

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.19 OF 2016**

- 1) Mr Luciano Leandro Mascarenhas
Major in age,
S/o. Joao Francisco Mascarenhas
R/o H. 151 Novangully,
Varca, Salcete, Goa
represented herein through
its Power of Attorney
Mrs Sandra Mascarenhas
Alias Mrs Maria Sandra
Berreto e Mascarenhas
- 2) Mrs. Sandra Mascarenhas Alias
Mrs. Maria Sandra Barreto e
Mascarenhas
Major in age,
w/o. Luciano Leandro Mascarenhas Petitioners
R/o. H. 151 Navangully,
Varca, Salcete, Goa.
Versus
- 1) State of Goa
Through its Chief Secretary,
Secretariat, Porvorim Goa.
- 2) Principal Chief Engineer,
Public Works Department, Altinho,
Goa.
- 3) Executive Engineer
PWD, Works Division VI (Roads)

- Fatorda, Goa
- 4) The Collector,
South Goa District,
Salcete, Margao, Goa.
 - 5) Mr. Churchill Alemao
Major in age, Indian National,
R/o. House No. 150,
Novangully, Varca,
Salcete Goa.
 - 6) Ciabro Alemao (Deceased)
Major in age, Indian National.
R/o. House No. 148/C.
Novangully, Varca,
Salcete Goa.
 - 7) Warren Alemao
Major in age, Indian National,
R/o. House No. 150,
Novangully, Varca,
Salcete, Goa.
 - 8) Quellan Alemao
Major in age, Indian National,
R/o. House No. 148/C,
Novangully, Varca,
Salcete, Goa.
- Respondents.

Shri V. A. Lawande and Shri P. Redkar, Advocates for the petitioners.

Shri S. D. Lotlikar, Advocate General with Shri P. Dangui, Additional Government Advocate for the respondents no.1 to 4.

Shri J.E. Coelho Pereira, Senior Advocate with Shri V. Braganza, Advocate for the respondent no.5.

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

Date:- 26th July, 2016

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

Heard Shri V. A. Lawande, learned Advocate appearing for the petitioners, Shri S. D. Lotlikar, learned Advocate General appearing for the respondent nos.1 to 4 and Shri J.E. Coelho Pereira, learned Senior Advocate appearing for the respondent no.5.

2. The above petition inter alia prays for an order to the respondents to comply with the direction dated 20/09/2013 and to direct the respondents to restore the subject PWD road to its original position.

3. Shri V. A. Lawande, learned Advocate appearing on behalf of the petitioners points out that the petitioners are the owners in possession of the residential property bearing survey no.11/13 and adjoining such property is the property belonging to the respondent no.5 under survey no.11/18 which abuts to the internal public road. The learned Counsel further points out that the property belonging to the petitioner was accessed by a public road passing through the property belonging to the respondent no.5. The learned Counsel further submits that the said road is a

public road and as such according to him, the PWD Authorities in the year 2005 at the cost of the public exchequer tared such road. The learned Counsel further points out that adjoining such road, there is a chapel which is worshiped by the devotees of the village and use the said public road to go to the chapel. The learned Counsel also points out that the petitioners have a right of access through the said road to go to the main road as according to him, they have no other access to go to the main road. The learned Counsel thereafter has taken us through the Noting of the relevant files to point out that the subject road was constructed at the cost of the public exchequer and as such,as the public were using such road to go to the chapel, it has to be treated as a public road. The learned Counsel further points out that the respondent no.5 has blanket abuse of power in the year 2013 excavated the said road and removed the tar put up by local P.W.D. at the cost of public exchequer. The learned Counsel further submits that such exercise on the part of the respondent no.5 is illegal and not justified as according to him as the said road is a public road and consequently is liable to be prosecuted under the provision of the Goa Prevention of Defacement of Property Act, 1988. The learned Counsel further points out that the Collector had issued directions to the concerned Authorities to restore the road to its original position considering the illegal excavation by the respondent no.5.

The learned Counsel further points out that even the Engineer had made the Noting directing the concerned authorities to restore the road to its original position. The learned Counsel thereafter has extensively taken us through the pleadings in the petition as well as the limited relief being sought by the petitioner to restore the original position of the subject road without going into the correctness or otherwise of the claim of the petitioner of the right of way. The learned Counsel has also taken us through the relevant photographs as well as the material produced on record to point out that similarly placed roads in the village were also tarred at the relevant time. The learned Counsel as such submits that immediate directions be issued calling upon the respondent No.5 to restore the road to its original position.

4. On the other hand Shri S.D. Lotlikar, learned Advocate General for respondents no. 1 to 4 submitted that without going into the contention as to whether the subject road is a public road or not the fact remains that the tar has been removed from such road which has to be immediately restored. The learned Advocate General further points out that the records reveals that the PWD department had tared such road at the cost of the public exchequer and as such it is necessary that the respondent no.5 should restore the road to its original position. The learned

Advocate General when asked as to whether the subject road is a public road or not, submits that the road is not a public road but however according to him it was tarred by the P.W.D. and as such the respondent no.5 is not justified to excavate such road. The learned Advocate General further points out that as there was obstruction from the respondent no.5 the concerned authorities were not in a position to take the necessary action in law.

5. The learned Advocate General has taken us through the affidavit filed by the respondent no.3 which clearly discloses that this road is in the private property. It is also pointed out from the Noting of the respondent no.5, when he was a Minister in the Council of Ministry there is a specific recording that he had directed such asphaltation of the road.

6. In reply to the said contention Shri Lawande, learned Counsel for the petitioners has disputed the submission of the learned Advocate General that the subject road is not a public road as reflected in the report of the PWD produced on record. The learned Counsel further points out that the records undisputedly suggest that the respondent no.5 has admitted that he has, in fact, excavated the road.

7. Shri J.E. Coelho Pereira, learned Senior Counsel for the respondent no.5 has pointed out that the subject road is a private road belonging to the respondent no.5 and the chapel existing therein according to him is a private chapel. The learned Senior Counsel further submits that prior to the filing of the present petition, the petitioners had served a legal notice on the respondent no.5 inter alia claiming that there was an original footpath leading to the property of the petitioner which had thereafter resulted in a three meters wide access which was being used by the petitioners as a matter of right to proceed to his residential house. It is further pointed out that this itself would suggest that the petitioners are claiming an easementary rights over the subject property which cannot be adjudicated in the present proceedings. The learned Senior Counsel further points out that the road was asphalted at the cost of the respondent no.5 and according to him this is a consistent stand taken by the respondent no.5 even in the Written statement filed before the District Magistrate in proceedings under Section 147 of Cr.P.C. The learned Senior Counsel has also taken us through the Written statement to point out that it is the contention of the respondent no.5 that the concerned Government Department had not tarred the road and as such according to him, the relief sought by the petitioners is totally misconceived. The learned Senior Counsel further points out that the petitioners had

failed in their attempt in inducing the State Government to acquire the subject road as can be seen from the information received by the respondent no.5 under the Right to Information Act. The learned Senior Counsel further points out that the Petition itself is malafide filed to settle political rivalry and as such the petitioners are not entitled to any relief sought in the above petition. The learned Senior Counsel further submits that there are disputed questions of fact which cannot be examined by this Court in the present Petition.

8. We have considered the submissions of the learned Counsel for the parties and we have also gone through the records.

9. In the present petition as pointed out herein above the petitioners are claiming a right of way through the subject road. The averments in the legal notice pointed out by Shri Pereira, learned Senior Counsel for the respondent no.5 clearly suggests that the petitioners prima facie are claiming a prescriptive right of access over such road. This aspect is seriously disputed by the respondent no.5 as can be seen from the affidavit on record. In such circumstances, we find that the question of examining the contention raised in the petition at the instance of the petitioner would not be justified in the Petition filed under Articles 226 and

227 of the Constitution of India. The claim of prescriptive right of suit of access would have to be examined in a proper Forum. The records also suggest that the petitioners had even attempted to acquire the road by making a representation to the Government. Apart from that with regard to the contention of Shri Lawande, the learned Counsel appearing for the petitioners that the subject road is a public road and as such, it is the duty of the concerned departments to ensure that there is no defacement thereof, we find, as pointed out herein above, the stand taken by the respondent no.3 is clearly that the road is located in a private property of the respondent no.5. Though Shri Lawande, learned Counsel for the petitioners has taken us through some Noting to point out that such road is a public road, these are matters which have to be adjudicated in proper Forum after the parties lead evidence with regard to their respective stands. Admittedly the subject road was not acquired nor the respondent no.3 is claiming ownership rights therein. Such disputed question of fact on the title of the respective parties are not matters which can be adjudicated in the Petition under Article 226 of the Constitution. As rightly pointed out by Shri Pereira, learned Senior Counsel appearing for the respondent no.5, there are disputed questions of fact on the claim of the petitioners that the subject road is a public road as well as whether the alleged area excavated was in fact

asphalted at the cost of the public exchequer. Considering that there are disputed factual contentions raised by the parties in the petition, we find that the records produced would not assist us to come to a definite conclusive view with regard to the claim of Shri Lawande, learned Counsel for the petitioners that the road was constructed at the cost of public exchequer and that the respondent no.5 should be directed to restore it.

10. Besides that it is not disputed that proceedings under Section 147 of Cr.P.C. are pending before the concerned Magistrate. The learned Magistrate would examine the matter on its own merits and determine the aspect whether the subject road is a public road.

11. With regard to the contention of Shri S. D. Lotlikar, learned Advocate General that the respondent no.5 should be directed to restore the asphalted position or that the respondent no.3 should carry out such repairs at their own costs, we find that, it would not be appropriate to issue such directions in the present petition specially when there is a dispute as to whether the subject road is a public road or not and proceedings are also pending before the learned Magistrate. Apart from that it is open to the concerned authorities if they so desire to take necessary action with that regard in accordance with law and there is no need for this Court

to issue such directions.

12. Subject to the above, we find no merit in the above Petition which stands dismissed accordingly.

NUTAN D. SARDESSAI, J.

F. M. REIS, J.

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