

IN THE HIGH COURT OF BOMBAY AT GOA

PUBLIC INTEREST LITIGATION WP NO. 18 OF 2014

Shri Antonio Sylvester D'Souza,
son of Kistu D'Souza,
aged 49 years, Indian National,
Agriculturist, resident of
House No. 850, Bhaidwada,
Korgao, Pernem Goa.
Phone No. 221336,
PAN CARD No. NIL,
NATIONAL UNIQUE IDENTITY NO.
8497058-2905
ANNUAL INCOME : Rs.50,000/-

... Petitioner

V e r s u s

1. Village Panchayat of
Korgao, through its Sarpanch,
having office at Panchayat Ghar,
Korgaon, Pernem Goa.
2. State of Goa, through its
Chief Secretary, having
office at Secretariat,
Porvorim, Bardez Goa.
3. The Director of Panchayats,
Government of Goa, having
office at Junta House,
Junta House, Panaji Goa.
4. Shri Martin Fernandes,
of major age, Indian National,
resident of House No. 887,
Haidawada, Korgao,
Pernem Goa.

.... Respondents

Mr. Devidas J. Pangam, Advocate for the petitioner.

Mr. G. Naik, Advocate for the respondent no.1.

Mr. S. Dhargalkar, Additional Government Advocate for respondent nos.
2 and 3.

:2:

Mr. V. Menezes, Advocate for respondent no.4.

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

Date :- 14th October, 2015

ORAL JUDGMENT (Per F. M. Reis, J)

Heard Mr. D. Pangam, learned counsel appearing for the petitioner, Mr. G. Naik, learned counsel appearing for respondent no.1, Mr. S. Dhargalkar, learned Additional Government Advocate appearing for respondent nos. 2 and 3 and Mr. V. Menezes, learned counsel appearing for respondent no.4.

2. Rule. Heard forthwith with the consent of the learned counsel.

3. The learned counsel appearing for the respective respondents waive service.

4. The petitioner inter-alia prays for a writ in the nature of mandamus or direction to the respondent nos.1 to 3 to execute and implement the demolition order dated 17.08.2002 and carry out demolition in respect of the illegal construction in the property surveyed under No.393/2 of Korgao Village of Pernem Taluka.

5. Briefly, it is the case of the petitioner that on 17.08.2002 the respondent no.1 Village panchayat has directed the demolition of a structure erected by the respondent no.4 in the property surveyed under No.393/2 of Korgao Village of Pernem Taluka. It is further his case that the respondent no.4 preferred an appeal before the Directorate of Panchayats, Panaji- respondent no.3 herein challenging the said demolition order dated 17.08.2002. By an order dated 22.12.2003, the appeal preferred by the respondent no.4 came to be dismissed. A writ petition was thereafter preferred by the respondent no.4 bearing Writ Petition No. 21/2004 before this Court challenging the said order. The matter was thereafter remanded by this Court by order dated 12.02.2004 to the respondent no.3 to reconsider the said appeal preferred by the respondent no.4 and pass a fresh order. Accordingly, by an order dated 22.04.2004, the appeal was dismissed by the respondent no.3. A writ petition was filed before this Court bearing Writ Petition No. 221/2004 by the respondent no.4 challenging the order passed by the respondent no.3. The said writ petition was dismissed by this Court on 12.05.2004. It is further the case of the petitioner that once such demolition order was passed it is the duty of the panchayat to execute such order and carry out the demolition. Despite of the expiry of almost nine years, no action has been taken by the respondent no.1 herein. As this action is a failure on the part of the respondent no.1 in performing their statutory duty, a notice dated 24.09.2013 was served on the respondent no.1 to execute and

implement the said order. But however, as there was no response, the petitioner filed the above Writ Petition seeking reliefs referred to herein above. An affidavit in reply came to be filed by the respondent no.4. It is the contention of the respondent no.4 that the present petition is not bonafide public interest but has been filed with oblique motive. It is further his contention that the present petition has been filed at the behest of one Shri Uday Prabhu Dessai, who claims to be an attorney of Dr. Susan Lad. It is further his case that there are several litigations pending between the respondent no.4 and the said persons referred to above and that the petitioner is aware about the said litigations as the plaint of such suit contends that the cause of action was also on account of assault on the petitioner. The said respondent further stated that he had filed a petition under Section 178 of the Panchayat Raj Act (herein after referred to as the "the said Act") before the Additional Director of Panchayats being Panchayat Appeal No. DP/PP/3/2004 challenging the notice dated 17.08.2002, directing the removal of the construction. The said appeal came to be dismissed and the respondent no.4 has preferred a Civil Revision Application No.35/2011 before the learned District Court which was allowed on 13.04.2012. It is further his case that consequently, the matter was remanded back to the Additional Director of Panchayats with a further direction that his order shall not be operated till the Government takes a final decision in terms of sub-section 2 of Section 178 of the said Act. It is further his case that as such there is no cause for the petitioner to file the above

petition. An affidavit in rejoinder was filed by the petitioner disputing the contention of the respondent no.4. It is his contention that the respondent no.4 assaulted him and his family members after he came to know about the filing of the above writ petition and that the petition filed at the behest of Mr. Uday Prabhu Dessai has been disputed by the petitioner. It is further contended by the petitioner that the proceedings initiated by the respondent no.4 after the disposal of Writ Petition by this Court are abuse of process of law. The affidavit in sur-rejoinder was also filed by the respondent no.4 disputing the contention in the affidavit in rejoinder.

6. We have heard the learned counsel appearing for the respective parties.

7. Mr. Pangam, learned counsel appearing for the petitioner has pointed out that the order passed by the District Court in the revision preferred by the respondent no.4 dated 13.04.2012 is an erroneous exercise of jurisdiction as once the application under Section 178 of the Panchayat Raj Act has been dismissed, the question of confirmation in terms of sub-section 2 would not arise at all. The learned counsel further pointed out that there is a jurisdictional error committed by the Revisional Court while passing the said order and as such it is appropriate for this Court to set aside such order which is unsustainable in law. The learned counsel in support of his submission

has relied upon the judgment of the learned Single Judge of this Court reported in **2010(2) GLR 337** in the case of **Claudio Michael D'Souza and another Vs Secretary (Panchayats) & others**. The learned counsel as such points out that the proceedings initiated by the respondent no.4 are an abuse of the process of law to delay the implementation of an order of demolition on untenable ground.

8. On the other hand, Mr. V. Menezes, learned counsel appearing for the respondent no.4 has pointed out that this Court cannot set aside the order of the Revisional Court as it is not challenged in the present petition. The learned counsel further pointed out that the petition itself is malafide at the instance of the petitioner and as such it would not be justifiable to examine the correctness of the order passed by the Revisional Court. The learned counsel further pointed out that the proceedings initiated by the respondent no.4 are very much in accordance with law and as such unless the proceedings are finally disposed of, the question of implementation of the demolition order would not arise at all. The learned counsel as such submits that the petition be rejected.

9. Mr. G. Naik, learned counsel appearing for the respondent no.1 has pointed out that the respondent no.1 shall implement the order of demolition in case the order passed by the Revisional Court is set aside by this Court.

10. We have considered the submissions of the learned counsel and we have also gone through the records. The respondents were put to notice that this Court would examine the legality and propriety of the order dated 13.04.2012 passed in the revision preferred by the respondent no.4. The records clearly reveal that the demolition order passed by the respondent no.1 dated 17.08.2002 had attained finality, and in fact, by order dated 12.05.2004 this Court finally upheld the said order of demolition by dismissing the Writ Petition preferred by the respondent no.4 bearing Writ Petition No. 221/2004. In such circumstances, there was no impediment for the respondent no.1 to proceed with the demolition of the subject construction. But however, despite of the said order, the mother of the respondent no.4 initiated proceedings under Section 178 of the Panchayat Raj Act. Section 178 of the Goa Panchayat Raj Act, 1994 reads thus :

“178. Power of suspending execution of unlawful orders or resolution.— (1)

If in the opinion of the Director, the execution of any order or resolution of a Panchayat or Zilla Panchayat or any order of any authority or officer of the Panchayat or the Zilla Panchayat or the doing of anything which is about to be done, or is being done, by or on behalf of a Panchayat or a Zilla Panchayat is unjust, unlawful or improper or is causing or is likely to cause injury or annoyance to the public or to lead to a breach of peace, he may by

order suspend the execution or prohibit the doing thereof.

(2) When the Director makes an order under sub-section (1), he shall forthwith forward to the Government and the Panchayat or Zilla Panchayat affected thereby a copy of the order with a statement of the reasons for making it, and the Government may confirm or rescind the order or direct that it shall continue to be in force with or without modification permanently or for such period as it thinks fit:

Provided that no order of the Director passed under sub-section (1) shall be confirmed, revised or modified by the Government without giving the Panchayat or the Zilla Panchayat concerned a reasonable opportunity of showing cause against the proposed order."

11. The learned Additional Director of Panchayats by order dated 01.08.2011 came to the conclusion that the petition under Section 178 filed by Mrs. Severian Fernandes, whose legal representative is the respondent no.4 herein, was not maintainable and accordingly, dismissed the petition. But however, the learned Addl. District Judge while disposing of the revision has taken a view that sub-section 2 of Section 178 mandates that the Director shall forward his order to the Government and only the Government can confirm or

rescind it with or without modification. The learned Judge as such directed the learned Additional Director of Panchayats to forward the order to the Government in terms of Section 178 (2) of the said Act. The learned Single Judge of this Court in the case of **Claudio Michael D'Souza** (supra) has observed at paras 23, 24, 25, 26 and 27 thus :

“**23.** As already seen, from sub-section (1) of section 178 of the Act that the Director of Panchayats can suspend a resolution passed by the Village Panchayat in case it is unjust, unlawful or improper or is causing or is likely to cause injury or annoyance to the public or to lead to the breach of peace, and, when he makes an order of such suspension in terms of sub-section (1) of Section 178, he is required to forthwith forward to the Government and the Panchayat, affected thereby, a copy of the order with the statement of the reasons for making it and thereafter the Government i.e the Secretary, on whom powers are conferred by the Government, may confirm or rescind the order or direct that it shall continue to be in force with or without modification permanently or for such period it thinks fit.

24. The Section itself shows that it consists in two parts. Sub-section (1)

which gives power to the Director to suspend the resolution, for reasons stated therein and sub-section (2) which requires him to submit his decision of suspension to the Government for its orders.

25. Admittedly, the Director of Panchayats did not entertain the petition of respondent no.3 and in fact dismissed the same as he found that the resolution of the Village Panchayat of 25/10/2002 was within the powers of the Panchayat as the technical authorities had given clearance for the construction license of the petitioner and as the resolution of the Gram Sabha was ultra vires the provisions of the Act. In fact, the Director of Panchayats in terms of clause 35(vii) had held that the respondent no.3 had failed to make out a case under Section 178 for suspension of the execution of the resolution of the Village Panchayat and had dismissed the petition of respondent no.3. No doubt, a copy of his Judgment/order was forwarded to the Secretary, Panchayats, for further action under Sub-section 2 of Section 178 of the Act. As rightly pointed out on behalf of the petitioner, the question of taking further action by the Secretary, Panchayats, would have been

called for only in a case where the Director of Panchayats had suspended the resolution either because it was unjust, unlawful or improper, etc. and then only the question placing the same before the Secretary of Panchayats would have arisen to confirm or to rescind the same or to direct that it would continue to be in force with or without modification permanently or for such period as it thinks fit. In my view, the authority and jurisdiction conferred on the Government i.e. the Secretary of Panchayats under sub-section (2) of Section 178 could be exercised by him only in a case where a resolution/ order was suspended by the Director as being unjust, unlawful etc. and not otherwise.

26. A careful reading of sub-section (2) of section 178 would show that when the Director makes an order under sub-section (1) and this order can only be of suspension, that he is required to forward to the Government a copy of the Order and then the Government may either confirm or rescind the order or direct it to continue to remain in force with or without modification permanently or temporarily. In case, an order or resolution of the panchayat is not suspended, there is no question of

the Government taking any further action even if the Government is informed of the dismissal of the application.

27. In my view, only because the copy of the order dated 31/01/2003 was sent to the Secretary for Panchayats, it did not give him jurisdiction or authority to review the order of the Director and come to his own conclusion. Once the Director had dismissed the application in terms of sub-section (1) of Section 178, there was no question of the Secretary for Panchayats exercising his authority or jurisdiction in terms of sub-section (2) of Section 178 of the Act. In other words, he would get jurisdiction only in case a positive action of suspension was taken by the Director and the matter was referred to him for his further orders. The Secretary for Panchayats had no jurisdiction, in my view, to entertain the so called reference made to him by the Director of Panchayats. In fact, there was no reference made by the Director of Panchayats to the Secretary of Panchayats and only because a copy of the order was sent to the Secretary the same did not clothe him with jurisdiction to proceed in terms of sub-section 2 of Section 178 of the

Act. As already stated, the Secretary was sent a copy of the judgment/order dated 31/01/2003 in a case where respondent no.3's petition was dismissed under sub-section (1) of Section 178 of the Act and in such a case there was no jurisdiction to be exercised by the Secretary of Panchayats in terms of Sub-section 2 of Section 178 of the Act. The jurisdiction of the Government under sub-section (2) of section 178 of the Act can be termed to be supervisory or revisional nature and can be exercised only in cases where the Director suspends a resolution or order but not otherwise."

12. Taking note of the said observations of the learned Single Judge as the Director did not invoke his powers to suspend the order under challenge under Section 178(1) of the said Act, the question of submitting the order to the Government in terms of Section 178 (2) of the said Act would not arise at all as the application filed by the respondent no.4 came to be dismissed. Hence, the order of the learned District Judge dated 13.04.2012 cannot be sustained and deserves to be quashed and set aside. The judgment relied upon by Mr. V. Menezes, learned counsel appearing for the respondent no.4 in the case of **Radhey Shyam and another V/s Chhabinath and others**, reported in **(2009) 5 SCC 616** on facts is not applicable to the facts

of the present case.

13. The contention of Mr. V. Menezes, learned counsel that this Court cannot examine the legality of the order passed by the Revisional Court cannot be accepted especially when statutory duties are not being performed despite of the orders passed by this Court upholding the demolition order, in view of the order passed which is patently erroneous affecting the jurisdiction. In such cases, it is always open for this Court to examine the correctness and legality of such order and in fact, the parties were put to notice by order dated 20.07.2015 that the correctness of such order would also be examined while disposing of the above Writ Petition. The legal process cannot be used to defeat or delay the effect of a legally passed order confirmed by this Court. In such circumstances, we find it appropriate to quash and set the order dated 13.04.2012 passed by the learned Judge in the revision preferred by the respondent no.4 and direct the respondent no.1 to proceed to comply with the order of demolition dated 17.08.2002 in accordance with law.

14. In view of the above, we pass the following :

O R D E R

- (i) The order dated 13.04.2012 passed by the learned District Judge in revision application is quashed and set aside.

:15:

- (ii) The respondent nos. 1 to 3 are accordingly directed to comply with the order dated 17.08.2002 in accordance with law.
- (iii) Rule is made absolute in above terms.
- (iv) The petition stands disposed of accordingly.

K. L. WADANE, J

F. M. REIS, J

at*