

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 382 OF 2007

Shri Vishnu Mahadev Prabhu,
Gaonkarwado,
Usgao, Goa (Since deceased-
represented by his Legal
Representative) Shri Ravindra
V. Prabhu, Gaonkarwado,
Usgao, Goa. .. Petitioner

Versus

1. The Administrator of Comunidades
North Zone, Mapusa, Goa
2. The Village Panchayat of Usgao-
Gangem by its Secretary,
Usgao, Ponda, Goa
3. The Collector of North Goa,
Panaji, Goa.
4. The Mamlatdar of Ponda Taluka,
Ponda, Goa
5. The Police Inspector,
Ponda, Goa.
6. Shri Sunil Vasant Prabhu,
resident of House No. 109,
Gaunkarwaddo, Usgao,
Ponda, Goa
7. The Comunidade of Usgao
Usgao, Goa.
8. Deputy Town Planner,
Ponda, Goa. .. Respondents.

Mr. Ryan Menezes, Advocate for the petitioner.

Mr. V. Rodrigues, Additional Government Advocate for
respondents no. 1, 3 to 5.

Mr. L. Raghunandan and Ms. S. Pereira, Advocates for respondent no. 2.

Mr. D. J. Pangam, Advocate for respondent no. 6.

**CORAM :- F. M. REIS, &
K. L. WADANE, JJ**

DATE : 4th March, 2015

ORAL JUDGMENT : (Per F. M. REIS, J.)

Heard Shri Ryan Menezes, learned Counsel appearing for the petitioner, Mr. V. Rodrigues, learned Additional Government Advocate appearing for respondents no. 1, 3 to 5, Mr. L. Raghunandan, learned Counsel appearing for respondent no. 2 and Shri D. J. Pangam, learned Counsel appearing for the respondent no. 6.

2. The above writ petition, *inter alia*, seeks a direction or order under Article 226 and 227 of the Constitution of India to quash and set aside the impugned order dated 19/06/2007 passed by the respondent no. 1 to the extent it relegates the Comunidade to a Civil Suit thereby refusing to take action under the Statute to demolish the disputed structure.

3. Briefly, it is the case of the petitioner that he is a

component of Comunidade of Usgao and that the Comunidade is the owner in possession of the property bearing Survey No. 207/1 of Usgao village. It is further their case that the respondent no. 6 obtained a permission from the local panchayat some where on 28/03/2006 for the construction of a house in the property bearing Survey No. 207/7-D. It is further his case that in July, 2006, the respondent no. 6 started digging foundations of pits in the properties Survey No. 207/1 and not in Survey No. 207/7-D. It is further the case of the petitioner that he had lodged a complaint to the respondent no. 1 and other authorities with regard to the encroachment in the Comunidade property bearing Survey No. 207/1 by digging the said pits. The respondent no. 1's Surveyor conducted a site inspection somewhere on 24/08/2006 and prepared a site inspection report, which according to him, revealed that the respondent no. 6, though had licence for construction in a plot in Survey No. 207/7-D, had started the construction in the Comunidade property bearing Survey No. 207/1. The petitioner contends that by letter dated 19/09/2006, the respondent no. 1 instead of taking action to stop the construction in view of the inspection report, merely called upon the Panchayat to inspect the site and submit a further report. It is further contended that in spite of the inspection report, the construction was coming up in the Comunidade land. Another

Surveyor was appointed by the petitioner in November, 2006 to inspect the site and prepare a plan of construction carved out by the respondent no. 6, which had been accordingly prepared by Shri Naresh Shet, which according to the petitioner, shows the construction as a building in progress by letter 'A' in the wrong location i.e. in Survey No. 207/1 and the approved site by letter 'B' in Survey No. 207/7-D. As no action was being taken despite of the complaint lodged by the petitioner to the concerned authorities with regard to the said construction, the petitioner and two others filed Writ Petition No. 572/2006 before this Court, which came to be disposed of vide order dated 20/03/2007, directing the respondent no. 1 to hold an enquiry and complete the same within three months. Thereafter, despite of the finding that the respondent no. 6 had encroached in the property of Comunidade and no action was taken, the petitioner filed the above petition.

4. Shri Ryan Menezes, learned Counsel appearing for the petitioner has pointed out that the respondent no. 1 has statutory duties to be complied with to ensure that there are no encroachments in Comunidade land. Learned Counsel further submits that despite of the petitioner producing overwhelming evidence on record to establish that the respondent no.6 has put

up part of his construction in the property belonging to Comunidade, no action has been taken by such authority. Learned Counsel further points out that even in the licence issued in favour of the respondent no. 6, the property, where the respondent no. 6 was permitted to put up the construction, was the property bearing Survey No. 207/7-D1 and not in the property belonging to Comunidade bearing Survey No. 207/1. Learned Counsel further points out that as the respondent no. 7 and other authorities have failed to perform their duties as contemplated in the Code of Comunidade, the petitioner, who is the component of such Comunidade, was forced to file the writ petition, *inter alia*, to direct the respondent no. 1 to demolish the disputed construction put up by the respondent no. 6 in the property of the Comunidade. Learned Counsel further points out that this petition is essentially to direct the authorities to perform their functions. Learned Counsel further submits that the petition be allowed.

5. On the other hand, Shri V. Rodrigues, learned Additional Government Advocate appearing for the respondents no. 1, 3 to 5 has pointed out that pursuant to the order passed by the respondent no. 1 dated 19/06/2007, the Comunidade has filed a Civil Suit in the Court of Civil Judge, Senior Division, Ponda being

Regular Civil Suit No. 43/2007, *inter alia*, for a mandatory injunction, demolition of the disputed structure, recovery of possession of the encroached area and for other consequential reliefs. Learned Counsel further points out that the petitioner as well as the respondent no. 6 were also parties to the said suit as the defendants. Learned Counsel points out that vide judgment and decree dated 16/10/2010, the learned Civil Judge, Junior Division, Ponda has dismissed the said suit. Learned Counsel further points out that the respondent no. 7 Comunidade had preferred an appeal challenging the said judgment before the Lower Appellate Court which also came to be rejected. Learned Counsel further points out that the petitioner, who was a party to the said proceedings, is bound by the finding therein and as such, the question of issuing any further direction to the Statutory Authorities on the specious ground that there is an encroachment in the Comunidade land, would not survive. Learned Counsel further submits that the petition be rejected.

6. Shri D. J. Pangam, learned Counsel appearing for the respondent no. 6 has filed an additional Affidavit and supported the contentions of Shri V. Rodrigues, learned Additional Government Advocate for the respondents no. 1, 3 to 5. Learned Counsel further submits that the respondent no. 6 has not carried

out any encroachment in the Comunidade land. Learned Counsel further submits that the construction, which is put up by the respondent no. 6, is in accordance with the duly sanctioned plan and the contention of the petitioner is totally misplaced. Learned Counsel submits that the petition be rejected.

7. Shri Ryan Menezes, learned Counsel appearing for the petitioner, in answer to the submissions made, has pointed out that there is no specific finding in the judgment passed by the learned Civil Judge, Junior Division, Ponda to the effect that the respondent no. 6 has not encroached the property of the Comunidade. Learned Counsel further points out that this aspect would have to be examined by the Statutory authorities, specially by the respondent no. 1, who has been given powers to ensure that there are no encroachments in the Comunidade land. Learned Counsel, as such, submits that the petition be allowed.

8. We have duly considered the submissions made by the learned Counsel for the respective parties. With the assistance of the learned Counsel, we have gone through the records.

9. A short point for consideration would be whether on

the premise that there is an encroachment in the property of Comunidade land, this Court would be justified in a Writ Petition filed under Article 226 and 227 of the Constitution of India to direct the demolition of such disputed structure in the present case.

10. The Administrator, by order dated 19/06/2007, has disposed of the said enquiry by observing thus :

"In the fitness of things the best interest of the Comunidade would be served by filing a Civil Suit before the appropriate Civil Court for removal of encroachment. The Attorney of Comunidade is hereby directed to file the said Civil Suit within 15 days from today. The Attorney is further directed to also file application for interim reliefs before the Civil Court pending final disposal of the suit and get status quo on the construction so as to stop the respondent from creating further 3rd party rights etc.. Further Attorney of Comunidade should also file appropriate applications with competent Authorities to get the records of Comunidade property bearing Survey No. 207/1 duly promulgated which shall be then made use of in the Civil Suit.

The Attorney should also join all the other interested parties and local authorities etc., as parties to the suit. The Attorney shall accord top

priority to the case and any negligence / delay will invite disciplinary action as contemplated in the Code. All the parties be informed by Regd. Post A.D."

11. As pointed out hereinabove, during the pendency of the above Writ Petition and pursuant to the said direction issued by an order impugned in the present petition dated 19/06/2007, a substantive suit was filed by the respondent no. 7, *inter alia*, seeking a mandatory injunction to demolish the disputed structure as well as restoration of possession and other consequential reliefs. The petitioner was also a party to the said suit and the learned Civil Judge, Junior Division, Ponda, by judgment and decree dated 16/10/2010, dismissed the suit filed by the respondent no. 7. On perusal of the said judgment and the issues framed by the Court, we find that there was a specific issue no. 2 as to whether the respondent no. 7 had established that there was any encroachment in the Comunidade property bearing Survey No. 207/1. Learned Judge, upon appreciating the evidence on record, has come to a conclusion that the Comunidade has failed to prove the said issue. The finding of fact arrived at by the learned Civil Judge has been confirmed by the Lower Appellate Court by dismissing the appeal preferred by the respondent no. 7. The defendant no. 1 in the said suit, who is the

petitioner herein, had chosen not even to enter the witness box in support of its contention to support the case of the respondent no.7 that there was an encroachment in the property of the Comunidade. This conduct of the petitioner itself would disentitle this Court to exercise extraordinary jurisdiction under Article 226 and 227 of the Constitution of India in favour of the petitioner. Apart from that, the findings of the learned Civil Judge, Junior Division to the effect that there was no encroachment by the respondent no. 6 in the property of the Comunidade are also binding on the petitioner, who was a party to the said suit. There are no allegations of any fraud or collusion between the parties in the said suit. In such circumstances, issuing any further direction to the authorities to take action against the respondent no. 6 on the premise that there is an encroachment in the Comunidade land would not at all be justified.

12. In view of the above, we find that there is no merit in the above Writ Petition. Hence, the petition stands rejected. Rule stands discharged. No order as to costs.

K. L. WADANE, J.

F. M. REIS, J.

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