

IN THE HIGH COURT OF BOMBAY AT GOA**Civil Revision Application no.15 of 2017**

Mrs. Soniya Satish Wankhade,
w/o Satish Wankhade,
major of age, married, housewife,
r/o H. No.890/4 (2), Ambica Plaza,
Nr. H. F. H. School,
Socorro, Bardez, Goa.

..... Petitioner

V e r s u s

1. The Comunidade of Serula,
through its Attorney,
having office at West Coast Residency,
Alto Porvorim,
Bardez, Goa.

2. Administrator of Comunidade,
at Mapusa, Bardez, Goa.

3. Mr. Miguel Vaz,
r/o Navelim, Salcete, Goa,
presently residing at Vaddem,
Serula, Bardez, Goa.

..... Respondents

Shri V. R Tamba, Advocate for the Petitioners.

Shri G. Usgaonkar, Advocate for the Respondent no.3.

CORAM: M. S. SONAK, J.

DATE: 20th April, 2017.

ORAL ORDER:

Heard Mr. Tamba, the learned counsel for the petitioner and Mr.

Usgaonkar, the learned counsel for the respondent no.3. The respondents nos. 1 and 2, though served, are neither present nor represented.

2. The challenge in this application is to the orders dated 25/1/2017 made by the learned trial judge, by which, the applicant's application under Order 7 Rule 11 of the C.P.C seeking rejection of the counter claim instituted by the respondent no.3 came to be dismissed. Further the learned trial judge also dismissed the applicant's suit for non prosecution on the same date.

3. Mr. Tamba, the learned counsel for the petitioner has made the following submissions in support of this application:

(a) That on 25/1/2017, when the learned trial judge made the impugned orders, Mr. Tamba reached the Court late, on account of traffic jam on the Mandovi bridge. Mr. Tamba submits that after the matter was mentioned to the learned trial judge, opportunity to make submissions could have always been granted to him. Since this was not done, Mr. Tamba submits that there is violation of principles of natural justice in making of the impugned orders.

(b) In this case, the counter claim, basically seeks to remove the alleged encroachment undertaken by the applicant, who is the plaintiff in the suit before the learned trial judge. In the counter claim, the respondent no.3 has stated that he is the shareholder of the Comunidade of Serula and

he has right to protect the interest of the shareholders in the representative capacity. Mr. Tamba relying upon the decision of this Court in the case of **Vaikunta Kushali Saunto Vs. Shri Shivaji Venkatesh Kudchadkar and others** 2003 (1) Goa L.T. 293 submits that a component of Comunidade has no right to independently file a suit in respect of a property belonging to Comunidade.

(c) In any case, Mr. Tamba submits that the Code of Comunidades, provides for a detailed procedure to address complaints of encroachments upon Comunidade property. He submits that the Comunidade itself or its components, have to first approach the Administrator with a complaint regards encroachment. If dissatisfied with the decision of the Administrator, there is an appeal provided to the Administrative Tribunal. Mr. Tamba submits that since this is a complete Code and since the complete procedure is prescribed by the Code of Comunidades in this regard, there is exclusion of jurisdiction of the Civil Court at least by implication. Mr. Tamba, therefore, submits that this is a clear case where on the basis of statement in the plaint, the counter claim which is in nature of a suit is barred. The learned trial judge by not rejecting the counter claim has failed to exercise jurisdiction vested in him under Order 7 Rule 11(d) of the C.P.C and such failure to exercise jurisdiction is liable to be corrected under section 115 of C.P.C.

Mr. Tamba in support of the aforesaid proposition places reliance upon the decision of the Hon'ble Apex Court in **Vankamamidi Venkata Subba Rao Vs. Chatlapalli Seetharamratna Ranganayakamma** (1997) 5 SCC 460.

(d) Mr. Tamba also submits that there is a settled principle in law where an act is required to be discharged in a particular manner, then, all other procedures required for the discharge of such act stand excluded or are forbidden by way of implication. Mr. Tamba places reliance on **Ramchandra Keshav Adke (Dead) By Lrs. Vs. Govind Joti Chavare and others**, AIR 1975 SCC 915. Relying upon this principle, Mr. Tamba submits that jurisdiction of the civil court is barred and the counter claim is required to be rejected.

(e) Finally, Mr. Tamba submits that there was no justification for dismissing the applicant's suit for want of prosecution. The matter was really posted for arguments on the application under Order 7 Rule 11 of C.P.C and there was nothing that was required to be done in the suit on the said date.

4. Mr. Usgaonkar, has defended the impugned order. He has placed on record a compilation of documents. He submits that there is no provision under the Code of Comunidades which bars the counter claim. He submits that the respondent no.3 is entitled to protect his interest as a shareholder. He

submits that in the counter claim, it is alleged that the applicant on basis of forged and false documents is trying to usurp comunidade property and to claim legitimacy to such usurpation. He submits that respondent no.3 was permitted to be impleaded as a defendant in the suit. He submits that it is not unknown that in such matters that the officers of the comunidade collude with parties and obtain decrees which are then foisted upon the Comunidade. He submits that the order permitting the impleadment of respondent no.3 has attained finality for want of challenge. In these circumstances, the impugned order was rightly made and there is absolutely no jurisdictional error warranting interference under section 115 of C.P.C. no dismissal.

5. The rival contentions now fall for determination:

6. The applicant in this case has instituted RCS no.158/2014/F pending before the learned trial judge. The substantive reliefs applied for in the suit read thus:

a) This Hon'ble Court be pleased to pass a judgment, order and decree of Declaration thereby declaring the plaintiff as the owner of the said Plot no.44, surveyed under survey no6/1, admeasuring an area of 325 sq.mts., situated at Socorro, Alto Porvorim, Bardez-Goa.

b) This Hon'ble Court be pleased to pass an order, thereby direction the

defendants to hand over the Certificate of Permanent Possession of the said Plot no.44, surveyed under survey no.6/1, admeasuring an area of 325 sq.mtrs, situated at Socorro, Alto Porvorim, Bardez-Goa.

7. The applicant, in his suit had only impleaded the Comunidade and the Administrator as defendants. The respondent no.3, who is admittedly a shareholder/component of the Commundiade applied for impleadment and such impleadment came to be granted. The order of impleadment, has not been challenged by the applicant. The respondent no.3 filed his written statement disputing the claim of the applicant and further instituted a counter claim seeking for the following substantive reliefs:

(a) For judgment, Decree and order declaring that plaintiff is not owner or in temporary possession of the suit plot No.44 in survey No.6/1 of Socorro Village and construction of residential house in the suit plot is illegal and is in violation of law.

(b) For judgment, Decree and order declaring that certificate of temporary possession giving suit plot No.44 in survey no.6/1 of Socorro Village is forged and fabricated document and that the file referred therein does not belong to allotment of plot no.44 and signature of the Tereza D. Barreto is forged.

(c) For judgment, Decree and order of mandatory injunction to demolish all

construction made in the suit plot by the plaintiff and out the suit plot to original state and direct plaintiff to surrender the possession of suit plot to the defendant no.1.

(d) For judgment, decree and order of permanent injunction restraining the plaintiff from interfering in any manner, whatsoever in the suit plot.

(e) For judgment, decree and order to pay appropriate penalty to defendant no.3.

(f) Cost of the counter claim be paid to the defendant no.3.

8. There is a strong presumption that the civil courts have jurisdiction to decide all questions of civil nature. The exclusion of jurisdiction of the civil courts is therefore not to be inferred and such exclusion must either be "explicitly expressed or clearly implied". Even provisions excluding the jurisdiction of the civil courts are to be strictly construed. The existence of jurisdiction in the civil courts to decide questions of civil nature being the general rule and exclusion being an exception, the burden of proof to establish exclusion is upon the party which seeks to oust jurisdiction. The rule that the exclusion of jurisdiction of the civil courts is not to be readily inferred is based on the theory that the civil courts are courts of general jurisdiction and the people have a right, unless expressly or impliedly debarred, to insist for free access to the courts of general jurisdiction of the

State. (See Chapter 9, of principles of statutory interpretation by Justice G. P. Singh - 14th Edition (pages 807 to 809)

Further, in this case, the petitioner had invoked the provisions of Order 7 Rule 11(d) of C.P.C. This means that it is for the petitioner to establish that the counter claim as instituted was barred on the basis of a statement in the counter claim. At the stage of deciding an application under Order 7 & Rule 11 (d) of the C.P.C there is no question advertig to any defences raised by the petitioner. The matter will have to be decided on the basis of the averments in the plaint itself.

9. Applying the aforesaid principles and upon perusal of the counter claim, it is quite clear that respondent no.3 has basically disputed the grant of reliefs in favour of the applicant as prayed for in the plaint. Additionally, the respondent no.3 has applied for a mandatory injunction to demolish the illegal construction undertaken by the applicant and to surrender the plot to the Comunidade.

10. The issue as to whether component of the Comunidade has locus standi to file a suit on behalf of the Comunidade or not is a matter which cannot be ordinarily decided at the stage of deciding the application under Order 7 Rule 11 of the C.P.C. In this case, if the pleadings in the

counter claim are minutely perused it is not as if that respondent no.3 has instituted the counter claim on behalf of the Comunidade, but the respondent no.3 states that he is entitled to protect his interest as a shareholder. There is also a statement that the respondent no.3 is entitled to protect the interest of other shareholders in Comunidade in a representative capacity. Whether, the respondent no.3 is entitled to sue in a representative capacity or not and that too, without following the procedure laid down under Order 1 Rule 8 of the C.P.C are matters that need not be gone into at the stage of deciding an application under Order 7 Rule 11 of C.P.C. However, these are certainly not matters on the basis of which, it could be said that the jurisdiction of the civil court stands barred on the basis of the statement in the plaint or in this case the statement in the counter claim.

11. On the aspect of implied exclusion of the jurisdiction of the civil court, Mr. Tamba has rightly placed reliance on the decision of the Apex Court in the case of **Vankamamidi (supra)**. The decision, in fact, assists the case of the respondent no.3 than the applicant. This is what the Hon'ble Apex Court has held :

“Under Section 9 CPC, the courts shall, subject to the provisions contained therein, have jurisdiction to try all suits of civil nature excepting suits cognizance of which is either expressly or impliedly barred. When a legal right is infringed, a suit would lie unless there is a bar against entertainment of such civil suit and the civil

courts would take cognizance of it. Therefore, the normal rule of law is that civil courts have jurisdiction to try all suits of civil nature except those of which cognizance is either expressly or by necessary implication excluded. The rule of construction being that every presumption would be made in favour of existence of a right and remedy in a democratic set-up governed by rule of law and jurisdiction of the civil courts is assumed. The exclusion would, therefore, normally be an exception. Courts generally construe the provisions strictly when jurisdiction of the civil courts is claimed to be excluded. However, in the development of civil adjudication of civil disputes, due to pendency of adjudication and abnormal delay at hierarchical stages, statutes intervene and provide alternative mode of resolution of disputes with less expensive but expeditious disposal. It is settled legal position that if a tribunal with limited jurisdiction cannot assume jurisdiction and decide for itself the dispute conclusively, in such a situation, it is the court that is required to decide whether the tribunal with limited jurisdiction has correctly assumed jurisdiction and decided the dispute within its limits. It is also equally settled that when jurisdiction is conferred on a tribunal, the courts examine whether the essential principles of jurisdiction have been followed and decided by the tribunals leaving the decision on merits to the tribunal. It is also equally settled legal position that where a statute gives finality to the orders of the special tribunal, the civil court's jurisdiction must be held to be excluded, if there is adequate remedy to do what the civil court would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Where there is an express bar of jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion, the examination of the remedies and the

scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary that the statute creates a special right or liability and provides procedure for the determination of the right or liability and further lays down that all questions about the said right or liability shall be determined by the tribunal so constituted and whether remedies are normally associated with the action in civil courts or prescribed by the statutes or not. Therefore, each case requires examination whether the statute provides right ad remedies and whether the scheme of the Act is that the procedure provide will be conclusive and thereby excluded the jurisdiction of the civil court in respect of thereof.

..... Obviously, therefore, the civil suits by necessary implication stand excluded unless the fundamental principles of procedure are not followed by the tribunals constituted under the land reform laws. In this case, the Act concerned extinguishes the pre-existing right, creates new rights under the Act and requires tribunals to enquire into the rival claims and a form of appeal has been provided against the order of the primary authority. Thereby the right and remedy mad conclusive under the Act are given finality by the orders passed under the Act. Thereby, any necessary implication, the jurisdiction of the civil court stands excluded.”

12. In this case, from the perusal of the provisions mainly contained in Chapter 12 of the Code of Comunidades including, in particular, Articles 371 to 384, it can hardly be said that there is exclusion whether express or by implication of the jurisdiction of the civil court in matters of this nature. The provisions mainly relate to administrative approvals which the Commundiade

has to obtain before it proceeds to institute a suit in the civil court. There is not a single provision in this chapter on the basis of which it could be said that there is any express exclusion of the jurisdiction of the civil court. In so far as the implied exclusion is concerned also, the provisions in this chapter hardly assist the case of the applicant. At the highest, as submitted by Mr. Tamba if the Comunidade seeks to proceed against any encroacher, then the procedure as prescribed may have to be complied before the institution of the suit. In the present case, the Comunidade has not instituted any suit against the applicant. Rather it is the applicant who may have instituted the suit against the Comunidade. Therefore, on the basis of the provisions in Chapter 12, it can be hardly be said that there is any express or implied bar to the respondent no.3 instituting a counter claim or that the counter claim as instituted, is required to be rejected by resorting to the provisions under Order 7 Rule 11 of the C.P.C.

13. As noted in the case of **Vankamamidi (supra)** this is really not a case where there is any express bar of jurisdiction. This is also not a case of implied bar of jurisdiction. No provision has been pointed out which suggests that there is any finality conferred upon the orders to be made by the Administrator or in that matter even the Administrative tribunal under Chapter 12 or Article 153 of the Code.

14. Upon perusal of the provisions in Chapter 12, it is clear that such provisions recognize that ultimately, even a Comunidade, may have to file a suit before the civil Court against an encroacher or usurper of Comunidade lands. **Vankamamidi (supra)** was a decision concerned with land reforms legislation wherein hierarchy of authorities was established and even finality was conferred upon the decisions of the hierarchical authorities. It is in these circumstances that it was held that jurisdiction of the civil Court stands excluded by necessary implication. The principles in the case of **Adke (supra)** is also not attracted in the facts and circumstance of the present case.

15. It must be noted that the applicant, who claims to have been acquired the land from the Comunidade by following the provisions of the Code of Comunidades, is herself seeking some reliefs against the Comunidade, whose functioning is governed by the Code of Comunidades. The applicant, it appears, has not resorted to the provisions of the Code for redressal of her grievances. The applicant, it appears, does not regard herself to be bound by any procedure prescribed under the Code. However, the applicant, in the same breath, seeks to non suit the respondent no.3, by relying upon certain procedural provisions in the Code. It does appear that the applicant has indulged in approbation and reprobation.

16. It is quite possible that the applicant found the presence of respondent no.3 inconvenient in the proceedings and therefore, the plea for rejection of the counter claim. As noted earlier, the counter claim, apart from seeking a relief of mandatory injunction requiring the applicant to demolish the construction and to restore the plot to the Comunidade, mostly seeks to oppose the grant of reliefs applied for by the applicant in her suit. As defendant, if the respondent no.3 is entitled to oppose the grant of reliefs as applied for in the plaint, then certainly, the respondent can may as well maintain a counter claim, so that the reliefs are complete in themselves.

17. The circumstances in which the impugned order dated 25/1/2017 came to be made have been set out by the learned trial Judge in the impugned order itself. Several opportunities were granted to the applicant and this really is not a case of breach of principles of natural justice. In any case, the submission of Mr. Tamba as to why the counter claim deserves to be rejected under Order 7 Rule 11 of the C.P.C. have been exhaustively heard and considered. There is no reason to remand the matter to the learned trial Judge for fresh consideration of the application under Order 7 Rule 11 of the C.P.C., in the facts and circumstances of the present case.

18. The order dismissing the suit itself for non prosecution,

however, appears to be harsh in the facts and circumstances of the present case. The matter was posted for hearing on the application under Order 7 Rule 11 of the C.P.C and there was really nothing much that was required to be done in the suit on 25/1/2017. Accordingly, the order dismissing the suit for non prosecution is hereby set aside, rather than require the applicant to take out fresh proceeding before the learned trial Judge for recall order setting aside the same order

19. The Civil Revision Application is therefore, disposed off with the following order:

- a) The impugned order dated 25/1/2017 dismissing the applicant's application under Order 7 Rule 11 of C.P.C with costs is not interfered with;
- b) However, the impugned order dated 25/1/2017 dismissing the applicant's suit for non prosecution is set aside and the suit is restored to the file of the learned trial judge;
- c) There shall be no order for costs in this revision application. However, the applicant will have to comply with the order for payment of costs as specified in the impugned order dated 25/1/2017.
- d) The observations in this order are for the purposes of deciding whether the applicant's application under Order 7 Rule 11 of the C.P.C was required to be granted. Therefore the said observations may not be taken as any reflection

on the merits of the interse disputes between the parties.

e) All concerned to act on the basis of authenticated copy of this order.

M. S. SONAK , J.

Ap/