

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 155 OF 2014

SHRI DAHYABHAI C. PATEL,
son of Shri Chhaganbhai Patel,
aged 81 years, Indian National,
resident of 23-B, Patel Park Society,
144 Nehru Road, Santacruz (East),
MUMBAI – 400 029.

.... Petitioner

Versus

1. VILLAGE PANCHAYAT PARRA,
through its Sarpanch, having office
at V.P. Parra, Bardez-Goa.
2. THE CHIEF PRINCIPAL ENGINEER,
Government of Goa, Public Works
Department, Altinho, Panaji-Goa.
3. STATE OF GOA, through its Chief
Secretary, having office at
Secretariat, Porvorim-Goa.
4. MR. MICHAEL LOBO,
of major age, Indian National,
resident of House No.174-A,
Bhatti Vaddo, Parra, Bardez,
Goa – 403 510.
5. M/S. NAZARI RESORT,
through its Partner,
Mr. Nazarias Lobo,
of major age, Indian National,
resident of House No.48/A,

Lobo Vaddo, Parra, Bardez,
Goa – 403 510.

6. MR. FRANCIS VIEGAS,
of major age, Indian National,
resident of House No.293/A,
Sonar Vaddo, Verla, Parra,
Bardez – Goa - 403 510.

... Respondents

Mr. Parikshit Sawant, Advocate for the Petitioner.

Mr. Pankaj Vernekar along with Mr. B. Fatarpekar, Advocates for the Respondent No.1.

Mr. P. Arolkar, Additional Government Advocate for Respondents No.2 and 3.

Mr. R. Shirodkar, Advocate for Respondents No.4 to 6.

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

Date:- 21st January, 2020

JUDGMENT (Per M. S. Sonak, J.)

Heard Mr. Parikshit Sawant, Advocate for the Petitioner, Mr. Pankaj Vernekar along with Mr. B. Fatarpekar, Advocates for the Respondent No.1, Mr. P. Arolkar, Addl. Government Advocate for Respondents No.2 and 3 and Mr. R. Shirodkar, Advocate for Respondents No.4 to 6.

2. The petitioner, by instituting this petition under Article 226 of the Constitution of India has applied for the following substantive reliefs:-

“(A) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, commanding the Respondents to forthwith hand over the possession of the Petitioner's property encroached in Survey No.121/28 of Village Parra, Bardez Goa;

(B) This Hon'ble Court be pleased to issue direction to the State to appoint a Committee of independent persons to inquire into the said illegal acts of the Respondent Nos.1 and 2;

(C) This Hon'ble Court also be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, commanding the Respondent No.3 to take appropriate action against all the officers of the Respondent Nos.1 and 2 and all other persons who are involved in the said criminal act of grabbing the Petitioner's land.”

3. The petitioner, in his petition has pleaded that he is the owner of the property bearing Survey No.121/28 at Parra, Goa and respondent no.1 Panchayat along with the respondent no.2 i.e. the Public Works Department have, in an high-handed manner, encroached upon a portion of this property in order to undertake the exercise of road widening, closure of drains and even construction of a traffic island. The petitioner has made reference to the order made by this Court on

20.07.2010 in Writ Petition Nos.178 and 185 of 2003 instituted by the erstwhile owner of the said property, one Mr. Claudio Michael D'Souza in the context of grant of permissions for development in the said property and also the proposed construction of a traffic island, on account of which development permissions were being declined by respondent no.1 to the erstwhile owner. It is the case of the petitioner that the respondents no.1 and 2 have acted in an high-handed manner in encroaching upon a portion of the petitioner's property admeasuring approximately about 232 sq.mtrs., not to mention certain further encroachments over drains and for purposes of road widening and therefore, the reliefs applied for in this petition should be granted to the petitioner, who is the subsequent purchaser. Mr. Sawant, the learned counsel for the petitioner has placed reliance upon the ruling of the Hon'ble Supreme Court in the case of *Vidya Devi v. The State of Himachal Pradesh and others – Civil Appeal Nos.60-61 of 2020 decided on 08.01.2020* to submit that though the right to property may not be a fundamental right, nevertheless, it is both the constitutional right as well as the human right.

4. Mr. Vernekar, Mr. Arolkar and Mr. Shirodkar, the learned counsel for the respondents pointed out that no relief should be granted to the petitioner and this petition should be dismissed without even going into the merits because the petitioner, has suppressed a

relevant and vital document namely the affidavit of the erstwhile owner of the property Mr. Claudio D'Souza dated 25.09.2002, in which, the erstwhile owner, has relinquished all rights to the property upon which now encroachment is unjustifiably claimed. Learned counsel for the parties point out that the petitioner was very much aware of this affidavit and despite such affidavit being the most relevant and vital material, the same was suppressed by the petitioner. The learned counsel therefore submit that this petition should be dismissed on the ground of suppression of relevant and material document, without entering into any determination of the merits or otherwise of the contentions raised by and on behalf of the petitioner.

5. The learned counsel for the respondents also point out that this petition raises several disputed questions of fact and therefore, the petitioner, may be relegated to the institution of a civil suit. They submit that the pleadings in the petition are also quite confusing. They submit that the portion of the property was already acquired by the Government and in this portion some road widening has already taken place. They point out that the petitioner is himself not clear as to the extent or location of the encroachment, if any. For all these reasons they submit that this petition should be dismissed on the ground that the petitioner has alternate and efficacious remedy.

6. Having considered the rival contentions, we are inclined to accept the submissions made by and on behalf of the respondents, both, on the aspect of suppression as well as the availability of alternate remedy.

7. On the aspect of suppression, we note that it is the case of the petitioner that the respondents no.1 and 2 have in an high-handed manner encroached upon a portion of his property for the purpose of road widening and construction of a traffic island. Now the predecessor in title of the petitioner Mr. Claudio D'Souza, had filed an affidavit dated 25.09.2002, which has some bearing upon this plea of alleged high-handed action on the part of respondents no.1 and 2. The contents of the affidavit dated 25.09.2002 read as follows:

“ I, MR. CLAUDIO MICHAEL D'SOUZA, son of Francis Xavier D'souza, major, Indian National, landlord, resident of Parra, Bardez-Goa, do hereby solemnly affirm and state as under:

1. I say that I am owner of the property surveyed under no.121/28, situated at Parra, Bardez – Goa.

2. I say that I desire to developed the said property by constructing thereon a building and compound wall.

3. I say that in the plan drawn by me for development of the said property I have kept an area of 750.00 sq.mts. As shown in the annexed plan for the purpose of road widening.

4. *I say that I have NO OBJECTION for Village Panchayat of Parra to take the said area in their possession.*

5. *I say that I hereby relinquish my right over the said road widening area and in future the Village Panchayat at Parra shall be the owner of the same.*

6. *I say that I have NO OBJECTION for Village Panchayat of Parra to construct road over the said area.*

7. *I say that I have sworn this affidavit after fully understanding the contents in it.*

8. *I say that the contents of this affidavit are true and correct to my knowledge.”*

8. To the aforesaid affidavit dated 25.09.2002 is annexed a site plan, which, refers to the area relinquished or purported to be relinquished by the said Mr. Claudio D'Souza. According to us, the aforesaid affidavit and the plan annexed to it were quite material and relevant documents, in so far as the plea raised in the petition is concerned. Accordingly, the petitioner, was duty bound, at the very outset, to refer to and even annex this affidavit and the plan. Later on, the petitioner, could have pleaded about the effect of such affidavit and plan. However, the petitioner, chose neither to refer to nor annex the affidavit and the plan, which according to us, constitutes suppression of relevant and material particulars.

9. Mr. Sawant however contends that on the basis of the affidavit dated 25.09.2002, there is no question of the deponent relinquishing or conveying any portion of his property. He submits that there is nothing in the affidavit regards construction of an traffic island. He submits that the affidavit at the highest indicates no objection to acquisition of the property. However, in this case, respondents no.1 and 2, without acquiring the property have straight away proceeded to encroach upon the same in an high-handed manner.

10. According to us, the issue as to the scope and effect of the affidavit dated 25.09.2002 is, at the present stage, quite irrelevant. Though, we too agree with Mr. Sawant that arguable issues arise in the context of the affidavit dated 25.09.2002, but what is important in the present context is that the petitioner, was not candid to this Court inasmuch as the petitioner neither referred to the affidavit nor annexed a copy of the same along with his petition. If the petitioner had made the necessary disclosures, then perhaps, the petitioner could have been heard on the effect of the affidavit and the plan annexed to the affidavit. Since this was never done by the petitioner, we feel that the extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India should not be extended to such a petitioner.

11. In ***Bhaskar Laxman Jadhav and others Vs Karamveer Kakasaheb Wagh Education Society and others***¹, the Special Leave Petition was dismissed because of non disclosure that the order of the Charity Commissioner dated 02.05.2003 had already attained finality. The plea that such order was in fact referred to in the pleadings was rejected by holding that such order ought to have been filed and further, the Petitioner should have clearly stated the same as attained finality. The Hon'ble Apex Court observed that mere reference to the order dated 02.05.2003, en passant does not serve the requirement of disclosure. It is not for the Court to look into every word of the pleadings, documents and annexures to fish out the fact. It is for the litigant to come up-front and clean with all material facts and then, on the basis of the submissions made by the learned counsel, leave it to the Court to determine whether or not a particular fact is relevant for arriving at a decision.

12. Similarly, in ***Prestige Lights Limited Vs State Bank of India***², the Hon'ble Apex Court upheld the decision of the High Court to non suit the Petitioner for failure to candidly state all the facts to the Court. The Hon'ble Apex Court observed that it was clear that though, the appellant- Company had approached the High Court under Article 226 of the Constitution, it had not candidly stated all the facts to the

1 (2013) 11 SCC 531

2 (2007) 8 SCC 449

Court. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of Law is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is any material suppression on the part of the applicant or twisted facts have been placed before the Court, the Writ Court may refuse to entertain the petition and dismiss it without entering into merits of the matter.

13. The Hon'ble Apex Court, in order to explain the object of the above principle then referred to the observations of *Scrutton, L.J.*, in ***R. Vs Kensington Income Tax Commissioner***³, in the following words :-

“(I)t has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts-facts, not law. He must not misstate the law if he can help it - the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside, any action which it has taken on the faith of the imperfect statement”.

(emphasis supplied)

³ (1917) 1 KB 486

14. The Hon'ble Apex Court has then proceeded to hold that it is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible.

15. In the present case, the affidavit dated 25.09.2002 made by the predecessor in title of the Petitioner, to which the Petitioner, was clearly privy, was relevant and material document. If the Petitioner desires the Court to adjudicate upon the effect of such document, then, it was the duty of the Petitioner to have placed such document on record and thereafter raise the issue of its scope and effect. However, since, such document was neither referred to nor placed by the Petitioner alongwith his petition, we are satisfied that such Petitioner, should not be permitted to invoke our extraordinary, equitable and

discretionary jurisdiction under Article 226 of the Constitution of India. This, according to us, would be consistent with the principles laid down by the Hon'ble Apex Court in *Bhaskar Laxman Jadhav* (supra) and *Prestige Lights Limited* (supra).

16. The petitioner, in this case, has not taken up the plea that he was unaware of the affidavit dated 25.09.2002. Obviously, the petitioner, could not have taken up such a plea because the affidavit, which has been placed on record along with the affidavit filed on behalf of respondent no.1 refers to the name of the petitioner as the purchaser of the stamp paper upon which the said affidavit has been made. Besides, it is the petitioner who has identified the erstwhile owner Claudio D'Souza, on the said affidavit.

17. Besides, we also agree with the learned counsel for the respondents that several disputed questions of fact are involved in the present petition. The resolution of such disputed questions of fact will not be possible in exercise of our summary jurisdiction. The learned counsel for respondent no.1 is right that such issues are normally required to be adjudicated by filing a civil suit. There are, indeed, disputed questions of fact, which, we will not be able to adjudicate in exercise of our summary jurisdiction under Article 226 of the Constitution of India.

18. For both the aforesaid reasons, we dismiss this petition. However, leaving open all objections which the respondents might have, we grant liberty to the petitioner to institute a civil suit on the same or even the subsequent cause of action before the competent Civil Court. If at all, such a civil suit is instituted by the petitioner within a period of three months from today, then, we only note that this petition was instituted on 05.12.2013 and the same, remained pending till date before this Court. We again clarify that all contentions of all parties, in relation to the civil suit, if at all the same is filed, are specifically kept open to be decided by the competent Civil Court. The Civil Court, to decide the civil suit on its own merits and in accordance with law, uninfluenced by any observations in this Judgment and Order.

19. With liberty as aforesaid, this petition is dismissed. There shall be no order as to costs.

SMT. M.S. JAWALKAR, J.

M. S. SONAK, J.