

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.1009 OF 2019**

Upama Gauns & Anr.

.... Petitioners

V/s

The Administrator of Comunidade,
Panaji & Anr.

.... Respondents

Shri A.D. Bhobe & Ms. Annelise Fernandes, Advocates for the Petitioners.

Shri Nigel Da Costa Frias, Advocate for Respondent No.2.

Coram: DAMA SESHADRI NAIDU, J.**Date: 9th December 2019****ORAL ORDER:**

In September 2017, the second respondent Comunidade complained to the Administrator about trespass and illegal construction on its property. It was said to be by an unknown person. So the Comunidade requested the Administrator to act. Then, after ascertaining the occupier's identity; in January 2018 the Administrator issued a show-cause notice, presumably, under Article 371 of the Code of Comunidades ("the Code"). The petitioners received the notice.

2. Notice received, the petitioners replied, first, in February 2018 and, again, in April 2018. The petitioners have maintained that the Administrator has no jurisdiction to act on the Comunidade's complaint. Besides, they have also asserted that Comunidade's complaint does not fit into the statutory scheme of Article 371 of the Code. Instead, if at all, the

Administrator wanted to act on the Comunidade's complaint, he should have taken recourse to Articles 372, 374, and other related provisions of the Code. Eventually, the Administrator provided an opportunity of hearing to the petitioners, had the site inspected, and then passed the impugned order of eviction. Aggrieved, the petitioners have filed this Writ Petition.

Submissions:

Petitioners:

3. Shri A.D. Bhobe, the learned counsel for the petitioners, has submitted that the Writ Petition involves a jurisdictional fact. To elaborate, he submits the Administrator is said to have acted under Article 371. But he could have invoked Article 371 only when he formed an opinion on his own about any alleged encroachment. On the contrary, if he wanted to act on a complaint, then he should take recourse to Articles 372, 374, and other related provisions.

4. After taking me through the statutory provisions, Shri Bhobe has submitted that there is, in the first place, a dispute about the identity or the location of the property. Second, in the reply, the petitioners have established *prima facie* case that they have been in possession for many years and that possession has been settled. So Shri Bhobe has urged this Court to interfere with the impugned order, for there should have been no summary eviction in the face of the petitioners' defence, such as statutory

violation and settled possession.

5. When this Court has persistently queried about the right the petitioners enjoy, Shri Bhobe has submitted that the petitioners are the tenants of the Comunidade's property. But lacking proof on that count, Shri Bhobe submits that the petitioners could, in the alternative, assert that they have perfected their right by adverse possession.

6. In sum, Shri Bhobe has submitted the matter ought to have been before the Civil Court, where the parties could lead evidence and establish their rival claims. In the end, Shri Bhobe contends that the impugned order suffers from the vice of violating the principles of natural justice, too. It is because the Administrator passed the impugned order without hearing the petitioners.

Respondent:

7. In reply, Shri Nigel Da Costa Frias, the learned counsel for the Comunidade, has submitted that the Administrator has all the powers under the Code to pass the impugned order. According to him, he has followed the due process, besides adhering to the statutory mandate, before passing the order. To elaborate, Shri Frias has submitted that the petitioners have been given an opportunity; in fact, before the Administrator, they were represented by a counsel, too. He has also stressed that the officials inspected the property and submitted a report to the Administrator. And this was to the petitioner's knowledge.

8. Shri Frias has also submitted that the Administrator has often

adjourned the matter to enable the petitioners to place their defence on record, including the documents, if any. But the petitioners placed no record before the authority. So, under those circumstances, drawing an adverse inference, the Administrator has passed the impugned order.

9. Heard Shri A.D. Bhobe, the learned counsel for the petitioners; and Shri Nigel Da Costa Frias, the learned counsel for Comunidade.

Discussion:

(a) The Complaint:

10. Through its complaint, dt.13.09.2017, Comunidade of Bambolim complained to the Administrator that its Managing Committee noticed encroachment on its land in Sy. No.68/2, with an illegal shed or room on it. The complaint further reveals that the Managing Committee is unaware of the encroacher because the property is far away from the habitat and that there is no one living in the said shed.

11. True, the Comunidade, in the complaint, asserts that “in accordance with Article 373 of the Code, the Attorney is obliged to denounce the encroachment of land. Then, it annexes the attorney’s denouncement. Before the Administrator follows the “other procedure laid down,” Comunidade wanted him to inquire “in terms of Article 371 of the Code of Comunidades which shall be preceded by filing a suit in the court of law.” The complaint also stresses that “in accordance with Article 125 (1) and (22), the Administrator of Comunidades has powers to enforce the

provisions of Code of Comunidades and also to proceed with encroachment of the lands of the Comunidades in accordance with Article 371 of Code of Comunidades.”

The Reply:

12. The Administrator issued a notice, dt.16.11.2017, requiring the first petitioner to appear before him on 27.11.2017. On that day, he wanted to examine the first petitioner’s documentary evidence. He did not respond. Then, the Administrator issued another notice—notice, dt.16.01.2018. Put on notice, the first petitioner replied on 5th February 2018.

13. In that reply, the first petitioner pleaded that on 31st January 2018, he already sought more time because he had not yet secured the certified copies of the documents he wanted to rely on. The reply reveals that the Comunidade also complained to the Village Panchayat about the illegal structure. Acting on the complaint, the Panchayat set itself out to demolish the structure. But the first petitioner claims to have secured orders of stay from the Additional Director-I of Panchayat, at Panaji, Goa. We need not pursue that line, though.

14. In his defence, the first petitioners, to begin with, contended that the property he had been in possession differs from the one the show-cause notice described. He wanted an inquiry “to identify the suit structure.” He has also pleaded that the shed has been existing for many years.

15. Later, in April 2018, both the petitioners—the husband and wife—replied. According to them, “the subject matter of the notice, dated 16.01.2018, involves complex issues of facts and law, requiring appreciation of provisions of Code of Comunidade and other relevant provisions of law.” The petitioners have further pleaded that the power of “summary eviction” under Article 371 vests with the “Director of Civil Administration.” And that power has not been delegated to the Administrator.

16. Eventually, the petitioners maintain that the notice, dt.16.01.2018, is without jurisdiction. To support that assertion, they contended that the Administrator should follow the procedure under “Articles 375/378 onwards.” Put differently, Article 371 does not apply.

What has the Administrator done?

17. Acting on the Comunidade’s complaint, the Administrator deposes his officials to inspect the property along with a surveyor from DSLR. On 27th November 2017, the surveyor identified the plot and inspected the property in Sy. No. 68/2. Then, the surveyor “physically measured from various angles as well as the shed/room.”

18. Thereafter, the Administrator has given many opportunities to the petitioners for their producing any documentary proof to justify their possession. In the first reply given in February 2018, the petitioners said they had applied for certified copies and would produce them soon. In the second reply given two months later, they simply attacked the notice as

ultra vires of the Administrator. Thereafter, too, though they had been represented by a counsel and given sufficient opportunities, the petitioners produced no piece of paper to justify their occupation.

19. To elaborate, the Administrator is said to have issued a notice on 16th November 2017. He issued a second notice on 16th January 2018. On 31st January 2018, the first petitioners seemed to have sought more time to produce the documents. At any rate, the first petitioner replied on 5th February 2018. Then, in April 2018, both the petitioners replied. They did not talk about any documentary proof, though. Began in 2017, the matter dragged through close to two years. Let us examine the Administrator's docket orders in 2019.

20. On 31st July 2019, the matter was called before the Administrator. The second petitioner was present, so was her counsel. Her counsel sought time "to produce ownership documents before this Court." The Comunidade's attorney objected. Then, the Administrator gave "last and final opportunity to produce the ownership documents before 30.08.2019." On 30th August 2019, the Administrator was absent because of his training. The matter was adjourned to 30th September 2019.

21. On 30th September 2019, the second petitioner and her counsel were present, but they produced no documents as they undertook on the last many occasions. Then, the Administrator passed an order, directing "next action to be initiated" on the Comunidade's complaint. Then, on 22nd October 2019, the Administrator passed the final order.

22. The Administrator, through the final order, directs the petitioners “to vacate the said land within 15 days.” If they are not to vacate, the petitioners “shall be liable for removal and forfeiture under Art. 372 of Code.”

The Grievance:

23. First, we must acknowledge that the petitioners have produced no documents to justify their occupation. Then, what remains is the petitioners’ assertion that the Administrator ought not to have acted under Article 371; instead, he should have acted under Article 373 and other provisions. They have stressed that even the *Comunidade*, that is the second respondent, has known the procedure. That is why it has, in its complaint, required the Administrator to take steps in tune with Articles 373 and 374.

Statutory Scheme:

24. Let us examine Article 373. It enlists the persons who “are obliged to denounce the encroachment of land”: the attorney of the *Comunidade* and the lessee of the fields. If the attorney does not denounce the encroachment of land despite his knowledge, he faces the prospects of dismissal from the office. The tolerant tenant, too, faces penalty proceedings if he does not denounce the encroachment. Under Article 374, the denouncement shall be addressed to the administrator. It should contain (a) the name, status, and the residence of the denouncer and of

“the encroacher”; (b) the denomination of the land encroached upon, its boundaries, the approximate area, time of encroachment of land, and its value; (c) the plot of land to which it belongs and the name of the lessee; (d) other clarifications that may help “to discover and delimitate the encroachment of land.”

25. Besides that, the denouncements, as Article 375 mandates, “can also” be made to the managing committee. If any member of the managing committee fails without proper justification to attend the meeting convened in this regard, he shall incur a fine. Thus, under Articles 374 and 375, there are two modes of complaint. After processing the complaint, the administrator shall call for the Managing Committee’s view, and shall notify the encroacher, to make a formal statement on the file in ten days. The encroacher must state whether he acknowledges the encroachment. If he does not acknowledge, he should present his defence. If he applies, the encroacher shall be given twenty days to submit his defence. Thus, once the encroacher has not admitted the encroachment, the procedure established in Articles 377 to 380 should be followed.

26. Once the period of ten days given to the encroacher ends, the Administrator shall fix the date and notify the complainant and the encroacher about the appointment of experts, who are to inspect the land and locally investigate the land. In fact, one of the experts shall be nominated by the complainant, another by the encroacher, and the third by the administrator. When the Administrator appoints the experts, he

must fix the day for inspection. He may require the members of the Managing Committee and the lessee of the land encroached to attend the inspection. Significantly, the provision does not insist on the presence of “the denouncer and the encroacher” during inspection. As Article 378 permits, after the local investigation, the parties may lead any oral or legal [documentary?] evidence.

27. From the evidence produced, if the encroachment stands proved, the Administrator shall order “the issue of a copy of the respective report and other extracts of the file of proceedings, which shall be handed over to the attorney of the *Comunidades*.” Then, the attorney requests the permission of the Administrative Tribunal for filing of the competent suit in the Court. In the process, the attorney “shall impose, by order on the file of proceedings, on the encroacher,” penalties. The penalties listed down in Article 379 shall be enforced only after the suit is decided in the Comunidad’s favour. Of course, Article 380 provides for the encroacher’s admitting the encroachment at any stage of the administrative inquiry. Article 381 speaks of the Administrator’s executing the “judicial decision.”

28. Article 382, on the other hand, clarifies that the Administrator, as soon as he knows about any encroachment of land, “shall proceed on his own initiative and in accordance with provisions of the preceding articles.” The “preceding articles” does not exclude Articles 371 and 372.

Articles 371 and 372:

29. Indeed, the Code of Comunidade has set out elaborate procedure to adjudicate the allegations of encroachment. Article 371 and 372, as the learned counsel on either side agrees, speaks of summary mechanism.

Article 371 reads:

Article 371 - Summary eviction of a person unauthorisedly occupying land vesting in Comunidades.-

(1) If in the opinion of the Director of Civil Administration, any person is unauthorisedly occupying or wrongfully in possession of any land.

(a) vesting in the Comunidade ; or

(b) to the use or occupation of which he is not entitled or has ceased to be entitled by reason of -

(i) any of the provisions of this Code, or,

(ii) the expiry of the period of lease or termination of lease for breach of any of the conditions annexed to the tenure, it shall be lawful for the Director of Civil Administration to summarily evict such person in the manner provided in clause (2).

(2) The Director of Civil Administration shall serve a notice on such person requiring him within such time as may appear reasonable after receipt of the said notice to vacate the land and if such notice is not obeyed, the Director of Civil Administration may remove him from such land.

(3) A person unauthorisedly occupying or wrongfully in possession of land after he has ceased to be entitled to continue the use, occupation or possession by virtue of any of the reasons specified in clause (1), shall also be liable at the discretion of the Director of Civil Administration to pay a penalty not exceeding two times the assessment or rent for the land for the period of such unauthorized use or occupation.

(4) The proceeds on account of the penalty imposed on the encroacher envisaged in clause (3) shall be credited to the coffer of the Comunidades.

30. As its heading suggests, Article 371 deals with summary eviction of “a person unauthorisedly occupying” land vesting in a Comunidade. A person may have been plainly in unauthorised or wrongful occupation, or his possession, once lawful, may have, with the passing time, turned

wrongful or illegal. The illegality could be in the face of the Code or on the expiry or termination of the lease. The termination of the lease, among other reasons, could be for the lessee's violating any condition annexed to the tenure. Then, the Director of Civil Administration may summarily evict the person in wrongful possession. And the procedure for eviction is provided in clause (2).

31. Under clause (2) of Article 371, the Director of Civil Administration must serve a notice on the person facing the allegation of being in wrongful possession. The notice, in fact, requires the encroacher to vacate the land in reasonable time, after his receiving the notice. If the notice remains unobeyed, the Director may effect his eviction. Under clause (3), the Director may exercise his discretion to impose on the person a penalty "not exceeding two times the assessment or rent" realisable for the period of the unauthorized use or occupation—the penalty proceeds going to the coffers of the Comunidades, as clause (4) mandates.

32. Now, we may turn to Article 372, which deals with *forfeiture and removal of property left out after summary eviction*. After summary eviction of the encroacher under Article 371, if any building or other construction remains on the land or any crop stands on the land, the encroacher may have it removed and taken away. If he fails, the property stands forfeited. For our purpose, this provision needs no elaboration.

What distinguishes Articles 371 and 372 from Article 374 and others in Chapter XII of the Code?

33. We may note that Articles 371 and 372 underwent an amendment. Before amendment, Article 371 insisted on an administrative inquiry before the Comunidades could sue those who encroach lands. The inquiry “as per the following article” shall serve as “the basis for authorizing the respective civil suit on title.” Then, the unamended Article 372 declared that all the members of the Comunidades and even the non-members were competent to denounce the encroachment of land. They should be, however, liable to the penalty if the complaints proved to be in bad faith and the denouncement untenable. Even Articles 371 and 372 before the amendment only set out steps in aid of the suit to be instituted under the later provisions.

34. The amended Articles 371 and 372 have, for the first time, provided for summary eviction of a person unauthorisedly occupying the land vesting in Comunidades. Then, the question is, when should the Administrator invoke the summary procedure and when should he invoke the other, more elaborate procedure that only leads to the Comunidade’s filing a civil suit?

35. Indeed, the petitioners have contended that the Administrator is incompetent to invoke Articles 371 and 372 of the Code, for those provisions empower the Director of Civil Administration. But, now, both the learned counsel agree that the Administrator has been delegated the

powers under Articles 371 and 372. So there remains no dispute about the Administrator's competence under these provisions.

36. We have already examined Article 371. Under that Article, unauthorised occupation invites summary eviction. The Article sweeps expansively. A person's once-legitimate possession may also turn to be unauthorised with passing time. Thus, a lessee may also render himself liable to summary eviction once his lease expires or even when he has violated any term of the lease. Earlier, pre-amendment, there was no occasion for distinguishing between summary eviction and legal eviction.

37. To me both forms of eviction are "just cause" evictions. In the context of the Code, I reckon summary eviction is quasi-judicial and legal eviction fully judicial. Under summary eviction, too, the occupier is put on notice and given an opportunity to justify his possession. The petitioners have argued that the Administrator can order summary eviction *suo moto*, on his own. If somebody else, say a denouncer, complains, then the eviction must be by recourse to civil suit under the Articles 373 and others. I am afraid the argument is fallacious. We cannot expect an Administrator to be a detective prying into every possession in a Comunidade. He may get information from any source. Thus information received, he sets himself out on deciding whether the person in possession has any semblance of right—that is, a *prima facie* claim—to hold on to the property.

38. Thus, faced with the amended Articles 371 and 372, every

inquiry into any alleged unauthorised occupation begins under Article 371. In the preliminary inquiry, if the occupier placed material before the Administrator justifying, *prima facie*, his possession and if that material requires deeper examination, certainly the fully-judicial proceedings should be taken recourse to. For example, the occupier may set up title in himself and claims that the Comunidade has nothing to do with the property. Then, he also backs up his claim with material evidence, true or false, but requiring deeper, preferably, judicial scrutiny. In that event, the recourse could only be to Article 373 and other provisions.

39. In the alternative, I may note that statutorily under Article 374, the denouncement shall be addressed to the administrator and should contain (a) the name, status, and the residence of the denouncer and of “the encroacher”, and so on. Here, the Comunidade complained against an unknown person. The Administrator enquired and found the petitioners to be the occupants. He put them on notice and given opportunity to justify their possession. At the very beginning, the petitioners sought time to produce documents. They claimed that they had applied certified copies of those documents. Strangely, to this day—even before this Court—the petitioners have placed no material to justify their possession.

40. Merely because a provision provides—in the alternative and, perhaps, under justifiable circumstances—for remedy before a civil court for eviction, the squatter cannot insist that the Comunidade or the Administrator should adopt the more dilatory device for eviction and let

the squatter thrive till then. That is not the legislative intent, nor its purpose, either.

Back to Brass-tacks:

41. I informed the petitioner's counsel that if the petitioners could establish any case before this Court, I would remand the matter to the Administrator. Then, the Administrator could reexamine and, if necessary, take recourse of the elaborate procedural mechanism set out under Article 373 and other provisions of the Code. Then came the reply that the property belonged to the Comunidade and that the petitioners are tenants. But there is no document to establish the tenancy. Then came the reply that the tenancy must have been over. When I further queried about the proof of the petitioners' paying the rent, there was no definite answer: the petitioners might have been paying the rent.

42. The fact remains that the property belongs to the Comunidade. In the two replies, the petitioners had no whisper that they are the tenants. Finally, the petitioners' counsel has contended that the petitioners could as well plead adverse possession. I am afraid tenancy and adverse possession are mutually exclusive. A person may possess property as a tenant even beyond the lease period (say, a tenant holding over or at sufferance) or with a hostile animus but "not by force, nor stealth, nor the license of the owner" (*nec vi, nec clam, nec precario*). He cannot possess the property under both the descriptions simultaneously. So I hold that the

impugned order calls for no interference.

43. Besides, about the lack of opportunity, I have gone through the record and found that the petitioners were put on notice. They replied to the show cause notice. Then, in the hearings before the Administrator, they were represented by a counsel, who sought adjournments on more than one occasion—to produce documents. He produced none, though.

Therefore, this Court sees no ground to exercise its supervisory jurisdiction under Article 227 of the Constitution of India to interfere with the impugned order of eviction. I accordingly dismiss the writ Petition.

DAMA SESHADRI NAIDU, J.

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