IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO. 53/2016

Goa University,
A body Corporate having it
Principal place at Taleigao Plateau,
Ilhas Goa 403 206
Through its Vice Chancellor,
Having its office at the University Campus,
Taleigao Plateau, Ilhas – Goa. .. **APPELLANTS**

Versus

1. Mr. Haroon Ebrahim,
Major of age,
Son of late Ibrahim Mohamed,
Residing at H.No.18/2001/1,
`Haroon' New Taleigao Bypass road,
P.O.Caranzalem, Goa 403 002.

2. Public Works Department,
Government of Goa,
Sub Division I, Division II (Roads),
Panaji – Goa.

3. State of Goa,
Through Chief Secretary,
Secretariat, Porvorim – Goa. .. **RESPONDENTS**

...

Mrs. A. Agni, Senior Advocate with Ms. A. Kamat, Advocate for the appellants.
Shri S. Kantak, Senior Advocate with Shri A. Kamat, Advocate for the respondent no.1.

CORAM :NUTAN D.SARDESSAI, J.
RESERVED ON : 17/02/2017.
PRONOUNCED ON :27/04/2017.

JUDGMENT :

1. The appellants who are the original defendants are challenging the order dated 24.06.2016 passed by the District Judge-1, North Goa Panaji, pursuant to which he allowed the respondent no.1's application for temporary injunction and restrained the appellants, their agents, servants etc., from blocking and obstructing the suit access as shown in the Plan.

2. Mrs. A. Agni, learned Senior Advocate for the appellants adverted to the pleadings in the plaint and raised a question whether the conduct of the plaintiff was at all equitable to grant the relief of injunction as prayed for. She adverted to the various correspondence forming a part of the proceedings and submitted that there was no right of easement spelt out by the plaintiff to entitle him to an access through the property of the appellants-defendants. The letter dated 9.5.1990 did not spell out any such right of easement nor was there any admission at their instance of providing the access in the letter dated 16.5.1990. The letter of the appellants dated 25.7.1992 was in respect of the proposal for the construction of a periphery road. The report drawn by the Government also referred to the alignment of the periphery road bypassing the University as also given by the appellants and which again did not make any reference to the existence of a traditional road. Besides, the letters dated 14.3.1996, 16.5.1996 and 21.4.1997 made a reference to the NOC to be issued to the

office of the Assistant Engineer, PWD for the portion of the road proposed to be constructed in his property and that the appellants had no objection for the construction of a periphery road but again without a reference to the existence of any traditional access as claimed by the plaintiff. The letter dated 26.8.1997 addressed by the Assistant Engineer, PWD to the plaintiff also referred to the construction from the main road to the plaintiff's plot while the letter of the plaintiff to the Assistant Engineer, PWD dated 22.9.1997 sought for information regarding the width of the periphery road. The letter of the plaintiff to the Chief Engineer, PWD dated 16.2.1998 conveyed the intention of the plaintiff to bear the costs of construction of the peripheral road but without referring to the traditional access through the property of the defendants.

3. Mrs. A. Agni, learned Senior Advocate for the appellants also invited attention to the report of the PWD dated 10.4.2012 which again referred to the peripheral road without any reference to the traditional access as also the letter of the Executive Engineer dated 16.9.1998 addressed to the plaintiff wherein again a reference was made to the work of the peripheral road being undertaken by the PWD on receipt of the entire costs and without a reference to any traditional access. She referred to the letter of the Executive Engineer addressed to the appellants dated

2.3.2000 which once again made a reference to the construction of the peripheral road along the boundary for the security of its inmates and once again reiterating the necessity of the construction of a peripheral road. The respondent-plaintiff had not taken any action in respect of the peripheral road from 2005 till 2015. A reference was also made to the letter of the respondent-plaintiff addressed to the appellants by which he had conveyed his intention to carry out the development and agricultural activities for which he needed an access to his property meaning thereby that there was no activity whatsoever carried on in the plaintiff's property unlike his case to the contrary till the year 2011. Rather, she invited attention to the appellants' letter dated 26.7.2011 pursuant to which they had made it abundantly clear to the respondent-plaintiff that the land of the appellants shall not be spared to construct a road to provide an access to his private property and which letter was not produced by the respondent-plaintiff at the time of filing of the suit.

4. Mrs. A. Agni, the learned Senior Counsel also referred to their written statement where they had specifically denied the existence of a traditional access road of the width of 10 mts. or any traditional access at all passing through their property as to provide a traditional access to that of the respondent no.1. There

was also no usage over any such alleged traditional access by the plaintiff as claimed in the plaint. Besides, it was their specific case that the appellants had constructed a compound wall adjoining the Survey nos.198, 199 and 131 i.e. between the properties Surveyed under nos.131 and 142 and 131 and 130 as also 131 and 132 and there existed the All India Radio compound wall touching their properties bearing Survey nos. 132 and 127, 135 and 127 and 126 and 125. The compound wall adjoining the property of the respondent-plaintiff was constructed around three years' back and which fact had been suppressed by the plaintiff, who had approached the Court with unclean hands. They were in the process of constructing the compound wall and had undertaken the work. However, adjoining the property under Survey no.131 no work was presently going on as the compound wall had been constructed three years back. The photographs accompanying their written statement showed that the digging work had been done for the purpose of laying high tension cables by the Electricity Department and there was an already existing compound wall around their property.

5. Mrs. Agni, learned Senior Advocate adverted to the letter dated 26.7.2011 addressed to the plaintiff pursuant to which it was made abundantly clear that the land of the appellants would not be spared to construct the road and provide an access to his

property. Quite on the contrary, the appellants had tendered the work of the construction of the compound wall as apparent from the letter dated 15.6.2009. The photographs on record showed the compound wall existing at loco. She invited attention to the affidavit of the appellants' Security Supervisor who had affirmed on Oath that during the course of his routine inspection on 5.9.2013 he was shocked to see that a part of the compound wall of the appellants adjoining to the Survey number belonging to it was partly demolished. He had also noticed that the Mechanical Clearance/Levelling for an approach road all along the All India Radio compound wall had been carried out and he was shocked to note that the University compound wall existing at loco since the last three years had been dislodged and thereupon he had immediately reported the matter to their Engineer as also the Executive Engineer followed by the complaint to the P.I. incharge Agassaim Police Station. The compound wall which was found to have been demolished on 5.9.2013 was in existence when he had joined as a Security Supervisor and it was totally intact and existing prior to 5.9.2013. During his previous visit on 4.9.2013 he had found the compound wall totally intact and found on 5.9.2013 that a part of the compound wall adjoining the land of the plaintiff was demolished. Besides, she referred to the photographs clearly showing the demolished portion of the compound wall to buttress a case on its existence prior to the act

of demolition and the demolition being carried out only to seek an access through the property of the appellants. Three complaints were lodged to the police in that context.

6. Mrs. A. Agni, learned Senior Advocate further submitted that the compound wall was reconstructed on behalf of the appellants and in that context referred to the bills of the Contractor and the supporting affidavit. She also adverted to the rejoinder filed by the respondents in which there was a reference for the first time to the trees unlike the earlier letter. Last but not the least she adverted to the impugned order and submitted that it was fraught with illegality and pressed for its reversal. She relied in M.Gurudas Vs. Rasaranjan [AIR 2006 SC 3275], Gujarat Bottling Co. Ltd. Vs. The Coca-Cola Co. & Ors. [AIR 1995 SC 2372], Kashi Math Samsthan and another v. Shrimad Sudhindra Thirtha Swamy and another [(2010) 1 SCC 689], Vassudev Nene Vs. Dattatraya Jog [(1999) 2 GLT 108] and Colgate Palmolive (India) Ltd vs Hindustan Lever Ltd. [(1999) 7 SCC 1], to support her case. The impugned order was liable to be quashed and set aside and the injunction application had to be dismissed. There was no question of any irreparable injury being caused to the respondent no.1 who had waited for three years till the construction of the compound wall and therefore on all these grounds, the impugned order had to be quashed and set aside.

7. Shri S.S.Kantak, learned Senior Counsel for the respondent-plaintiff posed a question whether an access was available and if it had been used for a long period of time which question needed to be determined. He also raised a question whether from the order as passed any other view was permissible and if so it was so gross as to call for an interference in appeal. He adverted to the plaint along with the photographs to buttress his case that it had showed an access to the plaintiff's property bearing Survey no.131 through the Survey no.132 of the appellants-defendants. Admittedly, the property of the plaintiff-respondent was landlocked. He adverted to the various letters including that dated 9.5.1990 to support his contention on the existence of a traditional access and the reply dated 16.5.1990 reiterating the existence of such access. He next referred to the application moved under Section 151 CPC and submitted that the status quo was granted in the plaintiffs' favour. He adverted to the written statement of the appellants and contended that there was suppression of material facts which would not entitle the appellants to a reversal of the order. He next referred to the order dated 29.8.2012 and the bailiff's report in particular to show that the plaintiffs access was blocked by the appellants. He referred to the photographs showing the availability of the materials like rubble stones, concrete and sand etc., which were indicative of the construction and not the demolition of the compound wall.

8. Shri Kantak, learned Senior Advocate for the respondent no.1 also referred to the peripheral road encompassing the access and that no other access was spelt out from the plaintiff's property to the main road. He referred to Sections 22 and 23 of the Easements Act, 1882, relied in M/s. Chheda Housing Development Corporation v. Bibijan Shaikh Farid and others [(2007) 3 All MR 780], and submitted that there was no perversity in the impugned order. The documents of 1990, the resolution of the Village Panchayat and the correspondence exchanged between the appellants and the Government on the peripheral road amply demonstrated the existence of an access to the plaintiff's property. Besides, there was no specific denial on the existence of there being an alternate access and finally wrapped his argument contending that the bailiff's report supported the existence of a traditional access.

9. Mrs. Agni, learned Senior Counsel clearly distinguished the judgment in Chheda Housing Development Corporation (supra), and submitted that there was no dispute with the proposition culled out in Wander India Limited. However, the said principle was not applicable to the case at hand considering the case of the plaintiff who had not even pleaded that any digging of the compound was carried out near the road to the suit property. There was also no admission on the part of of the appellants that

the plaintiff's property was landlocked. There was also no affidavit in support filed on the user of the suit access. She further relied in Shabbir Khan and others Vs.Krishna Babusso Naik [(1998) 1 GLT 395] and submitted that the bailiff's report strongly relied upon on behalf of the plaintiff was inconsequential to their case. It was the case of Mrs. Agni, learned Senior Counsel that though the plaintiff had claimed the traditional access of 10 mts. through the property of the appellants for carrying agricultural produce and that his property was landlocked, there were no material produced on the record. It was also not the case of the respondent no.1 that any opening was left in the compound wall. She referred to the documents of 1990 to contend that it was not at all the case of admission of any access through the said property. There was no basis for the trial Court to rely upon the bailiff's report and on these counts, the impugned order justified an interference in appeal.

10. The plaintiff-respondent had claimed the existence of the traditional access of the width of 10 mts. passing from the Communidade land situated on the southern side of the suit property providing the traditional access to the suit property over the said lands to the main road. It was also his case that he and earlier his predecessor-in-title used the same access continuously, openly, peacefully and as of right for an access from the main

road by foot as also by vehicles brought to the suit property for the purpose of bringing material, repairs, cultivation and plantation in the suit property as also the agricultural transport produced from the suit property. It was further his case that the lands over which the suit access existed were acquired by the Government for the purpose of the defendant no.1-appellants and handed over to them on acquisition and which were in their possession and occupation. He claimed that the suit property was landlocked and there was no access road available barring through the property of the appellants over a period of time. The plaintiff otherwise claimed a prescriptive right for the user of the suit property and in the alternative claimed that he was entitled to purchase the land covered by the suit access and the appellants were bound to sell to him. It was his case that on 26.8.2012 he found digging works undertaken on the suit access and learnt that the appellants were intending to construct the compound wall which permanently blocked the access causing irreparable injuries to him and on that premises maintained the suit and the application for interim relief.

11. The appellants had categorically denied the existence of the traditional access road of the width of 10 mts or any traditional access passing through their property and stated that there was no such access in existence at loco. The letter dated

9.5.1990 relied upon by the plaintiff itself showed that there was no easementary right of access claimed by the plaintiff and quite on the contrary it was apparent that there was a proposal of aligning of the road by the PWD bypassing the appellants' property and along the boundary of the University Campus including the small property of the private owners. The plaintiff had otherwise failed to place on record to show that any agricultural produce was obtained from the suit property. The acquisition of the appellants land was vide the Notification issued in 1982 and the possession was taken over by the Government in 1986 and handed over to the appellants in 1992. The defendant no.1 had also categorically denied that the plaintiff's property was landlocked and quite on the contrary the road as claimed did not exist at loco. The plaintiff by his letter dated 21.4.1997 had clearly admitted that his property was 300 mts. away from the starting of the road and the property bearing Survey no.131/1 was adjoining to the All India Radio complex. The appellants had constructed a compound wall adjoining to the Survey Nos.198, 199 and 131 and between the property bearing Survey Nos.131 and 142 and 131 and 130 as also 131 and 132 apart from the All India Radio compound wall touching their property between Survey nos.132 and 127 and 135 and 127 and 126 and 125. The compound wall adjoining the plaintiff's property was constructed around three years back and this fact was suppressed and he had

approached the Court with unclean hands. The appellants had undertaken the construction of the compound wall three years back and there was no basis in the plaintiff's case of any digging work being undertaken in the suit access which was not at all in existence. The photographs relied upon by them would show that the digging was done for the purpose of laying the high tension cables by the Electricity Department and which also showed the existence of the University Compound wall.

12. In the backdrop of the case set out by the respondent no.1 and the appellants and the supporting documents, it would be necessary to examine whether the learned Trial Court was in error in passing the impugned order as it did as contended on behalf of the appellants so as to justify interference in appeal or conversely whether no interference was warranted with the order under challenge being neither perverse, arbitrary or capricious. Both Mrs. A. Agni, learned Senior Advocate appearing for the appellants and Shri S.S.Kantak, learned Senior Advocate for the respondent no.1 had relied upon the correspondence, apart from the photographs to substantiate their plea on the non-existence/existence of the suit access through the appellants property leading to the main Donapaula - Bambolim road. Therefore, examining these documents would be primary to appreciate their respective contentions. The respondent no.1 by

his letter dated 9.5.1990 had referred to a traditional access through his property from the Communidade property which had been acquired for the appellants and calling upon the Vice Chancellor of the appellants to let him know what road/access had been earmarked to his property which he was prepared to develop at his cost. This letter in no manner delineates the access which he had to his property from that belonging to the appellants and quite on the contrary it indicates that he himself was in the dark to know what was the road/access earmarked by the appellants to his property. The reply of the appellants dated 16.5.1992 to the said letter only conveys the intention of the appellants to call for a meeting to identify the property and that they would show the traditional pathway realigned by them on the basis of their Master Plan. However, unlike the contention of Shri Kantak, learned Senior Advocate, this letter of the appellants in no manner conveys an admission on their part on the existence of a traditional access through their property. Rather, another letter of the appellants addressed to the Chief Engineer, P.W.D. dated 25.7.1992 conveys their intention to take a road along the peripheral road of their complex to lead to the Donapaula - Bamobolim road. The report drawn by the office of the Executive Engineer, P.W.D. dated 8.9.1995 in response to the letter of the appellants dated 25.7.1992 indicates that the alignment of the peripheral road bypassing the University was

given by the University and that the alignment of the road was taken along the boundary of the University Campus as per its plan as well as after consultation with the Engineering staff of the University which too does not make a reference to the existence of any traditional access as rightly submitted by Mrs. Agni, learned Senior Advocate for the appellants.

13. The letter of the Assistant Engineer, PWD dated 14.3.1996 addressed to the respondent in the context of the construction of the peripheral road in the University complex was also to request him to issue an unconditional NOC for the portion of the road proposed to be constructed in his property. The letter of the appellants to the Assistant Engineer, PWD dated 16.5.1996 was to convey their no objection for the construction of the peripheral road, the alignment of which was coming in the University complex. The respondent too had conveyed his unconditional NOC to the A.E., PWD for the construction of the peripheral road vide his letter dated 6.6.1996. For that matter, the respondent no.1 vide his letter dated 21.4.1997 had written to the Chief Engineer, PWD in the context of the construction of the peripheral road that he was seeking permission from their office to carry out the construction of a part of the road approximately 300 to 500 in length connected to his property and which could be further extended by the owners of the adjoining

property without even a whisper on the traditional access later claimed through the property of the appellants. The A.E., PWD had written to the respondent vide the letter dated 26.8.1997 the estimated cost of construction of a road from the main road to the plaintiff 's plot to a length of 420 mts. and to inform whether he was prepared to deposit the entire cost of the work with the PWD. The plaintiff in response to the PWD letter had replied vide the letter dated 22.9.1997 seeking information about the width of the peripheral road and days required to complete the work of the road from Donapaula to Bambolim in the University complex and vide the letter dated 16.2.1998 had assured to bear the full cost of the construction of the peripheral road proportionate to the length of the road touching his property bearing Survey no.131/1. Here again, there was no reference to the traditional access as was later sought to be canvassed on behalf of the plaintiff.

14. The report of the PWD dated 10.4.2002 in the context of the construction of the peripheral road along the northern boundary of the appellants' property too indicated that some developers owning plots along the proposed peripheral road were willing to construct the road to the respective areas but which made no reference to any traditional access through the property of the appellants. The letter of the Executive Engineer,

PWD dated 16.9.1998 to the respondent no.1 in the same context conveyed to him that the Government had directed that the work could be executed by the PWD once the entire cost was received by them and to submit his concurrence with the proposal and the time limit to deposit the proportionate cost of the road. The Executive Engineer, PWD vide his letter dated 2.3.2000 had written to the appellants' Engineer indicating that there was an administrative approval and expenditure sanction accorded by the Government for the construction of single lane kaccha road of the length of 3.4 kms. and that it was decided to take up the work if the developers of the adjacent lands agreed to meet the entire costs of the construction though the maintenance would be the responsibility of the Government. The appellants by the letter dated 25.11.2005 had written to the Principal Engineer, PWD in the context of the earlier request to undertake the construction of the peripheral road along their boundary to avoid the general traffic along the Bambolim - Donapaula road passing through the campus. They had also conveyed their plan to construct the compound wall along the University boundary for security to inmates including the students staying in the hostels and protection of vegetation and the property and consequent upon the decision taken at the Executive Council meeting dated 9.7.2005. The appellants had reiterated their request for the construction of a peripheral road along their boundary to be taken

up expeditiously which besides conveyed that they had plans to construct the compound wall along their boundary and it was not a matter of recent origin around the time of the institution of the suit.

15. The respondent by his letter dated 23.5.2011 addressed to the appellants had for the first time claimed that his property bearing the Survey no.131/1 had a traditional access which got landlocked on the Government acquiring the adjacent area for the appellants and their construction of a **compound wall**. He also referred to the approval for a peripheral road to give access to his property but which had not been constructed and that as he wanted to do development and agricultural activities he needed an access to his property and requested the appellants to give him an access to his property for which he was prepared to bear the cost involved in the construction of the road. In other words, even as late as **May 2011**, the respondents had not claimed any access through the appellants property to his property bearing the Survey no.131/1. The appellants as early as July 2011 had conveyed to the respondent no.1 in response to his application dated 23.5.2011 that the appellants land would not be spared to construct the road in an effort to provide an access to his private property and consequent thereto there was no correspondence exchanged by the respondent no.1 with the appellants asserting

the existence of a traditional access through the appellants' property, its long and continuous user over a period of time and or that his property was landlocked and till the time he came with the suit seeking the relief of injunction. The photographs relied upon by the appellants show an existing compound wall, a portion of which had been demolished.

16. The stand of the appellants was that they had begun the reconstruction of a part of the demolished compound wall on 20.9.2013 which was almost complete on 23.9.2013 when the respondent no.1 through his goons had trespassed in their property, threatened the labourers hired for the said work and again demolished/dismantled the portion of the compound wall which was reconstructed. The photographs produced on record demonstrated that the fresh stones at loco were a part of the demolished compound wall which was erected by the appellants. The appellants had otherwise relied upon the affidavit of their Security Supervisor who had asserted that he had visited the property in the course of his routine inspection on 5.9.2013 at 08.15 hours and was shocked to see that a part of the compound wall adjoining the Survey number belonging to the appellants was partly demolished. He had also noticed the mechanical clearance/levelling for an approach road all along the AIR compound wall had been carried out starting from the main road

opposite Nausi road junction in the Survey no.126, then through the Survey no.135 and ending in the Survey no.132, i.e. the boundary of the appellants and of the AIR junction. He had further asserted that the compound wall which was found to have been demolished was existing when he joined as a Security Supervisor and was totally intact prior to 5.9.2013. He had received a telephonic call on 23.9.2013 that some persons had again come to the site and demolished the appellants' compound wall which was under reconstruction around the property Surveyed under nos.126, 135 and 132. The appellants had placed additional photographs on record indicating the position of the AIR boundary wall and that of the appellants with the partly demolished portion and the stones lying at loco of the demolished portion thereby supporting their plea that the compound wall had been broken at the instance of the plaintiff. Besides, the appellants also relied upon the complaints to the police of the Agassaim Police Station in which they had alleged that there were illegal trespassing activities and encroachment by unknown persons in their Survey number by mechanical clearance/levelling for an approach road along the compound road from the main road and seeking action on priority basis as deemed fit. The appellants had produced the bills drawn by the Contractor with respect to the construction of the compound wall as early as August 2009 which confirms their case prima face on

the existence of the masonry wall and it being demolished subsequently. The respondents for the first time in their rejoinder had admitted the construction of a compound wall by the appellants but had qualified his statement that in view of the existence of the suit access they had left the portion of the suit access open which is in contra distinction to the earlier stand that there was no compound wall whatsoever.

17. Shri S.S.Kantak, learned Senior Advocate for the respondent no.1 had referred to the orders dated 4.7.2015, 4.1.2016 and 7.4.2016 in Goa University Vs. Vishwas Warehousing and Trading Pvt.Ltd. And 3 others (Writ Petition No.360/2015) to advance his contention that the appellants herein now could not take a different stand qua the compound wall and the statement in the affidavit to remove a portion of the compound wall to create an access for the respondent no.1 therein, to substantiate his case on the existence of an access. First and foremost, it is not apparent from the said orders what was the Survey number of the property involved in the said petition, where the present appellants had allegedly filed an application for regularisation and taken a decision to remove a portion of the compound wall to create an access for the respondent no.1 therein. This is besides the point that though Mrs. A. Agni, learned Senior Advocate appearing for the

appellants contended that such orders had to be produced alongwith an application, nonetheless these orders have no bearing on the outcome of these proceedings and which were otherwise not at large before the Trial Court while deciding the application for temporary injunction. Shri Kantak, learned Senior Advocate had also made a pertinent reference to the bailiff's report to substantiate his contention on the existence of an access.

18. A cursory perusal thereof reveals that the bailiff had visited the construction site, clicked photographs and noticed the masonry stones, sand, concrete and rubble stones dumped at the place and moreover there was an 8 mtrs. length foundation work done at the ground level of the compound wall to close the access which was 5 mts. wide connected to the main road Donapaula to Bambolim. However, this report would be subject to scrutiny in the proceedings before the Trial Court which does not make any reference to the survey number where he had found the said compound wall, the so-called access and moreover there were not even a reference to any person being present who had identified the place to him. This report of the bailiff therefore does not enure to the benefit of the respondent no.1. Shri Kantak, learned Senior Advocate for the respondent no.1 placed heavy reliance on an undated resolution adopted by the Village

Panchayat of Santacruz by which the Sarpanch had proposed to state about the existence of an old customary road joining Wasudha Colony, Santacruz to Bambolim-Donapaula road, which was being regularly used by the villagers including vehicular access and of a resolution being adopted to construct a permanent 10 mtrs. wide road on the existing customary road passing along the boundary wall of the All India Radio and passing through the property of the appellants. This resolution too apart from being undated cannot enure to the benefit of the plaintiff in the face of the voluminous material produced on record by the appellants substantiating their case and belying that of the plaintiff on the existence of an access through the appellants' property.

19. The learned trial Court considered the case carved on behalf of the appellants and that on behalf of the respondent no.1 and broadly referred to the various letters/reports particularly relied upon by the appellants and formulated the sole point for determination whether the plaintiff had satisfied the three cardinal principles for the grant of injunction and partly answered in the affirmative holding the respondent no.1 entitled to an order of injunction to restrain the defendants from interfering with the suit property/suit access to the extent of 3 mtrs. However, the learned Trial Court did not appreciate the context and purport of

the various letters relied upon on behalf of the appellants and hastily concluded on the basis of the letter dated 23.5.2011 that the plaintiff had made a request to the defendant no.1 to grant him an access through his property and referred to the reply of the appellants that they would not spare the land to construct the road. Surprisingly, the learned Trial Court on examining the correspondence entered into between the plaintiff and defendant no.1 held that the said documents did not support the cause of the plaintiff as regards the existence of the suit access or the traditional pathway. Yet, in the next breath, the trial Court held that the appellants letter dated 16.5.1990 fortified the case of the plaintiff.

20. One fails to understand how at all the Trial Court could have been carried away on a reading of the said letter in the face of the voluminous correspondence on record whereby the appellants had clearly belied the case of the plaintiff on the existence of an access through their property to reach the main Bambolim - Donapaula road. Though the learned Trial Judge had referred to the correspondence, he had failed to appreciate the same in the proper context and unlike the contention of Shri Kantak, learned Senior Advocate for the plaintiff failed to understand the core of the dispute and misinterpreted the correspondence to draw an inference on the existence of an access when none was conceded

on behalf of the appellants.

21. The Trial Court was also otherwise unduly carried away by the bailiff's report and the resolution adopted by the Panchayat when it did not at all indicate the date on which it was adopted and what was the status of the resolution subsequent thereto. The learned Trial Court had brushed aside the judgments relied upon by the appellants-defendant no.1 as being of no avail without in any manner discussing how the proposition culled out therein did not apply to the case at hand. The learned Trial Court in its own wisdom thus concluded that the plaintiff had made out a prima facie case, that the balance of convenience lay in his favour and he would suffer irreparable loss and injury and in that context proceeded to restrain the appellants from blocking or obstructing the access but to the extent of 3 mts. pending the suit. The reasons assigned by the learned Trial Judge on the face of it cannot stand the test of legal scrutiny and are found to be arbitrary and perverse justifying interference in appeal.

22. **Colgate Palmolive (India) Ltd.** (supra), held that generally the interlocutory remedy by way of a grant of an order of injunction is intended to preserve and maintain in status quo the rights of the parties and to protect the plaintiff being the initiator of the action against incursion of his rights and for which

there is no appropriate compensation being quantified in terms of damages. The basic principle for the grant of an order of injunction is to assess the right and need of the plaintiff as against that of the defendant and it is a duty incumbent on to the law Courts to determine as to where the balance lies. Another redeeming feature in the matter of grant of interlocutory injunction is that, in the event of the grant of injunction in regard to a party defendant where the latter's enterprise has commenced and, in that event the consideration may be somewhat different from that where the defendant is yet to commence its enterprise. It considered the decision in **Wander India Limited** (supra), where it was observed that "usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The Court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the

defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the balance of convenience lies. The interlocutory remedy is intended to preserve in status quo the rights of parties which may appear on a prima facie case. The Court also, in restraining a defendant from exercising what he considered his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted".

23. **Colgate Palmolive (India) Ltd.** (supra), also considered the judgment in **Gujarat Bottling Co.Ltd.** (supra), where the Court had sounded a different note, though however, emphasised the discretionary power in the matter of grant of interlocutory injunction and observed at paragraph 43 that the grant of an injunction during the pendency of the legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising such discretion the Court applies the following tests:-

(i) whether the plaintiff has a prima facie case;

(ii) whether the balance of convenience is in favour of the plaintiff; and

(iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.

24. **Kashi Math Samsthan & Anr.**(supra), reiterated the well settled principles that in order to obtain an order of injunction, the party who seeks for the grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if the injunction is not granted. But it is equally well settled that when a party fails to prove a

prima facie case to go for trial, the question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove a prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted.

25. **Shri Vassudev Nene** (supra) held that a party has to approach the Court with clean hands and should not suppress any material facts or documents. A person seeking injunction has to establish that the possession can be related to some right or title to the property and that too such possession of the party has to be lawful possession. It considered the judgment of the Hon'ble Apex Court in Wander Limited where it held that unless the view taken by the Trial Court on the basis of the analysis of the materials on record was so improper that no such view could have been taken by a man of prudence or that it was so perverse or arbitrary or that it was not borne out from the records considering that the lower Appellate Court was dealing with appeal against the discretionary order passed by the Trial Court, it was not possible for the lower Appellate Court to arrive at a finding different from the one by the Trial Court solely

because some other view was possible.

26. **Shabbir Khan** (supra), held that where the property had an access to a public road, it cannot be said to be landlocked. The respondents no.1 and 2 as the original plaintiffs had filed a suit against the appellants and others for a declaration that the only access of the plaintiffs to the public road was through the plot no.5 and which further passed through the property belonging to the plaintiffs and sought a right of preference and preemption in respect of the plot no.5 surveyed under no.110/4. It was their case that the plots no.1 to 4 of the property belonged to them and the plot no.5 which is the suit plot and also bearing under Survey no.110 belonged to the defendants. The plaintiffs case was that they were using the suit plot site as an access in order to reach the other properties then to the public road and that the said access through the plot no.5 was the only access they had in order to go to their property and then to the public road which was used by them for over 60 years. The defendants had submitted the Sale Deed of the suit plot no.5 for registration. The plaintiffs claimed that their property was enclaved and access to the public road passed through the suit plot and they had right of preference and preemption in respect of the suit plot no.5. According to the plaintiffs, they came to know about the Sale Deed on 20.11.1981 only when the defendant no.14 had

tried to obstruct them from using the access by constructing stone obstruction on the access and maintained the suit. The defendants had taken a plea that the plaintiffs had direct access to the road and did not have to pass through the suit property. The plaintiffs had never used the suit plot no.5 as an access and that on earlier occasions boundaries stones were put which was much prior to the Sale Deed.

27. In **Shabbir Khan** (supra), the Civil Judge held in the plaintiff's favour and allowed the suit directing the defendants to execute the Sale Deed in the plaintiffs' favour for registering the right of preemption and giving rise to the appeal before this Court. The learned Single Judge of this Court found from the pleadings that the plaintiffs had not claimed the right of preemption in terms of Article 2309 (1) of the Portuguese Civil Code and that an attempt was made to amend the pleadings more than 16 years since the institution of the suit and the plea of preemption was taken for the first time in appeal without any foundation in the pleadings. Nonetheless, it was held that the plaintiffs' property was not landlocked as right of access was claimed by the plaintiffs through the suit plot and no right of preemption could be claimed.

28. Another important facet of the case which was lost on

the Trial Court was that there were no supporting affidavits to substantiate the case of the respondent no.1 that he had an access through the property of the appellants and that it was used by him as a matter of right over a period of time to access the main Bambolim to Donapaula road. Considering the principles governing the grant of injunction which were not considered by the learned Trial Court, the impugned order which is fraught with perversity cannot be allowed to stand even considering the judgment in Wander India Limited (supra), being an appeal on principle.

29. In the result, i allow the appeal and the impugned order securing the plaintiff with the order of injunction is quashed and set aside with no order as to costs.

NUTAN D.SARDESSAI, J

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