

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 79 OF 2010**

Mr. Vishwanath M. Naik,
Advocate,
Resident of H.No.119,
Cruz Milagris Road,
Ela, Old-Goa, Tiswadi, Goa.

... Petitioner

Versus

1. State of Goa,
through the Chief Secretary,
with his Office at
Secretariat, Porvorim,
Bardez – Goa.
2. The Director of Panchayats,
Government of Goa,
with his office at Junta House,
3rd lift, 3rd floor,
Panaji – Goa.
3. Village Panchayat Se-Old Goa,
through its Secretary,
Ilhas – Goa.
4. Town Planner,
Office of the Town Planner,
Town and Country Planning Department,
Tiswadi Taluka Office,
Panaji – Goa.
5. The Assistant Engineer,

Office of the Assistant Engineer,
Sub-Division – I, Division – V,
Public Works Department,
Panaji – Goa.

6. M/s. Madkaikar Realtors Pvt. Ltd.
Represented by its Director,
Shri Pandurang Madkaikar,
Resident of Old Goa,
Tiswadi – Goa.

... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. S. Kenny, Advocate for the Petitioner.

Mr. Pravin Faldessai, Additional Government Advocate for Respondent Nos.1, 2, 4 and 5.

Mr. A. F. Diniz with Mr. Nikhil Pai, Advocates for Respondent No.3.

Mr. S. S. Kantak, Senior Advocate with Mr. A. Kakodkar and Mr. P. Talaulikar, Advocates for Respondent No.6.

**Coram:- M. S. SONAK &
C. V. BHADANG, JJ.**

Reserved on : 5th December, 2019

Pronounced on : 17th December, 2019

Oral Judgment (Per M. S. Sonak, J)

Heard Mr. S. D. Lotlikar, learned Senior Advocate with Ms. S. Kenny for the Petitioner, Mr. P. Faldessai, learned Addl. Government Advocate for Respondent Nos.1, 2, 4 and 5, Mr. A. F. Diniz with Mr. N. Pai for Respondent No.3, Mr. S. S. Kantak, learned Senior Advocate with

Mr. A. Kakodkar and Mr. P. Talaulikar for Respondent No.6.

2. The Petitioner, by instituting this Public Interest Litigation, questions the construction of buildings put up by the builder/Respondent No. 6 in the property bearing survey Nos. 102/1 and 102/2 of Ella (Old Goa), Tiswadi Goa (the said property) and seeks quashing of permissions, completion certificate, occupancy certificate and more particularly the orders of regularisation made by the Planning Authorities (Respondent No.4) and the Village Panchayat of Se-Old Goa (Respondent No.3) as being in violation of statutory provisions and planning regulations, not to mention that the same have been issued for malafide and extraneous purposes. The Petitioner alleges that the director of the Respondent No.6, was, at the relevant time, Member of Legislative Assembly (MLA) from the very constituency and also held the position of Minister of Transport, State of Goa. The Petitioner has alleged that whole scale illegalities were permitted and tolerated by the statutory authorities which mainly, taking into consideration the position of such director.

3. On 15th April, 2010, when the matter was taken up for consideration in the first instance, this Court, recorded the statement made on behalf of the Respondent No.6 that an affidavit-cum-undertaking would be filed in this Court agreeing to remove all shutters on the ground floor and the ground floor area would be kept vacant or used only for the

purposes of parking. In the order dated 15th April, 2010, it was made clear that any further rights which the Respondent No.6 may seek to create in favour of the third parties, will be after informing such third parties/purchasers of the pendency of such petition. It was made clear that such purchasers/transferee will be bound by the orders that would be made in the present petition.

4. On 15th June, 2010, this Court issued Rule by keeping open the preliminary objections relating to locus standi of the Petitioner to institute the present Public Interest Litigation. In the said order as well the statement on behalf of the Sixth Respondent regards the compliance with the statement recorded in our order dated 15th April, 2010, was once again recorded. The statement was accepted as the statement made to this Court and ad-interim relief granted earlier was directed to continue to operate as interim relief. Even the hearing of the petition was expedited.

5. In terms of the affidavit-cum-undertaking, the Sixth Respondent was duty bound to remove all the shutters from the ground floor shops/commercial areas and use the area for the purpose of parking. However, almost eight years later, when the matter was taken up for final hearing, the learned Senior Advocate appearing for the Petitioner made a grievance that till date the Sixth Respondent, had not complied with the undertaking given to this Court. Accordingly, opportunity was granted to

the Sixth Respondent to explain the position regards compliance.

6. After seeking some adjournments, ultimately the authorized representative of the Sixth Respondent filed an affidavit of purported compliance alongwith photographs. From the perusal of the same, it was apparent that there was some belated compliance, though, there was no compliance of the undertaking in its entirety. Now that the matter is taken up for final disposal, we leave the issue of compliance of undertaking, at that.

7. Mr. Kantak, learned Senior Advocate appearing for the Sixth Respondent in pursuance of liberty reserved to the Sixth Respondent in our order dated 15th June, 2010 questions the locus standi of the Petitioner to institute the present petition and even urge that the present petition was not instituted bonafide. Mr. Kantak submitted that the Petitioner had personal grudge against the director of the Sixth Respondent Shri Pandurang Madkaikar since the Petitioner had contested Zilla Panchayat elections against him and lost. Mr. Kantak also submitted that the present petition is in fact sponsored by Laxmikant Kundaikar and his wife Subhada Kundaikar (Kundaikars), who have put up the Petitioner, again, to wreck political vengeance. He pointed out that Kundaikars themselves have put up the illegal constructions and since, the action was taken by the Panchayat against such illegal construction and further since, the Panchayat

was controlled by the wife of Mr. Pandurang Madkaikar, the present petition came to be filed to either preempt action or to wreck the private vengeance. Mr. Kantak submits that for all these reasons, the Petitioner should be denied locus standi to maintain this petition, in any case, this petition should not be entertained on the ground that it is not a bonafide Public Interest Litigation.

8. We have considered the contentions raised by and on behalf of the Sixth Respondent that the petition lacks locus standi to maintain the present petition or that in any case this petition ought not to be entertained as a Public Interest Litigation. According to us, in the facts and circumstances of the present case, there is no really ground made out to sustain such preliminary objections and to deny locus standi to the Petitioner or to hold that the present petition is not some genuine Public Interest Litigation.

9. There is no dispute that the Petitioner is himself a resident of Village Ella where the constructions, which have been described as patently illegal and unauthorized have come up. The Petitioner has pointed out that several illegalities, including that the constructions ultimately put up are in breach of height restrictions, in excess of prescribed floor area ratio (FAR) and without keeping requisite set backs provided in the rules and regulations. In the petition, there are averments that the Authorities have

deliberately ignored all these illegalities taking into consideration the position of the director of the Sixth Respondent and further, proceeded to regularize such illegalities though such regularization was not at all permissible or in any case not at all justified. The Petitioner has pointed out that the said property was classified as Settlement – S2 zone for which permissible FAR was only 80%. However, in anticipation of change of classification, which anticipation never ultimately came true, the Sixth Respondent, taking advantage of position of its director, proceeded to put up the buildings of ground plus four storeys instead of permitted ground plus two storeys thereby breaching all rules and regulations as prescribed. The Petitioner has pointed out that even the regularization orders merely mention that the relaxation should be granted as this was “*a special case*”. The Petitioner has urged that there was nothing special in the present case except that the director of the Respondent No.6 was a political influential person. The Petitioner urges that the illegalities have been tolerated for extraneous reasons.

10. There is no denial to the fact that the director of the Sixth Respondent was the MLA of the constituency in which the constructions have come up. There is no denial that at the relevant time he was holding portfolio of Minister of Transport. In fact, the Sixth Respondent, has made reference to the political position of its director in order to urge that the Petitioner is nothing but a political rival. The Petitioner has made detailed

avermments not only as regards the illegalities in the constructions but also the manner in which the regularization orders came to be passed in the matter. All these matters are quite relevant because in such matters the message is more important than the messenger.

11. It is possible that the Petitioner may be a political rival of the director of Respondent No.6 at some point of time. However, taking into consideration the allegations made in the petition as also the material produced alongwith to back the allegations, it cannot be said that this petition has been filed only to seek some political vengeance. The allegations that Kundaikars are behind the institution of this petition are made, but far from made out. One of the allegations in the petition is that the director of Respondent No.6 has abused his position, not only to put up the constructions in question but also to secure their regularization, when in fact such regularization, was not otherwise permissible in law. If all such allegations are ultimately found to be true, it cannot be said that there is no public interest involved in the institution of this petition or that this petition is not instituted bonafide.

12. In the context of allegations of supporting unfair means at one of the premier universities, the Hon'ble Apex Court in ***Shivajirao Nilangekar Patil Vs Dr. Mahesh Madhav Gosavi and others***¹, rejected

¹ AIR 1987 SC 294

the contention that the Petitioner had private interest in the matter and consequently the public interest litigation was not bonafide. At paragraph 36, the Hon'ble Apex Court observed that the allegations in the petition disclose a lamentable state of affairs in one of the premier universities of India. *The petitioner might have moved in his private interest but enquiry into the conduct of the examiners of the Bombay University in one of the highest medical degrees was a matter of public interest. Such state of affairs having been brought to the notice of the Court, it was the duty of the Court to the public that the truth and the validity of the allegations made be inquired into. It was in furtherance of public interest that an enquiry into the state of affairs of public institution becomes necessary and private litigation assumes the character of public interest litigation and such an enquiry cannot be avoided if it is necessary and essential for the administration of justice.*

13. In ***C.S. Rowjee Vs Andhra Pradesh State Road Transport Corporation²***, the Hon'ble Apex Court has no doubt observed that caution to be exercised by the Court when the allegations are made against the person in power. However, in *Shivajirao Nilangekar Patil* (supra) the Hon'ble Apex Court explained these observations by stating that same were made in the year 1964 and now it has to be borne in mind that things are happening in public life which were never even anticipated

2 AIR 1964 SC 962

before and there are several glaring instances of misuse of power by men in authority and position. The Hon'ble Apex Court has said that this is a phenomenon of which the courts are bound to take judicial notice. The Hon'ble Apex Court has held that the Courts should be conscious while dealing with the allegations of *mala fide* or cast aspersions on holders of high office and powers, but the Court cannot ignore the probabilities arising from proven circumstances, in such cases.

14. Thus, even if it is assumed that there did exist some political rivalry between the Petitioner and the director of Respondent No.6, taking into consideration the issues raised in the present petition and applying the principles laid down by the Hon'ble Apex Court in *Shivajirao Nilangekar Patil* (supra), it will not be appropriate to deny the Petitioner locus standi or to dismiss this petition as not being some genuine public interest litigation.

15. Besides, this is a case where the Petitioner is admittedly a resident of locality in which huge illegal constructions are alleged to have come up. Several buildings, which were permitted to have ground plus two storeys, have come up with ground plus four storeys. No parking places were provided for these buildings, as a result of which, the pressure of parking on the public roads was bound to increase, even according to the stance taken by the Sixth Respondent. The allegation is that the buildings

are in breach of planning permissions and the planning regulations. The allegation is that the said property was zoned only as S2 and the buildings have been put up on the basis that this zone was to be converted to C2, which conversion admittedly never took place. In such matters, locus standi will have to be considered in favour of the residents of the locality who are bound to be affected by such large constructions and developments contrary to the planning regulations or bye laws framed by the local authorities.

16. In ***Bangalore Medical Trust Vs B. S. Muddappa and others***³, the Hon'ble Apex Court has held that locus standi to approach by way of writ petition and refusal to grant relief in equity jurisdiction are two different aspects, may be with same result. One relates to maintainability of the petition and other to exercise of discretion. Law on the former has marched much ahead. Many milestones have been covered. The restricted meaning of aggrieved person and narrow outlook of specific injury has yielded in favour of broad and wide construction in wake of public interest litigation. Even in private challenge to executive or administrative action having extensive fall out the dividing line between personal injury or loss and injury of a public nature is fast vanishing. Law has veered round from genuine grievance against order affecting prejudicially to sufficient interest in the matter.

³ (1991) 4 SCC 54

17. The Hon'ble Apex Court has further observed that the rise in exercise of power by the executive and comparative decline in proper and effective administrative guidance is forcing citizens to espouse challenges with public interest flavour. It is too late in the day, therefore, to claim that petition filed by inhabitants of a locality whose park was converted into a nursing home had no cause to invoke equity jurisdiction of the High Court. In fact public spirited citizens having faith in rule of law are rendering great social and legal service by espousing cause of public nature. They cannot be ignored or overlooked on technical or conservative yardstick of the rule of locus standi or absence of personal loss or injury. Present day development of this branch of jurisprudence is towards freer movement both in nature of litigation and approach of the courts. Residents of locality seeking protection and maintenance of environment of their locality cannot be said to be busybodies or interlopers (*S.P. Gupta v. Union of India*, [1982] 2 SCR 365--AIR 1982 SC 149; *Akhil Bharatiya Soshit Karamchari Sangh v. U.O.I.*, [1981] 1 SCC 246 and *Fertilizer Corporation Kamgar Union v. U.O.I.*, AIR 1981 SC 344).

18. The Hon'ble Apex Court has also observed that even otherwise physical or personal or economic injury may give rise to civil or criminal action but violation of rule of law either by ignoring or affronting individual or action of the executive in disregard of the provisions of law raises substantial issue of accountability of those entrusted with

responsibility of the administration. It furnishes enough cause of action either for individual or community in general to approach by way of writ petition and the authorities cannot be permitted to seek shelter under cover of technicalities of locus standi nor they can be heard to plead for restraint in exercise of discretion as grave issues of public concern outweigh such considerations.

19. For all the aforesaid reasons, we reject the preliminary objections as to the maintainability of the present petition and proceed to examine the matter on merits.

20. There is absolutely no dispute that the said property was zoned as Settlement – S2 zone in the Outline Development Plan (ODP) as then applicable. The floor area ratio (FAR) applicable to the properties classified in S2 zone was 80%. The Sixth Respondent, was issued permissions by the Planning Authorities and the Panchayat, on the basis that the said property is zoned S2 and therefore, eligible to FAR of 80% in terms of the permissions, the Sixth Respondent was required to put up several buildings having ground plus two storeys and tiled roof.

21. However, at the site, in total defiance of the planning permissions and the permissions issued by the local authorities, the Sixth Respondent proceeded to construct the buildings having ground plus four

storeys. In doing so, the Sixth Respondent violated height restrictions and the set back restrictions as applicable to S2 zone. The Sixth Respondent consumed FAR much in excess of what was otherwise permissible to the property in S2 zone. All this was done without seeking any revision of plans, assuming that such revision was permissible taking into consideration that the zone of the said property was only S2. All this was done in open defiance of planning permissions and the permissions issued by the local authorities. The Planning Authorities and the local authorities, also, it appears did not object to such blatant violation. In these circumstances, there does appear to be substance in the contention of Mr. Lotlikar, learned Senior Advocate appearing for the Petitioner that such inaction on the part of the Authorities has nexus with the position of power held by the director of the Sixth Respondent. As noted earlier, there is no dispute that the director of the Sixth Respondent was the Member of the Legislative Assembly from the area as also the Minister of Transport at the relevant period.

22. There is really no dispute raised even by the Sixth Respondent that the constructions put up in the form of ground plus four storeys buildings were in violation of planning permissions and the permissions issued by the local authorities in the first instance. There is also no dispute that the constructions as put up were in violation of planning regulations or bye laws of the local authorities. The Planning Authorities and the local

authorities who have been impleaded as Respondents to this petition also do not seriously dispute this position which, even otherwise is really undisputable.

23. The only explanation offered by the Sixth Respondent for putting up such illegal and unauthorized constructions, and thereafter seeking regularization thereof is that when the constructions commenced, the jurisdiction of North Goa Planning Development Authority (NGPDA) was extended to the village of Ella. On this basis, the Respondent No.6 felt that it might be possible to change the zoning of the said property from existing S2 zone with FAR of 80% to either C2 zone with FAR of 150% or C1 zone with FAR of 200%. The Sixth Respondent therefore applied for such change of classification/zone and in anticipation with the same would be granted, proceeded to put up the constructions at the site on the basis that the said property is already classified as C1 or C2 zone. This is the defence, can never be appreciated in terms of law. However, the impugned regularization orders made by the Planning Authorities and the Panchayat indicate that such alarmed justification, is one of the considerations taken into account by permitting the conditional regularization.

24. The aforesaid justification pleaded by the Sixth Respondent is to be found in the affidavit filed by one Vishnu Tivrekar, the Manager of the Sixth Respondent, on 22nd April, 2010. The affidavit after questioning

the locus standi of the Petitioner states that at the time when the original planning permissions and construction permissions issued to the said property were classified in S2 zone with FAR of 80% and therefore, the construction plans were drawn up to put ground plus two floors structure utilizing only about 73.88% of FAR even though 80% FAR was permissible. On this basis, the constructions actually commenced.

25. The affidavit on behalf of the Sixth Respondent then proceeds to state that some time around September, 2005, the jurisdiction of the NGPDA is extended to the Village of Ella and this meant that there was scope to reclassify the said property into C1 and C2 zone with FAR of 200% or 150% respectively. Since the properties around the said property were already developed “*there was a good chance that Respondent No.6's plot would be classified as C1 or C2 zone*”.

26. The affidavit of the Sixth Respondent further states that the Respondent No.6 some time in December, 2005 applied for change of zone to NGPDA and that the “*Respondent No.6 was optimistic that the same would come through*”. The affidavit then proceeds to state that “*anticipating additional FAR would be available as a result of it becoming a planning area and being entitled to be designated as C2 zone, provisions were made to consume the additional FAR that would become available*”.

27. Finally, the affidavit of the Sixth Respondent concedes that when the building was under construction and the structure of the two floors above was nearly complete, the area was withdrawn from being a planning area under the Town and Country Planning Act, 1974 and as such it was not possible to avail of additional FAR. The affidavit then takes a curious defence that the Sixth Respondent relying upon the policy of the State Government to encourage the parking on stilts, so as to ease the pressure on public roads and avoid traffic problems and hazards, decided to take advantage of this policy. The affidavit states that the Sixth Respondent then decided to utilize the ground floor area where the shops and commercial premises had already been converted as area for parking on stilts, and on such basis submitted revised plans for approval to the Planning and Local Authorities. The affidavit then states that upon such conversion of shops and commercial spaces to parking area of stilts, the entire construction came within the permissible limits for the property zoned as S2. The affidavit concedes that there were some deviations even then chosen to describe these deviations as minor deviations which were regularizable by the Planning and local authorities. On this basis, the Sixth Respondent has urged that the petition as filed be dismissed.

28. From the aforesaid it is very clear that the Sixth Respondent has virtually accepted that the construction put up by it were in total breach of the approved plans and approved permissions. The constructions

were also in breach of planning regulations or bye laws of the local authorities in relation to the property zoned as S2 and entitled to FAR of not greater than 80%. The so called justification or explanation that the constructions were put up in anticipation of zone changing to either C1 or C2, is clearly not acceptable though, the planning authorities in the present case have taken this aspect into consideration for the purpose of regularization. The attempt to take advantage of the policy of the Government to change parking of stilts and offer for converting the ground floor and commercial premises into area for parking on stilts, in the facts and circumstances of the present case was far from bonafide. The record indicates that despite the undertaking, the parking on stilts was never provided. It is only under the orders of the Court that the internal walls of the shops or shutters had to be removed, even as on date from the photographs produced before us, it is apparent that the buildings have no parking on stilt facilities. In fact, the access from the public road to the ground floor shops and commercial premises which were to be converted into area for parking on stilts is still not available.

29. The challenge in this petition is to the orders of regularization as reflected in the communication dated 31st July, 2008 addressed by the Planning Authorities to the Secretary of the Village Panchayat and the consequent orders made by the Village Panchayat on the said basis. The communication dated 31st July, 2008 is preceded by a Note, which explains

the decision making process leading to the decision of regularization as reflected in the communication dated 31st July, 2008. Apart from what is set out in the Note, even the Planning Authorities have not offered any other explanation as to the circumstances in which the regularization came to be permitted in the present case.

30. Accordingly, it is necessary to transcribe the Note at Exhibit -H in its entirety, for convenience of reference.

*Tiswadi Taluka Office,
Town & Country Planning Deptt.*

NOTE

This has reference to the representation dated 4th April 2008 of M/s. Madkaikar Realtors Pvt. Ltd. Addressed to the Hon'ble Chairman of the Town & Country Planning Board for approval of revised plans of the residential complex being constructed by them in property bearing survey No.102/1 and 102/2 village Ella, Tiswadi Taluka seeking relaxation of height of suit floor. May kindly see the copy of the said representation of page C/2 to C4.

The background of the case given under N.O.C for construction of residential complex in the aforesaid property was issued by the Department vide letter No.Tis/3057/Ella/05/741 dated 4/10/2005. The NOC was issued considering the Regulations applicable to S2 zone of PDA (Dev. Plan) Regulations, 2000. The property under reference falls in S2 zone as per the ODP for the erstwhile Panjim planning Area which is being followed. The property is located along the National Highway-4A to the northern side at Old Goa. The buildings recommended were with ground floor and 2 upper floors for some

buildings (A, B, C, D & E) and still floor with 3 upper floor for same other buildings (F,G,H,I,J&K). The net effective area to the property 5m² and the FAR consumed was 73.88. However, the applicant has earned out the construction of the buildings facing the Highway with ground floor having shops/apartments with 4.5 mts. height and 4 upper floor as against the approved ground 2 upper floors. When the application was received for approval of the revised plans by the Tiswadi Taluka Office of the Department. The same was not considered as the revised plans were not fitting within the conditions in respect of the height of the building which is 11.5 mts. maximum. Also, there was a complaint received from Shri Vishwanath M. Naik, Advocate stating illegalities in the construction. Copy of the complaint is placed in the file at C/5 to C 12.

Vide representative dated 4/4/08 addressed to the Hon. Chairman of the Town & Country Planning Board, they have claimed that they went ahead with the construction of the building facing the main road with ground floor and 4 upper floor with an intention to obtain revised approval as applicable under Section 3.6 of Part II of the PDA (Development Plan) Regulations 2000 as their application for change of zone from S2 to C2 was under the consideration of the Board.

As the practice of considering change of zone on an individual basis case by case has been discontinued by the Government. The applicant has now come out with a request for remedial action by proposing the ground floor meant for shops and apartment to be converted into suit parking by raising partly the plinth and construction of ramps.

As per the Regulations the height of the still floor should not exceed 2.5 mts to the bottom of the beam from the plinth level in case part of the building is proposed for stilt parking and 3 mts. to the bottom of the beam in case the full lower floor is proposed for all building. In the instant case height of the ground floor is to the tune of 5 mts. before, the height of the building facing the main

road will exceed permissible height of 11.5 mts. unless the height is counted from the top of the stilt floor and the height of the stilt floor and the height of the stilt floor is relaxed as a special case.

The whole issue was discussed in the 130th meeting of the Town & Country Planning Board held on 29/4/08. The Board after deliberation constituted a sub committee to study the drawings and documents and to prepare a proper draft affidavit to be sworn in by the applicant to prevent any use contrary what is stated in the affidavit. Copy of the minutes of the board meeting is placed in the filed C3, sub committee has submitted a draft affidavit to be sworn in by the applicant which is placed at page C18. The applicant has submitted an affidavit in the stamp paper swearing in the statements as suggested by the sub committee. The revised plans are submitted showing the effective area as 14.210 m2 which is the area calculation as per revised from I & XIV submitted by the applicant. The buildings A, B, C facing the Highway are with stilt floor and 4 upper floors. The buildings nos.D,E,F,G,H,I,J are with floor with 4 upper floors. The FAR proposed is 79.87%.

The revised plans are fitting with ladles as per the PDA (Development Plan) Regulations 2000 provided relaxation sought as granted.

In view of the above, the proposal is submitted to the Government for relaxation of the stilt height as recommended by me Town & Country Planning Board, based on the recommendations of the sub-committee so as to enable the Department to issue NOC for approval of revised plans. Please see at C/21 to 30.

Sd/-

(M.V. Polle)

Planning Assistant

Dy.T.P. (AK) Sd/-

S.T.P. (N) Sd/-

S.T.P. (H. Qs.) Sd/-

*“Information” made available under
Right to Information Act 2005*

Sd/-

PIO/APIO

Town & Country Planning Dept.

C.T.P. Sd/-

Commissioner & Secretary (TCP) Sd/-

Hon. Chief Minister Sd/-

C.T.P. Tiswadi Taluka/Office (officer)

Sd/-

PA/(P) Urgently

31. At the conclusion of the aforesaid Note, the officers like Senior Town Planner, Chief Town Planner, Commissioner & Secretary (TCP), Chief Minister have simply put up their endorsements so as to indicate their approval. On the basis of aforesaid Note and the endorsements, the communication dated 31st July, 2008 came to be addressed to the Secretary of the Village Panchayat, communication, is now impugned as regularization order made by the Planning Authorities.

32. The communication dated 31st July, 2008 is also transcribed herein below for convenience of reference.

*“Ref.No. Tis/3057/Ella/08/899
Office of the Town Planner,
Town and Country Planning
Department,
Tiswadi Taluka Office,
Panaji, Goa.
Dated: 31/7/08*

*To,
The Secretary,
Office of the Village Panchayat,
Se-Old-Goa,
Tiswadi – Goa.*

Sub: Application of Shri Madkaikar Realtors Pvt. Ltd. for the proposed Revised Plan of Residential Complex and Compound wall in respect of Survey no.102/1 & 102/2, village Ella, Taluka – Tiswadi.

Ref: Your letter no.VP/SOG/15/107/2008-09 dt. 22/04/2008.

As per O.D.P. of Panjim, the applicants plot is zoned as S-2. The F.A.R. is 80%.

Sir,

With reference to the above mentioned subject, this is to inform you that there is no objection over the proposed construction of Revised Residential Complex and compound wall from planning point of view on following conditions:

- 1. The permission is recommended as per the plans hereby annexed.*
- 2. The permission is liable to be revoked if it is based on false information/wrong plans/calculation/documents or any other accompaniments of the applications are found to be incorrect or*

wrong at any stage.

3. Any change to be corrected to the approved plans, prior permission has to be obtained.

4. Prior to commencement of development work, it will be incumbent upon the applicant to have valid Conversion Sanad of use of land as contemplated under Goa, Daman and Diu, Land Revenue Code 1968.

5. There should not be any drinking water well within 15 mts. of Septic Tank.

6. Regarding ownership of the land, this may be seen at your end.

7. License for construction should be issued after obtaining approval for the structural drawing from Assistant Engineer, PWD.

8. Before issuing the Occupancy Certificate, Completion Certificate/NOC has to be obtained from this office.

9. Traditional access/drain water if any, passing through the plot should not be blocked.

10. Necessary permission may be obtained from any other competent authority/Department if necessary as per rules and regulations.

11. Maximum height of the compound wall along the boundary other than that abutting on a street may be permitted up to the height of 2.0 m. only, and along the boundary abutting to a street up to 1.5 mts. only and shall be of closed type up to a height of 0.90 mts and of open type above that height.

12. All gates of the compound wall shall open inward and not outward into the footpath or the road.

13. Along the intersection of the streets, no compound wall shall be raised to a height of more than 0.90 mts. from the crown of the road for length of 0.9 mts from the intersection of the street. This distance being measured from the corner point of the plot.

14. Verification of the tenancy position and whether agricultural as on 2.11.90 has to be made at your end before the issue of the license/Sanad/order etc.

15. All the setback as shown on the site plan shall be strictly

maintained.

16. All the buildings roofs shall be sloppy as per the regulations.

17. This NOC is issued after obtaining Govt. approval on the relaxation of stilt height. However, the stilt floor shall not be used for shops, residential flats or any habitable or un-habitable space in future.

18. The ground floor of the building shall be converted to stilt floor by demolishing all masonry walls (external and internal) dismantle and remove all the rolling shutters, doors, windows and provide free and clean space for Parking of vehicles as undertaken in the Affidavit by the applicant.

19. The buildings are already constructed, therefore this NOC from the planning point of view may be treated as a regularization and Village Panchayat shall impose penalty as per the Village Panchayat Regulation Act.

20. This NOC is issued with the concurrence of the Chief Town Planner.

Yours faithfully,

sd/-

(Ashok Kumar)

Dy. Town Planner

Copy to:

The Assistant Engineer

Sub-Div. I, W.D.V

Panaji – Goa.”

33. From the aforesaid, it is very clear that the decision as well as the decision making process leading to regularization is mostly flawed. This is not the case where the Sixth Respondent had unintentionally or

inadvertently deviated from the approved plans or planning permissions issued on the basis that the said property was zoned as S2 and had maximum permissible FAR of 80%. This is the case where the Sixth Respondent has intentionally and deliberately deviated from the approved plans and planning permissions, in scant regard for the law and the planning permissions. The so called justification that the Sixth Respondent anticipated that the zoning would change, is not justification at all for the purposes of law.

34. Further, the basis for seeking regularization was the affidavit submitted by the Sixth Respondent that the entire ground floor which comprises of shops and commercial spaces would be converted into parking on stilts. Even after such conversion certain issues relating to height and set backs were to remain. For this, the Authorities without any specific orders appear to have granted relaxation by treating this matter as a “*special case*”.

35. Despite the affidavit, the Sixth Respondent after receipt of the regularization orders in terms of the communication dated 31st July, 2008 did not bother to seriously convert the ground floor of the building into stilt floor by demolishing all masonry walls, dismantle and remove all the rolling shutters, doors, windows and provide free and clean space for parking of vehicles as undertaken. This is only after the present petition

was filed in the year 2010 and this aspect of non compliance was brought to this Court, the Sixth Respondent offered to file yet another affidavit-cum-undertaking to comply with these conditions. Even thereafter almost seven to eight years, these conditions were not entirely complied with. Ultimately, some compliance is reported but from the photographs produced on record, it is apparent that there is no complete compliance in the sense that the ground floor has not been made ready for the use as parking on stilts.

36. From this, it is quite apparent that the regularization was applied for on the basis which was itself flawed. Secondly, the representations were held out that the entire ground floor would be converted into parking on stilts. These representations were not complied with even though these were the conditions subject to which the regularization came to be granted. Thirdly, the authorities, were not at all justified in treating the case of the Sixth Respondent as “*special case*”. There was nothing really special about the case of the Sixth Respondent. In fact, the Sixth Respondent in the present case, had deliberately quite brazenly deviated from the approved plans and planning permissions. The justification that the Sixth Respondent expected change of zone, which change never materialized is not the justification in the eyes of law. On such basis, the Authorities were not at all entitled to treat the case of the Sixth Respondent as “*special case*”.

37. The Authorities, in the present case have also failed to discharge the duties which they were required to discharge in terms of law by not even insisting upon compliance with the conditions imposed upon the Sixth Respondent at the time of regularisation. Mr. Lotlikar, learned Senior Advocate appearing for the Petitioner is quite right in submitting that the entire *modus operandi* was to grant regularisation by imposing certain conditions but thereafter not to insist upon the compliance with such conditions.

38. In ***Shanti Sports Club and Another v/s. Union of India and others – (2009) 15 S.C.C. 705***, the Hon'ble Apex Court, has, after adverting to its several earlier judgments on the subject, taken cognizance of buildings constructed in violation of municipal and other laws and emphasized that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings. The Hon'ble Supreme Court proceeded to state that unfortunately, despite repeated judgments of the Supreme Court and High Courts, illegal constructions continue to mushroom and thereafter, pleas are made for regularization on grounds of compassion and hardship. Hon'ble Supreme Court has observed that it is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorized constructions.

39. In *Royal Paradise Hotel (P) Ltd. v/s. State of haryana and others - (2006) 7 S.C.C. 597*, the Hon'ble Supreme Court rejected the plea for regularization of a construction made in violation of the provisions of the planning and municipal legislation by observing that no authority administering municipal laws and other laws like the act involved in the matter, can encourage such violations. Even otherwise, compounding is not to be done the when violations are deliberate, designed, reckless or motivated. Marginal or insignificant accidental violations unconsciously made after trying to comply with all the requirements of the law can alone qualify for regularization which is not the rule, but a rare exception.

40. In *Friends Colony Development Committee v/s. State of Orrisa and others*⁴, the Hon'ble Apex Court has held that structural and lot area regulations authorize the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts, and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is

⁴(2004) 8 SCC 733

posed to the occupants of the building. [For a detailed discussion reference may be had to the chapter on “Zoning and Planning” in *American Jurisprudence*, 2d, Vol.82.]

41. The Hon'ble Apex Court further observed that though the municipal laws permit deviations from sanctioned constructions being regularised by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are bona fide or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum.

42. The Hon'ble Apex Court has also observed that the application for compounding the deviations made by the builders should always be dealt with at a higher level by a multi-membered High Powered Committee so that the builders cannot manipulate. The officials who have connived at unauthorized or illegal constructions should not be spared. In developing cities the strength of staff which is supposed to keep a watch on building activities should be suitably increased in the interest of constant

and vigilant watch on illegal or unauthorized constructions.

43. The regularisation orders in the present case have not taken into consideration the law laid down by the Hon'ble Supreme Court in the aforesaid matters rather the Authorities have taken into account the extraneous reasons or circumstances and proceeded to regularize the unauthorized constructions put up by the Sixth Respondent. The Village Panchayat, did not even bother to impose any penalty upon the Sixth Respondent even though the communication dated 31st July, 2008 had required the Panchayat to impose penalty at the stage of regularization. The regularization, cannot be resorted to as a matter of a rule and in a routine manner. The regularization is only a matter of exception. Only such deviations deserve to be condoned, as are bona fide or are attributable to some misunderstanding. Compounding of deviations ought to be kept at a bare minimum. Besides, the Authorities have to ensure that the regularization of constructions are in accord with the planning regulations and bye laws as applicable.

44. In the present case, there is no specific order of relaxation is produced on record. However, the communication dated 31st July, 2008 does make a reference to obtaining Government approval on relaxation of stilt height. No provision was shown to us on the basis of which the Government, was vested with the powers to grant relaxation in such

matters. Assuming that there was some power vested in the Government based upon which such powers exercised were also not shown to us. For all these reasons, we are constrained to hold that the decision making process leading the issuance of communication dated 31st July, 2008 was flawed and consequently, the communication dated 31st July, 2008 deserves to be set aside.

45. The consequence of setting aside communication dated 31st July, 2008 as also the orders made by the Village Panchayat on the basis of said communication, will technically result in declaring the entire construction as illegal and requiring the Authorities to demolish the building put up by the Sixth Respondent. However, in the peculiar facts and circumstances of the present case, such a course of action may not be appropriate course of action to adopt.

46. Mr. Kantak, learned Senior Advocate appearing for the Sixth Respondent has submitted that the apartments in the buildings have been sold and third party rights have been created therein since last over nine to ten years. He submitted that the present petition was filed at the stage when the constructions were completed. He submits that even by the time this Court made its interim order on 15th April, 2010, several apartments had already been sold and third party rights were created. He points out that it is for this reason this Court in its interim order dated 15th April,

2010 directed that if the Respondent No.6 creates any further third party rights, it shall do after informing the purchasers of the pendency of the present petition. The interim order dated 15th April, 2010 thereafter states that such transferees shall be bound by the orders passed in this writ petition. He submits that none of the transferees, whether before or after making of the interim order dated 15th April, 2010, have been impleaded as the Respondents in this petition. He submits that it will be quite harsh to order the demolition of the third and fourth floors of the building in question, in these peculiar facts and circumstances.

47. Mr. Kantak, learned Senior Advocate appearing for the Sixth Respondent, on the basis of express instructions, however makes the following statements :-

(a) that the Sixth Respondent, will, both in letter and spirit, and scrupulously comply with the conditions prescribed in clauses 17 and 18 of the impugned communication dated 31st July, 2008 and in terms thereof convert and make operational the entire ground floor of the building as facilities for parking on stilts. Such exercise will be completed in all respects within six months from the date of the judgment and order of this Court;

(b) the Sixth Respondent will pay a penalty of Rs.50 lakhs within six weeks from the date of the judgment and order of this Court. Out of this, an amount of Rs.40,00,000/- will be paid to the National Defence Fund (PAN No.AAAGN0009F), Rs.5,00,000/- to Matruchaya Trust, Ponda Goa, and Rs.5,00,000/- to the Goa State Legal

Services Authority. He states that the Sixth Respondent will file an affidavit-cum-undertaking, with regard to such offer of payment.

48. Mr. Lotlikar, learned Senior Advocate appearing for the Petitioner submits that though it is true that the Sixth Respondent, has put up illegal and unauthorized constructions in blatant disregard of the legal provisions, it is also equally true that immense prejudice will occasion to the innocent third parties i.e. transferees of the apartments in the constructed building. He submits that the Sixth Respondent must ensure that the ground floor is indeed made available as parking on stilts and the same is not used for any commercial or habitable purposes. He submits that the Sixth Respondent must not be permitted to sell the parking lots in the parking on stilts. He submits that even the penalty amount, in the facts and circumstances of the present case must be in the range of rupees one crore or thereabouts.

49. Upon due consideration of the rival contentions on the aspect of moulding of relief, we feel that in the peculiar facts and circumstances of the present case ordering the demolition of upper two floors, may not be appropriate in the first instance. This is because most of the apartments on these floors, it appears, were sold or agreed to be sold even prior to making of ad-interim order dated 15th April, 2010. In fact, by the time this petition was instituted, the constructions were almost complete. The Petitioner,

who is resident of the locality, did not institute this petition, no sooner, he witnessed the constructions beyond the ground plus two floors. Prejudice which will occasion the transferees in such circumstances, will be quite immense and, will far out way the message, which demolition of the two floors would really sent to the violators of law like the Respondent No.6 in the present case. The offer of the Sixth Respondent to convert the entire ground floor into parking facilities on stilts is really, not some consideration that can be counted in favour of the Sixth Respondent because, in terms of communication dated 31st July, 2008 i.e. regularization order, the Sixth Respondent in any case, was duty bound to do the same. However, Mr. Kantak, may perhaps right in his submission that the Sixth Respondent having been deprived of entire profit from out of sale of ground floor commercial premises, is one of the considerations to be taken into account in the context of penalizing the Sixth Respondent. Besides, the Sixth Respondent of his own accord, has offered to pay penalty of Rs.50 lakhs within six weeks from the date of this judgment and order. The Sixth Respondent has offered to pay this penalty to the Army Relief Fund, to the reputed Orphanage Matruchhaya and the Goa State Legal Services Authority.

50. In ***Goel Ganga Developers India Private Limited Vs Union of India and others***⁵, the Hon'ble Apex Court after concluding the

⁵ (2018) 18 SCC 257

construction of the buildings containing large number of flats was illegal and unauthorized, posed to itself a question as to whether the demolition was the only answer ? This was answered at paragraph 53, in the following terms :-

“53. The next issue which arises is that what we should do with the construction. A large number of flats are already occupied and a large number of persons have paid money for occupying these flats. The learned counsel appearing for those persons who have purchased the flats urged that the flats should not be demolished otherwise they shall be put to great monetary loss. As pointed out above, now there are 807 flats and 117 shops which are either constructed or under construction. These flats are 1, 1.5 and 2 BHK flats and small shops and offices. The project proponent has already taken money from these persons and a large number of flats and shops have already been occupied and even where the remaining flats and shops are not occupied, persons belonging to the middle class have invested their life's earnings in this project. Keeping in view the interest of these third parties who were not parties before NGT, we are of the view that in the peculiar facts and circumstances of the case, demolition is not the answer. This would put innocent people at loss. Normally, this Court is loath to legalize illegal constructions but in the present case we have no option but to do so.

51. In *Goel Ganga Developers India Private Limited* (supra), the Hon'ble Apex Court, directed the builder to pay damages of Rs.100 crores or 10% of project cost whichever is higher in addition to penalty of Rs.5 crores as damages imposed by the NGT in its order dated 27th September,

2016. The Hon'ble Apex Court permitted the builder/developer to complete the construction of 807 flats, 117 shops/offices and cultural centre including the clubhouse but restrained the builder/developer from undertaking construction of any further building or flats, even though the entire project involved the construction of at least two more buildings having 454 flats and other construction. The Hon'ble Apex Court took into consideration the interest of third parties, who were not parties before the NGT and held that the demolition is not the only answer. The demolition would put the innocent people at loss even though the Court is loath to legalize the illegal constructions.

52. Therefore, taking into consideration all the aforesaid factors, we dispose of this petition by making the following order :-

(a) The impugned orders of so called regularization dated 31st July, 2008 and 8th September, 2008 to the extent, they purport to regularize the constructions of third and fourth floors on the buildings are hereby quashed and set aside;

(b) However, notwithstanding that the setting aside of the aforesaid orders, we do not direct the demolition of third and fourth floors on account of circumstances set out in our judgment and order in the first instance. The third and fourth floors however will have to be demolished, if within a period of six months, the Respondent No.6 does not comply with its undertaking with regard to clauses 17 and 18 of communication dated 31st July, 2008, converting the ground

floor shops into area of parking on stilt. Similarly, the third and fourth floors of the buildings will have to be demolished if the sixth Respondent fails to pay the amount of Rs.50 lakhs as offered by the Respondent No.6 within six weeks from the date of judgment and order;

(c) The undertaking given by Respondent No.6, consistent with the statements made on behalf of the Sixth Respondent, as recorded in paragraph 47 of this judgment and order, are accepted as undertakings to this Court. Formal undertaking of Janita Madkaikar, Director of Respondent No.6, in relation to compliance with conditions 17 and 18 of the communication dated 31/7/2008, is accepted. However, directions are issued to comply with condition No.16 as well, if not completely complied. Formal undertaking regards payment of penalty of Rs.50,00,000/- to be filed within two weeks from today;

(d) The Sixth Respondent to file an affidavit of compliance in this Court on or before 10th February, 2020 reporting compliance of the payment of Rs.50 lakhs, alongwith proof of payment/acknowledgment;

(e) The Sixth Respondent to file affidavit regards compliance with clauses 16, 17 and 18 of communication dated 31st July, 2008 by 8th June, 2020 alongwith photographs;

(f) The Respondent No.4 to verify the position of compliances on the part of the Sixth Respondent and file status report by 8th June, 2020;

(g) If, there is no compliance with regard to the directions for payment of penalty within six weeks and compliance with clauses 16, 17 and 18 of communication dated 31st July, 2008 by 30th May, 2020, then, the Respondent Nos.2 and 4 are directed to proceed with the demolition of third and fourth

floors of the building in question. Such demolition should be completed by 31st August, 2020;

(h) In the above eventuality the purchasers/transferees of the apartments on the third and fourth floors are reserved rights to take out appropriate proceedings seeking damages against the Sixth Respondent. This is without prejudice to the right of the Petitioner or any other person to move this Court for initiation of contempt action against the Sixth Respondent for breaching its own undertaking.

53. Rule is made absolute in this petition in the aforesaid terms.

54. There shall be no separate order as to costs.

55. This judgment and order is pronounced today in terms of Rule 1 of Chapter XI of the Bombay High Court Appellate Side Rules, 1960.

C. V. BHADANG, J

M. S. SONAK, J

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