

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 362 OF 2017**
AND
MISC. CIVIL APPLICATION 437 OF 2017

SMT. BINITA SANJAY RAITURKAR. PETITIONER.

V/s.

STATE OF GOA, THR. CHIEF
SECRETARY AND 8 OTHERS. RESPONDENTS.

Mr. S. S. Kantak, Senior Advocate with Mr. P. Talaulikar, Advocate for the petitioner.

Mr. P. Faldesai, Additional Govt. Advocate for the respondents No.1 to 5.

Mr. M. Pereira, Advocate for the respondent No. 6.

Ms. F. Gomes, holding for Mr. P. Rao, Advocate for the respondent No.7.

Mr. Nitin Sardesai, Senior Advocate with Mr. G. Panandikar, Advocate for the respondent No.8.

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

Date : - 17th July, 2017.

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

Heard Mr. S. S. Kantak, learned Senior Counsel appearing for the petitioner, Mr. P. Faldesai, learned Additional Govt. Advocate appearing for the respondents No.1 to 5, Mr. M. Pereira, learned

Counsel appearing for the respondent No.6, M. P. Rao, learned Counsel appearing for the respondent No.7 and Mr. Nitin Sardesai, learned Senior Counsel appearing for the respondent No.8.

2. The petitioner has filed the above petition, inter alia, on two counts. It is the contention of the petitioner that the respondent No.8 has started development activities in the property surveyed under Chalta No.22(part), P.T. Sheet No.193 of City Survey Margao, at Monte Hill, Margao in an orchard zone. The next grievance of the petitioner is that the property is hilly and has a steep slope, having a gradient of 1:4 and, as such, no development can be carried out therein. The respondent No.8 has disputed the said contentions and pointed out that the said property is S-2 Zone and further disputed that the gradient is 1:4 as claimed by the petitioner. It is further pointed out that requisite permissions from the statutory authorities have been obtained and according to the respondent No.8, no permission in terms of Section 17A of the Goa Town and Country Planning Act is required for carrying out such activity as, according to the respondent No.8, the gradient is within the permissible limit.

3. The respondent No.6 has filed reply, *inter alia*, contending that on an earlier occasion, somewhere in the year 2013, an application for development was filed by the respondent No.8 which came to be rejected at the 53rd Meeting of the respondent No.6. It is further pointed out that as per the ODP, prepared somewhere in the year 2010, the said property was shown as S-2. It is further pointed out that thereafter, according to the respondent No.6, the earlier plan submitted by the respondent No.8 was asked to be re-examined only to the extent of 4 bungalows; whereas according to the respondent No.6 the earlier permission was sought for 7 bungalows. It is further pointed out that as permission for 4 bungalows met the requisite statutory requirements, development permission was granted by the respondent No.6 in terms of the relevant provisions of the Act.

4. Mr. S. S. Kantak, learned Senior Counsel appearing for the petitioner has extensively taken us through the records to point out that the respondent No.8 has camouflaged the situation at the site by filling up the subject land by debris to bring the gradient within the permissible limit. The learned Senior Counsel further points out that the fact that the permission was rejected in the year 2013 came to their

knowledge only in view of the reply filed by the respondent No.6. It is further pointed out that the stand taken by the respondent No.6 that on earlier occasion permission was sought for 7 bungalows is totally incorrect based on the plan produced by the respondent No.6 itself. It is further pointed out that the respondent No.8 had illegally put up a retaining wall after the permissions were rejected and thereafter, filled up the land with debris to bring the gradient within the permissible limit. It is further submitted that it was incumbent upon the authorities to examine the gradient based on the contour plans which are available with the concerned Authorities as they were prepared in the year 1991 and thereafter, notified in the year 1997. The learned Senior Counsel further points out that despite of directions of this Court to the respondent No.5 to prepare a report to point out the actual gradient at the site, the Authorities have not complied with the directions in the order dated 22/06/2017 as, according to him, instead of examining the gradient based on the base of the retaining wall, the report has been prepared on the basis of actual gradient as found at the site, and without considering the contour maps. The learned Senior Counsel has also extensively brought to our notice inconsistent stand taken by the Member Secretary of the respondent No.6 to cover up the lapse on the

part of the respondent No.8. It is further pointed out that granting development permissions, in such circumstances, would be a premium to the illegality carried out by the respondent No.8, in filling up the land, without obtaining the requisite permissions under Section 17A of the Town and Country Planning Act. The learned Senior Counsel has, thereafter, taken us through the plan, as well as the material on record to point out that the development permission obtained by the respondent No.8 is contrary to the statutory provisions and as such, deserves to be quashed and set aside.

5. On the other hand, Mr. Nitin Sardesai, learned Senior Counsel appearing for the respondent No.8 has submitted that the retaining wall was existing much prior to the purchase of the property by the respondent No.8 as, according to him, it was constructed by the predecessor-in-title of the respondent No.8. It is further pointed out that the respondent No.8 has obtained the requisite permissions from the statutory authorities by disclosing all the true facts and according to him, there is no infirmity in the development permissions granted to the respondent no.8. The learned Senior Counsel submits that the respondent No.8 has not done any hill cutting and disputed the

contention of the petitioner that the respondent No.8 has done any land filling of the subject property. The learned Senior Counsel has also pointed out that there is no filling up of low lying land carried out by the respondent No.8 and that the stand taken by the petitioner on that count is contrary to the record. The learned Senior Counsel further points out that though the respondent No.8 intended to put up 7 bungalows on the earlier occasion, at the moment the respondent No.8 has restricted her permission only to 4 bungalows and, as such, according to him, the permissions sought by the respondent No.8 are in accordance with the statutory requirements. The learned Senior Counsel further points out that the respondent No.,8 will not carry out any hill cutting as, according to him, no hill cutting would be involved whilst putting up the bungalows as per the permissions granted by the statutory authorities. The learned Senior Counsel further submits that in such circumstances, as the respondent No.8 is not going to carry out any hill cutting, the question of obtaining any permission in terms of Section 17A of the Town and Country Planning Act would not at all arise. The learned Senior Counsel further points out that the grievance of the petitioner, according to the respondent No.8, is that the view of the petitioner would be affected, as the bungalows of the petitioner are

located on the top of the hill. The learned Senior Counsel further points out that in case, any permission is required under Section 17A of the said Act, the respondent No.8 shall obtain such permissions, in accordance with law. The learned Senior Counsel further submits that as, there is no hill cutting undertaken by the respondent No.8, no such permissions are required. The learned Senior Counsel, as such, submits that the petition be, accordingly, rejected.

6. Mr. Pravin Farlidesai, learned Additional Govt. Advocate appearing for the respondents No.1 to 5 points out that the Inspection Report submitted the respondent No.5 is pursuant to the directions of this Court and, according to him, the gradient of the hill where the construction is being carried out, meets the requirements. The learned Counsel further points out that even assuming that the height of the retention wall is taken into consideration, the gradient would be 1:78 or 1:75 and, as such, according to him, there is no reason to refuse the development permission on that count. The learned Counsel further points out that as there was no dispute raised by the petitioner with regard to whether such measurements were taken from the base of the retention wall, the learned Counsel, upon instructions of the Senior

Town Planner-respondent No.5, has submitted that the height was taken from the base of the retention wall. The learned Counsel, as such, points out that the report of the Authority may accordingly be accepted.

7. Mr. S. S. Kantak, learned Senior Counsel in rejoinder to the submissions, submitted that as the respondent No.8 had carried out land filling, the question of permitting the respondent No.8 to carry out any development in the subject property as the gradient, according to him, is not as per the existing permissible limits, would not at all be justified. The learned Senior Counsel further points out that allowing such permission, would amount to granting a benefit to the respondent No.8, based on his illegal expedient in filling up of the land to bring the gradient within the permissible limits to defraud the requirements of the statute. The learned Senior Counsel further points out that as the respondent No.8 had carried land filling, without obtaining requisite permissions, there is no question of allowing the respondent No.8 to carry out such development.

8. We have given our thoughtful consideration to the rival

contentions and we have also gone through the records. As pointed out herein above, the two grounds raised in the petition are that the subject land was an orchard zone and the other that it exceeded the permissible limits of the gradient of the hill which should not have been more than 1:4.

9. As far as the first contention is concerned, in view of stand taken by the respondent No.6 and the respondent No.8, the fact that the subject land is shown as S-2 in the ODP prepared in the year 2010 is not in dispute. In such circumstances, the contention of the learned Senior Counsel appearing for the petitioner that the subject land is an orchard zone cannot be accepted.

10. As far as the next contention of the learned Senior Counsel appearing for the petitioner that the subject land does not meet the permissible gradient, we find that the respondent No.5 has submitted a report, inter alia, stating that the present gradient of the subject land meets the permissible limits. The report also suggest that even assuming the height of the existing retention wall is considered, the gradient would be 1:78 or 1:75. These aspects have been seriously

disputed by the petitioners on the ground that the respondent No.8 camouflaged the situation to meet such requirements.

11. Another contention of the learned Senior Counsel appearing for the petitioner is that the gradient from East to West has not been examined by the respondent No.5 whilst preparing such a report. On this count, it is the contention of the learned Senior Counsel appearing for the respondent No.8 that such an exercise is not necessary as, according to him, it is a gradual slope and there is no retaining wall in such direction.

12. These disputed questions of fact, which arise in the present petition, cannot be decided in a petition under Article 226 of the Constitution of India. But, however, at this stage, as pointed out by the learned Additional Govt. Advocate, upon instructions, that even assuming the height of the retention wall is considered, the gradient is 1:78 or 1:75 and the statement of Mr. Nitin Sardesai, learned Senior Counsel appearing for the respondent No.8, upon instructions that no hill cutting would be carried out whilst carrying out the development of the subject property to the extent of 4 bungalows, we find that based

on the material on records, it would not be appropriate for this Court to entertain the petition at this stage. The contention of the petitioner that the respondent No.8 had camouflaged the situation at the site by filling up land, is also a disputed question of fact, which will have to be considered in a proper forum.

13. In such circumstances, we find that, reserving the right of the petitioner, if so advised, to file appropriate proceedings to get her rights adjudicated, entertaining the above petition would not at all be justified. Needless to say that any development carried out by the respondent No.8 is based on the statement of the learned Senior Counsel appearing for the said respondent, as reflected herein above, which stands accepted. In case, the factual situation is found otherwise, the respondent No.8 will not be entitled to claim any equities on that count. But, however, the contention of Mr. S. S. Kantak, learned Senior Counsel appearing for the petitioner that the gradient has to be examined on the basis of contour plans, is a matter which will have to be considered after such plans are produced and the petitioner establishes that such development is contrary to the provisions of the statutory regulations.

14. We have disposed of the above petition as the material on record is not sufficient to take a definite decision with that regard. Keeping all the disputed questions of fact to be considered in an appropriate forum and accepting the said statement of the learned Senior Counsel appearing for the respondent No.8 and the learned Additional Govt. Advocate appearing for the respondent No.5, and reserving the right of the petitioner, if so advised, to file appropriate proceedings on the allegations made in the present petition, or even approach this Court with more cogent material with regard to the grievances raised, we dispose of above writ petition. Interim order, if any, stands vacated.

In view of the disposal of the writ petition, Misc. Civil Application No.437/2017 is also disposed of as infructuous.

NUTAN D. SARDESSAI, J.

F.M. REIS, J.

ssm.