

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 211 OF 2021

Mr. Shamsunder V. Kamat
59 years of age,
R/o H.No.15,
St. Pedro, Ribandar, Goa.

...Petitioner

Versus

1. State of Goa,
Through the Chief Secretary
having office at Secretariat Complex,
Porvorim, Panaji Goa.

2. The Collector North Goa,
Having office at Collectorate Building,
Panaji Goa.

3 The Principal Chief Engineer,
Public Works Department,
Altinho, Panaji Goa.

4 The Executive Engineer,
Works Division-II,
Junta House, Panaji Goa.

5 The Deputy Collector Tiswadi, North Goa
Collectorate, Panaji Goa.

6 The Four Seasons Perola Co-op.
Housing Maintenance Society Ltd.,
Represented by its Secretary,
Mr. Rishikesh Narayan,
35 years of age,
Resident of Flat No.F-108,
Four Seasons by Perola, 20/1,

Baiguinim, Goa.

7 EPDPL of Vida I
Represented by its Joint Owner
Mr. Prakash Kittur,
Major of age 56,
Resident of C1, La Marvel Colony,
Dona Paula, Panaji Goa 403 002

8 Shri Raghav Jalan
Major of age 29,
Resident of Flat No.F-1, B-33,
Milroc Ribandar Retreat,
Ribandar, Goa.

9 Sunshine Educational Trust,
Represented herein by its trustee
Mr. Deepak Khaitan,
Major of age 54,
Resident of 20/1-B, Baiguinim,
Old Goa, Goa.

...Respondents

Mr. S. S. Kantak, Senior Advocate with Mr. Sahish Mahambrey, Advocate for the Petitioner.
Mr. D. Pangam, Advocate General with Mr. P. Arolkar, Additional Government Advocate for the Respondent nos. 1 to 5.
Mr. A. D. Bhohe, Ms. Kalpa Govenkar, and Ms. Annelise Fernandes, Advocates for the Respondent nos. 6 to 9.

**CORAM: DIPANKAR DATTA, CJ. &
M. S. SONAK, JJ**
DATED: 18th August 2021

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

1. Heard Mr. S. S. Kantak, learned Senior Advocate with Mr. Sahish Mahambrey for the Petitioner, Mr. D. Pangam, learned

Advocate General who appears along with Mr. Prashil Arolkar, learned Additional Government Advocate for Respondent Nos. 1 to 5 and Mr. A. D. Bhobe, learned counsel for Respondent Nos. 6 to 9.

2. On 05.04.2021, the parties were put on notice that this petition will be disposed of finally at the stage of admission. Therefore, Rule. The rule is made returnable forthwith at the request and with the consent of the learned counsel for the parties.

3. The challenge in this petition is to the order dated 13.05.2020 made by the Collector and District Magistrate, North Goa, in her capacity as a Chairperson of the District Disaster Management Authority, North Goa District (DA) in the purported exercise of powers under Section 33 of the Disaster Management Act, 2005 (DMA). The impugned order has directed the Executive Engineer, Works Division-II, PWD, Panaji "*to undertake the work of repair and reconstruction of the said road with immediate effect*".

4. The Petitioner claims to be the owner in possession of property bearing Survey No.21/1 (admeasuring 34600 square meters) and Survey No.21/1-A (admeasuring 4000 square

meters) situated in village Baiguinim Taluka Tiswadi Goa (the said property). The Petitioner has pointed out that the name of the Petitioner is recorded in the survey records concerning the said property.

5. The Petitioner has then pleaded that a portion of the said property was acquired by the State Government vide two separate awards dated 16.02.2008 and 17.08.2009 for construction of Panaji and Old Goa bypass road. The Petitioner has pleaded that in the acquired portion a bypass road has already been constructed and presently the work of construction of over-bridge and its approach road was underway.

6. The Petitioner has further pleaded that in the un-acquired portion of the said property, the Petitioner, has put up a petrol pump and a gas pump. In the said property the Petitioner provided a dedicated road for vehicles that access the petrol pump and gas pump. Some plans have also been appended to the petition to explain the location of the acquired portion, un-acquired portion, petrol pump, gas pump, and the dedicated road. The un-acquired portion of the said property is described as Part A, Part B, and Part C in the plan marked as Exhibit D to the petition. The dedicated road, which is the subject matter of the dispute in this petition is to be found in Part C of the plan. The

impugned order dated 13.05.2020 refers to this road depicted in Part C of the plan at Exhibit D to the petition as the "*said road*".

7. The Petitioner has further pleaded that in May 2020, the PWD authorities began to interfere with un-acquired property depicted in Part C. The Petitioner has pleaded that he was orally informed by the officials at the site that they were directed to carry out repairs/reconstruction to the said road, including by way of asphaltting the same. The Petitioner, therefore, instituted Civil Suit No.15/2020 before the District Court, North Goa on 18.05.2020 seeking a permanent injunction restraining the PWD, the State of Goa from interfering with the said property or the said road, which the Petitioner claims is a private road.

8. On 21.05.2020 the Respondent Nos. 6 to 9 herein sought for impleadment in Civil Suit No.15/2020. This application for impleadment referred to the impugned order made by the Collector. Therefore, the Petitioner, instituted the present petition on 26.05.2020 to impugn the order dated 13.05.2020 *inter alia* on the ground that the same was malafide and in excess of the jurisdiction vested in the Collector under the DMA.

9. Mr. Kantak learned Senior Advocate for the Petitioner submitted that a complaint from some residents from the locality

about alleged blockage of the said road gives no jurisdiction to the Collector to exercise any powers under the DMA. He pointed out that the expression "*disaster*" as defined under Section 2(d) of the DMA will not include a complaint of the nature made by Respondent Nos. 6 to 9 herein. He, therefore, submits that the impugned order is *ex facie* without jurisdiction and *ultra vires*.

10. Mr. Kantak submits that in any case, the powers under Section 33 of DMA are to be exercised by the District Authority and not by its Chairperson i.e. Collector. He submits that this was not at all a case of an emergency where the Chairperson could have exercised powers under Section 26(2) of the DMA. He submits that after the impugned order was made on 13.05.2020, the Respondents have not even bothered to place on record any *ex post facto* ratification by the District Authority and therefore, it is reasonable to presume that there exists no such ratification. For all such reasons, Mr. Kantak submits that the impugned order is illegal, ultra vires, null and void.

11. Mr. Kantak pointed out that even in the order dated 10.11.2011, by which, administrative approval and expenditure sanction was accorded for the improvement of existing roads in Baiguinim, there was a specific condition that the tender shall not be invited until the land is acquired. Mr. Kantak submits that to

date the said property or the said road was not acquired by the Government. He submits that from this condition it is quite clear that the said property and the said road is a private property of the Petitioner and the State through its PWD authorities has no right to interfere with the said property or private road therein.

12. Mr. Kantak submits that the orders made under the DMA have some statutory immunity and Section 71 bars the jurisdiction of the Civil Court to entertain any suit against such orders. He submits that the State Government, being conscious of the fact that it had no right or authority to interfere with the said property unless the same was duly acquired, has malafide invoked the provisions of the DMA to defeat the Petitioner's rights in Civil Suit No.15/2020 already instituted by the Petitioner. Mr. Kantak submits that this is an instance of a malafide and colorable exercise of power and the impugned order ought to be set aside on these grounds as well.

13. Mr. D. Pangam, learned Advocate General defends the impugned order based on the reasoning recorded therein. He submits that the complaints made by Respondent Nos. 6 to 9 indicated that the said road provided access to hundreds of school children and residents of the houses in and around the said property. He submitted that the said road was unauthorisedly

blocked by the Petitioner and removal of such blockage was necessary. He submitted that the said road was damaged by the Petitioner and such damage would result in road accidents thereby threatening the life of the commuters in the said area. He submits that such a situation is covered by the expression "*disaster*" as defined under Section 2(d) of the DMA and therefore, there was no infirmity in the impugned order.

14. Mr. Pangam submitted that the said road was constructed by PWD in the year 2006 and from time to time PWD has maintained and repaired the said road through its funds. He, therefore, submits that provisions of DMA were quite correctly invoked in the present case and now that the asphaltting of the said road is complete in all respects, no relief may be granted to the Petitioner.

15. Mr. Bhobe learned counsel for the Respondent Nos. 6 to 9 adopted the argument made by the learned Advocate General and submitted that the blockage of access or damage to the said road by the Petitioner would result in hundreds of school children being deprived of safe and proper access to their school. He submits that there is no infirmity in the impugned order and therefore this petition may be dismissed.

16. The rival contentions now fall for our determination.

17. The DMA was enacted to provide for the effective management of disasters and matters connected therewith or incidental thereto. The statement of objects and reasons refers to the Government decision to enact a law on disaster management to provide for requisite institutional mechanisms for drawing up and monitoring the implementation of the disaster management plans, ensuring measures by various wings of Government for prevention and mitigating effects of disasters and for undertaking a holistic, coordinated and prompt response to any disaster situation.

18. Section 2(d) defines the expression "*disaster*" as follows:-

"(d) "disaster" means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area."

19. The DMA, in its Chapter IV, provides for the constitution of the District Disaster Management Authority (DA). Section 25(2) provides that the DA shall consist of the Chairperson and such number of other members, not exceeding seven, as may be

prescribed by the State Government. The Collector, unless otherwise provided, is to be the Chairperson of DA.

20. Section 30 of the DMA deals with the powers and functions of the DA. Section 33 authorizes the DA, by order to require any officer or any department at the district level or any local authority to take such measures for the prevention or mitigation of disaster or to effectively respond to it, as may be necessary, and such officer or department shall be bound to carry out such order.

21. Section 26 of the DMA deals with the powers of the Chairperson of the DA and the same reads as follows:-

“26 Powers of Chairperson of District Authority. —

(1) The Chairperson of the District Authority shall, in addition to presiding over the meetings of the District Authority, exercise and discharge such powers and functions of the District Authority as the District Authority may delegate to him.

(2) The Chairperson of the District Authority shall, in the case of an emergency, have the power to exercise all or any of the powers of the District Authority but the exercise of such powers shall be

subject to ex post facto ratification of the District Authority.

(3) The District Authority or the Chairperson of the District Authority may, by general or special order, in writing, delegate such of its or his powers and functions, under sub-section (1) or (2), as the case may be, to the Chief Executive Officer of the District Authority, subject to such conditions and limitations, if any, as it or he deems fit.”

22. Section 71 of the DMA bars the jurisdiction of Court except for the Supreme Court or a High Court to entertain any suit or proceeding in respect of anything done, action taken, orders made, direction, instruction, or guidelines issued *inter alia* the District Authority in pursuance of any power conferred by or in relation to its functions, by DMA. Section 73 protects the action taken in good faith. Section 74 deals with the immunity from legal process to officers of the DA regarding any warning in respect of any impending disaster communicated or disseminated by them in their official capacity or any action taken or direction issued by them in pursuance of such communication or dissemination.

23. Therefore, it is quite clear that before the DA or for that matter the Chairperson of DA exercises any powers under the

DMA, such authorities have to be satisfied that they are dealing with “*disaster*” as defined under Section 2(d) of the DMA. Unless this basic jurisdictional parameter is found to exist, there is no question of DA or its Chairperson exercising any of the powers under the DMA.

24. The impugned order dated 13.05.2020 is quite cryptic and only refers to the said road being suddenly dug up and due to which there are road accidents taking place. The impugned order then recites that the said road was constructed by PWD in 2006 and the same has been used for many years by the residents in Survey No.20/1 to access their plots, residences, institutions, and businesses. Thereafter, the impugned order purports to record the opinion of the Chairperson i.e. Collector that there may be accidents during monsoon season if the said road is not repaired or restored in time. Based on this, the Chairperson-Collector in the purported exercise of powers under Section 33 of the DMA directed the Executive Engineer, PWD to undertake work of repair and reconstruction of the said road with immediate effect. The impugned order states that failure to comply with such directions will attract penal action under Section 56 of the DMA.

25. The affidavit filed by the Collector is as sketchy as the impugned order. Therefore, we called upon the learned Advocate General to produce the file before us.

26. On perusal of the file, we find that the noting refers to representation dated 18.02.2020 from Respondent Nos. 6 to 9 complaining about alleged blockage of their access. The representation further states that if the access is not cleared, the same will affect over 1000 school children, teachers, and staff. The representation also points out that the access to water tankers, ambulances, fire tenders will also render difficulty if the access is not restored. Noting also speaks about a draft order being placed in the file for the approval of the Collector.

27. Based on such noting, the Chairperson/Collector has simply made the following endorsement in the note sheet on 13.05.2020:-

“ we may issue order to EE, PWD to repair the road under Disaster Management Act”.

28. Significantly the representation, as well as the noting, makes no reference of whatsoever nature for invoking the provisions of the DMA. There is nothing in the file or in the note sheet suggestive of the fact that the Chairperson/Collector even

applied her mind as to whether the complaint in the representation, assuming the same to be true, is covered under the expression "*disaster*" as defined under Section 2(d) of the DMA. There is absolutely nothing in the file or any note sheet to suggest that the Chairperson/Collector ever applied her mind to either the provisions of Section 33 of the DMA or the provisions of Section 26 of the DMA. There is absolutely nothing in the file or note sheet to suggest that the Chairperson/Collector applied her mind to the existence of any emergency as contemplated by Section 26(2) of the DMA.

29. From the perusal of the representation, the note sheet as well as the impugned order, the only complaint is about the blockage of access and the damage to the said road. This is a case of possibly a private dispute between the Petitioner and the residents of the locality on the issue of access. Such a dispute cannot be elevated to the status of a "disaster" as defined under section 2(d) of DMA.

30. Even the Government order dated 10.11.2011 speaks about inviting tenders to repair or maintain the existing road which presumably includes the said road after the land is acquired. In this petition, we are not going into any disputed questions of fact concerning the title of the parties or whether the said road is a

private road or a public road. However, we are constrained to observe that even if all the allegations in the representation made by Respondent Nos. 6 to 9 are taken as correct, no case of some "disaster" as defined under Section 2(d) of the DMA was made out to clothe the Chairperson/Collector with powers under the DMA. Therefore, there is merit in the submission of Mr. Kantak that the impugned order made by the Chairperson/Collector by invoking the provisions of the DMA is *ultra vires*, null and void.

31. Section 2(d) of the DMA defines "disaster" to mean a catastrophe, mishap, calamity, or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area. Unless some material on record establishes some event, whether man-made or natural, amounting to a disaster as defined under Section 2(d) of DMA, the various authorities under the DMA cannot exercise the powers vested in them under the DMA.

32. The complaint in the representation made by Respondent Nos. 6 to 9, even if taken as correct can hardly qualify as some

catastrophe, mishap, calamity, or grave occurrence. Besides, there is no material to even suggest that the blockage of the said road or its digging up, would result in some substantial loss of life or human suffering or damage. The complaint even if taken as correct does not have the potential of the destruction of property or damage to or degradation of the environment. Besides, there is no material whatsoever on record that all this alleged destruction, damage, or degradation is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area. Unless all these parameters exist, there was no question of the Chairperson/Collector invoking the provisions of the DMA and making the impugned order.

33. The impugned order has been made by the Chairperson/Collector in the purported exercise of powers conferred upon her by Section 33 of the DMA. Now Section 33 of the DMA does not confer any powers on the Chairperson/Collector but powers of requisition are conferred on DA as constituted under Section 25 of the DMA. This is yet another reason to hold that the impugned order made by the Chairperson/Collector under Section 33 of the DMA is *ultra vires*, illegal, null, and void. Section 33 of the DMA does not empower the Chairperson/Collector to make a requisition

because the power to make such requisition is vested in the DA and not just the Chairperson of the DA.

34. In *Bin K. Kuriakose and others Vs Commissioner, Municipal Corporation of Gr. Mumbai and others*¹, the Division Bench of our Court (A. M. Khanwilkar, J, as His Lordship then was, and R. M. Savant, J) quashed and set aside a notice issued by the Assistant Commissioner under Section 34 of the DMA by holding that Section 34 of the DMA provides that it is the District Authority that is supposed to exercise powers and functions referred to therein. Therefore, the exercise of such powers by any other authorities would render the action/notice *ultra vires* the provisions of the DMA.

35. Though there is no reference to the provisions of Section 26 of the DMA in the return filed by the Chairperson/Collector, Mr. Kantak pointed out that the Chairperson of the DA, can, in case of emergency, have the power to exercise all or any of the powers of the DA. Her power is however hedged with the requirement that the Chairperson, in the exercise of such powers, shall be subject to *ex post facto* ratification by the DA.

¹ 2010(4) Mh. L.J. 239

36. Now, in this case, there is absolutely no material on record to suggest the existence of any emergency. Further, there is no *ex post facto* ratification by the DA produced on record by the Chairperson/Collector. Therefore, even if it is assumed that the Chairperson, can exercise the powers of the DA, the impugned order cannot be saved because there is no material on record suggestive of any emergency and further there is no material placed on record about any *ex post facto* ratification by the DA.

37. The orders made under the DMA can have serious consequences because the jurisdiction of the Civil Court to upset such orders has been statutorily taken away. Mr. Kantak pointed out that the impugned order has been made to defeat the civil suit already instituted by the Petitioner for asserting and protecting his proprietary rights. He submits that the State Government is quite aware that the said road is a private property of the Petitioner and unless the same is acquired under the law, it has no right or authority to interfere with the same. He submits that it is only to overcome this legal impediment that the provisions of the DMA were malafide invoked in this case.

38. According to us, this is a case of legal malafide, where the provisions of the DMA have been invoked even though there was no situation of “*disaster*” as defined under Section 2(d) thereof.

This is also a case where the Chairperson/Collector has exercised powers that were not even vested in her under the DMA, assuming that the provisions thereof could have been invoked in a situation of this nature. According to us, the provisions of the DMA cannot be invoked to deal with civil disputes involving two sets of persons or civil disputes involving a citizen and the Government by elevating such disputes to the status of a disaster. The provisions of the DMA can be invoked only in a situation of disaster as defined under Section 2(d) noticed above.

39. Every power, either statutory or otherwise must be exercised by the prescribed authority lawfully, reasonably, and in good faith. Otherwise, the exercise is malafide and the action is illegal. In *Ravi Bhoir Vs District Collector, Raigad*,² the Hon'ble Supreme Court held that "*legal malice*" means something done without lawful excuse. It is an act that is taken with an oblique and indirect object and not necessarily an act done from ill feeling and spite. Malafide exercise of power does not necessarily imply moral turpitude. It means the exercise of statutory power for "*purposes foreign to those for which it is in law intended.*" Passing an order for an unauthorized purpose constitutes malice in law.

² 2012 (4) SCC 407

40. Therefore, for all the aforesaid reasons, we are quite satisfied that the impugned order dated 13.05.2020 is illegal, *ultra vires*, null and void. Having said that, the further question that arises is the nature of relief that can be granted to the Petitioner in this matter.

41. Admittedly, under the cover of the impugned order dated 13.05.2020, the said road has been repaired and asphalted by the PWD authorities. The Petitioner has already instituted Civil Suit No.15/2020 claiming ownership/possessory right in respect of the said property and the said road. The Extraordinary jurisdiction of this Court is not well suited to go into the disputed questions of title, easementary right, etc. Those are all matters best dealt with by the Civil Court where all parties will have an opportunity of producing oral and documentary evidence about their respective claims. Now that we propose to set aside the impugned order dated 13.05.2020, the issue of the Civil Court's jurisdiction being barred will also not arise.

42. Therefore, according to us, the interests of justice will be met if we declare the impugned order dated 13.05.2020 as illegal, *ultra vires*, null and void, and further quash the same but leave the parties to resolve their civil disputes about the title, easementary right, etc. before the Civil Court in Civil Suit

No.15/2020 already instituted by the Petitioner herein or such other proceedings that the parties will deem it appropriate to institute in that regard. Upon quashing the impugned order, there will be no question of the Respondents claiming any immunity for their actions under the impugned order or raising any bar to the jurisdiction of the civil court by reference to the provisions of DMA. The suit will then have to be decided on its own merits based on the evidence the parties will produce before the civil court.

43. For all the aforesaid reasons, therefore, we declare the impugned order dated 13.05.2020 to be illegal, *ultra vires*, null and void, and further, we quash and set aside the same. Although we are not granting any further relief like restoration of status quo ante etc., in these proceedings, we make it clear that all such matters will have to be considered by the Civil Court either in the pending Civil Suit No.15/2020 instituted by the Petitioner or such other proceedings that the parties might take out before the Civil Court in that regard. All such issues are expressly left open for determination by the Civil Court, now that we have set aside the impugned order dated 13.05.2020.

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

M. S. SONAK, J.

CHIEF JUSTICE