

(1996) 06 BOM CK 0016

In the Bombay High Court

Case No : Civil Revision Application No. 182 of 1995

Mrs. Ana Colaco

APPELLANT

Vs

Thomas Colaco

RESPONDENT

Date of Decision : 21-06-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Easements Act, 1882 — Section 15

Citation : (1997) 3 BomCR 305

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : N. Sardesai, for the Appellant; A.P. Lawande, for the Respondent

Final Decision : Allowed

Judgement

R.K. Batta, J.—The petitioner (plaintiff in the suit) had claimed in the suit filed by her that there existed traditional passage from her house through the property of respondent (defendant in the suit) to go to Chorao/Bicholim road. The trial Court had granted injunction in favour of the petitioner, but the same was reversed by the learned Additional District Judge, Mapusa which is subject matter of challenge in this revision.

2. The short point to be decided in this revision is prima facie existence of traditional access as claimed by the petitioner. Learned Advocate Shri N. Sardesai submitted before me that the respondent permanently resides in Bombay and comes to Goa only during vacation; that the injunction in favour of the petitioner is operative since 2-4-91 to date; that though admittedly no sketch of the traditional passage had been filed by the petitioner, yet the respondent did file sketch showing the traditional access claimed by the petitioner; that the trial Judge had inspected the site and on the basis of site inspection as well as photographs on record had come to the conclusion that prima facie there existed way from the balcony of the petitioner to Chorao/Bicholim road and the Appellate Court was certainly not entitled to substitute its own view for the discretion

exercised by the trial Court regarding prima facie existence of the traditional passage. He also pointed out that both the parties had filed their own affidavits only and no affidavits of independent persons were filed by the parties and that the Appellate Court has wrongly concluded that the petitioner had suppressed material facts relating to existence of other access to Chorao/Pompurpa main road. He, therefore, contends that the interference by the Appellate Court was not based upon settled principles of law and as such the Appellate Court's order is liable to be set aside.

3. Learned Advocate Shri Lawande submitted before me that none of the ingredients which are necessary to establish easement as required u/s 15 of the Easement Act, have been pleaded by the petitioner and in the absence of such pleadings no relief could have been granted to the petitioner. In this respect he relies upon a judgment of this Court in Macario Antonio Francisco De Cunha and Another Vs. Alex Fred D'Souza and Others, and particularly paras 6 and 15 of the said judgment. The next contention advanced by him is that no dimensions of the traditional passage have been given nor any sketch was filed by the petitioner and thirdly there has been suppression of facts which has been rightly appreciated by the Appellate Court. In the course of arguments Advocate Shri Lawande submitted that in case revision is allowed, liberty be given to the respondent to put a revolving gate near the Cross so that cattle do not enter, but human beings can pass on foot.

4. Insofar as the first contention which has been advanced by Advocate Shri Lawande is concerned, I cannot accept his contention that there are no pleadings to prima facie make out a case of easement. The petitioner has categorically stated in the plaint that the traditional passage is being enjoyed by her without hindrance to the use of the said passage.

5. The Appellate Court had reversed the injunction order granted in favour of the petitioner on four different grounds. The first ground deals with the cause of action and in my opinion it has no relevancy whatsoever while deciding the question of temporary injunction. Even otherwise from the pleadings we cannot arrive at the conclusion that there has been no cause of action. The findings on this score of the Appellate Court are not supported by the averments in the plaint.

6. The second ground which has been considered by the Appellate Court is that the petitioner had failed to identify the suit access. He did not file any sketch. This is factually correct, but one has to bear in mind that a sketch showing the traditional access claimed by the petitioner had in fact been filed by the respondent himself. Besides that, certain photographs had been filed by the petitioner showing the suit access, though it would have been better if sketch regarding claim of traditional passage had been filed by the petitioner, but on that count alone petitioner's case could not be totally discarded. The trial Court had taken into consideration the said photographs and had prima facie come to the conclusion that there did exist way. The Appellate Judge was certainly not justified in substituting his opinion for the conclusion which had been arrived at

by the trial Judge, since the conclusion of the trial Judge on this aspect could not be said to be erroneous. If the way can be seen through photographs it can be accepted though, of course, it may be difficult to know the exact dimensions of such passage in the photographs.

7. Admittedly, none of the parties had filed affidavits of other independent persons on this issue and in such circumstances this fact could not be taken against the petitioner alone. Insofar as suppression of material facts is concerned, I find that technically there has been no suppression of facts as such. What the petitioner had stated in the plaint was that there existed a traditional passage leading to Chorao/Bicholim road and the case of the petitioner in the plaint is in respect of the said right of traditional passage leading to the main road Chorao/Bicholim. The other way which is spoken of by the respondent and has also been referred by the trial Judge in the inspection report does not lead to Chorao/Bicholim road but it leads to Madel/Pompurpa road. Therefore, the contention of the petitioner in para 11 of the plaint that the only access of the plaintiff to the main Chorao/Bicholim road cannot be said to be incorrect.

8. In view of the above, I am of the opinion that the learned Additional District Judge had not followed well settled principles while interfering with the order of the trial Court. The conclusions arrived at by the trial Court could not be said to be erroneous which would justify interference by the Appellate Court on the basis of material on record. For the purpose of temporary injunction, the petitioner had established existence of traditional passage from her balcony to Chorao/Bicholim road as shown in the photographs. The said photographs have been filed before me and are placed on record after the same are duly signed by Advocates for the parties. As I have already stated, it is not possible to make out what is the exact width of the passage. The photographs show that at places it is wide and at places it is narrow. In any case it is only a footway. Taking the facts and circumstances on record into consideration, the width of the said way is tentatively fixed for the purpose of temporary injunction proceedings as 2 feet. Learned Advocate Shri Lawande had sought liberty to put revolving gate near the Cross shown in the said photographs so that the cattle do not enter in the property but human beings can pass through the gate. Liberty is given to respondent to put such a revolving gate to prevent entry of cattle into the property, but it should be ensured that human beings can pass through the said revolving gate on foot.

9. Revision is allowed accordingly and rule is made absolute in the aforesaid terms. In the facts and circumstances parties are left to bear their costs.

Revision allowed.