

***IN THE HIGH COURT OF BOMBAY AT GOA***

**FIRST APPEAL NO.250 OF 2009**

1. Raghupati R Bhandari  
son of Ramkrishna Bhandari  
businessman, residing at  
Mahalaxmi, Bandora, Goa

... Appellant

**Versus**

1. Comunidade of Bandora,  
with its office at Nageshi  
Bandora, Ponda, Goa  
through its attorney

2. Vinayak Sadanand Naique Gaunekar  
residing at H.N. 71/8  
Nageshi, Bandora, Goa

3. Santosh Namshikar  
residing at H.N. 108 and 108A  
Nageshi, Bandora, Goa

4. Shyamsunder Naique Gaunekar  
residing at H.N. 206  
Mahalaxmi Bandora, Goa

... Respondents

Mr. M. B. Da Costa, Senior Advocate with Ms. K. Betquecar, Advocate  
for the Appellant.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Tanvi Kamat  
Ghanekar, Advocate for Respondent No.1.

**AND**

**WRIT PETITION NO.983 OF 2019**

Comunidade of Bandora,  
with its office at Nageshi

Bandora, Ponda, Goa.

Represented herein by its attorney

Mr. Madhav Dhaimodkar

.... Petitioner

**Versus**

1. The President,  
The Administrative Tribunal,  
3<sup>rd</sup> floor, Vaidya Hospital,  
Panaji, Goa

2. The Administrator of Comunidade.  
North Goa, Panaji, Goa.

3. Raghupati R. Bhandari  
son of Ramkrishna Bhandari  
businessman, major of age,  
resident of Mahalaxmi,  
Bandora, Goa.

4. M/s. Prasanna Developers Pvt. Ltd.  
A registered Company having office  
at 06, Anandvan, 1<sup>st</sup> floor,  
near Asilo Hospital,  
Mapusa, Bardez, Goa.

5. M/s. A. K. Constructions,  
Proprietorship concern of  
Shri Abhay Arondekar  
son of late Shri Kashinath Arondekar,  
major of age, businessman, having his  
office at Block No.5, Ground floor,  
next to Vaddem lake, Vaddem,  
Vasco-da-Gama, Goa.

... Respondents

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Tanvi Kamat  
Ghanekar, Advocate for the Petitioner.

Ms. Priyanka Kamat, Additional Government Advocate for Respondent No.2.

Mr. M. B. Da Costa, Senior Advocate with Ms. K. Betquecar, Advocate for Respondent No.3.

**Coram:- M. S. SONAK &  
BHARATI H. DANGRE, JJ.**

**Reserved on:- 1<sup>st</sup> February, 2021**

**Pronounced on:- 8<sup>th</sup> February, 2021**

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

Heard Mr. M. B. Da Costa, learned Senior Advocate with Ms. K. Betquecar for the Appellant in First Appeal No.250 of 2009.

2. Heard Mr. Sudin Usgaonkar, learned Senior Advocate with Ms. Tanvi Kamat Ghanekar for Respondent No.1 in First Appeal No.250 of 2009.

3. Heard Mr. Sudin Usgaonkar, learned Senior Advocate with Ms. Tanvi Kamat Ghanekar for the Petitioner in Writ Petition No.983 of 2019. Ms. Priyanka Kamat learned Additional Government Advocate for Respondent No.2 in Writ Petition No.983 of 2019.

4. Mr. Usgaonkar, learned Senior Advocate for the Petitioner in Writ Petition No.983 of 2019 submits that all the Respondents in Writ Petition No.983 of 2019 are duly served. However, despite service, such Respondents neither appeared themselves nor through any Advocates.

5. The learned counsel for the parties agree that the Writ Petition and First Appeal are to be taken up together and can be disposed of by a common judgment and order. The learned counsel pointed out that in case the Writ Petition No.983 of 2019 is allowed, then, there may be no necessity of deciding First Appeal No.250 of 2009 on merits.

6. Writ Petition No.983 of 2019 challenges the order made by the Administrative Tribunal, Goa, on 16<sup>th</sup> October 2019 rejecting the application made by the Petitioner – Comunidade of Bandora (Comunidade) under Section 350 of the Code of Comunidades ( the said Code ), to compromise the dispute which is the subject matter of First Appeal No.250 of 2009 by accepting an amount of ₹1.75 crores from M/s. A. K. Construction, an alleged subsequent purchaser in respect of the property which is the subject matter of First Appeal No.250 of 2009 admeasuring 1,42,720 square meters at Bandora, Ponda Goa.

7. Mr. Usgaonkar, learned Senior Advocate for the Comunidade submits that if the order dated 16<sup>th</sup> October 2019 made by the Administrative Tribunal (the Tribunal) is set aside and the application of the Comunidade seeking leave to compromise the matter is allowed then, the appropriate consent terms can be filed in First Appeal No.250 of 2009 and the appeal can be disposed of based on such

consent terms without necessity of adjudication on merits.

8. Mr. Usgaonkar submits that even though Raghupati Bhandari, the Appellant in First Appeal No.250 of 2009 had encroached upon the suit property admeasuring 1,42,720 square meters and even though the said Raghupati Bhandari, together with some of the members of the Comunidade, had succeeded in playing a fraud on the Comunidade and obtaining a decree dated 24<sup>th</sup> November 1994 in Civil Suit No.154/94/B from the Court of Civil Judge at Ponda purporting to legalise such encroachment, as of today, the Tribunal, ought to have permitted the Comunidade to compromise the matter by accepting an amount of ₹1.75 crores in lieu of the suit property admeasuring 1,42,720 square meters. He submits that Raghupati Bhandari has transferred at least a portion of the suit property, firstly to M/s. Prasanna Developers Private Limited and this company has further transferred the portion to M/s. A. K. Construction. Mr. Usgaonkar submits that even if Raghupati Bhandari's appeal is dismissed, as it ought to be, the Comunidade is likely to face hurdles when it comes to the execution of the decree. He, therefore, submits that the Tribunal ought to have allowed the Comunidade's application seeking leave to compromise the matter by accepting an amount of ₹1.75 crores in lieu of the suit property admeasuring 1,42,720 square meters.

9. Mr. Usgaonkar submits that since the general body of the

Comunidade has deliberated over the matter and resolved to compromise the appeal by accepting an amount of ₹1.75 crores, the Tribunal was not justified in rejecting the Comunidade's application under Section 350 of the said Code. He submits that the Tribunal in such matters should have deferred to the wisdom of the general body of the Comunidade just as Company Court defers to the commercial judgment of the body of the shareholders in a petition seeking amalgamation between two companies. He relies on *Hindustan Lever Vs State of Maharashtra*<sup>1</sup> in support of this submission.

10. Mr. Usgaonkar submits that for the aforesaid reasons, the Tribunal's order dated 16<sup>th</sup> October 2019 may be set aside and the Comunidade's application seeking leave to compromise accompanying First Appeal No.250 of 2009 made under Article 350 of the Code be granted.

11. Mr. Costa, learned Senior Advocate for the Appellant in First Appeal No.250 of 2009 submits that the Appellant has a good case on merits but if the Comunidade wishes to accept the amount of ₹1.75 crores from M/s. A. K. Construction, with whom the Appellant has no truck and consent to First Appeal No.250 of 2009 being allowed and the impugned judgment and decree dated 29<sup>th</sup> August 2009 in Special Civil Suit No.7/1999/A being set aside then, the Appellant, will welcome such a position. To that extent, Mr. Costa submits that the

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<sup>1</sup> (2004) 9 SCC 438

submissions made by Mr. Usgaonkar may be accepted and the Tribunal's order dated 16<sup>th</sup> October 2019, be set aside.

12. After the respective learned Senior Advocates made their submissions in Writ Petition No.983 of 2019, we requested them to make their submissions in First Appeal No.250 of 2009 as well. This is because we wished to acquaint ourselves with the issue involved in First Appeal No.250 of 2009 and to find out whether the compromise which the Comunidade wished to enter into was following the said Code and further, in the interest of the Comunidade and its members. This was more so because the Comunidade in its Special Civil Suit No.7/1999/A had alleged that the decree dated 24<sup>th</sup> November 1994 obtained by the Appellant Raghupati Bhandari in Regular Civil Suit No.154/94/B was a product of fraud and collusion in an attempt to usurp the suit property belonging to the Comunidade and admeasuring no less than 1,42,720 square meters, at Bandora, Ponda Goa. The Comunidade had itself alleged that apart from fraud and collusion, admission of frivolous claim of the Appellant Raghupati Bhandari by some of the members of the Comunidade who were closely related to Raghupati Bhandari was in breach of the provisions of Article 350 of the said Code. If all this was found to be correct, then obviously, the same would impact the decision in Writ Petition No.983 of 2019, because no Court can permit a compromise which is contrary to law or opposed to public policy, notwithstanding the support of General Body of the Comunidade to

such a proposal. Mere numbers are never sufficient to breach the provisions of law, particularly in a matter of present nature where the suit property belongs to Comunidade and not to some purely private owners.

13. Mr. Costa, learned Senior Advocate for the Appellant in First Appeal No.250 of 2009 at the outset pointed out that the Special Civil Suit No.7/1999/A was not at all maintainable for the following reasons :

- (a) That no permission as contemplated by Article 349 of the said Code was obtained by the Comunidade before instituting the said suit;
- (b) There was no justification in instituting the Special Civil Suit No.7/1999/A by constituting a Special Attorney when the regular attorney was very much available;
- (c) That the resolution appointing Special Attorney is not in terms of Article 10 of the said Code and therefore, based on such a resolution, the Special Attorney could not have instituted the Special Civil Suit No.7/1999/A in the Civil Court;
- (d) The provisions of the proviso to Order XXIII Rule 1 bar the Special Civil Suit No.7/1999/A because no separate suit is maintainable to question a consent decree

and the parties are required to take out proceedings in the same suit to establish that the consent decree was vitiated by fraud and/or otherwise opposed to the law. He relied on *R. Rajanna Vs S. R. Venkataswamy and others*<sup>2</sup>, *Sneh Gupta Vs Devi Sarup and others*<sup>3</sup>, and *Triloki Nath Singh Vs Anirudh Singh*<sup>4</sup> in support of this submission;

(e) That although the suit had alleged encroachment, there was no plan annexed to the suit as is mandated by the provisions of Order of the Civil Procedure Code;

(f) The plaint in Special Civil Suit No.7/1999/A is unclear and confusing. In one portion, the Comunidade claims to have possession of the suit property but in another portion, there are allegations of encroachment and relief is for recovery of the allegedly encroached portion. Mr. Costa submits that based upon such contradictory and confusing pleadings, the plaint in Special Civil Suit No.7/1999/A ought to have been rejected at the threshold and in any case, the decree made therein is vulnerable;

(g) Mr. Costa submits that the testimony of expert Mr. Purushottam Dalvi (PW2) examined on behalf of the Comunidade supports the case of the Appellant. He

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<sup>2</sup> (2014) 15 SCC 471

<sup>3</sup> (2009) 6 SCC 194

<sup>4</sup> CDJ 2020 SC 509

points out that the expert had admitted that the boundary walls surrounding the suit property are more than 50 years old. Mr. Costa submits that this was precisely the case of the Appellant that the encroachment, if any, took place more than 50 years ago, and further this encroachment was duly regularised by the Comunidade way back in the year 1948 itself.

14. Mr. Costa submits that even the depositions of the other witnesses examined on behalf of Comunidade support the case of the Appellant that the encroachment, if any, took place more than 50 years before the institution of the suit, and in any case, such encroachment was duly regularised by the Comunidade in the year 1948 as evidenced by Exhibit 41colly. Mr. Costa submits that even the witnesses examined on behalf of the Appellant make good the Appellant's case and the learned Civil Court was not at all justified in passing the impugned decree without properly evaluating and appreciating the oral as well as documentary evidence on record.

15. Mr. Costa submits that there was nothing illegal in the Deed of regularisation of encroachment issued in the year 1948. He points out that even the Comunidade has never challenged this Deed because the same was made following the provisions of the said Code. He points out that in any case, it would be too late in a day to challenge

such a Deed almost 50 years from the date of its making. He, therefore, submits that the impugned judgment and decree dated 29<sup>th</sup> August 2009 is liable to be set aside.

16. Mr. Costa submits that the learned Civil Court has failed to appreciate the correct scope and import of Articles 349 and 350 of the Code of Comunidade. He submits that the provisions of Article 350 will apply only to a suit that was instituted by the Comunidade after seeking permission under Article 349 of the said Code. He submits that since this Court has already held in the case of ***Comunidade of Cacoda Vs Vishnu Bhikaro Sawant And Anr.***,<sup>5</sup> that the provisions of Article 349 of the said Code are only directory and even a suit instituted without seeking approval under Article 349 of the said Code is maintainable, by the same analogy even the provisions of Article 350 of the said Code which the Comunidade seeks to invoke, are also directory. Therefore, any admission made on behalf of the Comunidade without seeking leave under Article 350 of the said Code can be taken into consideration by the Civil Court. In any case, a decree made based on such admission cannot be said to be a nullity or opposed to any of the provisions of the said Code.

17. Mr. Costa, for all the aforesaid reasons submits that the First Appeal No.250 of 2009 is liable to be allowed and the impugned judgment and decree dated 29<sup>th</sup> August 2009 be set aside.

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<sup>5</sup> 2008(5) AIR Bom R 122

18. Mr. Usgaonkar submits that the permission under Article 349 of the Code is not mandatory and does not bar any suit instituted without such permission. He points out that in any case such sanction was obtained during the pendency of the suit and this is sufficient compliance with the provisions of Article 349 of the Code. He submits that there is no infirmity whatsoever in the appointment of the Special Attorney and there is no bar to the appointment of Special Attorney even when the regular attorney is available. He submits that the provisions of Order XXIII were not at all applicable since the 1994 decree was not a consent decree but rather the same was a product of fraud and collusion. He submits that this distinction has been explained in *Sunil Mehra Vs Rajinder Singh Gulati*<sup>6</sup>. He submits that the plan of encroachment was annexed to the plaint and further, nothing was confusing or contradictory in the plaint. He, therefore, submits that there is no merit in this appeal and the same be dismissed.

19. Mr. Usgaonkar points out that the testimony of Mr. Purushottam Dalvi (PW2) is required to be read in its entirety. He submits that the said Dalvi was quite an aged person at the time of his deposition and the Appellant is not entitled to take any undue advantage of one or two confusing statements, in his deposition. Mr. Usgaonkar points out that much of Comunidade's case is based upon documentary evidence and relying on the same the Civil Court has quite correctly decreed the 1999 suit. Mr. Usgaonkar relies upon the reasoning in the

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6 2008(4) AIR Bom R 96

impugned judgment and decree and submits that this appeal may be dismissed.

20. Mr. Usgaonkar also points out that certain observations in the order dated 24<sup>th</sup> July 2014 by which the Contempt Petition No.10/2013 came to be dismissed were made in the context of deciding whether there was an intentional and willful breach of the orders made by this Court by the Appellant herein. He however submits that the material on record bears out that the Appellant, after obtaining interim order from this Court purported to create some third-party rights. He submits that such third-party rights have no legal sanctity whatsoever and based thereon there is no reason to allow this appeal.

21. Mr. Usgaonkar submits that if for any reason Writ Petition No. 983/2019 is not to be allowed, then, for all the aforesaid reasons, First Appeal No.250 of 2009 may be dismissed.

22. The rival contentions now fall for our determination.

23. In these matters, we are concerned with the properties called "*Tumagalvat and Navtavaril Bharad*" situated at village Bandora, Ponda Taluka. The property "*Tumagalvat*" is surveyed under No.159/0 and the property "*Namtavaril Bharad*" is surveyed under Nos.150/1, 150/2, and 150/3 in the village of Bandora, Ponda Taluka. These properties,

together admeasure 1,42,720 square meters and have been collectively referred to as the “suit properties”.

24. On 6th October 1994, the Appellant herein instituted Regular Civil Suit No.154/94/B in the Court of Civil Judge Junior Division, at Ponda, seeking a declaration that he is the exclusive owner in respect of the properties surveyed under Nos. 159/0, 150/1, 150/2, and 150/3, situated at Village Bandora, Ponda Taluka which are nothing but the suit properties herein.

25. The Appellant, in support of the 1994 suit pleaded that the suit properties have been wrongly recorded as “*Tumagalva*” and “*Navtavaril Bharad*”, when in fact the correct name of the suit properties is “*Locximigativoril*” (surveyed under No.159/0) and “*Joixenoichi Xir*” (surveyed under Nos.150/1, 150/2 and 150/3). The Appellant further pleaded that the suit properties were encroached upon by late Smt. Radhabai Bhandari during her lifetime and the Comunidade in the year 1948 not only verified but had regularised such encroachment upon payment of a specified amount. The Appellant pleaded that since the year 1948 at least, the Appellant's predecessor in title Smt. Radhabai Bhandari was in exclusive possession and enjoyment of the suit properties, adversely against everybody including the Comunidade. The Appellant, even relied on a Deed of 4<sup>th</sup> February 1948, in support of his contention that the encroachment by his predecessor in title was

regularised by the Comunidade in the year 1948 (1948 Deed).

26. To establish his link with Smt. Radhabai Bhandari whose name finds mention in the 1948 Deed, the Appellant relied on the Deed of Partition, hypothecation, and adoption dated 26<sup>th</sup> November 1944 by which the Appellant became a lawfully adopted son of the said Smt. Radhabai Bhandari. The Appellant has pleaded that Smt. Radhabai Bhandari expired on 19<sup>th</sup> July 1985 and in terms of the Deed of Succession dated 19<sup>th</sup> January 1994 the Appellant became the sole and universal heir of late Smt. Radhabai Bhandari.

27. The Comunidade which was purported to be represented by Vinayak Gaunekar, the President of the Managing Committee filed its written statement to the 1994 suit which was instituted on 6<sup>th</sup> October 1994 on 29<sup>th</sup> October 1994. The entire written statement comprises three paragraphs which are transcribed below for the convenience of reference.

“WRITTEN STATEMENT

MAY IT PLEASE YOUR HONOUR

*The defendant abovenamed states and submit as under :*

- 1. The defendant is authorised to file written statement in the meeting called on 23-10-1994.*
- 2. The defendant admits the contents of all the paragraphs of the plaint.*
- 3. The defendant, therefore, has no objection to decree*

*the suit as prayed for.*

*Ponda, 29<sup>th</sup> October, 1994.*

*Sd/-29.10.94*

*Defendant*

VERIFICATION

*I, Shri Vinayak Gaunekar, President of the defendant do hereby solemnly affirm and verify that what is stated in the paragraph 1 and 2 is true to my knowledge.*

*Solemnly affirmed at Ponda*

*this 29<sup>th</sup> day of October, 1994.*

*Sd/- 29.10.94”*

28. Based on the aforesaid written statement dated 29<sup>th</sup> October 1994, the learned Civil Judge Junior Division, at Ponda decreed the 1994 suit and declared that the property surveyed under No.159/0 is known as “*LocximigativoriP*” and the property surveyed under Nos.150/1, 150/2, and 150/3 is known as “*Joixenoichi Xir*”. The decree also declared that it is the Appellant who is the exclusive owner of the suit properties surveyed under Nos. 159/0, 150/1, 150/2, and 150/3 and consequently entitled to effect the mutation in survey records by deleting the name of the Comunidade therefrom. The formal decree was drawn on 24<sup>th</sup> November 1994.

29. Now in the plaint of the 1994 suit, the Appellant had very conveniently omitted to mention the area of the suit properties, which was 1,42,720 square meters. Instead, to take undue advantage of the 1948 Deed which had described the encroached properties as

“*Locximigativoril*” and “*Joixenoichi Xir*”, the Appellant pleaded that the correct name of the suit properties was not “*Tumagalvat*” and “*Navtavoril Bharad*” but that the correct name was “*Locximigativoril*” and “*Joixenoichi Xir*”. The attempt was to fraudulently pass of the suit properties as portions of the properties whose encroachment had been regularized by the 1948 Deed.

30. If the 1948 Deed is perused, it is evident that the total area which was encroached by late Smt. Radhabai Bhandari and which encroachment was regularised by the Comunidade admeasured 44,679 and 12824 square meters and not 1,42,720 square meters. Further, the 1948 Deed makes it clear that the northern boundary of property “*Locximigativoril*”, were the properties bearing Lot No.83 and Lot No.24. Now there is evidence on record that Lot No.83 corresponds to the property “*Tumagalvat*” surveyed under No.159/0 and Lot No.24 corresponds to the property “*Navtavoril Bharad*” surveyed under Nos. 150/1, 150/2, and 150/3.

31. The old cadastral maps which are part of the evidence on record also make it clear that the 1948 Deed had regularised the encroachment by Smt. Radhabai Bhandari on the properties named “*Locximigativoril*” and “*Joixenoichi Xir*”, together admeasuring about 44,679 and 12824 square meters only. Further, the evidence on record makes it clear that these two properties correspond to the properties

surveyed under Nos.152(part), 153(part), and 158(part) and certainly not the suit properties. In fact, the suit properties are towards the north of the properties regularised by the 1948 Deed. This position is clear not only from the 1948 Deed but also from the old cadastral survey records.

32. Thus from the oral as well as the documentary evidence on record, it is clear that the suit properties were neither encroached upon by Smt. Radhabai Bhandari sometime in the year 1948 or thereabouts nor was such encroachment at any time regularised by the Comunidade by the 1948 Deed, as was fraudulently alleged by the Appellant in the 1994 suit. As noted earlier, the Appellant avoided stating the area of the suit properties in the plaint of the 1994 suit because otherwise, it would be *ex facie* evident that the Appellant was purporting to pass of encroachment regularised by the 1948 Deed admeasuring hardly 44,679 and 12824 square meters as applicable to the suit properties admeasuring 1,42,720 square meters.

33. Even without going into the oral evidence on record, which, if read in its entirety supports the case of the Comunidade, documentary evidence which was relied upon by the Appellant himself in the 1994 suit, makes it clear that the claim of the Appellant in the 1994 suit was *ex facie* a fraudulent claim.

34. The records very clearly bear out that there was collusion

between the Appellant and the then Managing Committee of the Comunidade comprising three members i.e. Shri Vinayak Sadanand Naique Gaunekar (President), Shri Santosh Namshikar (Treasurer), Shri Shyamsundar Naique Gaunekar (Attorney). These persons were impleaded as defendant nos. 2, 3, and 4 in Special Civil Suit No.7/1999/A instituted by the Comunidade to declare the judgment and decree dated 24<sup>th</sup> November 1994 in the 1994 suit, null and void.

35. Now it is pertinent to note that Shri Shyamsundar Naique Gaunekar, the then Attorney of the Comunidade and defendant no.4 in Special Civil Suit No.7/1999/A was the blood brother of the Appellant Raghupati Bhandari. The only reason why two parties do not bear a common surname is that in terms of Deed of Partition, hypothecation, and adoption dated 26<sup>th</sup> November 1944, relied upon by the Appellant himself, the Appellant was adopted by Smt. Radhabai Bhandari and consequently assumed the surname "Bhandari". The pleadings to this effect in paragraph 13(a) of the plaint in Special Civil Suit No.7/1999/A were not even effectively denied by the defendants to this suit by the said Shri Shyamsundar Naique Gaunekar. Raghupati Bhandari, the appellant herein, in his cross-examination admitted that Shyamsundar was his brother.

36. Even otherwise, the collusion is evident from the fact that an *ex facie* fraudulent claim of the Appellant was not contested by the

Managing Committee members. Besides, it is inconceivable that Shri Vinayak Gaunekar, who filed the three-paragraph written statement on 29<sup>th</sup> October 1994, could have verified such written statement as “true to my knowledge” particularly when the Deed of 1948 which is a part of Comunidade records, very clearly referred to the regularisation of encroachment of properties other than the suit properties and admeasuring almost one third the suit properties.

37. In 1999, the Comunidade upon discovery of fraud played upon it by the erstwhile members of the Managing Committee instituted a Special Civil Suit No.7/1999/A in the Court of Civil Judge Senior Division at Ponda seeking restoration of the suit property by removing the boundary wall put in the encroached portion; a decree to declare the judgment and decree dated 24<sup>th</sup> November 1994 in the 1994 suit as null and void and a permanent injunction to restrain the Appellant herein from alienating, disposing or interfering with the suit property in any manner whatsoever.

38. The plaint in the 1999 suit was signed and verified by Upendra Gaunekar, Special Attorney of the Comunidade. Article 10 of the Code provides that the Comunidades will be represented in Civil Courts or any other tribunal, Government office, by its regular attorney on duty, or substitute with full powers or by a special attorney. Para 1 below this Article provides that the minutes of the meeting of the

election or the order of appointment of the regular attorney, effective or substitute, shall have the effect as that of a power of attorney, but in the event of choice of the special attorney, the power of attorney shall be recorded in the minutes of the meeting, in the respective book, specifying the respective power.

39. Now since the ground is raised in the appeal that the resolution appointing special attorney was not in terms of Article 10 of the Code, it is necessary to advert to the minutes of the extraordinary general body meeting of the Comunidade held on 12<sup>th</sup> May 1996. These minutes record that Upendra Gaunekar was being appointed as the special attorney of the Comunidade for the specific purpose relating to Agenda No.1. Now the Agenda No.1 speaks about the properties surveyed under Nos.150/1, 150/2,150/3, and 159/0, etc. transferred/usurped/tenanted to a close relative of one of the attorneys. Thereafter, the powers which were conferred upon the special attorney concerning this agenda item have also been set out with sufficient clarity in the minutes itself. Accordingly, there is full compliance with the provisions of Article 10 of the Code of Comunidade. Besides, Mr. Usgaonkar quite correctly pointed out that these are the matters internal to the Comunidade and the usurper of the Comunidade properties who had played a fraud on the Comunidade cannot be permitted to urge such contentions to defeat the validly instituted suit by the Comunidade.

40. Another ground raised by Mr. Costa on behalf of the Appellant is non-compliance with the provisions of Article 349 of the Code before the institution of the 1999 suit. Article 349 of the Code provides that when the Comunidad decides to file any suit in terms of Article 9, the attorney shall explain, with an indication of the probable expenditure to be incurred in the suit, with para wise pleadings in fact and law supported by documents and addressed to the Administrative Tribunal, through the respective administrator, who shall put his remarks on it. The Administrative Tribunal shall decide independently of the approval without circulation to other members, with the exception that of the *Ministerio Publico*, and if the permission is granted to file the suit, it shall sanction the expenditure to be incurred for the purpose.

41. In *Comunidade of Cacoda* (supra), the learned Single Judge of this Court ( F. I. Rebello, J as His Lordship then was ) has held that Article 9 and Article 349 of the Code of Comunidades neither imposes any bar on the jurisdiction of the Courts nor for that matter a bar on the Comunidades from filling suits even if such suits are not of preservatory in nature. At the highest, if the Comunidad files a suit and expends money towards it, the Comunidad would not be reimbursed the amount expended towards filling and prosecution of the suit from its account. This, in no manner, excludes the jurisdiction of the Civil Court, which could be said to be neither expressly nor impliedly barred.

It is always open to the Comunidade whether it be a suit of preservatory character or even a non-conservatory character to file such a suit. The conclusion which emerges from the discussion of the judgment that the Civil Courts have jurisdiction to entertain that suit even for mandatory injunction whether described as preservatory and/or non- conservatory, irrespective of whether the sanction is taken from the Administrative Tribunal or not. The sanction is only to expend monies and does not affect either the competence of the Comunidades to institute suits or the competence of the Civil Courts to entertain the same.

42. In *Comunidade of Cacoda* (supra) the learned Single Judge has further held that Article 349 of the Code is only procedural and does not create any substantive right. In other words, even if a suit is filed by the Comunidade in respect of its property without permission of the Tribunal, it will always be open to the Comunidade, if it has earlier not taken permission to apply post facto for such permission, even if such permission is required under Article 349.

43. Thus, the ground that the 1999 suit was not maintainable because no permission was obtained from the Administrative Tribunal before the institution of the same, cannot be accepted. In any case, there is no dispute whatsoever that the permission from the Administrative Tribunal was obtained on 6th December 1999 i.e. within seven months from the date of institution of 1999 suit. In paragraph 8 of the decision

in *Comunidade of Cacoda* (supra), it is clearly held that the absence of permission from the Tribunal does not affect the jurisdiction of the Court to entertain the suit by the Comunidade but, at the highest may disentitle the Comunidade to expend funds from its coffers for prosecuting such a suit. Further, even if the Comunidade has not taken permission before the institution of the suit, it will always open to the Comunidade to apply for and obtain post facto permission. Therefore, there is absolutely nothing wrong with Comunidade securing post facto approval from the Administrative Tribunal on 6th December 1999 for the institution of the 1999 suit in February 1999. In any case, based on this ground, it can never be said that there was any legal infirmity in the very institution of the 1999 suit as alleged by Mr. Costa, learned Senior Advocate for the Appellant.

44. Mr. Costa, adverting to the provisions of Order XXIII Rule 3 and 3A of the CPC had urged that no separate suit was maintainable to question a consent decree and the remedy, if any, was to apply to the same Court for setting aside the consent decree *inter alia* on the ground that the consent was a product of misrepresentation or fraud. Mr. Costa relied on *R. Rajanna Vs S. R. Venkataswamy and others*<sup>7</sup>, *Sneh Gupta Vs Devi Sarup and others*<sup>8</sup>, and *Triloki Nath Singh Vs Anirudh Singh*<sup>9</sup> in support of this contention.

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7 (2014) 15 SCC 471

8 (2009) 6 SCC 194

9 CDJ 2020 SC 509

45. The decree dated 24th November 1994 in the 1994 suit was not a consent decree to attract the provisions of Order XXIII Rule 3 or Rule 3A of the CPC. Rather, the decree dated 24th November 1994 was a decree based on a fraudulent admission and a product of fraud played upon the Civil Court by the parties to the 1994 suit in collusion with one another. Therefore, the parties who were affected by the fraud were entitled to file a suit seeking a declaration that such a decree was null and void. The legal, as well as the factual situation in the three decisions relied upon by Mr. Costa, was entirely different and therefore, based on three decisions, we cannot say that the 1999 suit was not maintainable. In all three decisions, the decrees were based on the consent of the parties where the parties had actually signed the consent terms and thereafter sought to renege upon such consents by alleging that the consent was not free or secured by misrepresentation or fraud. In all these cases the consent decrees were drawn out by complying with the provisions of Order XXIII Rule 3. It is in these circumstances, it was held that the proper remedy for the parties would be to take out an application before the same Court and not to file a separate suit.

46. In *Som Dev and others Vs Rati Ram and another*<sup>10</sup>, the Hon'ble Supreme Court has explained that after the amendment of the Code of Civil Procedure by Act 104 of 1976, a compromise of a suit can be effected and the imprimatur of the Court obtained thereon leading to a decree, only if the agreement or compromise presented in the Court is

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<sup>10</sup> (2006) 10 SCC 788

in writing and signed by the parties and also by their counsel as per practice. In a case where one party sets up a compromise and the other denies it, the Court can decide the question of whether there has been a compromise. But, when a compromise is to be recorded and a decree is to be passed, Rule 3 of Order 23 of CPC insists that the terms of the compromise should be reduced to writing and signed by the parties. Therefore, after 1.2.1977, a compromise decree can be passed only in compliance with the requirements of Rule 3 of Order 23 of CPC and unless a decree is passed in terms thereof, it may not be possible to recognise the same as a compromise decree. In the case before the Hon'ble Supreme Court, the decree was passed on 10.10.1980 after the amendment of the Code of Procedure Code and not in terms of Order 23 Rule 3 of CPC. Rather, the decree itself indicated that it was one on admission of a pre-existing arrangement. In the present case as well it is clear that the requirements of Order 23 Rule 3 of CPC were never complied with and the 1994 decree was based on the admission in the written statement, in terms of which, the then President of the Comunidade purported to admit the claim of the Appellant, in blatant disregard to the records of the Comunidade and the statutory provisions of Article 350 of the said Code. The provisions of Order 23 Rule 3A of CPC were thus not attracted to the situation of this nature.

47. To the facts and circumstances of the present case, the decision of the Hon'ble Supreme Court in *Bhoop Singh vs Ram Singh*

***Major & Ors***<sup>11</sup>, will apply. In that case, the decree was made “*in view of the written statement filed by the defendant admitting the claim of the plaintiff to be correct.*” The Hon'ble Supreme Court held that decreeing of the suit in such a situation is covered by Order 12 Rule 6, and not by Order 23 Rule 3 of CPC which deals with the compromise of a suit, whereas the former is on the subject of judgment on admissions. Therefore, the provisions of Order 23 Rule 3 of CPC will not apply in such a situation. The Hon'ble Supreme Court on the facts before it upheld the findings recorded by the first and second Appellate Courts that the decree in question was collusive as it was to defeat the right of others who had bonafide claim over the property.

48. Accordingly, based on the rulings relied upon by Mr. Costa, which are distinguishable, it will not be possible to hold that the 1999 suit was not maintainable. Besides, reference can also be usefully made to certain observations made by the Hon'ble Supreme Court in the cases of ***A. A. Gopalakrishnan Vs Cochin Devaswom Board and others***<sup>12</sup> and ***State of Punjab and others Vs Amar Singh and another***<sup>13</sup>.

49. In ***A.A. Gopalakrishnan*** (supra) the Hon'ble Supreme Court held that the bar contained in Rule 3A of Order 23 of CPC will not come in the way of the High Court examining the validity of a compromise decree when allegations of fraud and collusion are made

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11 1995 (5) SCC 709

12 (2007) 7 SCC 482

13 (1974) 2 SCC 70

against a statutory authority which entered into such a compromise. The Hon'ble Supreme Court observed that the properties of deities, temples, and Devaswom Boards, require to be protected and safeguarded by their Trustees/Archaks/ Shebaites/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities, and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of '*fences eating the crops*' should be dealt with sternly. The Government, members or trustees of Boards/Trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. Courts also must protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation.

50. In *Amar Singh* (supra) the Hon'ble Supreme Court held that where a compromise goes against a public policy prescription of a statute or a mandatory direction to the Court to decide on its own certain foundational facts, a *razi* cannot operate to defeat the requirement so specified or absolve the Court from the duty. The resultant order will be ineffective. After all, by consent or agreement, parties cannot achieve what is contrary to law and a decree merely based on such agreement cannot furnish a judicial amulet against statutory violation. For, '*by private agreement*' converted into a decree, parties

cannot empower themselves to do that which they could not have done by private agreement alone'. (See *Mulla : Civil Procedure Code.*, Vol. II, p. 1300). The true rule is that "*the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the Judge*". The learned author, Mulla, in his Commentary on Order XXIII, R. 3 (*Civil Procedure Code*, Vol. II, pp. 1299-1300) cites many authorities for this proposition and observes : "*If a decree is passed under this rule on a compromise which is not lawful, the Court should not enforce the decree in execution proceedings. Thus, a sale of an office attached to a temple is against public policy. Hence, if in a suit against the holder of such an office a compromise is arrived at whereby the holder of the office consents to the office being sold in satisfaction of the debt due to the plaintiff, and a decree is passed on the compromise, the Court should not withstanding the consent decree refuse to sell the office in execution. It is clear that if the matter had rested in contract only, the Court could not have enforced the sale in a suit brought for that purpose. The mere fact that the contract is embodied in a decree does not alter the incidents of the contract.*" The Hon'ble Supreme Court then referred to its earlier decisions in ***Chari Vs Seshadri*** (1973) 1 SCC 761, ***Bahadur Singh Vs Muni Subrati*** 1969 2 SCR 432, ***Kaushalya Devi Vs K. L. Bansal***, (1969) 1 SCC 59 and ***Ferozi Lal Jain Vs Man Mal*** (1970) 3 SCC 181 and observed that the core principle or ratio that is revealed in these cases is that in cases where a statute, embodies a public policy and

consequentially prescribes the presence of some conditions for grant of reliefs, parties cannot by-pass the law by the exercise of a consent decree or order, and mere judicial imprimatur may not validate such decree or order where the Court or Tribunal is not seen to have applied its mind to the existence of those conditions and reached its affirmative conclusion thereon. Such mindless orders are a nullity. The important facet of the law clarified in these decisions is that where high public policy finds expression in socio-economic legislation contractual arrangements between interested individuals sanctified into consent or compromise decrees or orders cannot be binding on instrumentalities of the State called upon to enforce the statute, although the tribunals enjoined to enforce the law may take probative note of the recitals in such compromise or consent statements in proof of facts on which their jurisdictions may have to be exercised. Further, if there is no evidence either by way of admissions in consent statements and *razis* or otherwise on the record, the reliefs sanctioned by the statute cannot be granted and orders or decrees which purport to grant them sans proof of the legal requirements will be a nullity.

51. Similarly, in this case, we cannot agree with Mr. Costa's contention that the averments in the 1999 plaint were either confusing or contradictory. The Comunidade had pleaded material particulars as were required to be pleaded. The plaint is required to be read and construed in its entirety. There is no scope to read some sentences out of context. Thus, construed the pleadings are quite clear in that plaint

alleges that though the suit properties were in possession of the Comunidade, the Appellant, taking advantage of the fraudulent decree dated 24th November 1994 constructed a rubble stone wall around a part of the encroached portion. Therefore, the recovery of possession was sought of the encroached portion by removing such rubble stone wall. In any case, this cannot be a ground to either reject the plaint or to dismiss the suit. The parties have to lead their evidence and upon appreciation and evaluation of evidence on record, the Civil Court has decreed the 1999 suit.

52. The expert examined on behalf of the Comunidade Purushottam Dalvi (PW2), at one stage did depose that the compound wall which he inspected at the site several years ago may have been constructed almost 50 years ago. However, such a stray sentence from the deposition of PW2 who was admittedly an aged person at the time of his deposition, cannot be overemphasized out of context. There is other oral evidence on record that establishes that a rubble stone wall was put up almost 50 years ago to enclose the encroached portion regularised by the 1948 Deed. Therefore, there is merit in the submission of Mr. Usgaonkar that some confusion was quite natural in the testimony of PW2 and such confusion in no manner detracts from the Comunidade's case which is mostly based on documentary evidence. Mr. Usgaonkar pointed out that the 1948 Deed refers to regularisation of the encroached portion admeasuring only 44,679 square meters and

12824 square meters and not to the suit properties which admeasuring 1,42,720 square meters. Mr. Usgaonkar also pointed out that the 1948 Deed makes it clear that the suit properties were in fact located to the north of the encroached properties regularised by the 1948 Deed. He pointed out that the northern boundaries of the properties referred to in the 1948 Deed are the suit properties and this is quite clear from the documentary evidence on record.

53. Raghupati Bhandari, the appellant herein, was not at all candid in his deposition before the Court. His deposition is more confusing than the deposition of Engineer Dalvi. He has not deposed to the correct survey numbers of the regularised property and suit property. At one stage he admitted that in pursuance of the 1948 deed, he paid regularization charges only in respect of an area of 4595 square meters, and therefore he was not claiming the balance area even though he was in possession of the same. He even admitted that the previous regularization was in respect of an area of only 4595 square meters. He added that if the Comunidade is now willing to accept the balance amount, he is willing to pay the same for regularization of the two properties referred to in the 1948 deed. He admitted that the property Zoixinichi Xir is surveyed under number 152 meaning thereby that same was different from the property Navtavaril Bharad surveyed under numbers 150/1, 150/2, and 150/3. He admitted that property at lote 24 surveyed under number 159 was reserved for cattle grazing. All such admissions coupled with the confusing replies given by the appellant in

his cross-examination is sufficient to demolish the appellant's case as pleaded in the written statement. The documentary evidence on record which the Trial Court has correctly analyzed is sufficient to sustain the findings recorded in the impugned judgment and order.

54. On the evaluation of both the oral and documentary evidence on record, there is no case made out to disturb the findings of fact recorded by the civil Court in the 1999 suit. The findings are entirely consistent with the evidence on record and in particular, the findings are consistent with the documentary evidence on record.

55. Mr. Costa may be right in his submission that there was no infirmity in the 1948 Deed or that it was too late in a day for the Comunidade to question the 1948 Deed. However, in this case, the Comunidade has never questioned the 1948 Deed. All that the Comunidade pointed out was that the 1948 Deed related to some properties other than the suit properties admeasuring only 44,679 and 12824 square meters. The Comunidade objected to the reliance placed by the Appellant on 1948 Deed, to fraudulently usurp the suit properties which were not even the subject matter of the 1948 Deed and admeasured almost three times more than properties which were the subject matter of 1948 Deed. Besides, the appellant's admissions that charges for the regularization of an area of 4595 square meters was paid by him and he had no claim to the property beyond 4595 square meters

are quite damaging to the case pleaded by the appellant in his written statement.

56. Apart from the fraud involved on the part of the Appellant and the former members of the Managing Committee of the Comunidade in obtaining the decree dated 24th November 1994, such decree, was liable to be declared as null and void because the admission of the claim of the Appellant by the President of the Comunidade in his written statement dated 29th October 1994 filed in the 1994 suit was in breach of provisions of Article 350 of the Code of Comunidades. Article 350 of the Code is required to be read and construed together with Article 349 of the Code and both these Articles are transcribed below for the convenience of reference.

*Art. 349 – When the comunidade decides to file any suit, in terms of article 9, the attorney shall explain, with indication of the probable expenditure to be incurred with the suit, with para wise pleadings in fact and law supported by documents and addressed to the Administrative Tribunal, through the respective administrator, who shall put his remarks on it.*

*The Administrative Tribunal shall decide, independently of the approval without circulation to other members, with exception that of the Ministerio Público, and if the permission is granted to file the suit, it shall sanction the expenditure to be incurred for the purpose.*

*Art. 350 – Same procedure as per the preceding article shall be adopted when the comunidade requests permission to withdraw, admit and compromise the suit.”*

57. Mr. Costa's contention that the provisions of Article 350 apply only to a suit instituted by the Comunidade by following the procedure prescribed in Article 349 of the Code cannot be accepted for more reasons than the one. In the first place, the plain reading of two provisions does not countenance any such interpretation. Secondly, such an interpretation would render the word "*admit*" in Article 350 of the Code otiose or superfluous. The question of admitting a claim by the Comunidade, in most cases will arise when a claim is made against the Comunidade or in a suit where the Comunidade is impleaded as a defendant. So also an occasion can arise for compromise of the suit in which the Comunidade is the defendant. If the interpretation suggested by Mr. Costa is to be accepted then, the scheme of provisions in Articles 349 and 350 of the Code will be unworkable, in most situations. There is nothing in Article 350 of the Code to suggest that same applies only where the Comunidade institutes a suit against some other defendants by following the procedure prescribed under Article 349 of the Code.

58. Further, based on the decision of the learned Single Judge of this Court in *Comunidade of Cacoda* (supra), it is not possible to hold that the provisions in Article 350 of the Code are only directory and not mandatory. The issue of interpretation of Article 350 of the said Code was not even remotely involved in *Comunidade of Cacoda* (supra). Therefore, the reasoning in the context of the interpretation of the provisions in Article 349 of the said Code cannot be mechanically applied for interpreting the provisions of Article 350 of the said Code.

59. According to us, in terms of Article 350 of the said Code, a Comunidade cannot, without seeking prior approval of the Administrative Tribunal, withdraw or compromise any suit instituted by it or admit any claim or compromise a suit in which it is impleaded as the defendant. The Comunidade in such case will have to follow the same procedure as is prescribed in Article 349 of the said Code in the matters of applying for and obtaining the approval of the Administrative Tribunal. However, it will not be correct to say that obtaining such approval from the Administrative Tribunal before a Comunidade withdraws a suit instituted by it or admits a claim or compromises a suit instituted by or against it is only some directory requirement. In this regard, it must be remembered that the Comunidade in terms of Article 5 of the said Code is under the administrative tutelage of the State, and in terms of the said Code, there are statutory restrictions when it comes to disposal of properties of Comunidades. One such salutary restriction is to be found in Article 350 of the said Code. Neither usurpers of Comunidade properties nor Comunidades can bypass this provision with impunity by styling the same as directory.

60. Ultimately, in such matters, we cannot forget the origins of the institution of Comunidades and the interests which the communities have in the institution of Comunidades and its properties. Rui Gomes Pereira in the introduction to his book *“GOA – Gaunkari, the old village associations, (1981)”* has noted:-

*“GAUM is village, GAUNKAR was its freeholder and GAUNKARI his associations, cooperatives, a small Republic. The Portuguese called them COMUNIDADES, because the gaunkars jointly held, administered and enjoyed the village lands. This word got into the vernacular language and it is by that name that those associations are commonly known. Hence they shall be referred to in this book as COMMUNITIES.”*

61. Presently, the administration of Comunidades is governed by Legislative Enactment No.2070 dated 15.04.1961 and is known as the “Code of Comunidades”. Recognizing the vital role played by these Comunidades at the village levels and the interests of the village communities in the institution of the Comunidades and its properties, Article 5 of the said Code, has made it clear that the Comunidades shall be under the administrative tutelage of the State, in terms established in the said Code, and its immovable properties may be granted on emphyteusis and alienated in the manner provided in the Code.

62. The scheme of the Code of Comunidades suggests that the Comunidades are not free to deal with their properties in the same manner as a private individual or entity. The Comunidades have to deal with their properties following the provisions contained in the said Code. There are checks and balances provided in the said Code to ensure that the Managing Committees of the Comunidades do not fritter away Comunidades properties for their private gains or without regard to the interest of the Comunidades and its members.

63. The aforesaid is quite evident from the several provisions of the said Code. For example, while Article 30 of the Code of Comunidades empowers the Comunidade to deliberate upon the issues of emphyteusis (long leases), sale or exchange of lands, or about the grant of rebate (quita) to the leaseholders, Article 153 of the said Code confers the power on the Governor-General (now Government) to grant emphyteusis (long leases), long term leases, authorize the exchange of lands of the Comunidades or even order their reversion. Article 324 of the said Code empowers the Comunidade to grant aforamento – emphyteusis in respect of its uncultivated and undeveloped lands and even the ones cultivated of vegetables when required for the cultivation of rice, fruit-bearing trees, or for the construction of houses. However, Article 325 of the said Code provides that the grant of certain lands by way of aforamento is forbidden. The forbidden category includes the lands earmarked for the use of the community or the lands for cattle grazing. This is relevant because the evidence on record in this matter suggests that at least a significant portion of the suit properties was the land necessary for cattle grazing. Therefore, a grant of such lands was forbidden in terms of Article 325 of the said Code. This statutory injunction could not have been overcome by the fraudulent *modus operandi* adopted by the Appellant and certain earlier members of the Managing Committee of the Comunidade in the present matter. In fact, paragraph 7 of Article 325 of the said Code provides that even an emphyteusis granted, in contravention of previous paragraphs of Article

325, shall be null and with no effect and the persons that contributed to such grants shall be liable for damages.

64. Since, the issue of grant of Comunidade lands is to be finally decided by the Governor-General (Government) there are detailed provisions that provide for how such applications shall have to be made and processed for the purposes of such grant. These are to be found in Chapter VI of the Code of Comunidades. Besides, the normal rule is that the lands of the Comunidade are to be allotted by public auction. There are certain exceptions where the lands to a specified extent can be granted without public auction. In *Michael Charles D'Souza* (supra), the challenge was to certain provisions of Code of Comunidade as well as rules made thereunder, which had permitted the grant of Comunidades lands to certain categories of person/institutions without the necessity of holding a public auction. One of the categories included the Government servants, employees of the Comunidade, and freedom fighters.

65. The Division Bench did not strike down the provisions of which had permitted the allotment of Comunidades lands to Government servants, employees of the Comunidade, or freedom fighters but read down the said provisions to permit such allotment only to landless Government servants, landless employees of the Comunidade and landless freedom fighters. All this suggests that though the lands are

owned by the Comunidade, it is not as if the Comunidades are free to dispose of their lands in the same manner as some private individuals or purely private entities may be. There are restrictions in the matters of Comunidade disposing of their lands or compromising suits affecting their land rights and such restrictions are to be found in various provisions of the said Code including requirements for obtaining the approval or permissions from the Government or Administrative Tribunal as the case may be.

66. Pereira, the noted scholar, in his above book has referred to the preamble to the Code of Comunidades in which it was clearly expressed that by abolishing the *foro* the historical truth, already stressed by Cunha Rivara, was re-established, by recognizing that the properties of the communities belong by way of perfect proprietorship to themselves and that the *foros* do not correspond to the division of ownership into *dominio util* and *dominio direcio*, the latter of the State and the former of the communities. From this, Pereira has opined that the Comunidades were the sole owners of their lands. However, they were subject to some limitations regarding their powers for transfer which did not affect their coming within the framework of the right of proprietorship, since such limitations are inherent for the purposes of the Comunidades and all such bodies.

67. Pereira, then proceeds to discuss the issue as to whether the

members of the Comunidades had the powers for alienation of village lands held by the Comunidades. He draws an analogy with the Hindu joint families by stating that the Comunidades and the Hindu joint families are two old institutions formed on unique basic concepts both regarding the governance of their affairs and their structures. The inalienability of their immovable properties was one of their fundamental commandments. The ancestral properties would be carefully preserved to be enjoyed eternally from generation to generation. That was the principal mission of the *Kartas*, their sacred duty. Strong rivalries and misunderstandings amongst these families and mutual corporal offences are frequent. Even the homicide of a co-partner by another would not be repugnant to them, they but would never agree to divide their ancestral properties. This is the thought that led to the formation of the Comunidades and moulded their structure and the norms of their conduct.

68. Pereira also refers to the ancient practices and usages concerning the administration of villages codified by a “*Foral*” by Vedor da Fazenda in 1526, in which there were no references to the sale and gift of the village lands because the old customs never permitted such alienations. However, Pereira adds that the sale of the properties of the Comunidade was, according to some writers permitted subject to certain restrictions. Thereafter there is a reference of Legislation of the 18<sup>th</sup> century that deviated for some time, from the principles of absolute inalienability of the village lands and the same being thenceforth subject

to Government authorization. Pereira then refers to *Regulamento das Comunidades*, 1882 which re-established the principle of absolute inalienability by sale or gift. Thenceforward only the alienation contemplated in the said *Regulamento* would be permitted, that is, the emphyteusis and long lease of the fallow, uncultivated and damaged lands excluding the lands of common utility.

69. Pereira, in his concluding chapter under the title “*An Ideal*” has pointed out that the Portuguese Rulers did not always look upon the communities as mere faithful agents for the collection of imposts and *foros* nor as coffers left permanently at their disposal to meet the budgetary deficit. Two centuries and a half after the conquest, the Government realised their potential and decided to convert the communities into cooperatives predominantly of public interest, after having tackled the unemployment problem of the tillers which might result from a change in the Government policy. This would be done with no prejudice to the members of the communities but to their full benefit. The Government thereafter protected the communities not as a token of gratitude for the valuable help rendered to them in their difficult moments nor for sentimental reasons but on account of their wide projection in the future. **Serra e Moura** expressing this view, wrote as follows :

*“To raze to the ground that centuries old edifice with a hammer of destruction, is easy. But, to raise on its ruins a more perfect and better finished work, a work resulting in greater glory to the architect and greater advantage to the*

*inhabitants of the villages, is a very difficult task”.*

70. All this suggests that even though the Comunidades may be the owners of their lands, still the Comunidades hold such lands or manage such lands in trust for the village communities. Therefore, there is an obligation upon the Managing Committees of such Comunidades to ensure that the Comunidade lands are not frittered away for some private gains but that dealings with the Comunidade lands are guided to achieve the best interests of the Comunidades and its members. This is the reason why certain fetters are imposed on Comunidades when it comes to dealing with their properties. The Government and the Administrative Tribunal has to be alive to this position even while considering the request from the Comunidades for disposal of its properties or for approval to admit any claims or enter into any compromises which will affect the land rights of the Comunidades.

71. In ***Chenchu Rami Reddy and another Vs Government of Andhra Pradesh and others***<sup>14</sup>, the Hon'ble Supreme Court in the context of devasthan property observed that more often than not a detriment to what belongs to 'many', collectively, does not cause pangs to 'any', for no one is personally hurt directly. That is why public officials and public-minded citizens entrusted with the care of 'public property' have to show exemplary vigilance. What is true of 'public property' is equally true of property belonging to religious or charitable

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14 (1986) 3 SCC 391

institutions or endowments. The Hon'ble Supreme Court concluded by observing that the property of such institutions or endowments must be jealously protected. It must be protected, for, a large segment of the community has a beneficial interest in it (that is the *raison d'être* of the Act itself). The authorities exercising the powers under the Act must not only be most alert and vigilant in such matters but also show awareness of the ways of the present-day world as also the ugly realities of the world of today. They cannot afford to take things at their face value or make a less than the closest-and-best-attention approach to guard against all pitfalls. The approving authority must be aware that in such matters the trustees, or persons authorized to sell by private negotiations, can, in a given case, enter into a secret or invisible underhand deal or understanding with the purchasers at the cost of the concerned institution. Those who are willing to purchase by private negotiations can also bid at a public auction. Why would they feel shy or be deterred from bidding at a public auction? Why then permit sale by private negotiations which will not be visible to the public eye and may even give rise to public suspicion unless there are special reasons to justify doing so? And care must be taken to fix a reserve price after ascertaining the market value for the sake of safeguarding the interest of the endowment.

72. For all these reasons, it is not possible to hold that the provisions of Article 350 of the said Code are only directory or that no

approval was necessary from the Administrative Tribunal before the erstwhile president of the Comunidad admitted the claim of the Appellant herein when such admission resulted in the Comunidad practically giving up its established rights in respect of the suit properties admeasuring 1,42,720 square meters. Thus, apart from the elements of fraud and collusion, we feel that the very filing of the three-paragraph written statement dated 29<sup>th</sup> October 1994 by the erstwhile president of the Comunidad in the 1994 suit purporting to admit the fraudulent claim of the Appellant was an unauthorized act under the said Code since the Comunidad or its Managing Committee had not obtained any approval from the Administrative Tribunal before admission of such claim. Since, the decree dated 24<sup>th</sup> November 1994 was based entirely on this unauthorized act on the part of the president of the Comunidad, the decree dated 24<sup>th</sup> November 1994 was quite correctly declared as null and void by the civil Court in the 1999 suit instituted by the Comunidad.

73. This is a case where the Comunidad has succeeded in establishing that the decree dated 24<sup>th</sup> November 1994 was obtained by the Appellant fraudulently and in collusion with erstwhile members of the Managing Committee, at least one of whom was his blood brother. Therefore, apart from the breach of the provisions in Article 350 of the said Code, the decree dated 24<sup>th</sup> November 1994 was liable to be declared as null and void on the ground that it was a product of fraud and collusion.

74. By now it is well established that fraud vitiates every solemn act. Fraud and justice never dwell together. A fraudulent misrepresentation is called deceit and consists of leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on the Court is always viewed seriously. A collusion or conspiracy to deprive the rights of the others to a property would render the transaction void *ab initio*. Fraud and deception are synonymous. [See: **Ram Chandra Singh vs Savitri Devi and Ors.**, 2003 (8) SCC 319 ].

75. In *Jai Narain Parasrampuria and others Vs Pushpa Devi Saraf and others*<sup>15</sup>, a suit challenging the award of the arbitrator and the consequent decree as fraudulent and collusive one was withdrawn by the Appellant before the Hon'ble Supreme Court without obtaining liberty to file a fresh suit. The High Court held that withdrawal of such suit disentitled the Appellant to raise the plea of fraud. However, the Hon'ble Supreme Court held that this was not a proper view and by the withdrawal of the suit, it cannot be said that the Appellant gave up their right to contend that the said award and decree were fraudulent. The Hon'ble Supreme Court held that the plea of fraud can be raised in a collateral proceeding and the Trial Court has recorded a specific finding

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<sup>15</sup> (2006) 7 SCC 756

that the decree was obtained by creating jurisdiction artificially of a Court originally, the decree must be said to have been obtained by concealment of material facts and by collusive and fraudulent exercise. The Hon'ble Supreme Court reiterated that any order or decree obtained by practicing fraud is a nullity. The fraud vitiates every solemn act and the plea of fraud can be raised even in collateral proceedings.

76. In *Mahboob Sahab Vs Syed Ismail and others*<sup>16</sup>, the Hon'ble Supreme Court has held that the doctrine of *res judicata* must be applied with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. If a party obtains a decree from the court by practicing fraud or collusion, he cannot be allowed to say that the matter is *res judicata* and cannot be re-opened and there can also be no question of *res judicata* in a case where signs of fraud or collusion are transparently pregnant or apparent from the facts on record.

77. In *A. V. Papayya Sastry and others Vs Govt. of A. P. and others*<sup>17</sup>, the Hon'ble Supreme Court has held that the fraud vitiates all judicial acts, whether in rem or in personam. Therefore, the judgment, decree, or order obtained by playing fraud on the Court has to be treated as non-est and nullity whether by the Court first instance or by the final Court. It can be challenged in any Court, at any time, in appeal, revision, writ, or even in collateral proceedings. This is in fact

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<sup>16</sup> (1995) 3 SCC 693

<sup>17</sup> (2007) 4 SCC 221

the exception to Article 141 of the Constitution and the doctrine of merger.

78. For all the aforesaid reasons, the First Appeal No. 250 of 2009 is liable to be dismissed and is hereby dismissed with costs assessed at ₹25,000/-.

79. Now coming to Writ Petition No.983 of 2019, we feel that there is no case made out to interfere with the order of Tribunal declining approval to the Comunidade to compromise the matter by accepting the amount of ₹1.75 crores. The Comunidade when it filed the 1999 suit had valued the suit property admeasuring 1,42,720 square meters at ₹4,28,16,000/- and paid maximum Court fees. This was in the year 1999. By the year 2019 when the Comunidade applied for approval to virtually give up its claim in respect of the suit properties admeasuring 1,42,720 square meters, the value of suit property must have increased at least two to three folds and must therefore be in the region of a minimum of ₹10 to 12 crores. The Tribunal was therefore right in holding that the Comunidade ought not to be permitted to enter into such a compromise since such a compromise will not be in the interest of the Comunidade or its members.

80. This is a case where the suit properties admittedly belonging to the Comunidade and admeasuring 1,42,720 square meters were sought to be usurped by the Appellant by practicing fraud and by

colluding with the erstwhile members of the Managing Committee of the Comunidade. The Trial Court in the 1999 suit has returned findings of the fraud and collusion. The 1994 decree was based upon the admission by the erstwhile president of the Comunidade and this admission was contrary to the records of the Comunidade and this admission was made without obtaining approval of the Administrative Tribunal under Article 350 of the said Code. To permit the Comunidade to compromise a matter of such a nature would amount to permitting the Comunidade to enter into a compromise in breach of public policy as is evidenced by the provisions of the said Code. The Tribunal was thus justified in rejecting the Comunidades' application seeking leave to compromise the matter and fraudulently give up its rights to the suit properties admeasuring 1,42,720 square meters by accepting a paltry amount of ₹1.75 crores.

81. There is neither any jurisdictional error nor perversity in the Tribunal's impugned order dated 16<sup>th</sup> October 2019 to warrant any interference with the same, in our writ jurisdiction. This is not a case where the Tribunal has failed to take into account relevant considerations or swayed by any irrelevant ones. Besides, the writ jurisdiction is to be exercised to promote justice and not to perpetuate any illegalities. In the facts of this case, to allow the Comunidade to compromise the matter would amount to allowing fraud and collusion to prevail over the interests of the Comunidade, over the interests of the

administration of justice, and in total disregard to the provisions of the said Code. The Tribunal, in this matter, has followed the principles laid down by the Hon'ble Supreme Court in *Chenchu Reddy* (supra) even without referring to the same and there is no case made out to interfere.

82. In *Maria Margarida Sequeira Fernandes Vs Erasmo Jack De Sequeira*<sup>18</sup>, the Hon'ble Supreme Court has held that false claims and defences are really serious problems with real estate litigation, predominantly because of ever-escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. The Supreme Court in *Ramrameshwari Devi* case, (2011) 8 SCC 249 aptly observed that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. To curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. This problem can be solved or at least be minimized if exemplary costs are imposed for instituting frivolous litigation. The imposition of actual, realistic, or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. The imposition of heavy costs would also control unnecessary adjournments by the parties.

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<sup>18</sup> (2012) 5 SCC 370

In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

83. The reliance placed by Mr. Usgaonkar on *Hindustan Lever* (supra) is with respect quite misplaced. The principles which apply to the amalgamation of two companies cannot be imported in the matter of this nature where the village community has an interest in ensuring that the properties of the Comunidade are not frittered away by acts of fraud and collusion. Even the existing general body of the Comunidade cannot, by some majority, fritter away the Comunidades property, particularly when the Comunidade property was sought to be usurped by practicing fraud and colluding with erstwhile members of the Managing Committee.

84. Mr. Usgaonkar's contention that the Comunidade will have difficulties in executing the decree dated 29<sup>th</sup> August 2009 can be no ground for permitting the Comunidade to enter into a compromise which will result in frittering away the Comunidades property admeasuring 1,42,720 square meters conservatively valued at ₹10 to 12 crores for a price of ₹1.75 crores. However, Mr. Usgaonkar is right in his submission that the observations made in our order dated 24<sup>th</sup> July 2014 while disposing of Contempt Petition No.10 of 2013 were only in the context of determining whether there was any deliberate disobedience of our orders by the Appellant Raghupati Bhandari or not. Such

observations, therefore, cannot enure either to the benefit of Raghupati Bhandari or the purchasers from Raghupati Bhandari, etc. Since Raghupati Bhandari attempted to obtain a title to the suit properties based on fraudulent and collusive decree dated 24<sup>th</sup> November 1994 and since the said fraudulent and collusion decree has been correctly declared as null and void by the civil Court in its impugned decree dated 29<sup>th</sup> August 2009, it is obvious that Raghupati Bhandari could never have transferred some title which he never legally or equitably possessed to third parties. The only issue in the Contempt Petition No.10 of 2013 was to determine whether there was any willful or deliberate breach of any orders by Raghupati Bhandari and no other issue was involved in the said Contempt Petition.

85. Besides, as was held in *Arjan Singh Vs Punit Ahluwalia and others*<sup>19</sup>, where a compromise decree was held as unlawful, no party claiming right under such compromise decree can ordinarily set up a plea of a bonafide purchaser for value without notice. The Hon'ble Supreme Court held that the sale deed in favour of some third party would not come in the Court's way in passing a decree in favour of the party on whom the compromise decree was not binding on account of fraud or otherwise.

86. For all the aforesaid reasons, even the Writ Petition No. 983 of 2019 is liable to be dismissed and is hereby dismissed.

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19 (2008) 8 SCC 348

87. For all the aforesaid reasons, both the First Appeal No.250 of 2009 and Writ Petition No.983 of 2019 are liable to be dismissed and are hereby dismissed. Interim relief, if any, is hereby vacated.

88. In First Appeal No.250 of 2009, the Appellant will have to pay the costs of ₹25,000/- to the Respondent – Comunidade.

**BHARATI H. DANGRE, J**

**M. S. SONAK, J**

**at\***

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