

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 275 OF 2012**

1 Mrs. Martha Luis,
Major of age,
r/o. H. No. 26,
Opposite GE (Projects),
Gurudwara Road,
Mangor, Vasco Goa 403802

.... **Petitioner.**

Versus

- 1 State of Goa,
Through Chief Secretary,
Secretariat,
Alto Porvorim Goa.
- 2 Under Secretary (Revenue),
Government of Goa,
Revenue Department,
Secretariat,
Alto Porvorim Goa.
- 3 The Collector,
Collectorate Building of
South Goa District,
Civil Administration Branch,
Margao-Goa.
- 4 Comunidade of Mormugao,
Through its Attorney,
Ground Floor,
Municipal Building,
Vasco-da-Gama, Goa.

5 Administrator of Comunidade,
Comunidade Office Bldg.,
South Goa with office at Margao. Respondents.

Mrs. A. Agni, Senior Advocate alongwith Ms. Jay Sawaikar,
Advocate for the Petitioner.

Ms. Priyanka Kamat, Additional Government Advocate for the
Respondents no. 1, 2, 3 and 5.

**Coram : M. S. SONAK &
SMT. M. S. JAWALKAR, JJ.**

Date : 12th March, 2020.

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

Heard Mrs. A. Agni, learned Senior Advocate who appears alongwith Advocate Ms. Jay Sawaikar, for the Petitioner and Ms. Priyanka Kamat, learned Additional Government Advocate for Respondents no. 1, 2, 3 and 5. Respondent no. 4 though served is neither present through any representative or Advocate.

2. The Petitioner challenges the determination of rate of ₹3600/- per square metre levied upon her for regularisation of her encroachment on the plot belonging to the Comunidade of Mormugao-(Respondent no. 4).

3. The Petitioner concedes that she was an encroacher of a plot of land admeasuring 393 sq.mts belonging to the Comunidade of Mormugao upon which her father-in-law had constructed a residential house much before the cut-off date of 15.06.2000. Accordingly, the Petitioner, vide her application dated 04.01.2002 in the prescribed form, applied for regularisation of this encroachment by invoking the provisions of Article 372-A of the Code of Comunidade (the Code).

4. By memorandum dated 10.04.2003 the Petitioner was informed by the Deputy Collector of Margao, Goa that her application is rejected for want of production of relevant documents alongwith the application seeking regularisation. On 17.02.2005, the Petitioner, by referring to the memorandum dated 10.04.2003 submitted the necessary documents.

5. By memorandum dated 25.02.2005, the Petitioner was informed that her application is being processed. In fact, the memorandum dated 25.02.2005 is addressed to various authorities for processing the Petitioner's application for regularisation and only a copy of such memorandum is marked to the Petitioner requiring her to approach the office of the Mamlatdar of Salcete for site inspection.

6. Ultimately, by order dated 21.10.2011, the Under Secretary (Revenue-II), informed the Collector of South Goa District that the Government has conveyed approval in terms of Article 372-A r/w. Article 153(9) of the Code and the Rules as prescribed vide Notification dated 05.11.2001 for regularization of unauthorised occupation of land surveyed under **Chalta No. 1 of P.T. Sheet No. 158 of Vasco City Survey**, situated at **Vasco City** and belonging to the Comunidade of **Mormugao**, having an area of **393 sq. mts.** to **Smt. Martha Luis**, r/o. H. No. 26, Gurudwara Road, Opp. G. E. (Project) Office, Mangor Hill, Vasco-da-Gama, being an encroacher for the construction of a residential house, **at an annual lease rent (foro) of ₹70,740/- (Rupees seventy thousand seven hundred forty only) at the rate of ₹3,600/- per sq. mts.** as per the revised rate of land w.e.f. 01/08/2006 as conveyed vide this department's letter No. 17/87/88-RD dated 04/10/2006, **in addition to penalty @ 50% of value of the plot @ ₹7,07,400/- only.**

7. A copy of the communication dated 21.10.2011 was marked to the Petitioner and she was requested to pursue the matter with the prescribed authorities to take possession of the plot from the Administrator of the Comunidade. It is admitted that this communication dated 21.10.2011 is the order of regularisation insofar as the Petitioner's encroachment of the Comunidade plot is concerned.

8. The Petitioner contends that alongwith her, several other encroachers had also applied for regularisation of their encroachments. The Petitioner has placed on record documents of regularisation of such encroachments at pages 82 to 88 of the paperbook of this Petition.

9. It is the case of the Petitioner that the Respondents have determined the annual lease rent (foro) in respect of these encroachments on the basis of the market rate of the plots under encroachments being ₹366/- per square metre. The Petitioner further points out that insofar as the Petitioner is concerned, the rate determined is almost 10 times higher, i.e. ₹3600/- per square metre.

10. The Petitioner contends that there is absolutely no difference in the case of the Petitioner as also the encroachers, whose encroachments were regularised vide orders at pages 82 to 88 of the paperbook. The Petitioner, therefore, contends that there was absolutely no justification in determining the rate of ₹3600/- per square metre insofar as the Petitioner's encroachment was concerned as against the rate of ₹366/- per square metre, which is the rate determined in the case of other almost identically placed encroachers from the same ward/locality.

11. Mrs. Agni, the learned Senior Advocate for the Petitioner

submits that this is a clear case of hostile discrimination which is prohibited by Article 14 of the Constitution of India.

12. Mrs. Agni, in the aforesaid circumstances, submits that the regularisation of the Petitioner's encroachment must be allowed on the basis of the rate of ₹366/- per square metre and not ₹3600/- per square metre. She submits that ultimately, the regularisations have been permitted on the basis of encroachments which took place several years earlier and, therefore, there is no justification in fixing such higher rate or levying penalty of 50%. She also points out to the affidavit filed by Mr. Ashutosh Apte, Under Secretary (Revenue) on behalf of Government of Goa to submit that there is no reason or rationale set out for practice of hostile discrimination against the Petitioner.

13. Ms. Priyanka Kamat, the learned Additional Government Advocate points out that the Petitioner's application for regularisation had in fact been rejected vide memorandum dated 10.04.2003. She submits that the Petitioner's application dated 17.02.2005, can at the highest be considered as fresh application seeking regularisation. In any case, she points out that the Petitioner's application for regularisation was processed by several authorities and, ultimately, the Collector of South Goa vide his letter dated 18.01.2010 submitted the proposal for regularisation to the

Revenue Department of the Government. She submits that as on 18.10.2010 the new rates which entered into force from 01.08.2006 became applicable. Therefore, the rate determined in the case of the Petitioner's encroachment was ₹3600/- per square metre. In contrast, she points out that, the applications of the other encroachers were forwarded by the Collector of South Goa on or about 06.10.2006 and, therefore, the rate of ₹366/- per square metre was determined in case of their encroachments. She submits that this is no case of hostile discrimination being practiced against the Petitioner. She further submits that penalty has been levied upon all the encroachers and the same is quite consistent with the provisions of the Code and Rules therein. For all these reasons, she submits that this Petition is liable to be dismissed.

14. The rival contentions now fall for our determination.

15. The issue of regularisation of encroachments of plots of the Comunidade is governed by the provisions of Article 372-A of the Code which reads as follows:

“372-A. Regularisation of unauthorised occupation, wrongful possession, etc.-- (1) Notwithstanding anything contained, elsewhere in this Code, or any other law for the time being in force, or in any instrument, judgement, decree or order of any court or

law, any person who is in unauthorised occupation of, or in wrongful possession of, or who has encroached upon, in or over, any land:

(a) vested in 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 a lease for breach of any of the conditions annexed to the tenure;

and has constructed, on or before 15-6-2000, a house, for residential purpose on such land, shall, on an application made by him to the Collector of the concerned district, within a period of 90 days from the date on which the Article 372-A, came into effect, in the specified form, accompanied by specified documents and on payment of specified fees, be entitled for the regularisation of such unauthorised occupation or wrongful possession or encroachment including of the said residential house, subject however to sub-clause (3) Article 372-A.

(2) From the date on which Article 372-A came into effect till the expiry of the period of 90 days prescribed under sub-clause (1) above, or till the pendency and disposal of the application, if any; made under sub-clause (1) above, as the case may be:

(a) no proceedings shall be initiated and no order shall be passed, under this Code, against a person who is

eligible to apply for and whose case falls, under sub-clause (1) above, and

(b) all proceedings already initiated and any order already passed under this code, against a person who is eligible to apply for and whose case falls under sub-clause (1) above, shall remain stayed during such period as prescribed above:

Provided that the period of stay of any proceedings initiated or of any order passed under this Code or the period during which no proceedings can be initiated or no order can be passed under this Code as stated above, shall not extend beyond a period of one year from the date on which Article 372-A came into effect notwithstanding the fact that the said application made under sub-clause (1) above is not disposed off within the said period of one year.

(3) The form of application, fees payable, the procedure to be followed in processing/deciding the application under sub-clause (1) above, the documents required to be furnished alongwith an application under sub-clause (1) above, the area to be regularised, the fine to be imposed upon, for regularisation, if any, etc., shall be such as may be specified in the rules under the Code.”

16. In terms of Article 372, the State Government has framed Rules known as Goa Legislative Diploma No. 2070 dated 15-4-1961 (Amendment) Rules, 2001. The 2001 Rules insert new rules 14, 15, 16, 17, 18 and 19 after rule 13 of the Goa, Daman & Diu Legislative Diploma Number 2070 dated 15.04.1961 Rules, 1985.

17. In the context of the issues raised in this Petition, reference is necessary to rules 14, 15, 18 and 19 which read as follows:

“14. Form of application for regularisation in terms of Article 372-A and fees payable thereof.-- Every application for regularisation as provided in clause (1) of Article 372-A shall be made in Form I hereto and shall be accompanied by a processing fee of rupees two hundred.

15. Area of land to be regularised in terms of Article 372-A.--(1) The area of land to be regularised in terms of Article 372-A shall be the land on which the residential house is constructed and the land around and appurtenant to such house subject to a maximum limit of five metres if such land lies within the jurisdiction of a Village Panchayat and two metres if such land lies within the jurisdiction of a Municipal Council, so however that the total maximum area of land to be regularised shall not exceed 300 square metres if such land lies within the jurisdiction of a Village Panchayat and 200 square metres if such land lies within the jurisdiction of a Municipal Council, or the actual total area whichever is less, including the area of the land covered by the residential house.

(2) Where the distance between the outer wall of two houses is less than double the limit of five metres or two metres as the case may be, as stated in sub-rule (1) above, the land appurtenant to such houses shall be half of the land lying between the outer walls of the said residential houses.

18. Fines for regularisation.--(1) The Administrator

shall impose a fine for the regularisation of the encroachment to the extent of 25% of the rates per square metre specified by the Government from time to time, in respect of talukas such as Canacona, Sanguem, Ouepem, Satari, Bicholim and Pernem and to the extent of 50% of the said rate in respect of the remaining talukas of the State of Goa.

(2) The Collector shall charge the present prevailing conversion charges as conversion fees and a fine equivalent to the conversion charges.

19. Regularisation of construction.-- The construction of the residential house proposed for regularisation shall be regularised by the local authority in accordance with the relevant laws in force administered by them."

18. From the perusal of Rule 18 it is quite clear that the Administrator of Comunidade is empowered to impose fine for regularisation of encroachments to the extent of 25% of the rates per square metre specified by the Government from time to time, in respect of talukas such as Canacona, Sanguem, Ouepem, Satari, Bicholim and Pernem and to the extent of 50% of the said rate in respect of the remaining talukas of the State of Goa. In the present case, we are concerned with the taluka Mormugao and, therefore, the Administrator is empowered to impose a fine for regularisation of the encroachment to the extent of 50% of the rate per square metre specified by the Government of Goa from time to time. Besides, the Collector is also competent to charge the present prevailing

conversion charges as conversion fees and a fine equivalent to the conversion charges.

19. Neither from the Rules nor the provisions of the Code, the learned Counsel for the parties were able to point out whether there exist any provisions prescribing cut-off date for making applications for regularisation. All that Article 372-A of the Code requires is that the encroachments, including, by way of construction of house for residential purpose therein must have taken place on or before 15.06.2000. Therefore, nothing really turns upon the date on which the applicant applies for regularisation of the encroachments. At the highest, the date may assume importance in the context of determination of the rate at which the penalty and annual lease rent is to be determined.

20. Record indicates that insofar as the Petitioner's encroachment is concerned, the calculations were on the basis that the rate must be ₹3600/- per square metre. However, in respect of other encroachers, whose regularisation orders are to be found at pages 82 to 88 of the paperbook are concerned, the calculations were on the basis of at the rate of ₹366/- per square metre. There is no serious dispute that the other encroachments are in respect of plots on the very same Comunidade and from the same locality/ward.

The Respondents, in such circumstances, were required to explain prima facie discrimination, insofar as the Petitioner is concerned.

21. Shri Ashutosh Apte, Under Secretary (Revenue) has filed an affidavit and attempted to explain the prima facie discrimination in paragraphs 3 to 7 of his affidavit, which read as follows:

- “3. I say that the Petitioner has challenged letter dated January 03, 2012 and the Communication dated 21/10/2011 whereby the approval of the Government in terms of Article 372-A read with Article 153(9) of the Code of Comunidade and Rules prescribed for regularisation of unauthorised occupation of land surveyed under chalta no. 1 of P. T. Sheet no. 158 of Vasco City Survey, situated at Vasco da Gama and belonging to Comunidade of Mormugao having an area of 393 sq. mts. to the Petitioner, being an encroacher is conveyed. The petitioners challenge is to the communication that the regularisation would be at an annual lease rent (foro) of Rs.70,740/- at the rate of 3600/- per sq, mts as per the revised rates of land w.e.f. 01/8/2006, in addition to penalty @50% of value of the plot @7,07,400/- only.*
- 4. I deny that there is arbitrary exercise on the part of this respondent in fixing the annual lease rent of 70,740/- quantified at the rate of 3600/- per m2 and further penalty at the rate of 50% of the value of the plot. I say that the case referred to by the Petitioner in the petition are not similarly placed liked the Petitioner. I say that the proposal was forwarded by the Collector only on 06/10/2006 in*

the case of the other encroachers while the Petitioners proposal was forwarded only on 19/01/2010. I say that the Petitioners application was considered on its own merits and approval was granted accordingly.

- 5. I say Petitioner is not entitled to the rate fixed for the other persons and is liable to pay as per the new rates as the case of the Petitioners is different from the case of the other encroachers relied on by the Petitioners.*
- 6. I deny that the Petitioner is being singled out and exorbitant rate is fixed while considering the application under article 372A of the Code of Communitade, whereas other similarly placed persons whose applications for regularisation have been considered at a land rate uniformly fixed at ₹Rs.366/- per m2.*
- 7. I say that the Land rates fixed for the Petitioner is strictly in accordance with the Gazette of 2003 and decision of the Government that the rates will come into force w.e.f. 01/08/2016.”*

22. The explanation, in fact, is in paragraph 4 of the affidavit. The affidavit states that the encroachers whose regularisation came to be regularised vide orders at pages 82 to 88 of the paperbook, were those whose applications for regularisation were forwarded by the Collector on 06.10.2006 whereas, the application of the Petitioner for regularisation of encroachment was forwarded by the Collector only on 19.01.2010. From this, it is sought to be

suggested that as on the date when the Petitioner's application for regularisation was forwarded by the Collector to the Government, the rates which entered into force w.e.f. 01.08.2006 became applicable. Therefore, the rate insofar as the Petitioner is concerned, is determined on the basis of Gazette of 2003 which came into force from 01.08.2006.

23. According to us, the aforesaid explanation can hardly be regarded as explanation to explain the charge of discrimination. In the first place, the Petitioner cannot have any control on the time taken by the authorities to process her application. Secondly, even insofar as the other encroachers are concerned, as per the affidavit, even their applications/proposals were received by the Government from the Collector on 06.10.2006. Accordingly, there was no reason not to make the rates of Gazette of 2003 which entered into force on 01.08.2006 applicable to the cases of these other encroachers as well. The fact that these rates have not been made applicable to other encroachers but made applicable only to the case of the Petitioner thus suggests that the Petitioner, though placed in equal situation, was not treated equally. In other words, the case of discrimination and consequent violation of Article 14 of the Constitution of India has been made out by the Petitioner in the matter of determination of the rates.

24. Ordinarily, therefore, we were inclined to grant full relief to the Petitioner by determining the rate of ₹366/- per square metre which is the rate determined in case of other encroachers whose encroachments came to be regularised vide orders at pages 82 to 88 of the paperbook. However, from Rule 15 of the said Rules we find that the Government was entitled to regularise encroachment to the maximum extent of 200 square meters if the land lies within the jurisdiction of Municipal Council or the actual total area, whichever is less, including the land covered by a residential house. In this case, there is no dispute that the land is located within the jurisdiction of Municipal Council. Therefore, the regularisation could have been to the maximum extent of 200 square metres and not beyond.

25. Instead, Government has accepted the resolution of the concerned Comunidade and purported to regularise the encroachments to the extent of 393 square metres. The Comunidade had reasoned that if an area of 193 square metres is left without regularisation, in all probability, such area will be encroached upon by the Petitioner or others without any benefit to the Comunidade.

26. According to us, this can hardly be the reason to recommend regularisation of an area in excess of the maximum prescribed land. In any case, there is no provision either under

Article 372-A of the Code or the said Rules, in terms of which the Government can approve regularisation of an area in excess of the total maximum area of 200 square metres where the land is within the jurisdiction of Municipal Council.

27. Therefore, insofar as the regularisation of 200 square metres is concerned, the Petitioner has made out a case that the rate to be determined is ₹366/- per square metre, consistent with the rate determined in respect of other encroachers, whose encroachment orders are to be found at pages 82 to 88 of the paperbook. However, in respect of the balance portion of 193 square metres, the Petitioner was not entitled to any regularisation at all, much less, regularisation of payments at the rate of ₹366/- per square metre.

28. Mrs. Agni, however, points out that the encroachments have taken place several years ago. The Comunidade had also resolved in favour of the regularisation in respect of the area of 393 square metres. She points out that even in respect of the other encroachers, the area encroached exceeds 200 square metres. She, therefore, submits that even the portion in excess of 200 square metres may be ordered to be regularised upon payments at the rate of ₹366/- per square metre.

29. According to us, rule 15 of the said Rules, is quite clear

and it provides that only 200 square metres of encroachment can be regularised if such encroachment is within the jurisdiction of Municipal Council. This rule, could not have been breached either by the Comunidade or the Government. Ultimately, it is to be borne in mind that there is public interest in ensuring that the properties of Comunidade are not frittered away by encroachments and easy regularisations of such encroachments. The Comunidades are under the tutelage of the State Government and, therefore, there is a duty and responsibility cast on the State Government to ensure that the Comunidade properties are not frittered away, particularly, by encroachments. The provisions of Article 372-A are in the nature of a one time exception and there is no question of either the Comunidades or the State Government expanding, unduly, the scope of such exception. Advisedly, therefore, the rules provide that the area to be regularised can be to the maximum extent of 200 square metres if the land is within the jurisdiction of Municipal Council.

30. The fact that the regularisation orders at pages 82 to 88 indicate that the Government has approved encroachments in excess of 200 square metres will not entitle the Petitioner to claim the same treatment by invoking Article 14 of the Constitution of India. What this Article contemplates is positive equality and not some kind of equality of illegalities.

31. Therefore, though in the peculiar facts of the present case, i.e., the fact that the encroachment took place several years ago, we will refrain from interfering with the regularisation orders, to the extent the area of the regularisation exceeds 200 square metres, the Petitioner, will have to pay annual lease rent on the basis of the market rate of ₹3600/- per square metre insofar as the additional encroachment portion admeasuring 193 square metres is concerned. This is, in fact, the minimum that the Petitioner will have to pay if, she seeks to sustain regularisation in respect of the additional area of 193 square metres.

32. According to us, the Comunidade concerned as well as the State Government will also have to take steps to recover additional lease rent (foro) from the encroachers whose encroachments have been regularised vide orders at pages 82 to 88 of the paperbook. This means that in respect of the regularisation of the encroachments in excess of 200 square metres, even these encroachers, will have to pay annual lease rent at the market rate. The State Government will no doubt have to comply with principles of natural justice before such action is taken. We further direct the State Government to complete such action in respect of other encroachers within a period of one year from today.

33. For all the aforesaid reasons, we hold that the Petitioner

will have to pay annual lease rent as well as fine as is contemplated by rule 18 of the said Rules in respect of the regularised area upto 200 square metres at the rate of ₹366/- per square metre. The annual lease rent on this basis comes to ₹3660/- and the fine amount comes to ₹36,600/-. To that extent, the order of regularisation dated 21.10.2011 shall stand modified.

34. However, when it comes to the balance area of 193 square metres which is unauthorisedly regularised by order dated 21.10.2011, the Petitioner cannot avoid payment of annual lease rent (foro) at the market rate which shall be ₹3600/- per square metre. On this basis, the Petitioner will have to pay annual lease rent of ₹34,740/-. Since, market rate is taken into consideration, Mrs. Agni submits that no further fine may be imposed upon the Petitioner. Since, the issue of so called regularisation of additional 193 square metres of land is only being tolerated though not approved, it is true that such tolerance cannot be relayed to either the exercise of powers under Article 372-A of the Code or rule 18 of the said Rules. Accordingly, no fine as such is being levied. The annual lease rent in respect of this portion of 193 square metres will, however, be determined at the market rate of ₹3600/- per square metre. Besides, we make it clear that this tolerance in respect of 193 square metres is not to be treated as a precedent by any of the Comunidades or the State Government. The regularisation in terms of Article 372-A will

have to be consistent with the limits set out in rule 15 of the said Rules.

35. Thus, totally, the Petitioner will have to pay annual lease rent of ₹38,400/- and fine of ₹36,600/-. The fine amount, if not already paid, will have to be paid within a period of 12 weeks from today. Similarly, the annual lease rent, w.e.f. 21.10.2011 will also have to be paid within 12 weeks from today. If this is not done, then the Petitioner will not be entitled to any benefits of regularisation and Comunidade and the State Government will have to take steps to remove the encroachment of the Petitioner and restore the plot of 393 square metres to the Comunidade.

36. The Rule is made partly absolute in the aforesaid term. There shall be no order as to costs.

37. All concerned to act on the basis of the authenticated copy of this order.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.

msr.