

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

**PIL WRIT PETITION NO.15/2020
WITH
MISC. CIVIL APPLICATION NO.86/2021**

1. Mr. Remedios D'Cunha ... PETITIONERS

72 years, retired
S/o late John Baptist D'Cunha
R/o H.No. 1023,
Alleam Waddo, Chinchinim, Salcete Goa.
Phone No. 9765345069,
Fax No. Nil
PAN Number: APEPD 5443D
National Unique Identity Number:
358095637573
Email: Nil
Income: Rs. 2,00,000/- p.a.

2. Mr. Alexandre M. S. C. Pereira
Son of Jose Patrocinho Pereira
64 years of age, retired
Resident of H. No. 116, Cotta,
Cavorim, Salcete, Goa - 403714
Phone No. 7350953401
Fax No. Nil
PAN Number: Nil
National Unique Identity Number:
209804849172
Email: Nil
Income: Rs. 1,50,000/- p.a.

3. Mrs. Fatima Rebello
43 years of age, farmer
Wife of Natallo Fernandes
R/o H. No. 83/1, Caregal,
Xeldem, Quepem, Goa - 403705
Annual Income: Rs. 88,000

National Unique Identity Number:

706472844426

Email: nil

Telephone: nil

4. Mr. Edwin Rebello

39 years of age, farmer

Son of Avelino Herculante Rebello

R/o H. No. 480, Naranpoi, Sarzora,

Chinchinim, Salcete, Goa - 40375

Annual Income: Rs. 1,25,000

National Unique Identity Number:

911807046155

Email: nil

Telephone: 9822433341

5. Mr. Elvis Conceicao Manuel Pereira

Son of Resureicao S. L. F. Pereira

54 Years of age, Service H. No. 46,

Mazilwaddo, Sirlim Chapel,

Sirlim, Salcete, Goa - 403725

Phone No. 9922280723

Fax No. Nil

PAN Number: AVHPP2165R

National Unique Identity Number:

334117910698

Email: Nil

Income: Rs. 1,50,000/- p.a.

6. Mr. Francis Furtado

Son of Gaspar Furtado

52 Years of age, Service H. No. 345,

Near Ashoka Shop, George Vaddo,

Carmona, Salcete, Goa - 403717

Phone No. 9762327220

Fax No. Nil

PAN Number: ABPPF3976N

National Unique Identity Number:

925306456502

Email: Nil

Income: Rs. 1,50,000/- p.a.

Versus

1. The State of Goa,
Through its Chief Secretary,
The Secretariat, Alto-Porvorim
Bardez - Goa - 403521.
2. The Executive Engineer,
Division VI, Public Works Department,
Fatorda, Goa - 403602.
3. The Chief Engineer,
Water Resources Department,
Sinchai Bhavan, Alto-Porvorim,
Bardez, Goa - 403521
4. The Deputy Collector & Flying-Squad
Incharge (South Goa),
Collectorate Building,
Margao, Goa - 403601
5. The Town Planner,
Town & Country Planning Department,
Salcete Taluka Office,
Margao, Goa - 403601
6. The Chief Town Planner (Planning)
Town & Country Planning Department
Panaji, Goa - 403001.
7. The Member Secretary,
Goa State Biodiversity Board,
Opposite Saligao Seminary,
Saligao, Bardez, Goa - 403511

8. The Secretary,
Village Panchayat Chichinim-Deussua
Chinchinim, Salcete, Goa – 403715.

9. M/s. A. R. Constructions,
PWD Contractor, Gogal, Fatorda,
Goa – 403602.

...RESPONDENTS

Mr. Nigel Costa Frias with Ms. Barbara Andrade, Advocates *for the Petitioners*.

Mr. S. Dhargalkar, Additional Government Advocate for Respondent State.

Mr. Vishwadh Sardessai, Advocate *for Respondent No.7*.

Mr. S. Karpe with Mr. Anand Shirodkar, Advocates *for Respondent No.9*.

CORAM: M. S. SONAK &
M. S. JAWALKAR, JJ
Reserved on: 20th September 2021

Pronounced on: 22nd September 2021

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

1. Heard Mr. Nigel Costa Frias for the Petitioners, Mr. S. Dhargalkar, learned Additional Government Advocate for the State, Mr. Vishwadh Sardessai for Respondent No.7 and Mr. S. Karpe for Respondent No.9.

2. The petitioners seek an appropriate writ, order, or direction commanding the respondents to stop the construction activities/construction of the proposed by-pass road at Chinchinim over properties bearing Survey Nos.44/1, 44/2, 44/13 and water bodies bearing Survey Nos.45/1, 45/15,

45/15(Part) i.e. lote no.306 and for restoration of these lands/water bodies to their original condition.

3. Mr. Costa Frias submits that the aforesaid relief is liable to be granted to the petitioners for the following reasons:

(a) That the aforesaid properties where the construction of the road has been commenced or continued constitute a Command Area as defined under Section 2(1) of the Goa Command Area Development Act, 1997. He submits that no construction of a road is permitted in such an area unless necessary permissions from the Command Area Development Board are obtained. He submits that since no such permissions have been applied for or obtained, the construction is required to be halted;

(b) The aforesaid properties are low-lying agricultural areas. The construction of the road involves filling of these areas. There is no permission under Section 17A of the Goa Town and Country Planning Act (TCP Act) obtained for such filling. Therefore, the construction of such road is required to be halted and the lands restored to their original condition.

(c) The construction of the roads is in breach of NOC dated 21.03.2005 issued by the Executive Engineer under the provisions of the Goa Irrigation Act, 1973. He submits that the NOC was only for the use of inspection path as a public road. There was no NOC for construction of a 10 mtr. wide road.

(d) The area surveyed under No.45/15 is a “*water body*”. This position has been confirmed by the Goa Biodiversity Board comprising experts. This position is clear from the acquisition map or for that matter the survey records. He submits that in terms of the Circular dated 17.05.2010 issued by the Chief Town Planner, no permission can be granted for construction over a water body unless the proposal is approved by a committee constituted vide Order No.36/1/TCP/52/2010/1633 dated 17.05.2010 along with details of the proposal, site inspection report and part Regional Plan. Further, such approval has to be placed before the Government before any construction works can actually proceed.

4. Mr. Dhargalkar, learned Additional Government Advocate disputes the aforesaid contentions. He submits that there is no material placed on record to indicate that this is a

Command Development Area. He submits that a petition to challenge the acquisition on this very ground has already been dismissed. He submits that no notification as contemplated by Section 17 or 18 has been produced by the petitioners. He submits that there is a dispute whether the areas are low-lying agricultural areas and in any case, the Circular dated 25.08.2011, makes it clear that the provisions of Section 17A of the TCP Act will not apply to works of widening or construction of road undertaken by the Public Works Department (PWD) or other Government agencies. He submits that this Circular has not been challenged in the present petition. He submits that necessary NOC has already been issued by the Executive Engineer, Water Resources Department (WRD) and there is no breach of the provisions of the Irrigation Act, 1973.

5. Mr. Dhargalkar submits that based on the pleadings as well as the material on record it cannot be said that the area under Survey No.45/15 is a water body. He submits that the Biodiversity Board is not the appropriate authority to determine whether or not the area is a water body. He submits that the acquisition plans or other plans relied upon by the petitioners are misinterpreted by the petitioners. He submits that 125 sq.mtrs. from these areas was acquired sometime in the year 1990 for construction of a canal. He submits that the balance 75 sq.mtrs.

has now been acquired for the purpose of road. He submits that the challenge based on the area being a water body is therefore quite misconceived and may be rejected.

6. Mr. Karpe, learned counsel for respondent no.9– Contractor supports the contention of Mr. Dhargalkar, learned Additional Government Advocate.

7. Mr. Vishwadh Sardessai, learned counsel for the Goa Biodiversity Board stands by the affidavit filed by Dr. Pradip Sarmokadam, Member Secretary of the Goa State Biodiversity Board who has stated on oath that the area surveyed under No.45/15 is indeed a water body. Mr. Sardessai refers to the report annexed to the affidavit and points out that even the Scientific Officer of the Goa State Wetland Authority (GSWA) and the officials of PWD were a part of the inspection team that prepared this report. He points out that even the list of the flora observations at the inspection site has been annexed to the inspection report.

8. The rival contentions now fall for our determination.

9. Insofar as the construction of the road on the properties which are the subject matter of this petition, except the

property surveyed under No.45/15, Chinchinim, are concerned, there is no case made out to halt the construction of the road. This construction, incidentally, has already been completed and the material placed on record by the petitioners is not at all sufficient to make good the grounds now raised in support of the petition. The material placed on record is only sufficient to make some orders in respect of the area surveyed under No.45/15, which, can be accepted as a water body.

10. As was correctly pointed out by Mr. Dhargalkar, the acquisition of this property was challenged *inter alia* on the ground that the same is affected by the provisions of the Goa Command Area Development Act, 1997 and the rules made thereunder. This challenge was however turned down because the petitioners were unable to place sufficient material on record in support of their case under the provisions of the said Act or the said rules. Even now, no notification as contemplated by Section 17 or 18 of the said Act has been produced on record. Based, therefore, on some replies by some officials or other such material, it would be unsafe to order the removal of the construction of the road that is already completed over the properties in question except, the area surveyed under No.45/15, where, the construction of the road was stayed and therefore, has not yet been put up.

11. On the aspect of permission under Section 17A of the TCP Act, reference is required to be made to the Circular dated 25.08.2011 issued by the Chief Town Planner. Clause 2 of this Circular reads as follows:

“2. Canal networks under the approved irrigation schemes by the Government, widening or construction of road involving cutting or filling which are pure engineering works by the PWD or any other Government agencies etc. shall not warrant additional permissions from the Chief Town Planner.”

12. The aforesaid Circular though signed by the Chief Town Planner is purportedly issued by the Government on the recommendation of the Board. This Circular is not challenged in the present petition and therefore, we are not required to go into the larger issue as to whether this Circular is valid or not.

13. However, this is admittedly, a case of construction of a road undertaken by the PWD. Therefore, we do not think that we should order the removal of the construction already made if, based on the Circular dated 25.08.2011, the PWD and the other authorities were of the opinion that no specific permission under Section 17A of the TCP Act was required to be obtained. Therefore, in the peculiar facts of the present case, we do not think that this ground has been made good by the petitioners.

14. Again, the contention based on the NOC dated 21.03.2005 issued by the Executive Engineer, WRD, or breach of the provisions of the Goa Irrigation Act, 1973 has not been made good by the petitioners. The NOC refers to the use of the inspection path to the watercourse 14P at Chinchinim as a public road subject to certain conditions. There is no allegation about the breach of those conditions or in any case, the allegations are quite vague and not made good. Therefore, in the peculiar facts of the present case, we do not think that any case is made out to order the removal of the construction already made based on the ground as urged.

15. Finally, we now come to the proposed construction of the road over the area surveyed under No.45/15 – the water body. There was an interim order made by us in this petition restraining the construction over this area and therefore, no construction has been made over this area.

16. Since there was a dispute raised as to whether this area is a water body or not, an order was made by us requiring the Biodiversity Board – members to inspect the site and to file a report.

17. Accordingly, a joint site inspection was held on 02.09.2020, which was attended by the following persons/officials:

(1) Mrs. Reshma Kerkar, Scientific & Administrative Officer, Goa State Biodiversity Board (GSBB) Saligao. Bardez, Goa.

(2) Dr. Shaiesh Morajkar, Scientific Officer, Goa State Wetland Authority (GSA), O/o GSBB, Saligao, Bardez, Goa.

(3) Mr. Niles Kanolkar, T.A., Public Works Department (PWD), Fatorda, Margao, Goa.

(4) Mr. Rajesh Harmalkar, Field Surveyor, Directorate of Settlement and Land Records (DSL), Panaji, Goa.

(5) Ms. Inacina Rebello, Sarpanch, Chinchinim - Deussua Village Panchayat, Salcete. Goa.

(6) Ms. Reina Dias, Panch member of the ward bearing survey No. 45/15 in the Chinchinim - Deussua Village Panchayat, Salcete, Goa.

(7) Mrs. Mabel Menezes, Chairperson, Chinchinim-Deussua Biodiversity Management Committee (BMC), Salcete, Goa.

(8) Mr. Remedios D'Cunha, Petitioner, Resident of Village Chinchinim, Salcete, Goa.

(9) Mr. Terence D'Cunha, Resident of Village Chinchinim, Salcete, Goa.

(10) Mr. Malcom Pereira, Resident of Village Chinchinim, Salcete, Goa.

18. The site inspection report makes the following observations to be found in the report itself:

*"1) There exist a water body known as "Valyacho Hondaro" on Survey No. 45/15 (area of 200 sq.mts.), which is partly landfilled. The visible flora (prominent presence of Nymphaea and Colocasia species) within the lake, exhibited characteristics of a typical freshwater ecosystem. The list of the flora observed at the inspection site is attached as **Annexure III**.*

2) Due to the landfilling at Survey No. 45/15 and the influence of heavy rains, the adjacent land bearing Survey No. 45/10 and 45/11 has also been filled with water.

3) There exists a small outlet/drain under the landfilled for road construction, which allows the water from the water body to flow into the adjoining fields."

19. Based on the aforesaid observations, the site inspection report draws the following conclusions and makes the following recommendations:

"Conclusion:

In accordance with the LD-VC-OCW NO. 106 of 2020 in PIL Writ Petition no. 15 of 2020 order of the Hon'ble

High Court of Bombay at Goa dated: 02.09.2020, GSBB verified in the presence of GSWA, BMC, and DSLR officials, that there exists a water body at survey No. 45/15 which is partly landfilled by WRD for Building a Canal.

Recommendation: *It is recommended that the existing landfilling at the site at survey No. 45/15 may be restored and the road along with the canal may be constructed on a stilt for the water body at survey No. 45/15.*

*Note: The Photo proofs of the Site inspection are placed herewith as **Annexure IV.***

20. Dr. Pradip Sarmokadam, Member Secretary of the Goa Biodiversity Board has filed an affidavit to place on record the site inspection report as aforesaid. In his affidavit, he has stated that he is filing his reply to bring the correct and factual position on record insofar as the property surveyed under No.45/15 of Chinchinim Village is concerned. Paragraphs 6 and 7 of the affidavit filed by the Member Secretary of the Goa Biodiversity Board read as follows:

“6. I state that as per the Report prepared by the Scientific Officer (GSWA), Scientific and Administrative Officer (GSBB), and Field Surveyor (DSLRL) it is revealed that there exists a water body on the land bearing survey no.45/15. I state that the Field Surveyor, DSLR with the help of the Survey map confirmed that there existed a water body covering the survey no. 45/15. I further state that it is observed that out of the 200 mts. of the water body, about

115 sq. mts. has been filled with mud apparently for the purpose of construction of canal and 75 sq.mts. has been acquired for construction of road for which landfilling was being undertaken by the PWD for By-pass road construction at Chinchinim Village.

Hereto Annexed and marked as “ANNEXURE A” is a Report of the Joint site inspection of property bearing survey no. 45/15 along with the supporting documents.

7. I state that the said water body is known as ‘Valyacho Hondaro’ in survey no. 45/15. I further state that based on the report annexed herewith it is recommended that the water body may be restored and the road along with the canal may be constructed on a stilt so that the water body is maintained.”

21. Based on the site inspection report as also the affidavit filed on behalf of the Goa Biodiversity Board, it does appear that the area surveyed under No.45/15 is indeed a water body.

22. Besides, even the plan for acquisition of the property indicates that the area surveyed under No.45/15 was a water body or a pond. The petitioners have placed on record a report from a private surveyor. This surveyor has referred to the old Comunidade records in which again, this area is shown as a pond or water body.

23. Based on the aforesaid material on record, we are satisfied that the area surveyed under No.45/15 is indeed a water body. The contentions of Mr. Dhargalkar to the contrary cannot be accepted. The site inspection report itself reveals that even the PWD engineers were a part of the team that inspected the site. The PWD engineers have not even bothered to place any note of dissent. Besides, the inspection team included *inter alia* Dr. Shailesh Morajkar, Scientific Officer of GSWA.

24. Rule 2(g) of the Wetland Conservation and Management Rules, 2017 defines "wetland" in the following terms:

“(g) “wetland” means an area of marsh, fen, peatland or water; whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six meters, but does not include river channels, paddy fields, human-made water bodies/tanks specifically constructed for drinking water purposes and structures specifically constructed for aquaculture, salt production, recreation and irrigation purposes;”

25. Having regard to the material on record, it is not possible to accept the contentions of Mr. Dhargalkar that the area surveyed under No.45/15 is not at all a water body or that it is

only some man-made depression in the field, in which water gets stored during the rainy season.

26. The Chief Town Planner has issued a Circular dated 17.05.2010 which is relevant and therefore, the same is transcribed below for the convenience of reference:

“ *CIRCULAR*

Date: 17/5/2010

The Town & Country Planning Board in its 136th meeting held on 16/4/2010 has decided that no construction/ development shall be allowed in the following areas:

- a) Notified forest.*
- b) Private forest identified by Karaporkar Committee and Sawant Committee.*
- c) Sloppy land having gradient more than 25%.*
- d) Mangroves areas.*
- e) Water bodies.*
- f) Cultivated paddy fields (low lying and presently under cultivation)*

Accordingly, it is hereby directed that no NOC for construction/sub-division of land as well as recommendation for conversion of use of land shall be issued in above-referred areas from a) to f). Further, the proposals falling within above category but the land under reference is earmarked as developable zone i.e. Settlement zone and Industrial zone to be submitted to the Chief Town Planner in order to place before the Committee constituted vide Order No. 36/1/TCP/S2/2010/1633 dated 17/5/2010 along with details of the proposal, site inspection report and part Regional Plan showing interpretation of the land under reference, etc. The decision/recommendation of the Committee in such cases to be placed before the Town & County Planning Board and then refer to Government for consideration."

27. In this case, admittedly, there was no reference made to the Committee referred to in the Circular and thereafter any approval obtained from the Government. Mr. Dhargalkar submitted that this course of action was not followed because according to the respondents the area surveyed under No.45/15 is not a water body at all. Now that we have found that this area was indeed a water body, there has to be compliance with the Circular dated 17.05.2010 because the respondents proposed to construct a road over a water body. Since this has not been done, it would not be appropriate to proceed with the construction of the road over the water body surveyed under No.45/15.

28. The Hon'ble Supreme Court in *Jagpal Singh & Ors. v. State of Punjab & Ors. - (2011) 11 SCC 396* made the following observations in the context of conservation and protection of water bodies:

“18. The present is a case of land recorded as a village pond. This Court in Hinch Lal Tiwari vs. Kamala Devi, AIR 2001 SC 3215 (followed by the Madras High Court in L. Krishnan vs. State of Tamil Nadu, 2005(4) CTC 1 Madras) held that land recorded as a pond must not be allowed to be allotted to anybody for construction of a house or any allied purpose. The Court ordered the respondents to vacate the land they had illegally occupied, after taking away the material of the house. We pass a similar order in this case.

19. In this connection we wish to say that our ancestors were not fools. They knew that in certain years there may be droughts or water shortages for some other reason, and water was also required for cattle to drink and bathe in etc. Hence they built a pond attached to every village, a tank attached to every temple, etc. These were their traditional rain water harvesting methods, which served them for thousands of years.

20. Over the last few decades, however, most of these ponds in our country have been filled with earth and built upon by greedy people, thus destroying their original character. This has contributed to the water shortages in the country. Also, many ponds are auctioned off at throw away prices to businessmen for fisheries in collusion with authorities/Gram Panchayat officials, and even this money

collected from these so called auctions are not used for the common benefit of the villagers but misappropriated by certain individuals. The time has come when these malpractices must stop.”

29. For all the aforesaid reasons, we restrain the respondents from undertaking any construction over the water body surveyed under No.45/15 until the respondents comply with what is set out in the Circular dated 17.05.2010 issued by the Chief Town Planner.

30. The Rule in this petition is made partly absolute to the aforesaid extent only.

31. There shall be no order as to costs.

32. The Miscellaneous Civil Application No.86 of 2021 does not survive and is accordingly disposed of.

M. S. JAWALKAR, J.

M. S. SONAK, J.