

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NOS. 654 & 708 OF 2009****WRIT PETITION NO. 654 OF 2009**

1. Mr. Amit Juneja,
son of late Rajendra Nath Juneja,
44 years of age,
Consultant, and
Residing at 212 Hacienda,
Alto Nagali, Dona Paula,
Goa 403 004.
 2. Mrs. Sudha Ladha,
wife of Vivek Ladha,
43 years of age, housewife,
Residing at 214 Nagali Hills,
Dona Paula,
Goa 403 004.
- Petitioners

V e r s u s

1. State of Goa,
Through its Chief Secretary,
with his office at Secretariat,
Porvorim Goa.
2. North Goa Planning and Development
Authority, through its Member Secretary,
with his office at Archdioscese Building,
1st Floor, Mala Link Road,
Mala, Panaji Goa.

3. Town and Country Planning Department,
through its Chief Town Planner,
with his office at Dempo Towers,
2nd Floor, Patto Plaza,
Panaji Goa.

4. Village Panchayat of Taleigao,
through its Sarpanch,
with her office at Panchayat House,
opposite Taleigao Church,
Taleigao Goa.

5. Mr. Guirish Keni,
Son of Mr. Anand Giri Keni
Major, businessman,
Residing at 708/3, Sushik Bunglow,
Alto-Porvorim Goa.

6. Mr. Mahesh Adwalpalkar
Major, businessman,
with his office at
F/5 First Floor,
Opp. P.W.D. Office,
St. Inez, Panaji Goa.

.... Respondents

Mr. R. Menezes and Ms. C. Rebeiro, Advocates for the petitioners.

Mr. Dattaprasad Lawande, Advocate General with Mr. A. Prabhudessai, Addl. Government Advocate for the respondent nos. 1 and 3.

Mr. H. D. Naik, Advocate for the respondent no.2.

Mr. N. Sardessai, Senior Advocate with Ms. N. Shirodkar, Advocate for the respondent no.5.

AND**WRIT PETITION NO. 708 OF 2009**

Taleigao Bachao Abhiyan,
having its office at
67 Sagar Co-operative Housing Society,
Dona Paula through its
President Mr. Annand Madgavkar
residing at 67 Sagar Co-operative
Housing Society, Dona Paula.

... Petitioners

V e r s u s

1. State of Goa,
through its Chief Secretary
with his office at Secretariat,
Porvorim Goa.
2. North Goa Planning and
Development Authority
through its Member Secretary,
with his office at
Archdiocese Building,
1st Floor, Mala Link Road,
Mala, Panaji Goa.
3. Town and Country Planning Department,
through its Chief Town Planner,
with his office at Dempo Towers,
2nd Floor, Patto Plaza,
Panaji Goa.
4. Village Panchayat of Taleigao,
through its Sarpanch,
with her office at
Panchayat house,
Opposite Taleigao Church,
Taleigao Goa.

5. Mr. Guirish Keni,
son of Mr. Anand Giri Keni, major,
businessman,
residing at 708/3, Sushik Bunglow,
Alto – Porvorim Goa.

6. Mr. Mahesh Adwalpalkar,
major, businessman,
with his office at F/5 First Floor,
Opp. P.W.D. Office,
St. Inez, Panaji Goa.

.... Respondents

Mr. S. G. Desai, Senior Advocate with Ms. P. Dessai, Advocate for the petitioner.

Mr. Dattaprasad Lawande, Advocate General with Ms. P. Sawant, Addl. Government Advocate for the respondent nos. 1 and 3.

Mr. H. D. Naik, Advocate for the respondent no.2.

Mr. N. Sardesai, Senior Advocate with Ms. N. Shirodkar, Advocate for the respondent no.5.

**Coram:- F. M. REIS &
PRITHVIRAJ K. CHAVAN, JJ.**

Judgment reserved on : 16.06.2017

Judgment pronounced on :08.08.2017

JUDGMENT (Per F. M. Reis, J)

Both the above Writ Petitions were taken up together as the issues involved in both the petitions are stated to be identical.

2. Briefly, it is the case of the petitioners that on 22.08.2009 the petitioner no.1 addressed a letter to the Sarpanch of the Village Panchayat of Taleigao asking her to produce the documents for verification for change of user of the recreational area. Thereafter, on 26.08.2009 the petitioner addressed a letter to the North Goa Planning and Development Authority asking them to survey the open space and withdraw the approval in favour of the builder to avoid encroachment in the open space. Subsequently, the petitioner filed an application under Right to Information Act to the Town and Country Planning Department to provide a certified copy of the ODP approved on 01.02.2006. The petitioner thereafter received a certified copy of the ODP plan from the Town and Country Planning Department and thereafter filed an application seeking certified copies of the various documents to the NGPDA. Subsequently, on 29.09.2009 the petitioner received from the Public Information Officer of the Town and Country Planning Department to provide the last approved sub-division of S.M.K. complex (Phase I and Phase II) stating that the last approved sub-division plan cannot be made available as the file is untraceable.

Ultimately, the petitioner sought for a survey report from the Surveyor Mr. Prazeres Gonsalves of the encroachment of the open space along with the plan on 03.10.2009. Mr. S. N. Bhobe also submitted his findings showing the encroachment in the open space in another report dated 05.10.2009 and that the construction put up by the private respondent nos. 5 and 6 was contrary to the statutory regulations. The petitioners accordingly filed the above petitions inter alia seeking directions to the respondent nos. 2, 3 and 4 to take action against the respondent nos. 5 and 6 to forthwith stop the illegal construction. As an interim relief was not granted the petitioners incorporated the subsequent events in the petition and sought to quash and set aside the order dated 25.01.2011 or any permission or licence granted by the authority. The respondent no.2 filed his affidavit through the Member Secretary of the NGPDA. He has stated that in the year 1986, in view of the high tension line passing through the property under survey No.279/1 of Village Taleigao, the respondent no.5 had applied for a revision/reconstitution of plot to the then Panaji Planning and Development Authority. The said Authority by an order dated

17.11.1986 issued a No Objection Certificate for reconstitution of plot nos. 72, 78, 275, 276 and 277 by shifting from their original position. The approval for reconstitution was granted by the then Panaji Planning and Development Authority in terms of the law after complying with the necessary procedure. It is also pointed out that plot no.78 which was reconstituted does not fall either within the open space or the recreational area. It is also pointed out that the Development Authority had issued a No Objection Certificate under Section 49(6) of the Goa, Daman and Diu Town and Country Planning Act, 1974 for registration of a sale deed in respect of plot no.78 in the land bearing survey No.279/1 of Village Taleigao. It is also pointed out that pursuant to the application dated 13.07.2009 the site inspection was carried out by the concerned officer of the authority and thereafter the said proposal was placed at the meeting held on 16.07.2009 and accordingly by order dated 27.07.2009 a development permission for construction of a compound wall, swimming pool and a multi-family dwelling building in plot No.78 under survey no.279 of Village Taleigao came to be granted. It is also pointed out that in the meeting held on 02.12.2009 discussed

with regard to the subject project was taken up and subsequently a show cause notice dated 18.11.2009 was issued to the respondent no.5 and it was decided to resurvey the entire sub-division layout through a competent authority and accordingly, addressed a letter dated 14.12.2009 to the Director of Land Survey and Settlement Records to carry out the survey of the sub-division layout and the property demarcating the open space of the portion of the sub-division. It is also pointed out that no development permission was granted to the respondent no.5 to carry out any development in the open space. A affidavit in rejoinder was filed by the petitioners inter alia disputing the contentions in the said affidavit. It is pointed out that no action was taken by the respondent no.2 on the complaint filed by the petitioners. It is also pointed out that the respondent no.2 ought to have taken immediate action with that regard. It is also pointed out that the expert Mr. Prazeres Gonsalves engaged by the petitioners has correctly shown the subject development in open space and the development is in an open space which cannot be permitted. The respondent no.2 also filed affidavit stating that respondent no.2 appointed Shri Umesh N. Phaldessai,

registered Land Surveyor to demarcate the open space and the reconstituted plot no.78. The rejoinder to such affidavit is also filed by the petitioners. Affidavit of the power of attorney of the petitioners is also filed.

3. In Writ Petition No. 708 of 2009, the subject dispute is the same development which is the subject matter of the above Writ Petition. It is the basic contention that the construction is being put up in the open space.

4. We have heard Mr. S. G. Desai, learned Senior Counsel appearing for the petitioners, Mr. R. Menezes, learned counsel appearing for the petitioner in Writ Petition No. 654 of 2009 and Mr. N. Sardesai, learned Senior Counsel appearing for the respondent no.5. An inspection was directed by this Court in respect of the subject property and subsequently the interim order came to be vacated by order dated 05.02.2010. By an order dated 22.03.2010, the construction put up by the respondent nos. 5 and 6 was made subject to the outcome of the Writ Petition. Thereafter, a

plan was directed to be prepared in the presence of the parties by super imposing the 1978 and 1986 plans or by any other methods.

5. Mr. S. G. Desai, learned Senior Counsel appearing for the petitioners has pointed out that the subject development carried out by the respondent nos. 5 and 6 is in open space and the respondents are not entitled to carry out such development. The learned Senior Counsel pointed out that in the original plan, the plot no.78 is clearly depicted and as such by shifting the boundaries of the plot, the respondent nos. 5 and 6 have encroached into the open space. The learned Senior Counsel has taken us through the master plan to point out that the subject construction which is stated to be in plot no.78 is encroaching into the open space which is located on the eastern side. The learned Senior Counsel has also taken us through the plan prepared by Mr. Prazeres Gonsalves to point out that there is substantial area encroaching into open space located on the eastern side. The learned Senior Counsel pointed out that the development terms stand vitiated as no development can be carried out in open space and as such the impugned development

permission deserves to be quashed and set aside. The learned Senior Counsel has also pointed out that as the construction is in open space no development can be carried out and in support of his submissions the learned Senior Counsel has relied upon the judgment of this Court reported in ***AIR 2002 Bom. 258*** in the case of ***Down Mangor Valley V/s Mormugao Municipal Council***.

6. On the other hand, Mr. N. Sardesai, learned Senior Counsel appearing for the respondent no. 5 submitted that the construction put up by such respondent is pursuant to the statutory permission. It is further pointed out that the report submitted by the statutory authorities pursuant to the direction of this Court clearly reveals that there is no encroachment in the open space. The learned Senior Counsel further pointed out that fixed point is the overhead high tension wire existing at the site which clearly shows the identity of plot no.78 wherein the respondent no.5 has put up the construction. The learned Senior Counsel further pointed out that the petition is an abuse of the process of the Court and deserves to be dismissed with exemplary costs.

7. The learned Advocate General however pointed out that pursuant to the inspection conducted, it was found that there is no encroachment in the open space and the open space has been clearly shown in the sub-division plan and the construction put up by the respondent no.5 is in plot no.78.

8. We have given our thoughtful consideration to the rival contentions and we have also gone through the records. Plot no.78 is clearly shown in the sub-division plan placed on record and on the eastern side of such plot is an open space. The area of land where the permission has been obtained is in accordance with the area of plot no.78 as shown in the sub- division plan. It is the contention of the petitioners that the eastern boundary of plot no.78 has been shifted to include the land in the open space. But however with the assistance of Mr. R. Menezes, learned counsel appearing for the petitioners we have measured the distances from the admitted position of the plot located on the southern side on the approved sub-division plan with the subject plot no.78. On examining the admitted positions of plot nos. 82 and 83 which are located on the southern side of the subject plot no.78 and drawing a

parallel line from south western point with the eastern boundary of plot no.82 located on the southern side, we find that such imaginary line would prima facie include approximately two-third of plot no.82. On perusal of the master plan produced on record and examining the position of plot no.78 as shown therein with plot no.82, the parallel line so drawn would more or less be identical. But however, on drawing a parallel line from the south-eastern point of plot no.78 as shown by Mr. Prazeres Gonsalves at page 325 excluding the encroachment shown by yellow colour towards the eastern side, we find that it would more or less end up to the boundary line separating plot nos. 82 and 83 which is not the position as shown in the original admitted sub-division master plan placed on record. This depiction of plot nos. 82 and 83 vis-a-vis subject plot no.78 would prima facie show that the claim by the petitioners that the open space has been encroached cannot be accepted. Apart from that, the plan on record shows the position of the high tension wire as shown in the plan and the high tension wire actually at the site. But however, apparently there was a revision of the plan based on the high tension wire and the actual location of

the plot which was subjected to such high tension wire would have to be definitely identified to examine the validity of the contention of the petitioners. The location of the plot which is subjected to high tension wire is also a disputed question of fact which is seriously disputed by the private respondents and there is no conclusive and definite material on record to examine the validity of the contention of the petitioners. As already pointed out herein above, the plans submitted by the Statutory Authorities have also claimed that there is no encroachment in the open space as claimed by the petitioners. These aspects prima facie show that the alleged encroachment claimed by Mr. Prazeres Gonsalves is not correct. The admitted position of plot nos. 82 and 83 have not been considered by Mr. Prazeres Gonsalves while making the report. Even the report of Mr. S. N. Bhole, has not considered such aspects which would lead to a definite conclusion about the alleged encroachment in the open space claimed by the petitioners. In such circumstances, we find that there are serious disputed questions of fact which cannot be considered or examined in the present Writ Petitions. Prima facie, on the basis of the material on

record and the reports submitted by the Statutory Authorities pursuant to the directions issued by this Court, we find that there is no cogent and acceptable evidence on record to conclusively establish the claim of the petitioners that the development carried out by the respondent no.5 is on the open space located on the eastern side. In such circumstances, we are of the view that the question of granting any relief in the present Writ Petitions and quashing the impugned permissions would not at all arise. The petitioners if so advised would have to get their dispute adjudicated, if they so desire in an appropriate forum considering the serious disputed questions of fact which arise in the present Writ Petitions. The judgment of this Court relied upon by Mr. S. G. Desai, learned Senior Counsel appearing for the petitioners as such is not applicable to the facts of the present case.

9. In view of the above, we find that there is no substance in the above writ petitions. Subject to the above, both the petitions stand rejected.

PRITHVIRAJ K. CHAVAN, J
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F. M. REIS, J