

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO.695 OF 2014.

Mrs. Juliana Jaime Pereira, w/o Solan
Periera, resident of H. No. 436/1, of
Dando Ward, Goa Velha, Tiswadi
Taluka, Goa. Petitioner.

versus

- 1 The State of Goa Through the
Chief Secretary, Secretariat, Alto
Porvorim, Bardez, Goa.
- 2 The Collector, Collectorate
Building, Panaji, Goa.
- 3 The Chief Town Planner, Patto,
Panaji, Goa.
- 4 The Mamlatdar, Tiswadi Taluka,
Mamlatdar Building, Panaji, Goa.
- 5 Director of Panchayats, Junta
House, 18 June Road, Panaji, Goa.
- 6 Village Panchayat of Goa Velha,
Through its Secretary, Having
Office at Goa Velha.
- 7 The Block Development Officer, 4th
Floor, Junta House, 18 June Road,
Panaji, Goa.
- 8 Mrs. Ludina D'Souza, wife of late
Sucurro D'Souza, resident of
House No. 432, Dando Ward, Goa
Velha, Tiswadi Taluka Goa.

- 9 Camelo Fernandes, husband of late Mrs. Santana Fernandes, resident of House No. 434, Dando Ward, Goa Velha, Tiswadi Taluka, Goa.
- 10 Annarita Fernandes, wife of Lawrence Fernandes, resident of House No. 433, Dando Ward, Goa Velha, Tiswadi Taluka, Goa.
- 11 Joaquim Fernandes and her son Simon Fernandes, resident of House No. 433, Dando Ward, Goa Velha, Tiswadi Taluka, Goa. Respondents.

Mr. R. Bras De Sa, Advocate for the petitioner.

Mr. V. Rodrigues, Additional Government Advocate for the respondent nos. 1 to 5 and 7.

Mr. Nigel Costa Frias, Advocate for the respondent no.6.

Mr. J. Vaz, Advocate for the respondent nos.9,10 and 11.

**Coram:- F. M. REIS &
M. S. SANKLECHA, JJ.**

DATE: 21st April, 2015.

ORAL ORDER (PER F. M. REIS, J)

Heard Mr. R. De Sa, learned counsel appearing for the petitioner, Mr. V. Rodrigues, learned Additional Government Advocate appearing for the respondent nos. 1 to 5 and 7, Mr. Nigel Costa Frias, learned Advocate appearing for the respondent no.6 and Mr. J. Vaz, learned Advocate appearing for the respondent nos.9,10 and 11.

2. The above petition inter alia seeks for direction of this Court to the respondent no. 6 to clear 5 mts. road reserved at loco for the benefit of the petitioner and other public using such access at the site.

3. Shri De Sa, learned counsel appearing for the petitioner points out that it is the case of the petitioner that the disputed access is a public road, as according to him, the road was tarred at the cost of the public expenses. The learned counsel further points out that as there was an encroachment in said 5 mts access, the petitioner filed a complaint before the local panchayat in respect of the compound wall put up by the adjoining plot owners thereby encroaching in the said access. The learned counsel further submits that it is the statutory duty of the local panchayat to perform their function under the provisions of the Panchayat Raj Act whereby any encroachment on a public road or on a public street has to be removed by the panchayat authority immediately. The learned counsel for the petitioner has thereafter taken us through the complaint lodged by the petitioner to the panchayat as well as to the Planning Authority in respect of such illegal encroachment in the public access and no action has been taken by such authorities. The learned counsel has thereafter pointed out that though show cause notice was issued by the local Panchayat dated 1.7.2014 no action has been taken by the Panchayat. The learned counsel further points out that the

Panchayat as well as the authority have not performed statutory duties as provided under the law and, as such, it would be necessary for this Court to issue a writ against the said respondents to perform such duty. The learned counsel for the petitioner has thereafter taken us through the photographs at the site to point out that the access has been tarred at the cost of public expenses and the encroachments carried out by different owners of the respective plots are clearly depicted. The learned counsel has thereafter taken us through the definition of a public street in terms of the provision of the Regulation 2010 to point out that any street used by the public is deemed to be a public street. The learned counsel has thereafter taken us through the provisions of the Panchayat Raj Act to point out that the panchayat is duty bound to perform their functions to remove the obstruction to the public road of 5 mts width as well as through the affidavit of the respondent no. 9, 10 and 11 to point out that the averments made therein against the petitioner to the effect that the construction put up by the petitioner is not legal, and the petitioner in her affidavit in rejoinder has given all the details of the sanction plan. The learned counsel has thereafter taken us through the pleadings as well as material on record to point out that the respondent no. 6 has not acted upon her complaint nor perform their statutory duties and, as such, this Court should direct the authority to remove the illegal construction and maintain the access of 5 mts road

at site.

4. Mr. Nigel Costa Frias, learned counsel appearing for the respondent no. 6 has pointed out that the disputed access is not a public road. The learned counsel has thereafter taken us through the provisions of 5.1(5) and 12.1.(g) of 2010 Regulations to point out that unless and until there is an approved sub division the question of there being vesting of the land reserved for road in favour of the panchayat would not arise. In the present case, the alleged sub division has not been approved, as according to him, the owner himself has carved out different plots and reserved an access for the benefit of such plot owners which land is not vested in the Panchayat. The learned counsel has thereafter taken us through the information provided to the petitioner in connection with asphaltting of the said road to show that the Panchayat has categorically stated that the Panchayat has not carried out any such asphaltting of the road. The learned counsel further points out that as the disputed road is not a public road nor a public street, the question of directing the Panchayat to perform their statutory duties would not arise. The learned counsel further submits that the Panchayat shall take necessary action in accordance with law on the show cause notice dated 1.7.2014. The learned counsel, as such, submits that the petition be rejected.

5. Mr. V. Rodrigues, learned counsel appearing for the respondent nos. 1 to 5 and 7 has pointed out that the disputed road is not a public street as according to him, there is no material on record to show that in fact the PWD had incurred any expenses for the construction of the said road. The learned counsel for the respondent contended that the PWD had not incurred such expenses and the petition is totally silent with that aspect. The learned counsel for the respondent nos. 1 to 5 and 7 further points out that as the sub-division has not been approved, the question of claiming that the road referred therein is a public road is totally unfair. The learned counsel, as such, submits that the petition be rejected.

6. Mr. Vaz, learned counsel appearing for the respondent nos. 9 to 11 submits that the respondents are senior citizens and the petition has been filed only to harass the respondents. The learned counsel further points out that the respondent nos. 9 to 11 are mundkars of the original owners and they have their residential houses which are in existence for more than 70 years. The learned counsel has further taken us through the photographs to point out that the trees shown therein clearly show that the claim of the petitioner that there was an existing 5 mts access is totally false. The learned counsel further points out that the trees shown in the photographs clearly show that such trees were existing for more

than 70 years and as such, according to him, the question of there being a 5 metres wide access at the site is erroneous. The learned counsel has thereafter taken us through the photographs of the building put up by the petitioner which is without maintaining proper set back. Learned counsel, as such, submits that the petition be rejected.

7. Mr. R. Bras De sa, learned counsel appearing for the petitioner in reply to the submission has taken us through the affidavit in rejoinder to point out that there are averments in the petition that the PWD had in fact spent the amount for asphaltting of the disputed road. The learned counsel further points out that it is not open to the Government to make such allegations without filing a proper reply. The learned counsel has thereafter reiterated his submissions by taking us through the definition of "Public Street" in terms of Regulation 2010 to point out that the disputed road has to be considered as a public street and, as such, submits that necessary direction be issued in the above Writ Petition.

8. We have given our thoughtful consideration to the rival claims of the parties and with their assistance we have also gone through the record.

9. The grievance of the petitioner essentially has to be examined in

the context as to whether the disputed road claimed by the petitioner is a public road or public street. It is not in dispute that the disputed road has not been acquired by any Authority. Apart from that on perusal of the record as well the photographs, we find that it prima facie shows that there never existed a 5 mts width road at the site as contended by the petitioner. In fact Mr. Rohit De Sa, learned counsel appearing for the petitioner does not seriously dispute the said aspect, but however, it is contended by Mr. De Sa that in the plan attached to the sale deed, a 5 mts road has been reserved by the original land owner. As far as the claim of such access depicted in the plan attached to the sale deed is concerned, the petitioner is always at liberty to take any action in regard in accordance with law. Merely showing a 5 mts road on a sub division which has not been approved, cannot be considered to be a public road as rightly pointed out by Mr. Nigel Costa Frias, learned counsel for the respondent no. 6.

10. On going through the provisions of the Regulation as pointed out by Shri Nigel Costa Frias, learned counsel appearing for the respondent no. 6, we find that the contention of Mr. De Sa that road reserved in the plan attached to the said deed is deemed to be a public road cannot be accepted. Such road shown in sub division would be vested in the panchayat only after complying with the requisite formalities to get such

sub division duly approved. Admittedly in the present case, sub division has not been approved and as such the question of claiming that road shown on such plan is a public road cannot be accepted.

11. Besides that there is a dispute as to whether asphaltting of such road was at the cost of public exchequer as claimed by the petitioner. No material has been produced on record by the petitioner to that effect.

12. With regard to contention of Shri De Sa, that such road is deemed to be a public street in terms of definition clause 103 of Regulation 2010, we find that a public street means any street over which the public has right of way, levelled, paved, metalled, channeled, severed or repaired out of municipal or other public fund or under the provisions of relevant Act or is declared as a public street, and shall include the roads of a sub-division approved by a competent authority.

13. In the present case, as rightly pointed out herein above, there is no material to suggest that such road was asphalted at the costs of funds of the local authority. The sub division plan is also not been shown to be approved, consequently the contention of Mr. De Sa that such road is deemed to be a public street ex-facie cannot be accepted.

14. With regard to the contention of Mr. Rohit Bras De Sa, such road is deemed to be a public street in terms of the definition in Section 103 of the Regulation 2010, we find that unless there is a specific procedure followed to determine such reserved access as a public road, the question of claiming the road is a public street ex-facie cannot be accepted.

15. Be that as it may, we find that as Mr. Nigel Costa Firas, learned counsel for the respondent no. 6 has pointed out that the respondent no. 6 shall take the necessary action in terms of the show cause notice dated 1.7.2014 in accordance with law and as such to that extent the grievance of the petitioner is substantially redressed.

16. Considering that the disputed question of fact cannot be decided in a petition under Articles 226 and 227 of the Constitution of India and as the contention of the petitioner is essentially on the basis of a subdivision which clearly depicts such access, we find that the exercise of writ jurisdiction at the instance of the petitioner would not be justified. Apart from that on perusal of the approved plan of the petitioner, we find that even the survey plan does not depict any public road in front of the construction proposed to be put up by the petitioner in plot no. 9 belonging to the petitioner.

17. In view of the above, we find that no case is made out by the petitioner to invoke jurisdiction under Articles 226 and 227 of the Constitution of India, but however, the respondent no. 6 shall proceed to decide the show cause notice dated 1.7.2014 after hearing the parties in accordance with law. Subject to the above, petition stands disposed of.

M. S. SANKLECHA, J.
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F. M. REIS, J.