

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 654 OF 2010**

Mrs. Maneesha Narvekar,
"Ganesh' 164- V, Alto Dhuler,
Mhapsa, Bardez, Goa.

.... Petitioner

V e r s u s

1. State of Goa,
through the Chief Secretary,
Secretariat, Porvorim,
Bardez, Goa.

2. ~~Mr. Joaquim Alemao~~, (deleted as per order dtd.23.2.2017)
The Hon'ble Minister for Urban
Urban Development, State of Goa,
Secretariat, Porvorim, Bardez, Goa.

3. Mhapsa Municipal Council
through its Chief Officer,
Mhapsa Municipal Council,
Mhapsa, Bardez, Goa.

4. Nisha N. Mayekar,
major of age, married,

5. Shri Naguesh Mayekar,
major of age, married,
both the above are residents
of Dangui Colony, Mhapsa,
Bardez, Goa.

..... Respondents

(the above are the parties registered addresses)

Shri S. Narvekar for the Petitioner.

Shri. D. Shirodkar, Additional Government Advocate for Respondent no.1.

Shri S. D. Padiyar , Advocate for Respondent no.3.

Shri. Amey Kakodkar, Advocate for Respondent nos.4 and 5.

CORAM: C. V. BHADANG, J.

DATE: 16th February, 2018.

ORAL JUDGMENT :

The challenge in this petition under Articles 226 and 227 of the Constitution of India, is to the judgment and order dated 26/7/2010 passed by the second respondent, Minister for Urban Development, State of Goa in Municipal Second Appeal No.7/2009. By the impugned judgment, the second respondent has allowed the Municipal Appeal filed under section 184D to the Goa Municipalities Act 1968 (Act, for short) and has set aside the judgment and order dated 3/2/2009 passed by the Municipalities Appellate Tribunal (Appellate Tribunal, for short). The net result is that the final notice dated 3/8/2004 issued by the third respondent/Municipal Council, for demolition of a compound wall constructed by the petitioner has been set aside.

2. The brief facts necessary for the disposal of the petition may be stated thus:

That on 7/2/2002, a show cause notice was issued to the fourth and the

fifth respondent purportedly under section 184 of the Act on the allegation that the said respondents have undertaken the construction of a compound wall which was falling in the road widening area and was not in accordance with the construction licence. There is a transgression report attached to the show cause notice which is dated 3/1/2002 which reads thus:

DOCUMENT OF TRANSGRESSION:

During the site inspection, it is observed that Shri Nagesh Mayekar, resident of Dangui Colony has constructed compound wall of a length of 28.00 mts. along with main road to Dangui colony.

The part of the compound wall is coming in the road widening area. This activity is done without obtaining the licence from this Council.

DESCRIPTION OF TRANSGRESSION:

One Shri Nagesh Mayekar resident of Dangui Colony has constructed the compound wall having a length of 28.00 mtrs. which is falling in the road widening without taking any permission.

PARTICULARS OF TRANSGRESSION:

Shri Nagesh Mayekar,
Dangui Colony,
Mapusa-Goa.

Junior Engineer,
Mapusa Municipal Council

3. It appears that the said respondents filed a reply to the show cause notice and the matter was heard by one Mr. T. A. Fernandes, who was

then the Chief Officer of the Municipal Council. During the course of the hearing respondent no.4 filed an Affidavit dated 8/8/2002 stating that the compound wall is constructed in her property bearing P.T.S. Sheet 112 Chalta no.1 and there was no compensation towards any land cost paid to her. It was pointed out that the compound wall is constructed as per the construction licence. The fourth respondent, however, undertook to remove the said compound wall at her own cost as and when required for the road widening purpose. It appears that thereafter the matter remained pending. Mr. D.M. Bhandodkar, who was the successor of Mr. Fernandes took up the matter in the year 2004 and a final notice dated 3/8/2004 was issued directing the fourth respondent to vacate the encroachment and to demolish the compound wall within 15 days. It appears from the final notice that the same was issued as the Council had issued a work order for construction of a drain at the location where the compound wall was constructed. The fourth respondent challenged the said final notice before the Appellate Tribunal in Municipal Appeal no.34/2004 which was dismissed by the Appellate Tribunal on 3/2/2009 inter alia on the ground that the photographs produced on record showed that the compound wall was falling within the road widening area. Feeling aggrieved the fourth respondent approached the second Appellate Authority under section 184D of the Act. By the impugned judgment the second appellate authority has allowed the appeal and the order of demolition has been set

aside which is subject matter of challenge in this petition.

4. I have heard Shri Narvekar, the learned counsel for the petitioner, Shri Shirodkar, the learned Additional Government Advocate for respondent no.1, Shri Padiyar, the learned counsel for the respondent no.3 and Shri Kakodkar, the learned counsel for respondent nos. 4 and 5. Perused record.

5. It is submitted by the learned counsel for the petitioner that a Division Bench of this Court in a batch of petitions i.e. W.P. No.92/2007 and others by judgment and order dated 4/12/2014 has struck down the section 184D of the Act as being unconstitutional. It is submitted that once this Court has declared the provisions of section 184D of the Act as unconstitutional the impugned judgment passed by the second respondent would be rendered without jurisdiction. It is next submitted that the second appellate authority was also in error in holding that the impugned order of demolition is vitiated on the ground that it was passed by Mr. Bandodkar, who was the successor to Mr. Fernandes, the Chief Officer who had heard the petitioner. It is submitted that by virtue of an Affidavit dated 8/8/2002 the fourth respondent had clearly undertaken to remove the compound wall if it was necessary for the purpose of road widening and as such, there was no further necessity for Mr.

Bandodkar to have heard the petitioner. The learned counsel was at pains to point out that the final notice dated 3/8/2004 makes a reference to a work order being issued for construction of a drain at the location where the compound wall was standing. It is submitted that the second respondent had directed a local inspection. The report dated 8/6/2009 of the local inspection would clearly show that the construction of the compound wall was in violation of the approved plan. The learned counsel made an attempt to demonstrate this on the basis of the approved plan.

6. Shri Padiyar, the learned counsel for the respondent no.3. has however, fairly conceded that the Chief Officer who was successor to Mr. Fernandes could not have issued the demolition notice.

7. On the contrary it is submitted by Shri Kakdolkar, the learned counsel for respondent nos.4 and 5 that it has clearly come on record that the petitioner was heard by one Chief Officer and the order is passed by his successor. It is submitted that only on this ground, the demolition notice would stand vitiated as has been rightly held by the second appellate authority. The learned counsel pointed out that this Court while entertaining a writ petition would not set aside the order of the second appellate authority, if it has the effect of restoring the order which is otherwise illegal. The

learned counsel countered the submission that the construction of the compound wall is in violation of the sanctioned plan or the construction licence granted. It is submitted that the Affidavit was filed only to buy peace as at the relevant time the council was not executing the actual road widening work. It is also submitted that the final notice which is based on the necessity of demolition of the compound wall for construction of a drain was never the ground in the show cause notice.

8. It is submitted by Shri Kakodkar that there is an important change in the material circumstance inasmuch as the Outline Development Plan (ODP) for Mapusa has been modified and the width of the road has since been reduced to 10 metres from the earlier width of 15 metres. He, therefore, submits that in the changed circumstances the land may not be needed for road widening. Lastly, it is submitted that the petitioner in para 1 of the petition has suppressed the material facts and has claimed that liberty was granted to the petitioner in W.P. No.212/2010 to challenge any adverse order that may be passed in the Municipal Second appeal. It is submitted that no such liberty can be gathered from the order dated 16/6/2010, passed in W.P. No.212/2010.

It is submitted that notwithstanding the fact that section 184D of the Act has been struck down, the judgment and order of the second appellate

authority can be sustained on the principles of de facto doctrine. Reliance in this regard is placed on the decision of the Supreme Court in the case of **Union of India and another Vs. Charanjit S. Gill and others (2000) 5 SCC 742**, **Dr. A. R. Sircar Vs. State of U. P. and others (1993) Supp (2) SCC 734** and **Gokaraju Rangaraju Vs. State of Andhra Pradesh (1981) 3 SCC 132**.

9. I have carefully considered the rival circumstances and the submissions made.

10. At the outset, it may be mentioned that the learned counsel for the respondents nos.4 and 5 has disputed the locus standi of the petitioner to challenge the impugned order passed by the second appellate authority. In the facts and circumstances of the case I am not inclined to accept the said contention. The present petition was filed in the year 2010 and Rule was issued on 13/9/2010. Admittedly, the house of the petitioner is situated at a distance of about 300 metres from the house of the third respondent. The issue pertains to the necessity of demolition of the compound wall constructed by the respondent no.3 for road widening and/or laying of a drain, which would be in the close proximity of the house of the petitioner. Normally, it is every citizen who can be said to be interested in the orderly

development of the locality and the city where he resides. Although the rule comes with well known exceptions and cannot be stretched beyond a particular point, the fact remains that in the present case the house of the petitioner is in the close proximity with the house of the respondent no.3 and as noticed earlier, the issue pertains to the widening of the road and/or laying of a drain. Thus it can be said that the petitioner would be affected one way or the other by the outcome of the show cause notice and the order of demolition. For this reason and further having regard to the fact that the petition was entertained and Rule was issued as far back as in the year 2010, I would decline to uphold the objection raised on behalf of the respondent nos.4 and 5 to the locus standi of the petitioner.

11. Coming to the statement made in the petition. It is true that in para 1 of the petition, the petitioner has averred that Writ Petition no.212/2010 was dismissed while granting liberty to the petitioner to approach this Court to challenge any adverse order that may be passed in the Municipal Second Appeal. The order dated 16/6/2010 passed in W.P. No.212/2010, does not spell out any such liberty. It was submitted by the learned counsel for the petitioner that this Court had left the contention of the parties on merits open and this according to the petitioner would be a liberty to challenge the order passed in the Second Municipal Appeal. Although I am

not inclined to accept the contention raised on behalf of the petitioner that any liberty to challenge the order in the second Municipal Appeal was granted by this Court, I am also not inclined to accept that the petition could be dismissed on account of the averment as made in the petition. The averment is not such which would indicate that there is any gross and/or willful suppression of the material fact. The petitioner did not stand to gain by making any such averment in the petition. The petitioner had enclosed a copy of the order passed in W.P. No.212/2010 along with the petition. Thus, had the petitioner any willful intention of suppressing the nature of the said order, the petitioner would not have annexed a copy of the same. It also cannot be said that the petition was admitted only on the basis of the averment in the petition that there was a liberty granted by the Division Bench in W.P. No.212/2010. Normally for a contention of the nature advanced on behalf of respondent nos.4 and 5 to be accepted, it has to be shown that there is *supressio veri* and/or *suggtestio falsi* of any fact on the basis of which a particular order is sought to be or is actually obtained. Once the petitioner had enclosed a copy of the order passed in W.P. No.212/2010, it cannot be accepted that there was any willful intention to suppress the nature of the order or to suggest that there was a liberty granted. As noticed earlier, there is nothing on record that the rule was issued only on the basis of the averment made in the petition that such liberty was granted. There is one

more reason why I am not inclined to accept the contention as raised on behalf of the respondent nos.4 and 5. It is now well settled that the jurisdiction of this Court under Article 227 of the Constitution of India is essentially to ensure that the Subordinate Courts and Tribunals act within the bounds of their authority and that any order passed by such Court or Tribunal does not result in manifest injustice. It is further well settled that jurisdiction exercised under Article 227 of the Constitution of India is essentially to ensure that public confidence in the administration of justice is not shaken. This is why in an appropriate case a petition under Article 227 of the Constitution of India, unlike under Article 226 can be entertained suo moto. (See **Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil (2010) 8 SCC 329** and **Radhey Shyam and anr. Vs. Chhabi Nath and others (2015) 5 SCC 423**). Here is a case where the Second appellate authority had directed local inspection and in the report dated 8/6/2009 there were certain circumstances brought on record to suggest that the construction of the compound wall was not conforming to the approved plan. Even in the face of such a report, the Second appellate authority has not only allowed the appeal but had directed restoration of the compound wall, which in the interregnum was already demolished.

There is also an issue about the jurisdiction of the second appellate authority in the wake of striking down of section 184-D of the Act by this

Court. For all these reasons I do not find that the petition at this distance of time can be dismissed on the preliminary grounds as raised on behalf of the respondent nos.4 and 5.

12. This takes me to the merits of the matter. There is no manner of dispute that the Division Bench of this by a judgment and order dated 4/12/2014 passed in Writ Petition No.92/2007 and others has declared section 184-D of the Act unconstitutional. The judgment does not show that any orders passed prior to such declaration have been saved on the principle of de facto doctrine. It is well settled that when a statutory provision is struck down as ultra vires, the necessary effect is that there was no such provision which can be read into the statute since inception and in that case the order passed by the Second appellate authority would be entirely without jurisdiction.

13. It is, however, contended on behalf of the respondent nos.4 and 5 that the judgment and order passed prior to such declaration would be saved on the principle of de facto doctrine. I do not propose to go into the question whether the impugned order passed by the second appellate authority can be sustained on the principle of de facto doctrine. This is because even assuming that the second appellate authority lacked jurisdiction (on account

of striking down of section 184D of the Act), the order passed by the Municipal Appellate Tribunal confirming the notice of demolition cannot be restored on account of the fact that the said order was passed by an authority which never heard the petitioner. It is now well settled that the authority who hears has to decide and in a case where the authority which decides is different/distinct from the one which hears, the order would be vitiated on account of the breach of principles of natural justice. It is also well settled that this Court would not set aside an order if it has the effect of reviving/restoring another order which can be said to be illegal. Thus, if the order passed by the Second appellate authority is set aside on the ground that the second appellate authority lacked jurisdiction (on account of the striking down of section 184D of the Act) it would have the effect of reviving the notice/order of demolition which is passed by an authority which never heard the petitioner and thus can be said to be passed in breach of the principles of natural justice. I also find that while the original show cause notice made a reference to the necessity of the demolition of the compound wall for road widening the demolition notice is with reference to laying of a drain. For this reason I am not inclined to interfere with the order passed by the Second appellate authority. However at the same time it is necessary to note that if the second appellate authority had come to the conclusion that there was breach of principles of natural justice on account of the fact that the Chief

Officer who passed the order of demolition (Mr. Bandodkar) never heard the petitioner, the proper course would have been to send the matter back to the Municipal Council for hearing respondent no.3 and to take the show cause notice to its logical conclusion. It was thus not open for the second appeal authority to have allowed the appeal in its entirety and to the extent of permitting the status quo ante to be restored by reconstruction of the compound wall which was already demolished. I, therefore, find that it would be appropriate if liberty is granted to the Municipal Council to pursue the matter afresh by issuing a fresh show cause notice and to pass appropriate orders after hearing the parties concerned. This would also take care of any subsequent developments as has been pointed out by the learned counsel for the respondent no.3 about the modification of the ODP, which according to the respondent no.3 would not now require the widening of the road. All these aspects can be appropriately looked into by the Municipal Council and then it can take appropriate action as may be deemed fit. In such circumstances, the following order is passed:

ORDER:

- i) The petition is partly allowed. The impugned order is hereby modified.
- ii) It will be open to the second respondent to issue a fresh show cause notice

to the third/fourth respondent and to pass appropriate order in accordance with law after hearing the petitioner and the third and fourth respondent.

iii) Rule is made absolute in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.

Ap/