

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 336 OF 2019**

Mrs. Zaira D. Gomes,
W/o. Mr. William Remedios Jude
Da Cunha Gomes,
59 years old, Married, Housewife,
and anr.

.... Petitioner/
original defendants nos.1 & 2.

V e r s u s

1. Shri Wilfred Colaco,
S/o. Mr. Pascoal Colaco,
Aged about 35 years,
Married, service and others.

..... Respondents/
original plaintiffs

Shri V. P. Thali, Advocate for the Petitioners.

Shri R. G. Ramani, Advocate for the Respondent nos.1 to 4.

Shri. V. Sardesai, Addl. Government Advocate for Respondent nos.5, 6 and
7.

Shri Ivan Santimano, Advocate for Respondent nos.8 and 9.

CORAM: C. V. BHADANG, J.

Date: 17th September, 2019.

O R D E R:

The challenge in this petition is to the order dated 6/7/2018 passed by the learned District Judge, South Goa at Margao in Civil Suit no.14/2018. By the impugned order, the learned trial court has granted leave to the

respondents nos.1 to 4 (the original plaintiffs) under section 80 (2) of the Civil Procedure Code (C.P.C, for short) to file suit. The petitioners are the original defendants nos.1 and 2 in the said suit, while the respondent nos.5 to 9 are the original defendant nos.3 to 7.

2. The aforesaid suit is filed by the plaintiffs for a declaration that they are the absolute owners in possession of the suit plot admeasuring 181 sq.mtrs., purchased by the plaintiff no.3 by sale deed 16/2/2007 and for other consequential reliefs.

3. The plaintiffs filed an application for leave to file the suit under section 80 (2) of the C.P.C. on the ground that there is an apprehension that the original defendants nos.6 and 7 may at any time revoke the occupancy certificate issued by the defendant no. 6 and will initiate action for demolition of the house of the plaintiff no.1, thereby frustrating the object of filing of the suit.

4. The learned trial court by the impugned order has granted the leave. It may be mentioned that although a notice under section 80 of the Code is for the purpose of the benefit of the Government or a Public Officer, none of the respondents nos.5 to 7 have chosen to challenge the said order. The challenge

is by the private defendant nos.1 and 2.

5. I have heard Mr. Thali, the learned counsel for the petitioners, Mr. Ramani, the learned counsel for the respondent nos.1 to 4, Mr. Sardessai, the learned Additional Government Advocate for the Respondent nos.5, 6 and 7 and Mr. Santimano, the learned counsel for the respondent nos. 8 and 9.

6. Mr. Thali, the learned counsel for the petitioner has submitted that although the notice under section 80 of C.P.C is for the benefit of the Government or a public officer, even a private party can challenge the order granting leave under sub section 2 of section 80 in as much as, the same strikes at the root of the jurisdiction of the Court to entertain the suit. For this purpose, the learned counsel has placed strong reliance on the judgment of this Court the case of **Ebrahimbai Vs. State of Maharashtra and others AIR 1975 Bom. 13**, and in the case of **M/s. Boshan Developers Pvt. Ltd. Vs. Communiade of Bordem (CRA nos.21 and 23 of 2015 decided on 16/9/2015)** and the decision of the Supreme Court in the case of **State of Kerala and others Vs. Sudhir Kumar Sharma and others (2013) 10 SCC 178**. It is submitted that there is a jurisdictional error committed by the trial court in granting leave under section 80(2) of the Code without there being any urgency, as there was no interim or urgent relief sought by the respondent

nos.1 to 4.

7. Mr. Ramani, the learned counsel for the respondent nos.1 to 4 has supported the impugned order. The learned counsel has placed reliance on the Full Bench decision of this Court in the case of **Vasant A Pandit Vs. Bombay Municipal Council and others**, in which the observations made by the Division Bench in the case of **Ebrahimbai (supra)** have been explained away. Reliance is then placed on the Division Bench decision of this Court in the case of **Hirachand Himatlal Marwadi Vs. Kashinath Thakurji Jadhav, AIR (29) 1942 Bom. 339**, the decision of the Allahabad High Court in the case of **Shiv Rani Vs. District Judge, Manipuri and others 2007 0 AIR (All) 84** and the decision of the Supreme Court in the case of **State of A.P. And others Vs. Pioneer Builders, A.P (2006) 12 SCC 119**. It is submitted that it is not open for the private defendants to raise the ground of either the absence of the notice under section 80 of C.P.C or to challenge the grant of leave under section 80 (2) of C.P.C.

8. The learned Additional Government Advocate for the respondent nos.5, 6 and 7 as well as the learned counsel appearing for the respondent nos. 8 and 9 have submitted that this Court may pass appropriate orders as may be deemed just and necessary.

9. On a careful consideration of the rival circumstances and the submissions made, I do not find that any case for interference is made out. This is a case where the leave was sought by the plaintiffs for filing the suit without serving a notice under section 80 of C.P.C which has accordingly has been granted by the trial court. The Government or the public officers concerned have not chosen to challenge the said order and the challenge is by the private defendants. The Supreme Court in the case of **State of A.P. and others Vs. Pioneer Builders (supra)** has held that the service of notice is a condition precedent for institution of a suit against the Government or a public officer and it imposes a statutory and unqualified obligation to serve such notice and in absence thereof, suit is not maintainable, except where section 80 (2) applies. In the said case, the trial court had granted leave under sub section 2 of section 80 by observing that “there was no tenable ground to refuse the leave asked for”. Although the Hon'ble Supreme Court found favour with the submission that the order was cryptic, and did not approve of the manner in which the order was passed and the leave was granted, has further found that the State having not raised any objection about the maintainability of the application and the grant of leave, has refused to interfere. The Hon'ble Supreme Court found that the order passed on the contractor's application under section 80 (2) of C.P.C cannot be said to be

beyond jurisdiction. Even in the present case, although the order may be cryptic, the State having not taken exception to the said order, I do not find that the challenge can be entertained at the instance of the private defendants.

10. The Division Bench of this Court has held that it is open to the party protected by section 80 to waive its right to such notice and its waiver binds the rest of the parties and a party, who has no right to such a notice cannot challenge the institution of the suit for want of such notice.

11. A Full Bench of this Court in the case of **Vasant Ambrao Pandit (supra)** had an occasion to consider the absence of a statutory notice under section 527 of the Bombay Municipalities Corporation Act. This Court after taking note of the decision of the Division Bench in the case of **Ebrahimbai (supra)** (which has been relied upon by the petitioner) has held thus in para 8 of the judgment :

In our opinion, the true legal position in this behalf is that no suit can be instituted without service of the notice if such service of the notice is required statutorily as a condition precedent. The giving of the notice is a condition precedent to the exercise of jurisdiction. But, this being a mere procedural requirement, the same does not go to the root of jurisdiction in a true sense of the term. The same is capable of being waived by the defendants and on such waiver, the

Court gets jurisdiction to entertain and try the suit. The plea of waiver can always be tried by the civil court. In fact, it is not suggested who else can try. The question whether, in fact, there is waiver or not would necessarily depend on facts of each case, and is liable to be tried by the same Court if raised.”

12. In the present case, the suit has been filed after obtaining the leave under sub section 2 of section 80 of C.P.C and the State or the public authorities have chosen not to challenge the same.

13. The reliance placed on behalf of the petitioner on the decision of the Supreme Court in the case of **Sudhir Kumar Sharma (supra)** is misplaced, as in that case the challenge was raised by the State and not by the private party.

14. In the case of **M/s. Boshan Developers Pvt. Ltd.**, the decision of the Full Bench of this Court in the case of **Vasant A. Pandit (supra)** was not brought to the notice of this Court. That apart, in that case also there was absence of the notice as contemplated under section 289 (1) (b) of the Goa Municipalities Act. I am bound by the Full Bench decision of this Court in the case of **Pandit (supra)** and, particularly having regard to the decision of the Supreme Court in the case of **Pioneer Builders (supra)**, no case for

interference is made out. The petition is without any merit and is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/