAIGANKAR

 Digitally signed by ESHA SAINATH VAIGANKAR
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