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IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 18 OF 2024

WITH

CIVIL APPLICATION NO. 55 OF 2024

IN

APPEAL FROM ORDER NO. 18 OF 2024.

1 Mr. Sidharth Babusso Purshottam Naik Dessai Alias Sidharth Babusso Naik Dessai Alias Sidharth Babusso Dessai Alias Sidharth B. Dessa1, Son of late Shri. Babuso Purshottam Naik Dessai, Aged about 53 years, married, businessman, Resident of House No. 114/2, Zariwado, Davorlim, Salcete, Goa.

2 Mrs. Jyoti Sidharth Naik Dessai, Wife of Mr. Sidharth Naik Dessai, Aged 45 years, Both resident of House No. 114/2, Zariwado, Davorlim, Salcete -Goa.

3 Mr. Bhupesh Naik Dessai, Aged 45 residing Near Trik factory, Cotta-Fatorpa, Cuncolim, Salcete Goa. .... Appellants.

Versus

M/s Deejay Coconut Farm Pvt. Ltd., A company registered under the Companies Act with registered office at St. Patrick Complex Brigade road, Bangalore, 560025, Earlier known as “M/s Deejay Consultancy Serves” and authorised representative Shri. Rhushikesh Bhaskar Sapre, Vide resolution of Board of Directors of M/s Deejay

Coconut Farm Pvt. Ltd. Xelde,
Quepem, Goa, 403705. .... Respondent.

Mr. Sandesh D. Padiyar and Mr Prayash Shirodkar, Advocate for the appellant.
Mr A. F. Diniz, Senior Advocate with Mr Ryan Menezes, Ms Gina Almeida and Mr Nigel Fernandes, Advocate for the respondents.

CORAM: BHARAT P. DESHPANDE, J

Reserved On: 1st August 2024
Pronounced on: 13th August 2024

JUDGMENT

1. Heard Mr S. D. Padiyar, learned counsel along with Mr P. Shirodkar, learned counsel for the appellants and Mr A. F. Diniz, learned Senior counsel along with R. Menezes, learned counsel for the respondent.

2. Admit.

3. Matter is taken up for final disposal at the admission stage itself with consent of the parties.

4. The present appeal is filed challenging the order passed by the learned trial Court dated 16.9.2020 thereby allowing the application filed by the respondent under Order XXXIX Rule 2(A) r/w 10 of CPC, by striking off defence of the appellants/defendants.

5. The dispute between the parties will have to be discussed in a nutshell. Parties are referred to as the plaintiff and the defendants as

they appear before the trial Court. The appellants are the original defendants wherein the respondent is the plaintiff.

6. Plaintiff filed a suit before the Civil Judge, Senior Division Quepem bearing Special Civil Suit no.14/2019/A somewhere in November 2019. The said suit is filed for declaration of having an access through the property of the defendants by way of easementary right, permanent injunction and other reliefs under Section 34 and 38 of the Specific Relief Act. Along with the suit an application for temporary injunction was filed. On receipt of suit summons and the notice on injunction application, defendants appeared and filed their reply, written statement denying the case of the plaintiff. However on 5.12.2019, the plaintiff filed another application for temporary mandatory injunction along with amendment to the plaint. Amendment application was allowed which resulted in filing additional written statements to the amended plaint as well as reply to the application for temporary mandatory injunction.

7. Learned trial Court after hearing both the sides disposed of both applications i.e. temporary injunction application as well temporary mandatory injunction application by common order dated 30.7.2020. By this order the learned trial Court allowed the applications by observing that the plaintiff is permitted to use the suit access. Defendants have been directed to allow the plaintiff to use the suit access by removing the obstacles/obstruction, if any, from the

suit access. The plaintiff was directed to give a bank guarantee of Rs.3,00,000/- as condition precedent so as to compensate the defendants for any loss or damage, in the event plaintiff fails to prove the claim.

8. Plaintiff then furnished bank guarantee on 6.8.2020 which defendants disputed. An application for suspension of such order was rejected by the trial Court on 18.8.2020. However, on the same day the plaintiff filed an application under Order XXXIX Rule 2(A) r/w 10 of CPC alleging violation of the order dated 30.7.2020. Defendants filed a reply denying all the allegations and also claiming that bank guarantee is not properly furnished. However, the trial Court passed the impugned order thereby striking off the defence of the defendants which is challenged in the present appeal.

9. Mr Padiyar would first of all submit that though application for disobedient of the injunction order is filed all the allegations made therein were denied by the defendants and thus it was incumbent upon the learned trial Court to conduct an inquiry so as to establish whether there was any disobedient of its order.

10. Mr Padiyar would submit that the learned trial Court failed to consider the pleadings and orders passed by it and without conducting any inquiry passed the impugned order.

11. Mr Padiyar submits that observations of the learned trial Court that there is no need to conduct inquiry is clearly against the settled

proposition of law and without considering the material on record. Mr Padiyar would further submits that an order of striking off defence is therefore harsh order and ultimately prevents the defendants from pleading its case. Before passing such harsh order, concerned Court must satisfy itself that in fact there is disobedience, which is wilful and deliberate. He would submit that opinion could be reached only after conducting inquiry into the allegations but not otherwise.

12. Mr Padiyar would submit that such orders were passed during the Covid period and defendants also preferred an appeal against such injunction order, however, in between the impugned order was passed.

13. Mr Padiyar placed reliance on the following decisions:-

1. ***M/s V. G. Quenim Vs Bandekar Brothers Pvt. Ltd. Goa[1].***
2. ***Sachin Y Mense Vs Shri Sunil Noronha and ors.[2]***

14. Per contra Mr Diniz would submit that there was no need to conduct any inquiry as reply filed by the defendants would clearly go to show that there was defiance of the order passed by the trial Court which was clearly wilful in nature. He would submit that the plaintiff was prevented from using the suit access inspite of clear orders as defendants failed to clear the suit access by closing trenches. He

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1 2018(2) ABR 67

2 2016(5) ALL MR 146

would submit that bank guarantee was furnished as directed by Court and an application filed by the plaintiff for clarification of such order on bank guarantee was rejected. He would submit that once an order is passed and there is no stay or otherwise of the order, defendants were supposed to obey it. Such disobedience is clearly wilful and in breach of the directions given and therefore, no interference is required.

15. Mr Diniz placed reliance in the case of ***Pralhad Nagorao Bodkhe Vs Sau. Sulochana Ramchandra Kawarkhe***[3].

16. Rival contentions fall for consideration.

17. Before considering the submissions, it is necessary to look into the pleadings and more particularly the plaint. Plaintiff claimed to be lessee of Vithaldas Y. Poi Kakode in respect of the properties as described in paragraphs 2 and 3 of the plaint. Plaintiff claimed that such properties were taken on lease for a period of 33 years from 1.8.2011 by registering a Lease Deed from its owner for setting up a farm. Plaintiff runs hybrid coconut seedlings farm along with research activities for coconut seedlings project. Said farm along with a nursery is located in a portion of around 28,100 sq.mts and is fenced. Mother palms are located in the property identified at paragraph no.3 and paragraph no. 2. Due to such research activities coconut palms of the plaintiff's company are having the highest

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3 2021 (3) Bom.C.R. 57

coconut production. They are having tie-ups with foreign countries and farms existing in other states. Such a farm at Balli started somewhere in the year 2012 i.e subsequent to taking over the lease of the properties mentioned in paragraph 2 and 3 in the plaint.

18. For operating such a farm, the plaintiff is using four wheeler and six wheeler vehicles for carrying saplings from the said farm to different places. Similarly the plaintiff is required to carry manure, fertilizers from various suppliers. Plaintiff employed many labourers who are coming to the farm on a daily basis on their two wheeler vehicle or even on foot. In order to approach the said farm, the plaintiff is using a road which is shown in the report of Mr Amarnath B. Dessai in red colour which is kaccha road, and it reflects in the regional plan as 10 mts wide panchayat road, which is referred in the plaint as a suit access.

19. Plaintiff further disclosed that the suit access starts from Fatorpa-Morpila road and leads to the farm located in survey no.17. It is the contention of the plaintiff that such suit access passes through the property bearing survey no.38 which is claimed to be the property of the defendants. It is further claimed by the plaintiff that such kaccha road/suit access is even used by the predecessor in title of the plaintiff for more than 50 years and thus, it is crystallised into a prescriptive access. There is no other alternate access available to the plaintiff to reach said farm.

20. Plaintiff in paragraph 22 shows that during the first week of December the defendants blocked the suit access at the main Fatorpa Morpila road by dumping huge boulders. A complaint was lodged to the police. Upon which defendants were directed to clear the blockade but they refused to take such directions into consideration and since there was possibility of breach of peace, proceedings under Section 147 of Cr.P.C. were initiated. Sub Divisional Magistrate(SDM) accordingly, passed an order to open the suit access with further direction to take police protection. Accordingly, in pursuant to the order of SDM blockade was cleared. These averments are found in paragraph 23 of the plaint. Plaint further shows that defendants filed Criminal Writ Petition No.166/2019 seeking quashing of the order passed by the SDM. Said petition was allowed and order of SDM was quashed and set aside with direction to the SDM to dispose of the proceedings within six weeks.

21. Plaint in paragraph 24 would then show that in view of the orders passed by the High Court setting aside the order of the Deputy Collector, plaintiff apprehends that the defendants again would close the suit access by dumping rubble, mud etc. or by digging trenches and or in any other manner. Accordingly, suit is filed by making averments in paragraph 31 that on 30.11.2019 defendants closed the access between 5 p.m to 6 p.m in an attempt to make the plaintiff's application for temporary injunction infructuous, after seeking time

to file written statement and upon noting that the Court had not given any ad-interim relief to the plaintiff. Paragraph 31 also shows the cause of action which arose in the first week of December when the suit access was blocked and again on 18.11.2019 when the High Court vacated the interim relief granted by SDM.

22. Suit is for grant of declaration that the plaintiff is having easementary right over the suit access with an amended prayer that defendants be ordered to clear the blockade created in a suit access of survey no. 38/1 of village Fatorpa.

23. Detailed discussions with regard to the pleadings including the amendment, plaint is required so as to consider the obstruction of the learned trial Court regarding inquiry.

24. Defendants in their detailed written statement denied the allegations of having any suit access and claimed that there is an alternate access available to the plaintiff. However, the first application for temporary injunction is only for grant of temporary injunction whereas second application at Exh.15 is filed for temporary mandatory injunction.

25. Admittedly the plaint was amended. However as discussed above it is admitted in the plaint itself that after the order of SDM was passed, so called blockade was cleared. This statement is found in paragraph no.23 of the plaint. Paragraph 24 of the plaint shows that there was apprehension of further blocking the suit access. Amended

plaint 31A would show that the defendants closed the suit access between 5 p.m to 6 p.m on 30.11.2019. There is no specific averments as to how suit access was closed. Similarly it is disclosed in paragraph 31A that such access was closed between 5 p.m to 6 p.m on 30.11.2019, which means that after 6 p.m on that date there was no closure of the suit access.

26. Learned trial Court while disposing of both the applications filed at Exh.4 and 15 observed in its order dated 30.7.2020 that plaintiff succeeded in proving the prima facie case that there is suit access and that earlier it was blocked. Learned trial Court observed that there is averment made in the written statement that there was earlier blocking which was removed pursuant to the order passed by the Deputy Collector. Final order passed by the trial Court reads thus:-

> *"Pending the hearing and final disposal of the present suit, Defendants shall permit the plaintiff to use the suit access by removing obstacles/ obstructions if any from the suit access"*

27. The words "if any" used in the above order reflecting to the aspect of removal of obstacles/obstructions. In the entire order dated 30.7.2020, learned trial Court failed to observe that there was any obstacles/obstructions existing on the suit road after the so called blockade was cleared as per order of Deputy Collector.

28. Plaintiff itself admits in paragraph 23 that so called obstructions/blockade was cleared as per order of the Deputy

Collector. Thereafter plaintiff had only apprehension that the defendants may close the suit access, amended the plaint and more particularly paragraph 31A shows that defendants closed the suit access only between 5 p.m to 6 p.m. Thus closing the access for one hour, even if it is accepted, would not in any manner required to be considered as an attempt to close the suit access. Besides such averments were denied by the defendants in their written statement and also in the reply to the injunction application.

29. Even otherwise averments in paragraph 31A did not elaborate as to how suit access was closed and by what means that too between 5 p.m to 6 p.m on 30.11.2019.

30. The order dated 30.7.2020 by which learned trial Court granted temporary injunction, nowhere records a finding that after filing of the suit and before deciding the injunction application, suit access was closed by defendants and more particularly by creating any obstacle/obstruction.

31. Even otherwise, the operative part of the order which is quoted above would go to show that the plaintiff's were permitted to use the suit access and the defendants were directed to remove obstacles/obstructions, if any, from the suit access. The above words would clearly go to show that such obstacles/obstructions will have to be established by the plaintiff existing on the suit access and that too after passing of the temporary injunction order.

32. An application under Order XXXIX Rule 2(A) of CPC filed by the plaintiff shows only averments in paragraph 5 that the defendants did not clear the blockade over the suit access so as to use it by the plaintiff. First of all there is no averment in the application filed by the plaintiff under Order XXXIX Rule 2(A) of CPC as to how and by what means suit access is blocked by the defendants. Words "if any" used by the trial Court clearly shows that even the trial Court was not confirmed that the suit access was in fact blocked by creating any obstacle or obstruction.

33. Plaintiff was supposed to disclose in his application filed under Order XXXIX Rule 2(A) of CPC as to when such blockade was created and/or by what means. The allegations in the application are casual and vague. It is for the plaintiff to satisfy the Court that inspite of order, there is a blockade of the suit access, for the simple reason that proceedings under Order XXXIX Rule 2(A) of CPC are drastic if established for the disobedience of such orders. Power of the Court could go to the extent of sending a defaulter in civil prison. In this case defence is struck off which is also a drastic step.

34. Defendants filed a reply to the application under Order XXXIX Rule 2(A) of CPC by denying all the allegations and more particularly about the breach of such injunction order.

35. Learned trial Court while passing the impugned order presumed that there was blockade, on the basis of some portion

disclosed in the written statement and copied in the reply filed to the application for disobedience. First of all, a written statement to the amended plaint was filed much prior to disposing of the injunction application. Even the plaintiff in the amended plaint admitted that earlier blockade near the road was cleared after the order of SDM was passed. Thereafter there is no clear averment as to when there was any blockade of the suit road, except some vague averments found in paragraph no. 31A of the amended plaint, which is already considered as averments vague as vagueness could be. Even otherwise such averments disclosed that the alleged blockade was only during 5 p.m to 6 p.m on 30.11.2019. Thus plaintiff himself failed to disclose as to what method was used to block the suit access.

36. Averments/pleadings of the written statements by the defendants would go to show that some trenches were dug by other co-owners and not by present defendants. However, such pleadings cannot be imported into the application for disobedience so as to take away the right of the defendants from the pleading in the written statement.

37. Learned trial Court observed in paragraph no. 7 that there is no need to conduct any inquiry on the ground that defendants failed to file further replies stating that they have complied with the order. Such observations are clearly against the settled proposition of law. Plaintiff who approached the Court claiming disobedience of the

order is required to prove such disobedience and more particularly obstructions as alleged on the suit access. It is not for the defendants to come forward and say that they have removed obstructions, if any. Learned trial Court by observing that the defendants failed to justify their conduct are clearly against the settled proposition of law and more particularly while dealing with an application for disobedience of the injunction order.

38. Learned trial Court then observed that it could be safely inferred that defendants have wilfully failed to comply with the order and thus no inquiry is necessary, is again a finding which is clearly against settled proposition of law. By doing this, the learned trial Court has in fact violated the principles of natural justice by refusing to give an opportunity to the defendants to put up their case.

39. Learned trial Court also failed to consider its own order of grant of injunction wherein Court clearly observed that the defendants shall remove the obstructions/obstacles, if any, from the suit access. This itself shows that the matter was required to be inquired into as to whether actually there was any obstruction and that too wilfully created by the defendants in defiance of the order of injunction.

40. It is now well settled that any order of strike off defence is clearly a harsh order and practically refusing the pleadings of a party on the alleged disobedience of an order. Thus for that purpose, there

must be cogent and convincing evidence and that too after conducting specific inquiry in that regard. Such inquiry is necessary when the defendants in their reply affidavit have clearly denied disobedience of the order passed by the Court.

41. In the case of ***M/s V.G. Quenim*** (supra), a learned Single Judge of this Court has observed that purpose of introduction of Rule 11 of Order XXXIX (Bombay amendment). Such observations are found in paragraph 17 onwards.

42. In the case of ***Sachin Y Mense*** (supra), learned Single Judge of this Court again considered the provisions of Order XXXIX Rule 2(A) and Rule 11 of CPC and observed that even strike off defence is very harsh order and should be resorted to only if default is wilful and in disobedient of the orders passed by the Courts.

43. In the case of ***Pralhad Nagorao Bodkhe*** (supra), learned Single Judge of this Court after discussing various decisions, observed that in that matter, there was clear breach of orders passed by the Court and that too wilful on the part of the respondents. In that matter a suit for partition and separate possession was filed wherein an application for temporary injunction was granted restraining defendants from alienating or creating third party interest. However, defendants in defiance of such order executed and registered two sale deeds thereby alienating the suit property in favour of third party. Thus, the said case is distinguishable as the sale

deeds were produced on record which clearly show that such property was alienated inspite of the knowledge of injunction order.

44. Matter in hand is squarely distinct wherein allegations regarding obstructions of the suit access after passing of the injunction order is clearly vague and not giving specific details. After the injunction order was passed by the trial Court would go to show that obstruction, if any, will have to be removed. It therefore shows that even the trial Court was not certain as to whether there was any obstruction at the time of passing of such order. Otherwise the words "if any" would not have appeared in the order.

45. For all the above reasons, the impugned order suffers from perversity and also for failing to consider the settled proposition of law regarding conducting inquiry into the matter when the allegations are not certain about obstruction.

46. The impugned order is therefore quashed and set aside. Application filed under Order XXXIX Rule 2(A) r/w Rule 10 of CPC is accordingly dismissed.

47. Parties shall bear their own costs.

48. Appeal stands disposed of accordingly and pending applications, if any, stand disposed of.

BHARAT P. DESHPANDE, J.