
(2014) 08 BOM CK 0176

In the Bombay High Court

Case No : Appeal from Order Nos. 5 and 25 of 2014

Goa Industrial Development Corporation

APPELLANT

Vs

Sadhana Builders Pvt. Ltd.

RESPONDENT

Date of Decision : 08-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 7 Rule 11
Land Acquisition Act, 1894 — Section 41

Citation : (2014) 6 ABR 23 : (2014) 6 ALLMR 497 : (2015) 4 BomCR 62 :
(2015) 1 MhLj 340

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : Vivek Rodrigues, Advocate for the Appellant; N. Sardessai and Shirin Naik, A.D. Bhobe, A. Prabhudesai, Addl. Government, Advocate for the Respondent

Judgement

F.M. Reis, J.—Heard Mr. A.D. Bhobe and Mr. V. Rodrigues, learned counsel appearing for the defendant Nos. 1 and 3 respectively, Mr. N. Sardessai, learned counsel appearing for the plaintiff and Mr. A. Prabhudesai, learned Addl. Government Advocate appearing for the defendant No. 2 in above appeals. Both the above appeals were taken up together for hearing with the consent of the learned counsel as they both challenge the same impugned order. The parties shall be referred to in the manner they so appear in the cause title of the impugned order. Admit.

2. Heard forthwith with the consent of the learned counsel.

3. The learned counsel appearing for the respective respondents waive service.

4. Mr. A.D. Bhobe, learned counsel appearing for the defendant No. 1 has pointed out that the learned Judge has passed the impugned order directing a mandatory injunction to open an access to a road which is a private sub-division road in the industrial estate belonging to the defendant No. 1. The learned counsel further pointed out that without examining as to whether the plaintiff has any right of

access through the said road, the learned Judge was not justified to pass the impugned order. The learned counsel further pointed out that the plaintiff have their construction in survey No. 23/1-B whereas the industrial estate belonging to the defendant No. 1 in survey No. 23/1 of Corlim village. The learned counsel further pointed out that it is the case of the defendant No. 1 that the access to the said plot is towards the southern side of the property surveyed under No. 23/1-B. The learned counsel further pointed out that the deed executed in favour of the plaintiff itself discloses that towards the northern and eastern side there is a road. The learned counsel further submits that when the sale-deed itself suggest the existence of a road towards the northern side and eastern side, the question of the plaintiff claiming any right to the road belonging to the defendant No. 1 located on the western side of the plot would not arise. The learned counsel further submits that when the suit was filed the plaintiff sought for an ad-interim relief to restrain the defendant No. 1 from erecting a compound wall which was in progress from the north-south direction on the western side of the plot belonging to the plaintiffs. The learned counsel further submits that by an order dated 24.11.2010 an ex parte ad-interim order was passed which was in operation until the written statement was filed and was automatically vacated as the same was not extended. The learned counsel further pointed out that a contempt petition was filed by the plaintiff against the defendant No. 1 before the written statement was filed claiming that despite of such ex parte interim order the defendant No. 1 blocked the access by a compound wall. The learned counsel however pointed out that the defendant No. 1 on their own immediately demolished such portion of the compound wall. The learned counsel further pointed out that as there was no order in operation against the defendant No. 1, compound wall was completed thereby closing the said access somewhere on 13.02.2013 which has been erroneously directed to be demolished in the impugned order. The learned counsel further pointed out that the road which was located towards the western side of the property of the plaintiff is for their own use and occupation of the defendants and occupants of the plots existing therein. The learned counsel further pointed out that in case the plaintiffs are permitted to use such access, the security of the units located in the industrial estate would be severely affected and as such the learned Judge was not justified to pass the impugned order. The learned counsel further pointed out that the plaintiffs have relied upon a letter dated 28.05.2008 addressed by the defendant No. 1 inter alia allowing the use of the said road upon conditions of payment of a non refundable deposit of a sum of Rs. 40,000/- besides a sum of Rs. 5000/- as annual licence fee. The learned counsel further pointed out that such licence has already been revoked by the defendant No. 1 during the pendency of the suit and as such according to him the question of using such access does not arise. The learned counsel further pointed out that such licence in any event was not issued to the plaintiff and as such they have no right to claim any right on the basis of such document. The learned counsel further submits that it is well settled that Court can only direct the status quo ante as on the date of the filing of the application and as such according to the learned counsel the compound

wall was already completed as on the said date and as such the question of granting a mandatory injunction to change such status quo is totally erroneous. The learned counsel thereafter has taken me through the findings of the learned Judge and pointed out that the learned Judge has misconstrued the material on record to come to the conclusion that the plaintiffs are entitled for the relief of a mandatory injunction. The learned counsel also pointed out that the plaintiffs have failed to establish any easementary right of access through the suit road. The learned counsel has also taken me through the plaint and pointed out the inconsistency therein to claim a right of access through the suit road. The learned counsel as such points out that the impugned order deserves to be quashed and set aside. In support of his submissions, the learned counsel has relied upon the judgment reported in Hero Vinoth (minor) Vs. Seshammal, .

5. Mr. V. Rodrigues, learned counsel appearing for the appellant/defendant No. 3 in Appeal From Order No. 25 of 2014 has supported the submissions of the learned counsel appearing for the defendant No. 1. The learned counsel pointed out that as the defendant No. 3 are the occupants of the industrial establishment located in the property belonging to the defendant No. 1, grave prejudice and security problem would occasion to the defendant No. 3 in case such access is permitted to be used by the plaintiff. The learned counsel has taken me through the impugned order and pointed out that the question of any right of access through the road existing on the western side of the plot of the plaintiff does not arise at all. The learned counsel has thereafter taken me through the original sale-deed pursuant to which the defendant No. 1 has purchased the property surveyed under No. 23/1 and pointed out that the plaintiff are trying to claim their right of access on the basis of a restricted covenant existing therein which clearly shows that such right of way was reserved only for the vendors therein to go to the property which was located towards the northern side of the road shown therein. The learned counsel further pointed out that this right reserved in the said sale-deed of the defendant No. 1 dated 28.02.1974 cannot inhere any benefit to the plaintiff. The learned counsel as such points out that the question of changing the status quo as is existing at the site would not arise and consequently the impugned order passed by the learned Judge deserves to be quashed and set aside. The learned counsel further pointed out that though the road was shown in the original sale-deed executed with the predecessor in title of the plaintiff showing the road towards the northern-western side nevertheless, in sale-deed executed in favour of the plaintiff the road is shown towards the western side of the said plot. The learned counsel as such points out that the impugned order be quashed and set aside. Mr. V. Rodrigues, learned counsel has relied upon the judgment of the learned single Judge of this Court reported in Suresh Malappa Shetty Vs. Special Recovery Officer and Others, to advance his contention that a licence does not create an encumbrance in an immovable property. Mr. V. Rodrigues, learned counsel also relied upon the judgment reported in Hero Vinoth (minor) Vs. Seshammal, .

6. Mr. N. Sardesai, learned counsel appearing for the plaintiff/respondent No. 1

has supported the impugned order. The learned counsel pointed out that the property belonging to the plaintiff surveyed under No. 23/1-B has been developed and a construction consisting of ground plus three floors has been erected. The learned counsel further pointed out that the development plan which has been sanctioned by the statutory authorities in favour of the plaintiff clearly shows the access to the said plot through the disputed road located on the western side of the plot of the plaintiff. The learned counsel further pointed out that the plaintiff has erected a compound wall separating the property of the plaintiff with the property of the defendants towards the western side and put up an iron gate having a width of six metres towards the western side road. The learned counsel further pointed out that all the materials which were required for putting up such multi-storey building were brought to the plot through the disputed road. The learned counsel further pointed out that the defendant No. 1 has acquiesced in the construction put up by the plaintiff and as such it was not open to the defendant No. 1 to now contend that the plaintiff have no right of access. The learned counsel dealing with the boundaries in the original sale-deed has pointed out that on the eastern side of the property there is no road found at loco as there is a drain and towards the northern side there is no existing road available at the site. The learned counsel thereafter has taken me through the plan and pointed out that towards the southern side the alleged road claimed by the defendant No. 1 is a narrow strip of land in between the structures existing therein which by no stretch of imagination can be an access to the building constructed by the plaintiff. The learned counsel further pointed out that these structures are in a private property and as such it cannot be accepted that the plaintiff had such right of way to go towards the southern side. The learned counsel further pointed out that the learned Judge has directed the appointment of a Court Commissioner to examine the site at loco and the Head Surveyor from the Government Department visited the property and clearly mentioned that the only motorable access available to the plaintiff is through the disputed road located towards the western side of the property. The learned counsel further pointed out that the officials of the defendant No. 1 failed to remain present despite of being notified by such Commissioner and as such this itself would justify taking adverse inference against the defendant No. 1. The learned counsel further pointed out that by inadvertence the ad-interim order of injunction granted by the learned Judge was not extended after filing of the written statement. The learned counsel further pointed out that it is not in dispute that as on the date of the filing of the suit and on the date of the ex parte order the disputed access was available to the plaintiff through the compound wall. The learned counsel further submits that it is well settled that the Court can always grant a mandatory injunction to maintain the status quo ante when the Us between the parties started. The learned counsel further pointed out that as on that date there was an opening for the plaintiff to go to the main road through the gate constructed by the plaintiff. The learned counsel further pointed out that the Apex Court has deprecated such acts committed by the parties in the judgment reported in Municipal Corporation, Ludhiana Vs. Inderjit Singh and

Another, and laid emphasis to para 14 of the said judgment. The learned counsel further pointed out that the question of granting any mandatory injunction is well settled in the judgment of the Apex Court reported in *Dorab Cawasji Warden Vs. Coomi Sorab Warden and others*, . The learned counsel thereafter has taken me through the sale-deed executed in favour of the defendant No. 1. The learned counsel pointed out that they now traced a registered sale-deed whereby the property was sold to the defendant No. 1 which is a sale-deed dated 28.02.1974 and laid emphasis to Clauses (vi) and (vii) of the said sale-deed to advance his contention that the sale in favour of defendant No. 1 itself was subject to a reservation of a right of way for the vendors therein and their purchasers. The learned counsel further pointed out that this itself shows that the defendant No. 1 was not entitled to block the access of the plaintiff as it is not in dispute that the property which was purchased by the plaintiff was part of the same property which belongs to the original vendors of the defendant No. 1. The learned counsel thereafter has taken me through the provisions of the Building Regulations and relied upon Clause 12.1(g) of the Goa Land Development and Building Construction Regulations, 2010 to point out that all sub-division roads shall be treated as deemed public roads unless the same are part of a co-operative housing or maintenance society or a gated community. The learned counsel as such points out that the road located on the western side of the property of the plaintiff is a sub division road, it is deemed to be a public road and as such, it is not open to the defendants to block such access.

7. In reply to the contention of Mr. Sardessai, Mr. Bhobe, learned counsel appearing for the defendant No. 1 has pointed out that such regulations are not applicable to the sub-division by an Industrial Corporation. The learned counsel further pointed out that there is a Circular to that effect issued by the Government. The learned counsel as such points out that the sale-deed which is relied upon by the plaintiffs now cannot be considered as according to him the pleadings in the plaint do not suggest that the plaintiffs were claiming such access on the basis of such restrictive covenants. The learned counsel as such points out that the impugned order be quashed and set aside.

8. I have carefully considered the submissions of the learned counsel and I have also gone through the records. The order impugned by the appellants herein is an order disposing of an application for temporary injunction. In this context, the interference of this Court in such appeal under Order 43, Rule 1 of the Civil Procedure Code has been well settled by the Apex Court in the recent judgment reported in *Mohd. Mehtab Khan and Others Vs. Khushnuma Ibrahim and Others*, , wherein the Apex Court has observed at paras 20, 21 and 22 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 emphasised 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. v. Antox India (P) Ltd.*

21. Para 14 of the aforesaid judgment which is extracted below would amply sum up the situation: (*Wander Ltd. case*, SCC p. 533)

"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 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 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) (P) Ltd. v. Pothan Joseph* : (AIR p. 1159, para 9)

"9.... These principles are well established; but, as has been observed by Viscount Simon in *Osenton (Charles) & Co. v. Johnston* : (AC p. 138)

"... 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."

22. Though the above discussions would lead us to the conclusion that the learned Appellate Bench of the High Court was not correct in interfering with the order passed by the learned trial Judge we wish to make it clear that our aforesaid conclusion is not an expression of our opinion on the merits of the controversy between the parties. Our disagreement with the view of the Division

Bench is purely on the ground that the manner of exercise of the appellate power is not consistent with the law laid down by this Court in *Wander Ltd.* Accordingly, we set aside the order dated 9-10-2012 passed by the Appellate Bench of the Bombay High Court and while restoring the order dated 13-4-2012 of the learned trial Judge we request the learned trial Judge, or such other court to which the case may, in the meantime, have been transferred to dispose of the main suit as expeditiously as its calendar would permit with the expectation that the same will be possible within a period of six months from the date of receipt of this order. The appeal shall stand disposed of in terms of the above."

Keeping the parameters laid down by the Apex Court in the said judgment, I will now proceed to examine the rival contentions in the present appeals. The record reveals that the plaintiff filed a suit for declaration and injunction claiming a right of access through the road existing on the western side of the plot belonging to the plaintiff. The fact that the said road is a sub division road constructed by the defendant No. 1 has not been disputed. In this connection, though Mr. Bhobe, learned counsel appearing for the defendant No. 1 has pointed out that the Regulations of 2010 are not applicable to the sub-division of the defendant No. 1 Corporation and that there was a Circular to that effect, no such Circular has been produced on record by the learned counsel. In such circumstances, on plain reading of Clause 12.1(g) of the said Regulations, 2010, a sub-division road is deemed to be a public road. In such circumstances, the contention of the defendants to claim that they are entitled to use such road for their exclusive enjoyment cannot prima facie be accepted. The record also reveals that the construction put up by the plaintiff has almost reached at the final stage. Such construction cannot be put up within a short span of time. There is no material on record to show that the construction material etc., was taken to the plot of the plaintiff by any other access other than the disputed road located on the western side of the plot of the plaintiff. Apart from that, a gate has been erected leading to such road by the plaintiff which was never objected by the defendant No. 1. When the suit was filed it is not in dispute that the compound wall in line with gate put up by the plaintiff was open and leading to the road located on the western side of the plot of the plaintiff. In such circumstances, as on the date of the filing of the suit the access was very much available for the plaintiff and the same was being used by the plaintiff much prior to the said date. In the present case, it is not in dispute that the Court granted an ex parte order until the filing of the written statement directing the defendant No. 1 not to put up any compound wall blocking such access. The interim order came to be vacated as the plaintiff did not seek for extension despite of filing of the written statement. It is pointed out by Mr. Sardessai, learned counsel appearing for the plaintiff that the proceedings were stayed as the defendant No. 1 filed an application for rejection of the plaint under Order 7, Rule 11 of the Civil Procedure Code. The said order was challenged before this Court. In such circumstances, the record also reveals that the ad-interim order was not vacated by giving any reasons after hearing both the parties. The Apex Court in the judgment in the case of

Municipal Corporation, Ludhiana Vs. Inderjit Singh and Another, has observed at para 14 thus:

"14. The appellant furthermore acted arbitrarily insofar as it demolished the structures, despite pendency of the suit. We would assume that the order of injunction was granted for a limited period, but it is expected of a Statutory Corporation to act thereupon by informing the court thereabout. Furthermore, the notice was vague. It did not contain any description of the property. How much area of the property was the subject-matter of unauthorized constructions had not been disclosed. It is not in dispute that a plan for construction of the building was sanctioned. It was, therefore, obligatory on the part of the authorities of the appellant to categorically state as to how much area, if any, was the subject-matter of unauthorized construction."

9. Considering the said observations, it was expected of the officials of the defendant No. 1 to at least inform the learned Judge before embarking into a situation to change the status quo as existing as on the date of the filing of the suit, during the pendency of the hearing of the temporary injunction application, taking advantage that the interim injunction was in operation for a limited period. This conduct of the defendant No. 1 in putting up such construction cannot be condoned. The Apex Court has clearly held that the Court can grant mandatory injunction to bring the situation as on the date of the filing of the suit. In the present case, as on such date the access was very much open and available to the plaintiff. Apart from that, the contention of the learned counsel appearing for the defendant Nos. 1 and 3 that the sale-deed executed in favour of the predecessor in title of the plaintiff discloses that there are roads towards the northern and eastern side of the property purchased by the plaintiff cannot be accepted. In fact, to clear such doubt, the learned Judge had appointed a Commissioner as the defendants were claiming such road was existing and the Commissioner was directed to verify the situation at loco. The Commissioner's report dated 04.06.2013 clearly suggest that no roads are actually available either on the northern side or the eastern side at the time of such inspection and in spite of notice to the defendant No. 1 no officials of the defendant No. 1 were present on such date of inspection. This itself shows that the defendant No. 1 could not support their claim that such road was existing towards the northern and eastern side of the plot belonging to the plaintiff. In such circumstances, the action of the defendant No. 1 in erecting a compound wall and thereby totally obstructing the access of the plaintiff is utterly unjustifiable.

10. The learned Judge while passing the impugned order has taken note of the facts of the case and also the conduct of the defendant No. 1 in blocking the access of the plaintiff along the six metres wide gate which was existing to proceed towards the western side road existing at loco. The learned Judge has taken note of the reply dated 29.05.2008 by virtue of which the defendant No. 1 has granted N.O.C., to M/s. D.S. Contractors Private Limited to use the said road as an access. The learned Judge has also taken note of the fact that such

permission could be revoked in case of failure to comply with any or all the conditions as stipulated in the said N.O.C., or any objection raised by the Government, Industrial Association/Local Authority. The learned Judge also took the view that the contention of the defendant No. 1 that such N.O.C., was not transferable could not be prima facie accepted. The learned Judge also considered the fact that the cheque for payment of Rs. 5000/- as provided in the said N.O.C., was also received by the defendant No. 1 from the plaintiff. Though it was claimed by the defendant No. 1 that the cheque was not encashed, the learned Judge also took note that the alleged revocation of the said N.O.C., was after the filing of the suit. The learned Judge also examined the report of the Commissioner appointed by the Court who had inter alia stated that a tar road is located in the property surveyed under No. 23/1 and which is adjoining the plot of the plaintiff and that there is a compound wall along the western side of the plot of the plaintiff. The learned Judge further held that the claim of the defendant No. 1 that there is a motorable way towards the southern side cannot be accepted. The learned Judge also took note of the fact that the plaintiff have no other access to go to the main road besides the disputed access in the present suit. The learned Judge as such came to the conclusion that the plaintiff have an access on the western side of the property as claimed by the plaintiff. The learned Judge as such granted a relief of mandatory injunction to provide an access without any obstruction to the road existing on the western side of the property of the plaintiff. The findings of the learned Judge cannot be faulted. Admittedly, as pointed out herein above, the access on the western side of the plot of the plaintiff was being used to carry the construction material at the time of the construction of the building in the plot of the plaintiff. Apart from that, there is no other motorable access prima facie available for the plaintiff to go to the main road. The N.O.C., relied upon by the plaintiff would further corroborate the contention of the plaintiff that the defendant No. 1 did not raise any objection in such user of the road by the plaintiff. In such circumstances, the findings of the learned Judge in the impugned order are justified.

11. Apart from that, the sale-deed sought to be relied upon by Mr. Sardessai, learned counsel appearing for the plaintiff was not produced before the Trial Court along with the plaint but thereafter. The case of the plaintiff claiming right to the disputed access is supported on plain reading of clauses (vi) and (vii) of the averments therein. Clauses (vi) and (vii) of the said sale-deed reads thus:

"(vi) That the Vendors hereby agree and grant to the PURCHASER the existing right of way/passage leading from the main national road Panaji/Ponda upto the said piece of parcel of land and more particularly delineated and shown in blue colour in the plan annexed hereto. It is hereby understood and agree upon between the parties that the said use of the way/passage by the PURCHASER will include all the right to take motor vehicles and or any conveyance vehicles and also electric line, gas and water connection through said way/passage without any hindrance, objection on the part of the VENDORS, and or the aforesaid Purchasers or user/s provided that the PURCHASER, its licensees, lessees,

servants, agents will not create any sort of way passage free from such obstructions.

It is hereby also agreed upon between the parties that the said way/passage will be reserved for common use of the Vendors. PURCHASER, past purchaser of the part of the land and or the future purchaser/s of the remaining part of the property belonging to the VENDORS.

(vii) Likewise the PURCHASER also agrees and grants a right upon of way/passage to the VENDORS or to the future purchaser/s for the use and enjoyment of the remaining property of the VENDORS situated on the northern side."

(Emphasis supplied).

12. The said clauses clearly provide that the sale in favour of the defendant No. 1 was subject to a right of common user of the right of way granted not only to the vendors but all the subsequent purchasers. In such circumstances, as the land which is purchased by the plaintiff is located on the north- eastern side of the existing road as shown in the plan attached to the said sale-deed, the plaintiff can also prima facie seek a right of way to take vehicles etc., on the basis of said sale-deed. Mr. Sardessai, learned counsel appearing for the plaintiff has also pointed out that they did not have a copy of the said sale-deed when the suit was filed. The learned counsel further pointed out that the plaintiff was under an impression that the land was acquired under the Land Acquisition Act for the defendant No. 1. The said explanation is plausible in the facts and circumstances of the case as normally lands are acquired by the authorities such as the defendant No. 1. In such circumstances, the high handed conduct of the defendant No. 1 of putting up a compound wall thereby totally blocking the plaintiff from enjoying their property and the building constructed therein would itself justify the mandatory injunction granted by the learned Judge while passing the impugned order. While granting such relief, the learned Trial Judge has taken note of the observations of this Court in the case reported in 1989 (1) Goa Law Times 327 in the case of *Morto Manohar Agashikar v. Shamsunder P. Naik*, to note that in the present case the plaintiff had filed a suit seeking for a declaration that they are entitled to use the said road as an access and for a permanent injunction to restrain the defendants inter alia from carrying out any construction of whatsoever nature on the western boundary of the plaintiff's plot in such a manner as may obstruct or block the six metres wide access or entry into its plot. The learned Judge also noted that by an amendment which was permitted on 02.02.2011, the plaintiff had also sought for a permanent and mandatory injunction to direct the defendant No. 1 to demolish the part of masonry wall that had been constructed along side the six metres wide access or approach or entry to the plaintiff's plot from the suit road and restore the same to the status quo ante. The learned Judge also noted that the relief can be moulded to provide an access to the plaintiff. The direction issued in the impugned order is to demolish the compound wall which was admittedly constructed during the pendency of the suit thereby blocking the access of the

plaintiff to the main road.

13. In this connection, the Apex Court in the judgment reported in *Dorab Cawasji Warden Vs. Coomi Sorab Warden and others*, has observed at para 16 thus:

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief."

14. This Court in the judgment reported in *Baban Narayan Landge Vs. Mahadu Bhikaji Tonchar and Others*, has inter alia held that the Civil Court has jurisdiction to issue at an interlocutory stage a mandatory injunction as to restore the status quo anterior to the date of the institution of a suit. Considering the aforesaid judgment of this Court, the power to issue mandatory injunction at an interlocutory stage cannot be doubted. In the present case, considering the said N.O.C., the recitals in the sale-deed in favour of the defendant No. 1 and the fact that the plaintiff have no other access to go to the building constructed in the plot belonging to the plaintiff would prima facie suggest a high degree of assurance that at the trial a similar injunction would in all probabilities be granted and that an irreparable injury would enure to the plaintiff in case such relief is not granted until the final decision. In another judgment of the Apex Court dealing with right of access, reported in *Joy Auto Works and Others Vs. Sumer Builders (P) Ltd. and Another*, , it has been observed at paras 41, 42, 43, 44 and 45 thus:

"41. While the Trial Court has allowed access on foot from the main road to the said premises, in our view, a motorable access should be preserved at least till the 40 feet wide DP road adjacent to plot No. 878 is available to the appellants for egress and ingress from their portion of the premises, which is otherwise landlocked, or till the disposal of the suit.

42. It would not be appropriate on our part to make any observation on the

merits of the case of the parties since the same is yet to be decided. We are only required to ensure the balance of convenience and inconvenience and the equities between the parties at this stage.

43. We are also required to consider if any of the parties will suffer irreparable loss and injury unless an interim order, as prayed for by the appellants, is allowed or denied. This is not one of those cases where the appellants may be suitably compensated by damages in case their suit succeeds.

44. Having considered the submissions advanced on behalf of the respective parties, including that of Bombay Municipal Corporation, we are of the view that ad-interim protection, as prayed for by the appellants, should be given in the facts and circumstances of the case.

45. We, therefore, direct that the appellants-plaintiffs will be entitled to a motorable access from the main road to Plot No. 878 through Plot No. 879 and the portion of Plot No. 879 in their possession either till the disposal of the suit or till the construction of the 40 feet wide D.P. Road running adjacent to Final Plot No. 878 by Bombay Municipal Corporation in terms of the assurance given by it on 7-8-1984, in Writ Petition No. 1667 of 1984 and also in terms of the directions given in Writ Petition No. 2443 of 2006 filed by the Respondent No. 1 before the Bombay High Court, whichever is earlier."

15. Considering the ratio laid down by the Apex Court in the aforesaid judgment, the learned Judge was justified to come to the conclusion that the balance of convenience was in favour of the plaintiff. The plaintiff cannot be compensated in terms of money in case the injunction as prayed for is refused as the plaintiff have no other access to go to the main road and occupy the multi-storey building constructed by the plaintiff in their plot after obtaining due sanction from the statutory authorities. The judgments relied upon by the learned counsel appearing for the defendants are not applicable to the facts of the present case. In the present case as pointed out herein above, the clauses of the sale-deed executed in favour of the defendant No. 1 itself suggest that the right of way was granted and/or reserved also in favour of the plaintiff. In fact, the Apex Court in the judgment in the case of Hero Vinoth (minor) Vs. Seshammal, has observed at para 30 thus:

"30. An easement by grant does not get extinguished under Section 41 of the Act which relates to an easement of necessity. An easement of necessity is one which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternate access becomes available, the legal necessity of burdening the servient

owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily recognized in Section 41. Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant and Section 41 is not applicable in such case."

16. For the aforesaid reasons, I find that the discretion exercised by the learned Judge while passing the impugned order in the facts of the present case cannot be faulted and as such no interference is called for in the impugned order.

17. The defendant Nos. 1 and 3 have also raised a concern with regard to the security of their units. It is always open to the defendant No. 1 to take any measures in accordance with law to ensure that the security to the units existing in the plot of the defendant No. 1 are not affected and merely on that count the plaintiff cannot be deprived of enjoying the plot in survey No. 23/1-B belonging to the plaintiff. Though Mr. Rodrigues, learned counsel appearing for the defendant No. 3 seriously objects for the production of the sale-deed, Mr. Bhobe, learned counsel appearing for the defendant No. 1 who was also a party to the sale-deed did not dispute the correctness or authenticity of the said sale-deed produced by the plaintiff. In any event, the findings arrived at by this Court as well as in the impugned order are only prima facie which shall not influence the learned Judge while deciding the suit on merits.

18. In the peculiar facts and circumstances of the case, I find that there is no case made out for interference in the impugned order but however, considering that the plaintiff would be using the access during the pendency of the suit, I find it appropriate in the interest of justice to put the plaintiff to terms. The plaintiffs are as such required to deposit a sum of Rs. 1,00,000/- before the learned Trial Court within four weeks from today. In case such amount is deposited the same shall be invested in fixed deposit in any nationalized bank initially for a period of one year and same shall be renewed from time to time until disposal of the suit on merits.

19. Subject to the said deposit of Rs. 1,00,000/- referred to at para 19 and for the reasons stated herein above, both the appeals stand dismissed. Considering the dispute in the suit, the learned District Judge is directed to dispose of the suit filed by the plaintiff as expeditiously as possible and in any event within one year from the date of the receipt of this order i.e. on or before 31.12.2015. Both the appeals stand disposed of accordingly with no order as to costs.