

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 53 OF 2015

1. Mr. Simao Oliveira,
age, Indian National, resident
of House no. 67/1, Capela Vaddo,
Sernabatim,
Salcete, Goa.
 2. Mr. Vasco D' Costa,
of major age, Indian National,
son of Wolfgang D' Costa, resident of
House no. 170/1, Capela Vaddo,
Sernabatim, Salcete, Goa.
 3. Conceisao D' Souza,
of major age, Indian National, daughter
of Jose D' Souza, resident of
House no. 71/1, Capela Vaddo,
Sernabatim, Salcete Goa.
 4. Dr. Robinson da Costa,
of major age, Indian National,
resident of House no. 66, Capela Vaddo,
Sernabatim, Salcete, Goa.
- Petitioners

V e r s u s

1. State of Goa,
through the Chief Secretary,
having office at Secretariat,
Alto Porvorim,
Bardez, Goa.
2. The Collector, Government of
Goa, having office at
Collectorate Building,
South Goa, Margao, Goa.
3. The Chief Town Planner,
South Goa, Town and Country
Planning Department,
Government of Goa,
Margao, Goa.
4. The Administrator of Comunidades,
South Goa, Comunidade Building,
Margao, Goa.

5. The Managing Committee,
Comunidade of Sernabatim/
Colva, through the Attorney,
having office at Sernabatim,
Salcete, Goa.
6. The Mamlatdar of South Goa,
Government of Goa, having
office at Margao, Salcete, Goa.
7. The Director of Panchayats,.
Government of Goa,
having office at Junta House,
18th June Road, Panaji, Goa.
8. Village Panchayt of Colva,
through its Secretary, having
office at Sernabatim, Vanelim
Colva and Gandaulim,
Salcete, Goa.
9. The Block Development Officer,
Government of Goa,
Collectorate Building,
South Goa, Margao,
Salcete, Goa.
10. Mr. Rosario Godinho
of major age, Indian National
and his wife;
11. Mrs. Amelia Godinho,
of major age, Indian National,

Both residents of 71, Capela Vaddo,
Sernabatim, Salcete, Goa.
12. Mr. Pedro Godinho, son of
Mr. Rosario Godinho, of
major age, Indian National.
Resident of House no. 71,
Capela Vaddo, Sernabatim,
Salcete Goa.
(Registered addresses)

..... Respondents

Mr. Rohit Bras De Sa, Advocate for the Petitioners.

Mr. A. N. S. Nadkarni, Advocate General with Ms. P. Kamat, Addl. Government Advocate for the Respondent no. 1.

Mr. C. A. Ferreira, Advocate for the Respondent no. 8.

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

Date : **10th March, 2016**

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

Heard Shri Rohit Bras De Sa, learned Counsel appearing for the Petitioners, Mr. A. N. S. Nadkarni, learned Advocate General appearing for the Respondent no. 1 and Mr. C. A. Ferreira, learned Counsel appearing for the Respondent no. 8.

2. Th above Petition, inter alia, prays for direction to remove the encroachment of an illegal house on the public nallah/bundh falling in the property surveyed under no. 69/3 belonging to the Comunidade of Sernabatim.

3. Briefly, the facts of the case as stated by the Petitioner are that the present Petition has been filed for the inaction on the part of the Respondents-State Authorities of not having acted upon the representation made by the Petitioners in bringing to the knowledge of the Respondents that the public nallah belonging to the Comunidade of Sernabatim falling in the property surveyed under no. 69 of Sernabatim Village has come to be obstructed by the Respondent nos 10 to 12 who have illegally constructed a residential house thereby obstructing the natural flow of water. It is further their case that they had brought to the notice of the Respondent-State Authorities that the Respondent nos. 10, 11 and 12 have constructed illegally a house in the public nallah on 29.01.2014 along with the requisite document,. It was also brought to their notice that no license was obtained for construction of

such house. It is further the contention of the Petitioner that the Sarpanch of the Village Panchayat addressed a letter to the Administrator of Comunidade of Sernabatim on 18.02.2014 calling upon the Administrator to carry out the site inspection. It is further their case that the Comunidade of Sernabatim on 30.04.2014, lodged a complaint with the Police Inspector, Colva Police Station, whereby he had stated that he has been directed by the Arbitrator of Comunidade, South Goa, to register a FIR against Godinho family, Copel Vaddo, Sernabatim. It is further their case that no technical approvals have been obtained by the said Respondents to put up any construction in the said nallah nor they have applied for permission under Section 44 of the Town and Country Planning. It is also their contention that the Petitioner had prepared a plan which, according to the Petitioners, disclosed that the encroachment to the public nallah/bundh is causing a health risk and is a nuisance to the people in the locality. Accordingly, the above Petition has been filed for the aforesaid reliefs.

4. The Respondents have filed their reply disputing the said contention.

5. Shri Rohit Bras De Sa, learned Counsel appearing for the Petitioners, has submitted that earlier Writ Petition bearing no. 603 of 2012 was filed by the same Petitioners which came to be disposed off by Order dated 12.12.2012, whereby this Court upon hearing the parties to the Petition had disposed of such Petition accepting the statement of the Respondent nos. 7 and 8 therein about the removal of the vehicles which were parked and directing the Respondent no. 6 therein/Panchayat to take appropriate steps expeditiously so that the road is allowed to be used by the Petitioners and others who are entitled to use the said road. Learned Counsel further submits that despite of the said directions, the

encroachment of the road at the site has not been removed and, as such, Respondent no.8/Village Panchayat herein, be directed to remove such encroachment. Learned Counsel further submits that the private Respondent nos. 4 and 5 have put up banana saplings at the edge of the road which is causing obstruction to the user of such road as directed by this Court. Learned Counsel has also taken us through the photographs on record to point out that the said private Respondents to protect the banana plantation, has even placed some old tyres so that the vehicles do not cause any damage to such plantation. Learned Counsel further pointed out that the Respondent no. 8 had given an undertaking to this Court that the encroachment would be removed in the said order and, as such, according to him, as the undertaking has not been complied with, the Respondent no. 8 be directed to remove the encroachment and provide a four metre wide access. Learned Counsel has thereafter taken us through the material on record to point out that the road which has been constructed was a public road and, as such, according to him, the Village Panchayat is duty bound to remove the encroachment and maintain such road. Learned Counsel further submits that as the Village Panchayat has failed to comply with the statutory regulations as provided under the Village Panchayat Act, this Court should issue the directions as prayed for.

6. On the other hand, Shri A. N. S. Nadkarni, learned Advocate General, appearing for the Respondent no. 1 has pointed out that unless and until the Petitioners establish that the disputed road was constructed or black topped at the cost of public ex-chequer, the question of contending that such road is a public road is not justifiable. Learned Advocate General as such pointed out that as this aspect has not been established by the Petitioners, the question of granting any relief to

the Petitioners would not arise.

7. Shri C. A. Ferreira, learned Counsel appearing for the Respondent no. 8, has submitted that on plain perusal of the Order passed by this Court on 12.12.2012³ in the said Writ Petition, it is clear that there is no undertaking given by the Respondent no. 8 to remove the encroachment. Learned Counsel further pointed out that the encroachment, if any, would have to be removed in accordance with law and, as such, the learned Counsel submits that the records of the Respondent no. 8 did not disclose that such road is a public road. Learned Counsel further pointed out that the Petitioners are relying upon a resolution of the Panchayat which was of the year 2000 wherein the Panchayat was intending to construct a four metre wide access but, however, there is nothing on record to suggest that based on the said resolution, the Panchayat had in fact constructed any such road. Learned Counsel further pointed out that the arguments advanced by the learned Counsel appearing for the Petitioners are in fact not the grievances raised by the Petitioners in the above Writ Petition. Learned Counsel further submits that the subject road was not even depicted in the Survey Records and, as such, the contention of the Petitioners that such road is a public road deserves to be rejected. Learned Counsel further pointed out that even in the complaint lodged by the Petitioners, there is an allegation made therein that the subject road was a narrow road and tarred in the year 1998 and, as such, the contention of the learned Counsel appearing for the Petitioners that there was any encroachment subsequently is totally erroneous.

8. We have considered the submissions of the learned Counsel and we

have also gone through the records. On perusal of the averments in the Petition and the reliefs sought therein, we find that the main grievance of the Petitioners is in connection with a nallah existing at the site but, however, the learned Counsel appearing for the Petitioners, did not raise any submission during the course of his arguments in respect of such nallah and, as such, the question of examining the said aspect in the present Petition would not arise.

9. Be that as it may, as pointed out herein above, the main contention of the learned Counsel appearing for the Petitioner is that the four metre wide public road is being encroached upon by the private Respondents by putting banana plantation and covering with rubber tyres. The records do not reveal that the road was constructed at the cost of the funds of the Pnachayat nor there were any proceedings initiated for acquiring such road. The Survey Records indisputably, do not disclose the existence of such road. As such, there is no cogent material on record to conclusively come to the conclusion that the subject road is a public road as contended by the Petitioner. The Resolution relied upon by the learned Counsel appearing for the Petitioner only indicates the intention to construct the road. There is no material produced that in fact pursuant thereto any such public road was constructed by the local Panchayat or any of the statutory authorities. Apart from that, it would also be pertinent to note that in an affidavit filed by the Secretary of the Panchayat, he states that upon inspection of the access/road, he found no blockade of access and he has produced the photographs along with his affidavit with that regard. He has also produced the photographs and the report of the Architect to show the position at site. He has further stated that the width of the road in the property surveyed under no. 69 of Sernabatim Village at six different

locations i.e. from 2.6 to 4.5 metres even at the place where there is an alleged blockade by the private Respondents. The reliance by the learned Counsel for the Petitioners in the Order passed in Writ Petition no. 603 of 2012 to contend that the direction was as it was accepted that the encroachment was on the public road cannot be accepted. We find no findings on that count in the said Order.

10. In such circumstances, as there is no conclusive material in support of the contention that the subject road is a public road, we find that there is no case made out for any reliefs sought in the present Petition. On examining the rival contentions, it appears that the dispute between the Petitioners and the private Respondent nos. 10 to 12 is with regard to an obstruction to an alleged road. Whether the Petitioners have a right of access through the subject property is a disputed question of fact which cannot be decided in a Petition under Articles 226 and 227 of the Constitution of India. The civil consequences, if any, in favour of the Petitioners would have to be adjudicated in a proper proceeding in accordance with law and not in the present Petition under Article 226 of the Constitution of India where such disputed question of fact cannot be adjudicated.

11. Subject to the above, we find no merit in the above Petition which stands accordingly rejected.

K. L. WADANE, J.

F. M. REIS, J.

arp/*