

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO.53 OF 2020**

1. Mr. Vijayanand Kankonkar,
s/o late Popatlal G. Kankonkar,
38 years of age,
And his brother

2. Mr. Alok Kankonkar,
s/o late Popatlal G. Kankonkar,
33 years of age,

Both residing at C-3, 2nd Floor,
Seagull Apartments,
Near Panjim Market,
Panaji, Goa.

... Petitioners

Versus

1. State of Goa,
Through Chief Secretary,
Secretariat,
Alto Porvorim, Bardez, Goa.

2. The Deputy Collector & SDM,
Panaji, Goa,
Having office near Ferry Wharf,
Panaji, Goa,
Presently presided over
By Mr. Vivek H.P.

3. Rama Krishna Kankonkar
Son of late Krishna Ganesh Kankonkar
54 years old, Businessman,
Residing at House No.11,
Chimbel Gawant,

Ward No. 11, Chimbél, Ilhas, Goa.

4. Shashikala Krishna Kankonkar
Alias Xexicala Crisna Canconcar
w/o late Saba Nilu Kerkar,
age 63 years,
D2, Kadamba Apartments,
Dr. A. B. Road,
Panaji, Goa.

... Respondents

AND

Mr. Demu Shiroadkar
Son of late Deu Shiroadkar
72 years of age, Farmer,
Residing at House No.47,
Gawanth, Chimbél, Tiswadi-Goa
for himself as Villager of ward 'Gawanth'
and representing a Group of Villagers of
ward 'Gawanth' in the Village Chimbél
(Morombi-O-Grande), who are interested
in asserting a claim to access to
Suit Property for the purpose of
immersion of Ganesh and during
other religious activities.

... Intervenor

Mr. S. D. Lotlikar, Senior Advocate with Mr. Myron Menezes D'Souza,
Advocate for the Petitioners.

Mr. Pravin Faldessai, Additional Public Prosecutor for Respondent Nos.
1 and 2.

Mr. Sanman Keny, Advocate for Respondent Nos. 3 and 4.

Mr. S. Arabekar, Advocate for Respondent No.5-Intervenor.

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

Date:- 12th July 2021

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

Heard Mr. S. D. Lotlikar, learned Senior Advocate along with Mr. Myron Menezes D'Souza for the Petitioners, Mr. P. Faldessai, learned Additional Public Prosecutor for Respondent Nos.1 and 2, Mr. Sanman Keny, learned counsel for Respondent Nos. 3 and 4 and Mr. S. Arabekar, learned counsel for Respondent No.5.

2 Rule. The rule is made returnable forthwith at the request and with the consent of the learned counsel for the parties.

3 This petition was initially instituted to question the proceedings commenced by notice No. SDM/TIS/MISC/Chimbel/2020/648 dated 24.02.2020 issued by the Deputy Collector and SDM, Panaji Goa (Respondent No.2). Thereafter, the petition was amended to seek quashing and setting aside of the judgment and order dated 27.02.2020 made by Respondent No.2 in the said proceedings.

4. The Petitioners claim to be owners of the property bearing Survey No.192/1, Chimbel, Tiswadi Goa (the said property). The Petitioners claim that there is a private water body belonging to the Petitioners situated in the said property, to which, none of the Respondents or for that matter the villagers of Chimbel have any right. The Petitioners claim that despite this, Respondent No.2 for the last three years, has been initiating proceedings to facilitate the villagers like Respondent No.5 to use the said private water body for immersion of

idols of Ganesh and Saraswati.

5. Mr. Lotlikar, learned Senior Advocate appearing for the Petitioners submits that the proceedings initiated by the Respondent No.2 are without any authority of law particularly because the Petitioners have already instituted Regular Civil Suit No. 18/2020 in the Court of the Civil Judge Junior Division, Panaji and this Civil Court is seisin of the matter. Mr. Lotlikar submits that on one occasion having regard to the fury of the mob, the Petitioners were constrained to consent to the immersion before the Respondent No.2 because the Respondent No.2 made a specific order that thereafter, the parties, will have to sort out their disputes before the Civil Court. Mr. Lotlikar submits that on the next two occasions though there was no consent from the Petitioners, Respondent No.2 initiated proceedings only to permit the villagers to immerse idols in the private water body belonging to the Petitioners.

6. Mr. Lotlikar submits that in the affidavit now filed by Respondent No.2, he has admitted that such proceedings were not under any provisions of law but the orders were made on account of consensus arrived at between the parties. Mr. Lotlikar submits that there was no consensus arrived at and in any case, even the consent of the parties cannot confer jurisdiction upon Respondent No.2 in such matters. Mr. Lotlikar, therefore, submits that the impugned order dated 27.02.2020 may be set aside and the parties may be relegated to the

Civil Court for sorting out their civil disputes in accord with the law.

7. Mr. Faldessai, learned Additional Public Prosecutor submits that there were no malafides involved in the action of Respondent No.2. He submits that Respondent No.2 had to intervene as otherwise, the law and order situation was likely to develop. He submits that the orders were made based on the consensus which was arrived at before Respondent No.2. He, therefore, submits that this petition may be dismissed but the disputes between the Petitioners and the villagers should be sorted out before the Civil Court in the future.

8. Mr. Arabekar submits that the orders were made based on the consensus. He submits that even now the Civil Court has made orders favorable to the villagers. He submits that on merits the villagers have every right to undertake immersion in the water body which is not a private water body of the Petitioners.

9. Mr. Keny submits that Respondent Nos. 3 and 4 also have a right to the said property. He submits that Respondent Nos. 3 and 4 have no objection if the villagers undertake immersion in the water body. He submits that Respondent No.2 assumed jurisdiction and made orders based on the consensus arrived at between the parties. He submits that any interference with the impugned order ought not to affect the proceedings before the Civil Court. He, therefore, submits that this petition may be dismissed.

10. The rival contentions now fall for our determination.

11. In this case, on 28.02.2020, we made the following order:-

“We post this matter for further consideration on 09.03.2020.

2. The respondent no.2 to explain the nature of jurisdiction exercised by him in making the impugned order dated 27.02.2020.

3. By our order made yesterday, we had declined any ad interim relief in this matter. However, we are till date, not clear as to the nature of jurisdiction which is sought to be exercised by the Deputy Collector and SDM in this matter. Therefore, the fact that we have declined interim relief must not be construed as some sort of a approval of the view taken by the Deputy Collector and SDM in the impugned order.

4. The reason why we have declined interim relief is because on one previous occasion, the petitioners had themselves consented to the festivities being performed in the water body in the property claimed by the petitioners and on the second occasion, a similar order was challenged but the petition was withdrawn. Thirdly, we find that the impugned order permits the villagers to only access the pond/water body during the zatra which is scheduled today and tomorrow. Besides, there are directions to the villagers to conduct the rituals in a peaceful manner without causing damage to crops and property, not to burn the fire crackers inside the said landed property and not to litter the space.

5. In fact, Mr. Lotlikar, without prejudice to the contentions in the petition, states that the petitioners,

on this occasion, will allow the villagers to access the water body. He however requests that police may be posted at the site so as to ensure that the villagers do not cause damage to the crops and property or light fire crackers inside the property.

6. According to us, the request made by Mr. Lotlikar is quite reasonable in the circumstances of the case and therefore, we direct the presence of police personnel to ensure that there is no damage to the crops and property or lighting of fire crackers. Mr. Lotlikar clarifies that this concession which is made today may not be construed against the petitioners on future occasions. This is clarified and this concession which is made is not to be taken into account on future occasions.

7. We understand that the petitioners have already instituted Regular Civil Suit No.18 of 2020 before the Court of the Civil Judge, Junior Division at Panaji. In such Civil Suit, leave is applied for to sue the villagers in the representative capacity. Such leave has already been granted. Mr. Lotlikar states that even an application for injunction has been taken out in the said Suit, in which, notices have been issued to the villagers.

8. According to us, the issues relating to the rights of the villagers to access the water body if any, can be best sorted out in such a Civil Suit. Accordingly, we direct that the application for injunction taken out by the petitioners in the said Civil Suit be disposed of as expeditiously as possible and in any case within a period of two months from today.

9. The learned Advocate General states that the petitioners have no rights to the property in question. Same is the contention of the learned counsel for the intervenors. All these matters are really not required to be gone into in this petition, particularly, since, a Civil Suit has already

been instituted.

10. Stand over to 09.03.2020.”

12. Thereafter, on 09.03.2020, we had directed Respondent No.2 to file an affidavit in this matter explaining the nature of jurisdiction exercised by him while making the impugned order.

13. Mr. Vivek H. P. (IAS), the Deputy Collector and SDM, Tiswadi Taluka has filed an affidavit in this matter. In the affidavit, the officer has denied the allegations of threats and coercion and has submitted that his interference was only to persuade the parties to arrive at a consensus so that the disputes which tended to breach peace are settled amicably. In his affidavit, he has admitted that the proceedings initiated by him were neither under Section 133 of the Criminal Procedure Code nor Section 145 of the Criminal Procedure Code. The officer has stated that the orders were issued only when both the parties arrived at some consensus and requested written direction to avoid confusion. The officer has maintained that there was no scope for being aggrieved by the said orders since the orders were based on a mutually arrived agreement between the parties.

14. The aforesaid explanation is to be found in paragraphs 19 and 20 of the affidavit of Respondent No.2 filed on 01.07.2021, which read as follows:-

“19. It is respectfully submitted that this Respondent never had the intention to threaten anybody by any force

to come to an agreement but only to persuade concerned parties to arrive at consensus and ensure the dispute be settled amicably. It is further submitted that on all the occasions sighted above, there were neither instances reported under section 133 Cr.P.C. nor anybody claimed possession under Section 145 hence this Respondent could not pass the order expressly under these relevant provisions by following due procedure. It is submitted that even though, this Respondent felt that there was no need to pass orders in all instances narrated above, it is pertinent to mention that orders have been issued only when both the parties arrived at a conclusion and requested for a written direction to both the parties to avoid confusion if any. Thus it is submitted that these orders were issued only to ensure peace is maintained in the locality and not to harm anybody's interest whatsoever.

20. It is further submitted that the orders were issued only when consensus arrived and the directions was for both the parties. There was no scope for being aggrieved by the said order since it was a mutually arrived agreement by the parties."

15. The aforesaid means that there is no clarity as to the statutory provisions under which Respondent No.2 assumed jurisdiction and made the impugned order. Respondent No.2 claims that the impugned orders were made only based on consensus arrived at between the parties. Now there is a serious dispute between the parties on this aspect of so-called consensus. The record at least *prima facie* indicates that when Respondent No.2 made his first order dated 30.08.2019, the Petitioners, without prejudice to their rights and contentions on merits, consented to its making. Mr. Lotlikar submitted

that this concession was only to avoid precipitating the matter and was based on the assurance of Respondent No.2 that at least thereafter the villagers would approach the Civil Court to claim their rights over the use of the water body in their property.

16. Now if the first order dated 30.08.2019 is perused then, there is good reason to accept the statement made by Mr. Lotlikar. This is because the order dated 30.08.2019, after issuing specific directions as to the course of conduct to be adopted by the parties on 15.09.2019, made the following specific observations “ *After the said date, the villagers have advised to approach the appropriate forum to claim the rights over the use of the said water body*”.

17. Despite the aforesaid, it appears that the villagers did not institute any proceedings before the Civil Court in support of their rights to immerse idols in the water body nor did the Petitioners institute any proceedings before the Civil Court to injunct the villagers from doing so. Instead on 07.10.2019, Respondent No.2 once again made an order directing the Petitioners to keep the access to the said water body in the said property open to enable the public to immerse Devi Saraswati idol on 08.10.2019. Even the Police Inspector of Old Goa Police Station was directed to provide security. The Mamlatdar of Tiswadi was also directed to ensure the immersion takes place without any damage to the said property. Now, this second order dated 07.10.2019 does not refer to any consensus or consent.

18. The Petitioners, then filed Regular Civil Suit No.18/2020/C before the Civil Court some time in February 2020. Despite the pendency of this suit, Respondent No.2 issued notice dated 24.02.2020 again to facilitate the members of the public to immerse idols in the water body of the said property. It is in pursuance of such a notice, the Respondent No.2 made the impugned judgment and order dated 27.02.2020, again directing the Petitioners to open the gates of the field in survey No.192/1 in which the water body is situated during the Jatra of Devi Sateri scheduled on 28th and 29th February 2020 and to restore the water body to its original condition. The villagers were also advised to conduct rituals peacefully without causing damage to the crops and property and not to burn the firecrackers inside the landed property and not to litter the space.

19. Again, this order dated 27.02.2020 also does not indicate that the same was based on any consensus arrived at between the parties. The theory of consensus finds no force in the material on record particularly when it comes to the order dated 07.10.2019 and the impugned order dated 27.02.2020. In any case, Respondent No.2, has to exercise powers as may have been conferred upon him by any provisions of law. Based upon the alleged consensus, it is not open for a Deputy Collector or SDM to interfere with a purely civil dispute between the parties, more so when the parties are already before the Civil Court agitating their civil right. No amount of consent can confer jurisdiction upon an authority where such jurisdiction is found to be

lacking. Respondent No.2 in his affidavit has clearly stated that he was not exercising any powers under Section 133 or Section 145 of the Criminal Procedure Code. Respondent No.2 has also not referred to any other provisions of law to which the proceedings initiated by him relate to. Therefore, even if we do not go into the disputed contentions between the private parties or go into the disputed contentions of consensus still, we are satisfied that the Respondent No.2, in the facts of the present case, could not have assumed jurisdiction to resolve a purely private civil dispute between the parties.

20. On the aforesaid short ground, the impugned judgment and order dated 27.02.2020 required to be set aside and is hereby set aside.

21. However, setting aside the impugned order dated 27.02.2020 should not impact, even in the slightest, any decision on the merits of the dispute which is presently being agitated before the Civil Court either at the interim stage or final stage. The impugned order of the Respondent No.2 is now set aside, not by adjudicating the rival contentions of the parties on merits but only because Respondent No.2 was unable to point out the nature of jurisdiction that was exercised by him. Therefore, it is made clear that merely because the impugned judgment and order is now being set aside that is not a factor which the Civil Court should consider one way or the other while deciding the civil dispute between the parties. The civil dispute will

have to be decided on their own merits and in accord with law based on the evidence which the parties place before the Court.

22. The parties naturally will have to abide by the orders which the Civil Court shall make in the matter. If any of the parties have any disputes on the issue of either ownership of the said property or rights to the water body therein or any such dispute, then, it is the Civil Court that is the appropriate forum for the resolution of such dispute. Now that the parties are already before the Civil Court, it is only appropriate that the Civil Court adjudicates such dispute on their own merits and in accord with the law.

23. The Rule in this petition is made absolute to the aforesaid extent. There shall be no order as to costs.

SMT. M.S. JAWALKAR, J.

M.S. SONAK, J.

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