

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NOS. 991 & 1069 OF 2018**

Sheila Dhody Petitioner
Versus
State of Goa, Thr. its Chief Secretary & 2
Others Respondents

Shri S.D. Lotlikar, Senior Advocate with Shri Shivan Desai,
Advocate for the Petitioner.

Shri D. Lawande, Advocate General with Shri Pradosh Dangui,
Government Advocate for the Respondent Nos. 1 and 2.

Respondent No. 3 in person.

CORAM : C.V. BHADANG, J.

Reserved on : 28th November, 2018

Pronounced on : 1st December, 2018

ORDER:

Both these petitions are between the same parties and involve identical issues of law and fact and as such, they are being disposed of by this common order.

2. The challenge in this petition under Article 226 of the Constitution of India, is to the order dated 24.08.2018, passed by the respondent no. 2-Goa Coastal Zone Management Authority (GCZMA), under Section 5 of the Environment (Protection) Act, 1986, directing demolition of five structures

located in property bearing Survey No. 226/1 of Anjuna village Bardez, Goa.

3. The facts in both these petitions are similar and the grounds of challenge are identical. In such circumstances, the facts as obtaining in Writ Petition No. 991/2018 are reproduced and may be stated thus:

That the petitioner is the owner of a boutique hotel under the name and style as “Casa Vagator” situated at Vagator, Anjuna. Incidentally, the petitioner is also the owner of four other boutique hotels namely “Casa Britona”, “Casa Baga”, “Casa Anjuna” and “Casa Colvale”.

The respondent no. 3 filed separate complaints before the respondent no. 2, in respect of five structures as aforesaid, claiming that they are illegal and unauthorised, being constructed without the permission of the respondent no. 2 and are in breach of Coastal Regulation Zone (CRZ).

4. The respondent no. 3 approached the National Green Tribunal, Pune (NGT) by filing OA No. 170/2016 (WZ), seeking resolution of his complaint filed before the respondent no. 2 and also sought demolition of all the five hotels.

5. The NGT disposed of the applications on 12.01.2017 with the following directions:

1. *Applicant and respondent nos. 1 to 5 shall between themselves exchange documents upon which they rely on or before 8th February 2017. Applicant and respondent nos. 1 to 5 shall appear before respondent no. 6 GCZMA at about 3.00 p.m. on 15th February, 2017.*
2. *We direct respondent no. 6 GCZMA to give hearing to the applicant as well as respondent nos. 1 to 5 and shall dispose of the said application within next five weeks.*

6. It appears that the respondent no. 2 issued a notice to the petitioner on 08.02.2017, enclosing the inspection report of the inquiry committee of the even date and the hearing was scheduled by the respondent no. 2 in its meeting dated 28.02.2017 (142nd meeting). The respondent no. 2 in the said meeting decided as follows:

“After detailed discussion and due deliberation and on considering the written as well as oral submissions/replies made by the parties, the Authority noted that the residential structures are being used for commercial purpose as such the Authority decided to direct Mrs. Sheila Dhody, the respondent to bring/restore the use of all the structures under reference which includes Casa Britona, Casa Baga, Casa Colvale, Casa Vagator and Casa Anjuna back to its original purpose i.e. the residential purpose. The

Authority based on the site inspection report submitted in each matter noted that with respect to all the five matters i.e. Casa Colvale, Casa Britona, Casa Baga, Casa Anjuna and Casa Vagator there have been extensions carried out to the existing structures. However, further decided to issue Order of demolition in exercise of the powers vested under Section 5 of the Environment Protection Act, 1986 read with other enabling provisions with a direction to Mrs. Sheila Dhody to demolish all the extensions carried out to the existing structures (which includes Casa Colvale, Casa Britona, Casa Baga, Casa Anjuna and Casa Vagator) and restore the land to its original state within 15 days time period, failing which the Dy. Collector & SDO, Bardez, Goa to demolish the structure and restore the land to its original condition and recover the expenses as arrears of land revenue."

7. In respect of Casa Vagator, it was decided as follows:

"The Authority noted that the structure is being used for commercial purpose and the CRZ Notification permits repairs, reconstruction of structure on existing plinth, FSI etc. without change in existing use. After detailed discussion and due deliberation the Authority decided to accept the report of the Inquiry Committee dated 09.02.2017 and further decided to issue Order of demolition in exercise of the powers vested under Section 5 of the Environment Protection Act, 1986 read with other enabling provisions with a direction to Mrs. Sheila Dhody to demolish: a) Seven structures

and two sheds in the property surveyed under Sy. No. 226/1 of Village Anjuna and shown in the site plan attached to the report submitted by the Inquiry Committee. b) Remove the swimming pool, 3 plinth existing in the property bearing Sy. No. 226/1 of Village Anjuna and shown in the site plan attached to the report submitted by the Inquiry Committee. The Authority further decided to direct Mrs. Sheila Dhody to bring/restore the use of the existing structure to its original use i.e. residential use.”

8. Admittedly, the orders based on these resolutions/decisions were not communicated to the petitioner.

9. It appears that the petitioner filed two applications before the respondent no. 2. The first of such application was filed on 03.03.2017, for leave to produce additional documents and for grant of personal hearing. The second application came to be filed on 23.03.2017, after the petitioner obtained the copy of the decision dated 28.02.2017. That application was filed purportedly for correction of the minutes dated 28.02.2017 “so as to reflect the factual position of the proceedings”. Both these applications were taken for consideration by the respondent no. 2 in its meeting dated 18.04.2017 (147th meeting), wherein the respondent no. 2 decided to forward a copy of the same to the respondent no. 3/complainant for his

reply and to grant an opportunity to the concerned parties to be heard.

10. In the meeting dated 15.06.2017 (151st meeting), the respondent no. 3 objected for rehearing, on the ground that the respondent no. 2 has no power of review, once a decision was taken in the 142nd meeting held on 28.02.2017, directing demolition of the subject structures.

11. It appears that in the meantime, the respondent no. 3 approached the NGT by filing MA No. 179/2017 in OA No. 170/2016, questioning the powers and authority of the respondent no. 2 to review or rehear the matter. However, on 14.12.2017, the respondent no. 3 decided to withdraw the application, reserving liberty to approach the Tribunal, if necessary, after the respondent no. 2 passes an order. The application was accordingly disposed of as withdrawn.

12. The respondent no. 2 issued notices and decided to grant personal hearing in its meeting dated 18.01.2018 (164th meeting), which was eventually called off. The respondent no. 2 considered the matter in its meeting dated 31.07.2018 (180th meeting), in which the authority decided as follows:

“The Authority observed that review applications are being filed by respondents even though an exhaustive proceedings have been undertaken to arrive at a decision. Also, it goes without saying that if a party is aggrieved by an order of the Authority remedies in terms of appeal before the Hon'ble NGT Court are available to them. The Authority is already overburdened with backlog of pending cases and complaints. In such a situation, review applications for the cases which have already been decided after detailed hearing, add to the pendency and hampers the disposal of other cases by GCZMA. Further, review applications are being used as a tool to frustrate the implementation of decision and execution of the orders passed by the Authority. In the present case as well, the demolition order as per the resolution of 142nd GCZMA meeting held on 28.02.2017 has not been issued till date. As such, Authority rejected the review application and re-affirmed its decision as per the resolution of 142nd GCZMA meeting held on 28.02.2017. Orders be passed as per above immediately”.

13. Consequently, the respondent no. 2 issued the impugned order dated 24.08.2018, for demolition of the structures as originally decided in the meeting dated 28.02.2017.

14. A few more facts would be necessary to be set out. In the meantime, the respondent no. 3 approached the Division Bench of this Court in Writ Petition No. 702/2018, for enforcement of the decision, for demolition taken by the respondent no. 2 on 28.02.2017. It appears that incidentally, a question was also raised as to the availability of the powers of review. However, it appears that on 28.08.2018, the second respondent took a conscious decision based on the decision of the Supreme Court in the case of **Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd. & Another, (2005) 13 SCC 777**, holding that the authority has no power of review on merits but, has a limited power of “procedural review”. The said decision was produced before the Division Bench of this Court in Writ Petition No. 702/2018. The Division Bench disposed of the said Writ Petition on 25.09.2018, holding that there was “no impediment for the authority as on date to proceed with further legal process”. The Division Bench has found that the respondent no. 2 has stated that it has powers of a “procedural review” on the ground of breach of principles of natural justice. However, such breach must go to the root of the decision making and such breach of principles of natural justice must arise entirely due to the omission or error on the part of the respondent no. 2,

without any contribution on the part of the party against whom the order is passed.

15. After the aforesaid petition was decided on 25.09.2018, the petitioner has filed the present petition on 28.09.2018, challenging the direction for demolition issued on 24.08.2018.

16. I have heard Shri Lotlikar, the learned Senior Counsel for the petitioner and Shri Lawande, the learned Advocate General for the respondent nos. 1 and 2. I have also heard the respondent no. 3 in person. Perused record.

17. It is submitted by Shri Lotlikar, the learned Senior Counsel for the petitioner that once the respondent no. 2 had decided to grant personal hearing to the petitioner, in its meeting dated 18.01.2018, the subsequent decision dated 31.07.2018, not to entertain the review application is passed without affording the petitioner an opportunity of hearing. It is submitted that once the authority had decided to rehear the petitioner, particularly, in the context of the two applications dated 03.03.2017 and 23.03.2017, the authority could not have issued demolition order, based on the earlier order dated

28.02.2017, without affording opportunity of hearing to the petitioner. It is submitted that the said action of the respondent no. 2 is in gross violation of principles of natural justice. It is also submitted that as per the order dated 12.01.2017 of the NGT, the parties were directed to exchange the documents on or before 08.02.2017. However, the copy of the report of the inquiry committee was supplied on 11.02.2017 and on this count, even the original order dated 28.02.2017 is vitiated on account of breach of principles of natural justice.

18. The respondent no. 3 has raised a preliminary objection to the maintainability of the petition, on the ground of availability of an alternate remedy to approach the NGT. It is submitted that the application purportedly, filed for production of documents and for correction of the minutes dated 28.02.2017 was *ex-facie* not maintainable, as the authority had no power to review its own decision/order. The respondent no. 3 pointed out that in fact, the authority resolved on 28.08.2018 that the said authority has no power of review, which fortifies the conclusion that the decision to rehear the parties was not correct. It is thus submitted that the respondent no. 2 was not obliged to give any opportunity to the petitioner, particularly, when the order dated 28.02.2017 was passed after affording an

opportunity to the petitioner of being heard. It is submitted that there is absolutely no breach of principles of natural justice, insofar as the order dated 28.02.2017 is concerned. The respondent no. 3 pointed out that the Division Bench in its order dated 25.09.2018 in Writ Petition No. 702/2018 has recorded a statement on behalf of the learned Advocate General that the orders of demolition have already been issued. The Division Bench has directed in para 7 of the order that in case, the order is not issued, the same should be issued within one week. It is submitted that the present petition is filed thereafter, to overtake the order of the Division Bench, which is not permissible.

19. The learned Advocate General has submitted that before the decision dated 28.02.2017 was communicated to the petitioner, the petitioner has filed two applications i.e. on 03.03.2017 and 23.03.2017 and the respondent no. 2 had decided to rehear the matter on 18.04.2017. A specific query was made as to whether, any order passed in this petition would be contrary to the order passed by the Division Bench on 25.09.2018, directing issuance of the order of demolition, if not already issued. It was pointed out by the learned Advocate General that the Division Bench has noted that as on date,

there was no impediment for the authority to proceed with the further legal process, in as much as the authority had rejected the review, by its order dated 28.08.2018.

20. I have carefully considered the circumstances and the submissions made. Firstly, it is necessary to deal with the preliminary objection as raised by the respondent no. 3 about the maintainability of the petition, in view of the availability of an alternate remedy. The remedy under Article 226 of the Constitution of India is a remedy in public law and is a discretionary remedy. Although, availability of an alternate remedy is not a bar to this Court exercising jurisdiction under Article 226 of the Constitution of India, there is self imposed restriction, on such exercise of discretion, when the party has an equally efficacious remedy available. The Supreme Court in the case of **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Others, (1998) 8 SCC 1** has culled out the well known exceptions, where this Court would exercise such a discretion, notwithstanding the fact that the parties have an alternate remedy available. The exceptions are (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the

vires of an Act are challenged.

21. According to the petitioner, this Court can exercise discretion as there is failure of principles of natural justice in this case. It is contended that the respondent no. 2 having decided to rehear the matter on 18.01.2018, thereafter, unilaterally could not have decided not to entertain the review application. Secondly, it is contended that the original order dated 28.02.2017 is also passed in breach of principles of natural justice as the report of the committee was supplied after 08.02.2017. The contention in my considered view, cannot *prima facie* be accepted. I say *prima facie* as I am not inclined to entertain the petition in view of the availability of an alternate statutory remedy and therefore, any observations herein should not prejudice any of the parties, if such a remedy is resorted to.

22. It is true that the NGT by its order dated 12.01.2017 had directed the parties to exchange the documents upon which they relied on or before 08.02.2017. The contention on behalf of the petitioner is that the inspection report was furnished somewhere on 11.02.2017. *Prima facie*, merely on account of a delay of three days, it is not possible to accept that there was

any breach of principles of natural justice, insofar as the original order dated 28.02.2017 is concerned. It is contended that the decision, which was taken by the second respondent on 28.02.2017 in its 142nd meeting was not communicated to the petitioner and before it was communicated, the petitioner filed the application dated 03.03.2017. After obtaining a copy of the decision on 28.02.2017, the petitioners filed the application dated 23.03.2017, requesting for a personal hearing in the matter. A distinction was sought to be made between the decision/resolution of the respondent no. 2 and an order. The contention cannot *prima facie* be accepted. Such a distinction, even if assuming to be there, in my considered view, would be inconsequential. The order is eventually based on the resolution/decision taken by the respondent no. 2 and therefore, merely because no order was communicated the decision will not lose its efficacy.

23. It is true that the respondent no. 2 on 18.04.2017 had decided to grant an opportunity to the concerned party of being heard. However, subsequently, on 31.07.2018, had rejected the review application and in the interregnum the petitioner was not heard. The question is whether, *prima facie* this would lead to inference of breach of principles of natural

justice and the answer, in my considered view, has to be in the negative for the reason that the authority itself has now resolved and the Division Bench of this Court in Writ Petition No. 702/2018 has held that there is only a “limited power of procedural review”. I have gone through the application dated 23.03.2017 and I *prima facie* find that the review/reconsideration sought therein, would not be a matter of “procedural review”. Thus, if there was no power of review, which could have been exercised on the basis of the application dated 23.03.2017, the fact that the petitioner was not heard on the said application would not lead to a conclusion that there was any breach of principles of natural justice. In any event, all these aspects can be agitated before the NGT. A Division Bench of this Court in the case of **South West Port Limited Vs. State of Goa & Others** (Writ Petition No. 173/2018 decided on 24.04.2018) has *inter alia* held that a NGT being an expert body on environmental matters, is better suited to decide the matters of the present nature. This is one more reason why this Court normally would be slow to exercise discretion, in the wake of availability of an alternate statutory remedy.

24. In that view of the matter, I decline to entertain the petition and the following order is passed:

ORDER

- (a) Both the petitions are dismissed, in view of the availability of an alternate remedy, with no order as to costs.
- (b) Needless to mention that the observations herein are essentially of *prima facie* nature, in order to decide the limited question whether, the petition can be entertained in view of the availability of an alternate remedy. The observations herein will not come in the way of the petitioner, if the petitioner takes recourse to the statutory remedy.
- (c) The rival contentions of the parties are left open.

25. At this stage, Shri Desai, the learned Counsel for the petitioner seeks extension of the interim relief, in order to enable the petitioner to take recourse to the statutory remedy, as may be available. As the interim relief was operating, the same shall continue to operate for a period of six weeks from today.

C. V. BHADANG, J.

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