

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 473 OF 2014

Smt. Amina Bi Shaikh,
Wife of Shaikh Mohamad Shafi,
59 years of age,
R/o H. No. 78, Bandarwada,
Bicholim, Goa.
Represented herein by her
Constituted Attorney
Shaikh Mohammad Shafi,
64 years of age,
r/o H. No. 78, Bandarwada,
Bicholim, Goa.

... Petitioner

Versus

1. Chief Officer
Bicholim Municipal Council,
Having office at Bicholim
Municipal Council,
Bicholim – Goa.
2. Smt. Razia Begum,
Major in age,
Resident of Muslimwada,
Bicholim – Goa.
3. Om Razia Begum,

Major in age,
Resident of Muslimwada,
Bicholim – Goa.

4. Haider Abbas,
Major in age,
Resident of Muslimwada,
Bicholim – Goa. ... Respondents.

Mr. Ashwin D. Bhobe, Advocate for the Petitioner.

Mr. Sandesh Padiyar, Advocate for the Respondent No. 1.

Mr. S.D. Lotlikar, Senior Advocate with Mr. Prasheen Lotlikar,
Advocate for the Respondents No. 2, 3 and 4.

CORAM : N. M. JAMDAR, J.

DATE : 11 FEBRUARY 2015

ORAL JUDGMENT :

Rule. Rule made returnable forthwith. Respondents waive service. Taken up for hearing.

2. A short issue that arises in this petition is whether the Municipal Council, while deciding an application for building permission can entertain the claim of a third party as regard access and refuse building permission, by adjudicating upon the issue of access.

3. The petitioner is a owner of the property situated at

Village Bicholim, Goa. The petitioner was desirous of carrying out construction in the property. On 1 February 2008, she applied to the Chief Officer of Bicholim Municipal Council for building permission. The application was filed along with endorsement, questionnaire duly signed by the petitioner and the Civil Engineer, estimate for the proposed construction, Form I and Form XIV, schedule 2 and a copy of the plan. On 16 September 2008, the office of Deputy Chief Engineer granted permission to the petitioner. As per the procedure the matter came for consideration of the Municipal Council. When the application came up for consideration of the respondent no.1 Chief Officer, a complaint was made by respondents no.2, 3 & 4 (the respondents) that the permission should not be granted to the petitioner as access to the land of respondents will be affected. The Chief Officer, along with Municipal Engineer, and Junior Engineer conducted inspection of the site. The Chief Officer considered the objections of the respondents and held the access of the respondents will be affected and, accordingly, by impugned order dated 22 November 2013 refused the application of the petitioner. Hence, this petition.

4. I have heard Mr. A.D. Bhobe, learned Counsel for the petitioner, Mr. S.D. Padiyar, learned Counsel for respondent no.1 and Mr. S.D. Lotlikar, learned Senior Advocate for respondents no.2,3 & 4.

5. The Chief Officer entertained the complaint from respondents, went to the site, conducted an inquiry, examined

the location, decided whether defendants have a right of access, and recorded a finding, and dismissed the application. What the Chief Officer did was akin to exercising judicial powers. The question is whether the Chief Officer was entitled to exercise such judicial powers.

6. In the State of Goa, building construction is now regulated by the Goa (Regulation of Land Development and Building Construction) Act, 2008 (for short, Act of 2008) and the Goa Land Development and Building Construction Regulations, 2010 (Regulations of 2010). Section 2(a) of the Act of 2008 defines “building construction”. Section 2(a) states that “building construction” will take the same meaning assigned to “building operations” in clause (5) of Section 2 of the Goa Town and Country Planning Act, 1974; “building” in clause (2) of Section 2 of the Goa Panchayat Raj Act, 1994; “to construct a building” in Section 184(1) of Goa Municipalities Act, 1968; “building” in Clause 8 of Section 5 of the City of Panaji Corporation Act, 2002. Section 3 of the Act of 2008 states that all land development and building construction in Goa State, subject to provisions of Section 9, will be in accordance with the acts and provisions made under the provisions of the Act of 2008. The Act of 2008 supersedes all earlier laws in force governing land developments and in so far as they are inconsistent they stand repealed.

7. Regulations of 2010 regulates the manner in which construction is to be carried out. Regulation 3 deals with the procedure and requirements for securing development

permissions, completion and occupancy certificates. Regulation 3.2D lists the documents which are to be submitted alongwith the application. They include right of ownership or interest, original survey plans, copy of index and entries from Records of Rights or City Survey Register, copy of Sale/Gift or such other instrument or assignment, affidavit from the owner, certificate from Architect/Engineer/Planner stating that the plans are drawn as per relevant acts and regulations, Structural Liability Certificate, Conversion Sanad, copy of Sanad if applicable. Regulation 3.6.1 specifies steps to be taken to obtain the permission. The category II deals with areas under jurisdiction of Town Planning Department and Municipal Council, which is the present case. The procedure is to first apply to Town Planning Department for technical clearance and for recommendation of conversion and thereafter to apply to Municipal Council enclosing the technical clearance order.

8. When the application is received by the Chief Officer in respect of the building permission, the Chief Officer has power to either refuse or grant the permission. The grounds on which the Chief Officer and council can refuse permission are listed in Section 185(1) of the Goa Municipalities Act 1968. The contingencies in which the permission can be refused are: if the Council has passed resolution acquiring the land; if the proposed construction would contravene the provisions of the Act or any other law or scheme or other orders passed; if the relevant documents and information required are not furnished; if no plans have been prepared for laying out streets; if there is no provision for access to the building; if the

proposed construction is an encroachment on Government land; and for any other reasons recorded in writing.

9. The issue therefore would arise whether the rejection by the Chief Officer in the present case would fall under any of seven categories listed above. The rejection is not on the ground of acquisition or lack of relevant documents or laying out streets or encroachment. There is also no ground that there is no access to the building to be constructed. The access is in reference to the claim of a third party. As regard the last ground “for any other reason”, it will have to be read *noscitur a sociis* with the earlier grounds. This ground cannot be an independent ominous ground to include any reason whatsoever. The earlier categories deal with legal and technical grounds pertaining to the construction. They have direct reference to the proposed construction. The residuary power therefore will have to be in respect of legal and technical grounds, with direct reference to the proposed construction. This clause obviously will not cover adjudication of rights of a third party qua the proposed construction.

10. The next possible ground for rejection is that the proposed construction would contravene the provisions the Act of 1968 or any other law or scheme, rule, bylaws or any other order passed under the Act. Prior to the commencement of the Act of 2008 Goa, Daman and Diu (Panchayat) Building Rules were in force. Under Rule 13 of the Rules of 1971 byelaws were framed. These byelaws dealt with access to the proposed building. They also provided for traditional foot access.

Byelaws also provided that no proposed construction should deprive the access of the other buildings which were constructed by obtaining permission under the byelaws. After the commencement of the Act of 2008 and Regulation of 2010, as stated above, the Regulations of 2010 would now be in force.

11. Regulation 4.11 of the regulations of 2010 speaks of development of landlocked areas. It deals with development of any landlocked areas without access or inadequate access. 4.11 makes a reference to the area accessible by traditional access passing through a property of a different owner. It then refers to area proposed to be made accessible by an access having width more than 4.50 metres but less than 6 metres. It deals with the contingencies where access is provided through the property of a different owner by his voluntary consent. If the access is not voluntarily made then the authority at the request of the owner of the landlocked property can acquire the area of access with certain conditions. Thus any building which is built as per the regulation will have a provision for access, even though it has to pass through the land of other owner.

12. Based on the byelaws framed under Rules of 1971 and the Regulations of 2010, it is contended by Mr. Lotlikar that the concept of access cannot be said to be completely alien to the inquiry to be conducted by the Chief Officer. He submitted that inquiry as to the access is not completely shut out while considering the application for building permissions. It is no

doubt true that the regulations 4.11 and the erstwhile byelaws do make a mention of access and, therefore, a broad proposition that Chief Officer cannot enter into the aspect of access, cannot be accepted. However, the question still remains that to what extent the Chief Officer can consider the issue of access.

13. The Rules and Regulations speak of traditional access. Also of access to a building sanctioned as per the relevant regulations. These are accesses in reference to a third party. Thus there would be two types of access. One which are already appearing in any public document such as survey plan, building permission, etc. Second will be a right of access or easement decided by the Court of law.

14. The complaint made by the respondent does not make reference to a traditional foot access or to any access to the respondents' property as per any building plan. The issue access is called upon to be decided for the first time by the Chief Officer. The core issue is whether the Chief Officer, at the first instance, without either the access appearing in any public document or pronounced by a Court of law, can decide the existence of an access and adjudicate upon the same.

15. Mr. Padiyar pointed out that the traditional accesses are normally specified in the survey plans. As regard the access to any building which has been built as per permission, it would be found in the building plans. A third party complainant can produce these documents or an order of the competent Court

before the Chief Officer. The inquiry as to the proposed construction affecting the rights of a third party will be restricted to only examination of these documents. Without these to hold that right of access exists will be excusing an original adjudicatory function. Considering the nature of powers exercised by the Chief Officer and Municipal Council, it will have to be held that only those accesses claimed by a third party which are borne out by any public document, proclaimed by any Court of law or granted as per valid permissions to a building constructed as per the relevant byelaws/regulations, can be considered. It will not be permissible for the Chief Officer to carry out an inquiry for the first time to consider the case of access put by a third party. To put it differently unless the access is shown as going through the property proposed to be developed in a survey plan, or the claimant of such an access is a building built as per sanctioned plan or the claimant has an judicial pronouncement in his favour, he cannot call upon the Chief Officer to adjudicate his claim at the first instance otherwise it would mean that the Chief Officer can decide issues of easementary rights.

16. In various decisions of our High Court and the other High Courts such assumption of judicial power by planning authorities has been frowned upon. In the case of ***Municipal Board Vs. Mahdzak*** reported in ***1945 Law Suit (All) 102***, the learned Single Judge of the Allahabad High Court, in identical facts, held that the legislature never intended that the municipal planning board should assume judicial functions

and take upon a jurisdiction to go into question of private rights and refuse sanction. In the case of ***Annapurna Builders, Hyderabad Vs. Municipal Corporation of Hyderabad and Another*** reported in ***1987 Law Suit (AP) 571***, issue arose before the learned Single Judge of Andhra Pradesh High Court as to what extent inquiry by Municipal Council is to be carried out in respect of ownership. The learned Single Judge held that the Municipal Council has powers to make summary inquiry as regard the rival contentions and Municipal Council cannot adjudicate upon interse dispute of the parties. In the case of ***Ganesh V. N. Panvelcar Vs. Gram Panchayat of Verem-Betim-Reis Magos***, reported in ***1987 Law Suit (Bom) 16***, Division Bench of this Court considered the scope of jurisdiction of village panchayats in respect of inquiry into the title of the applicants. The Division Bench was considering the provisions of Goa, Daman & Diu Village Panchayat Regulations of 1962. The Division Bench categorically held that the fact that village panchayat should verify the ownership does not mean that Village Panchayat has right to decide the title to the property. In the case of ***Ram Nath Mehra and Others Vs. Calcutta Municipal Corporation, (1988) 2 CALLT 347 HC***, an issue arose before the Calcutta High Court as to whether the municipal corporation authorities could compel the applicant to submit No Objection Certificate from the urban land ceiling authorities and for failure of the applicant to furnish the same, the municipal corporation could refuse the building permission. The learned Single Judge held that the corporation will have to act within the four corners of the relevant Municipal Corporation Act and it is not their domain

to insist on permissions required under some other enactment and which is the task of the authority under that Act.

17. All these decisions indicate that the planning authority cannot enter into private dispute and decide inter se rights. The Chief Officer in the present case has done precisely that. He has entertained a complaint from the respondents, visited the site in question, adjudicated the claim of the respondents vis-a-vis the contentions of the petitioner for the first time and has reached a conclusion. As stated above, if the case is based on access already established in a public document or permissions granted or on pronouncement of the Court of law, the Chief Officer can entertain the complaint of third party. Even though the Chief Officer may be required to take into consideration issue of access while granting building permissions, he has no judicial power to decide dispute as regard access and refuse permission. The legislature has conferred no such judicial function on the Chief Officer. Mr. S.D. Lotlikar and Mr. S.D. Padiyar ultimately agreed that the Chief Officer is not empowered to assume such judicial functions. Mr. Lotlikar submitted that the respondents have now filed a suit for declaration of their access and other rights.

18. In the circumstances, it would have to be held that the impugned order passed by the Respondent No.1-Chief Officer is without jurisdiction. The impugned order will have to be quashed and set aside and the matter will have to be reconsidered by the respondent no.1. Accordingly, the impugned order dated 22 November 2013 passed by

respondent no.1 is quashed and set aside. The Respondent No.1. will consider the application for building permission by the petitioner as per law, in light of what is stated above. It is clarified that the impugned order is set aside on the ground of lack of jurisdiction and I have not entered into the merits of the rival contentions of the parties. All contentions of the parties are kept open. Furthermore, the respondents have already filed a civil suit, which will be decided on its own merits. The Chief Officer will make an endeavour to dispose of the application within six weeks. Rule is made absolute in above terms. No costs.

N.M. JAMDAR, J.

NH/-