

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 369 OF 2016

1. Shri Joseph Antonio D'Souza,
alias Joseph D'souza,
s/o Joaquim D' Souza,
married, aged 56 years,
Indian National, business
and his wife.

2. Smt. Fabiola D' Souza,
d/o Charles Fernandes,
married, aged 53 years,
Indian National,

Both r/o H. No. 692,
D' Mello Wado, Anjuna,
Bardez, Goa.

... Petitioners

V e r s u s

1. State of Goa,
through the Chief Secretary,
having office at Secretariat,
Porvorim, Goa.
2. Goa Coastal Zone Management Authority,
through its Chairman,
having office at Dempo Towers,
Patto, Panaji, Goa.
3. The Member Secretary,
GCZMA, having office at Dempo Towers,
Patto, Panaji, Goa.
4. Union of India,
through the Secretary,
Ministry of Environment,
and Forests, Paryawaran Bhavan,
Lodhi Road, New Delhi 110 001
5. Ministry of Environment and Forests,
Through its Secretary,
having office at Paryawaran Bhavan, CGO
Complex, Lodhi Road,
New Delhi 110 001.

6. Collector & District Magistrate (North),
having office at Collectorate,
Panaji, Goa.
7. Deputy Collector & Sub
Divisional Officer of Bardez,
having office at Collectorate Building,
Mapusa, Goa.

..... Respondents

Mr. N. N. Sardessai, Senior Advocate with Ms. Gautami A. Kakodkar, Advocate for the Petitioners.

Mr. Vivek Rodrigues, Government Advocate for the Respondent nos. 1, 3, 6 and 7.

Ms. K. Shetye in person-Intervenor

Coram :- **F. M. REIS,**
 NUTAN D. SARDESSAI, JJ.

Date : **25^h April, 2016**

ORDER (Per F. M. Reis, J.)

Heard Shri Nitin Sardessai, learned Senior Advocate for the Petitioners and Shri Vivek Rodrigues, learned Government Advocate for the Respondent nos. 1, 3, 6 and 7.

2. The above Writ Petition prays for a writ or direction to quash and set aside the Order dated 02.03.2016 as well as the show cause notice dated 07.11.2014 and 31.07.2015. It is also prayed that the Respondent no. 4 be directed to constitute the Goa Coastal Zone Management Authority and further a writ commanding the Respondent no. 5 to order demarcation of the High Tide Line for the entire State of Goa by the competent authority and further a relief commanding the Respondent no. 1 to prepare the Goa zone Management plan for the State of

Goa after ensuring that the same is prepared in accordance with the provisions of the CRZ Notification of 2011.

3. Shri Vivek Rodrigues, learned Government Advocate for the Respondents, has raised a preliminary objection to the effect that the Petitioners have an alternate remedy in challenging the impugned orders before the learned National Green Tribunal and, as such, the question of entertaining the above Writ Petition would not arise.

4. Shri Nitin Sardesai, learned Senior Advocate for the Petitioners points out that the impugned Orders have been passed without following the principles of natural justice as, according to him, there was no adequate hearing given to the Petitioners before the impugned Order was passed. It is further pointed out that the Goa Coastal Zone Management Authority itself is not constituted in terms of the provisions of The Environment (Protection) Act, 1986. It is further submitted that as the Order constituting the Goa Coastal Zone Management Authority is not passed in the name of the President in terms of Article 77 of the Constitution of India, such Orders stand vitiated and have no legal effect. It is further submitted that as the impugned Order itself has been passed by an Authority without jurisdiction, this Court can exercise jurisdiction under Article 226 of the Constitution of India. The learned Senior Counsel further submits that unless and until the plan is duly prepared in terms of the CRZ Notification 2011, the question of directing any action against the Petitioners would not arise. It is further submitted that the Coastal plan relied upon by the authorities has not been prepared in terms of the directions of this Court and, as such, the reliance on such

plan itself is misconceived. It is further submitted that unless and until the coastal plan is duly prepared and approved, there is no jurisdiction on the authorities to take any action against the Petitioners as, according to him, the subject constructions are in conformity with the CRZ Notification. Learned Senior Counsel further pointed out that the Petitioners have not committed any breach of any provisions of law and, consequently, the impugned Orders deserves to be quashed and set aside and directions be issued as prayed for. The learned Senior Advocate further points out that the Petitioners are disputing the existence of the Government Order constituting the Goa Coastal Zone Management Authority and, as such, according to him, the burden is upon the Government to establish that an Order was in fact made by the Government in the manner provided in the Rules of business framed by the Government under Clause (3) of Article 166 or under Article 77 of the Constitution of India. The learned Senior Advocate further points out that the Respondents have not produced any such Government Order and, as such, as the Respondents have failed to discharge such burden, it is clearly to be assumed that the Order constituted in the Goa Coastal Zone Management stands vitiated and, as such, the impugned Orders were passed by the authorities without jurisdiction.

Learned Senior Advocate has relied upon the Judgment of the Apex Court reported in **AIR 1964 SC 1823** in the case of **R. Chitrlekha & anr. vs. State of Mysore & Ors.**

5. On the other hand, Shri Vivek Rodrigues, learned Government Advocate for the Respondents, has submitted that all such contentions raised by the Petitioners can be dealt with by the National Green Tribunal as the orders which

have been impugned are appeal-able. Learned Government Advocate further submits that on minute perusal of the averments in the Petition, the only contention of the Petitioners is that the Orders which have been issued are not in the name of the President and there is no specific challenge to the existence of the Government Order. The learned Government Advocate has taken us minutely through the averments in the Petition to point out that the existence of the Government Order has not been challenged and only the form of the Order is being challenged by the Petitioners. Learned Government Advocate further pointed out that the Notification has been duly authenticated by the competent person authorised under the Rules and, as such, it is not open to the Petitioners to dispute the authenticity or the existence of such Order. Learned Government Advocate further pointed out that the impugned Orders were passed after giving a due hearing to the Petitioners and, as such, according to him, there is no breach of the principles of natural justice as contended by the Petitioners. The learned Government Advocate has also brought to our notice the Notification issued by the Central Government dated 22.03.2016 to point out the amendment to the Coastal Regulations Zone Notification of 2011 which, inter alia, states that until the Coastal Management Plan is prepared, the Coastal Zone Management Plan which has already been approved by the erstwhile Ministry of Environment and Forest under Coastal Regulation Notification of 1991 shall be valid up to 31st day of January, 2017.

6. We have considered the submission of learned Counsel and we have also gone through the records. The fact that the impugned Orders can be challenged in terms of Section 16 of the National Green Tribunal Act is not in dispute. The only contention of Mr. Sardesai, learned Senior Counsel appearing

for the Petitioners is that such Order was passed in the breach of the principles of natural justice and that the authority which has passed such Order had no jurisdiction to pass such Order. It has also been contended that as Anjuna Village is now a duly classified urban area, it has to come within CRZ-II under the CRZ Notification of 2011. The main contention of Mr. Sardesai, learned Senior Advocate is based on the ground that the power to issue such Order dated 22.07.2013 reconstituting the Respondent no. 2 for a period of three years from 22.07.2013, lies with the Central Government and that the reconstitution has not been carried out by the Central Government but by Joint Secretary who has no such authority and, as such, is bad in law. On perusal of the said Order dated 22.07.2013, it clearly states that by an Order of the Government of India in the Ministry of Environment and Forests, number S. O. 821(E) dated 09.04.2010, the Central Government reconstituted the Goa State Coastal Zone Management Authority for a period of three years and the term of the said Authority had expired. It is further stated that the Central Government is of the view that such authority must be reconstituted. The existence of such Order, prima facie, has not been disputed by the Petitioners and the only contention is that the Order is not in conformity with the provisions of Article 77/Article 166 of the Constitution of India. A strict compliance with the requirements of Article 77/Article 166 of the Constitution, gives immunity to the Order that it cannot be challenged in a Court of law on the ground that it is an Order of the President/Governor. If, therefore, the requirement of such Articles are not complied with, the resultant immunity cannot be claimed by the State but this will not nullify the Order itself if it appears from the other material that such a decision was in fact taken by the Government. As already referred to herein above and on going through the Order dated 22.07.2013, it clearly emerges

that such Order came to be passed pursuant to a decision taken by the concerned Ministry and, as such, we find that, prima facie, the existence of such Order is not under challenge in the present Petition. In the present case, it is also not, prima facie, disputed that the Order is duly authenticated in terms of the Rules.

7. As pointed out herein above, the existence of such Order has not been disputed by the Petitioners and, as such, prima facie, we are not inclined to accept the contention of Mr. Sardesai, learned Senior Advocate for the Petitioners, that the Goa Coastal Zone Management Authority has not been duly constituted. In any event, these contentions can be considered by the Appellate Authority constituted under the National Green Tribunal Act.

8. Dealing with the contention of Mr. Sardesai, learned Senior Advocate for the Petitioners, that this Court can entertain the above Writ Petition under Article 226 of the Constitution of India though an alternate remedy is available in terms of the National Green Tribunal Act, this Court in a Judgment passed in Writ Petition no. 400 of 2015 dated 01.07.2015 has observed at Paras 16, 17, 18 and 20 thus :

“16. Considering the view that we have taken with regard to the contention of the respondent No.1 in connection with the maintainability of the above writ petition, we shall now proceed to examine whether, any case is made out by the petitioner for interference of this Court under Articles 226 and 227 of the Constitution. As already pointed out herein above, the order impugned in the present writ petition

is appealable in terms of Section 22 of the said Act. In such circumstances, we will have to examine in what circumstances the jurisdiction of this Court under Articles 226 and 227 can be exercised when an effective alternate remedy is provided under the Statute. It is well settled that a Writ Court would be slow in entertaining a writ petition when a remedy of statutory appeal is available to the petitioner. The discretion is to be exercised in the cases such as when there is a gross breach of the principles of natural justice or a jurisdictional issue is raised. In the present case, the main contention of Shri Sardesai, learned Senior Counsel appearing for the petitioner is that there is a jurisdictional error committed by the Tribunal in entertaining the petition filed by the respondents No.1 to 4 in terms of Section 14 of the said Act. The respondent No.1, who appears in person, submits that the petition filed by the said respondents is not only under Section 14 of the said Act, but also under Section 16 of the said Act. It is the contention of the respondent No.1 that the said respondents have also challenged the report prepared by the GCZMA with regard to the construction in question. The contention of Shri Sardesai, learned Senior Counsel appearing for the petitioner that the submissions advanced have not been

considered in the impugned Judgment, are seriously disputed by the respondent No.1 in the present petition and, as such, it would not be proper to examine whether there is any gross breach of the principles of natural justice when a statutory appeal is available in terms of Section 22 of the said Act.

17. The Apex Court, in the Judgment reported in 2010 (8) SCC 110, in the case of **United Bank of India v. Satyawati Tondon**, has observed at paras 43 and 55 thus :

“43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage

constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

...

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.”

18. On perusal of the said observations of the Apex Court, a serious concern has been shown by the Apex Court with regard to the matters which the High Court has entertained under Articles 226 and 227 when a statutory appeal is provided under the relevant Statute. Dealing with the aspect that merely because jurisdictional issue is involved, the Court may not necessarily exercise jurisdiction under Articles 226 and 227, the Andhra Pradesh High Court in a Judgment reported in AIR

1991 AP 326, in the case of ***Tulasi Enterprises vs. Andhra Pradesh State Consumer Commission, Hyderabad and another***, has observed at paras 10 and 11 thus :

“10. It is true that whenever the Legislature creates a separate tribunal with a hierarchy of appeals, the jurisdiction of the High Courts under Art. 226 of the by the said Tribunals is not and cannot be ousted. It is also true that whenever questions of jurisdiction are raised, the High Court normally permits such questions to be raised under Art. 226 of the Constitution and examines whether the applications or the other proceedings filed before the Tribunal are within the jurisdiction of the said Tribunal or not. But the High Court has a discretion to entertain the writ petitions and, in particular, to decide, for example, any questions of jurisdiction unless they involve serious or disputed questions of fact. It is not as if the High Court is bound to entertain every writ petition which raises a question of jurisdiction of a Tribunal.

11. In relation to the Consumer Protection Act, 1986, it is to be noted that apart from creating a hierarchy of tribunals, there is a specific provision made in S. 23 for a further appeal against the final orders of the National Commission. The intention of Parliament appears to be that final orders of the National Commission should not be questioned in the High Courts under Art. 226 of the Constitution of India. The District Forums are presided over by the Principal District Judge, while the State Commissions are presided over by no less a person than one

who has been a Judge of the High Court or is a sitting Judge of the High Court. Surely, a litigant cannot be permitted to say that a District Judge at the level of the District Forums, or a retired or sitting Judge of the High Court at the level of the State Commission, is not competent to decide the question of jurisdiction. The entire intention of the Parliament was to give a speedy and effective remedy before these authorities. This intention will be defeated if parallel proceedings are permitted before the High

Court under Art. 226 of the Constitution of India in respect of matters pending before the bodies under the Consumer Act. We are saying that merely because a question of jurisdiction is raised, the High Court should not feel it imperative to admit the writ petition. If a writ petition is permitted on the question of jurisdiction or other similar grounds, the parties would naturally have a remedy of Letters Patent Appeal and then a further appeal to the Supreme Court under Art. 133 of the Constitution of India. After the question of jurisdiction or other preliminary question is decided in proceedings arising in a writ petition and are carried to the highest court should it be held that the matter is within the jurisdiction of the District Forum or the State Commission - then the main case has to be then taken up by the District Forum or the State Commission, as the case may be. This would obviously entail extraordinary delay and would defeat the very purposes of the Act. We have already noticed that the rules provide for speedy disposal of the complaints normally within ninety days or in cases where any analysis or tests have to be conducted, within 150 days. The High Court is already

burdened with heavy arrears and that is the precise reason why a separate hierarchy of tribunals has been created. It would therefore, be not wise for the High Court to take upon itself the burden of deciding disputes even if they relate to the jurisdiction which could be decided by the District Forums, presided over by District Judges or by the State Commissions, presided over by sitting or retired High Court Judges.”

19. ...

20. The Apex Court, in the Judgment reported in (2012) 8 SCC 524 in the case of ***Cicily Kallarackal v. Vehicle Factory***, has observed at para 4, thus :

“4. Despite this, we cannot help but state in absolute terms that it is not appropriate for the High Courts to entertain writ petitions under Article 226 of the Constitution of India against the orders passed by the Commission, as a statutory appeal is provided and lies to this Court under the provisions of the Consumer Protection Act, 1986. Once the legislature has provided for a statutory appeal to a higher court, it cannot be proper exercise of jurisdiction to permit the parties to bypass the statutory appeal to such higher court and entertain petitions in exercise of its powers under Article 226 of the Constitution of India. Even in the present case, the High Court has not exercised its jurisdiction in accordance with law. The case is one of

improper exercise of jurisdiction. It is not expected of us to deal with this issue at any greater length as we are dismissing this petition on other grounds.”

Taking note of the said observations of this Court, relying upon the Judgments of the Apex Court, we find that the Petitioners have an adequate alternate remedy to raise all the contentions sought to be raised in the above Writ Petition and, as such, interference in the impugned Orders in this Writ petition is not at all required.

9. The contention of Mr. Sardessai, learned Senior Advocate that the impugned Order cannot be sustained as the Management Plan has not been prepared in terms of the CRZ Notification of 2011 cannot be accepted in view of the amendment referred to by Mr. Vivek Rodrigues, learned Government Advocate which, inter alia, states that the earlier Plan which has been duly approved shall continue to be in force up to 31.01.2017.

10. In view of the above, as the Petitioners have an alternate remedy to challenge the impugned orders in terms of the National Green Tribunal Act 2010 and, as prima facie, the contention of Mr. Sardessai, learned Senior Advocate, that the impugned orders have been passed by an Authority without jurisdiction are not sustainable, we find it appropriate to dispose of the above Writ Petition by holding that we are not inclined to exercise jurisdiction under Article 226 of the Constitution of India as the Petitioners have an efficacious alternate remedy to challenge the impugned Orders. All the contentions raised by the Petitioners including lack of

jurisdiction and/or that the impugned Order was passed in violation of the principles of natural justice, are left open to be examined on its own merits, in accordance with law.

11. Subject to the above, the above Writ Petition is rejected.

NUTAN D. SARDESSAI, J.

F. M. REIS, J.

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