

Vinita

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 25 OF 2020

Mr. Govind Atmaram Kubal, Son of late
Atmaram Kubal, Major of age, occupation
Business, Residing at House No.112,
Dhakati, Chandai, Pirna, Bardez-Goa. Petitioner.

Versus

Comunidade of Pirna, Having their
Office at Pirna, Bardez-Goa, Through its
duly elected Attorney, Respondent.

Mr. C. Padgaonkar, Advocate for the petitioner.

Mr. S. N. Joshi and Ms. S. Rawool, Advocates for the respondent.

CORAM: SANDEEP K. SHINDE, J.
DATE: 4 AUGUST, 2022.

JUDGMENT.:

1. Rule, made returnable forthwith. Learned Counsel for the respondent waives notice on behalf of the respondent.

2. This petition under Article 227 of the Constitution of India, questions the correctness of the order dated 23.12.2019, by which, the learned Civil Judge, Junior Division 'B' Court Bicholim, recalled and set aside the order recording the compromise between the parties and

passing of a decree under Order 23 Rule 3 of the CPC and consequently restoring the suit to the file.

3. Briefly stated the facts of the case are that, the suit property surveyed under No.60/0 belongs to plaintiffs. The plaintiffs are the Comunidade of Pirna. The committee manages the affairs and the properties of the Comunidades under the control of the Administrator of the Comunidade. The committee of the plaintiffs by its resolution dated 20.1.2015 had resolved to file a suit against the defendant/petitioner and accordingly, obtained approval of the Administrator of Comunidade, North Zone, Mapusa. The suit property admeasures 136850 sq. mts. The defendant was found occupying an area of 20000 sq. mts. area of the suit property without any authority. The earlier committee of the plaintiffs did not take any steps to prevent the defendant from further encroaching in the suit property. Therefore, the suit was instituted by the Comunidade of Pirna through its duly elected attorney Shri Naresh H. Naik for a decree in the nature of the permanent injunction restraining the defendant, his family members, agents, servants, or any other person acting on their behalf from interfering in the suit property in

whatsoever way and the suit was instituted on 27.5.2015.

4. On 17.11.2015, Shri Naresh H. Naik, attorney of Comunidade and the defendant/petitioner, compromised the suit by which the plaintiffs through constituted attorney had agreed that defendant shall restrict his claim only to the suit portion admeasuring 20000 sq. mts. and shall not interfere with balance area admeasuring 116850 sq. mts from the survey no. 66/0 of village Pirna. Likewise, the plaintiffs had also agreed and consented that it shall not interfere with the suit portion admeasuring 20000 sq. mts in possession of the defendant. The plaintiffs/Comunidade also permitted the defendant to mutate his name in the revenue records admeasuring 20000 sq. mts. in the property under survey no.66/0 specially carved out as plot 'A' as shown in the annexed sketch. Whereupon decree in terms of Order 23 Rule 3 of CPC was drawn.

5. In September, 2016, the plaintiffs through its duly elected attorney Shri Krishna Vassudev Naik moved an application under Section 151 of CPC for recall of the judgment and decree dated

17.11.2015 passed under Order 23 Rule 3 of the CPC.

6. Plaintiffs sought recall of the consent decree on the following grounds namely;

- i. That the then attorney of Comunidade Shri Naresh H. Naik, President Shri Uttam Narayan Naik, treasurer Shri Datta A Naik, and the beneficiary of the consent terms namely, Shri Govind A. Kubal defendant therein played fraud on the Comunidade.
- ii. The then elected body of the Comunidade did not obtain any approval from the Administrative Tribunal in terms of Article 350 of the Code of Comunidades to institute eviction proceedings as against the defendant Shri Govind Atmaram Kubal.
- iii. That by giving a false impression, that the suit was of preservative nature, and sanction was sought from the Administrator of Comunidade.
- iv. The suit was instituted on 27.5.2015 and the consent decree was passed on 17.11.2015. This itself demonstrates connivance between the parties.
- v. That in absence of approval in terms of Article 350 of

the Code, the constituted attorney of the Comunidade could not have compromised the suit.

- vi The general body of the Comunidade was kept in dark by the elected committee in the matter of consent terms referred herein above.
- vii The elected body of the Comunidade mislead the Court whereby irregular decree came to be passed.
- viii The Comunidade has filed an application under Section 156(3) of the Cr.P.C., in the Court of Judicial Magistrate First Class against Shri Naresh H. Naik, (Attorney), Uttam Narayan Naik(President) and Shri Datta A. Naik, treasure, and the plaintiff seeking registration of crime under Section 407, 408, 409, 420 read with 120 of the Indian Penal Code.

7. The learned Trial Court vide order dated 23.12.2019, 'recalled', the compromise order and consequent consent decree dated 17.11.2015. Feeling aggrieved by that order, original defendant has filed this petition.

8. Heard Mr. C. Padgaonkar, learned Counsel for the petitioners and Mr. S. N. Joshi, learned counsel for the respondents.

9. The question for consideration, is “whether Comunidade of Pirna, could have compromised the suit instituted by it, without seeking prior approval of the Administrative Tribunal in terms of Article 350 of the Code of Comunidades?”

10. In terms of Article 350 of the Code of Comunidades, a Comunidade cannot without seeking prior approval of the Administrative Tribunal withdraw or compromise any suit instituted by it or admit any claim of compromise suit in which it is impleaded as defendants. The Division Bench of this Court in the case of *Raghupati R. Bhandari vs Comunidade of Bandora, First Appeal No.250 of 2009 dated 8.2.2021*, explained the scheme of Code of Comunidade, whereby emphasised 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 proprieties following the provisions contained in the said Code. Thus held that there are checks and balances provided in the said Code to ensure that the Managing Committee of the Comunidade do not fritter away Comunidades properties for their private gains or without regard to the

interest of the Comunidades and its members. The paragraph no. 59 and 61 of the judgment in First Appeal no.250 of 2009 in **Raghupati Bhandari**(supra) read as under:-

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.*
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.
Emphasis supplied.

11. In the case at hand, admittedly, the then managing committee of the plaintiffs did not seek prior approval of the Administrative Tribunal under Article 350 of the Code to compromise the suit relating to the immovable property of the Comunidade, which was otherwise mandatory. The paragraph no.61 of the judgment in the ***Raghupati Bhandari***(supra) underlines the role played by the Comunidades at the village level and held that the administration of Comunidades is governed by Legislative enactment No.2070 dated 15.04.1961 and is known as "Code of Comunidades." As such, held that Comunidades plays a vital role at the village levels, in the interest of the village communities in the institution of the Comunidades and its properties. Otherwise also Article 5 of the said Code makes it clear that Comunidades shall be under the Administrative protection of the State, and its immovable properties shall be alienated in the manner provided

in the Code.

12. Rule 3 of Order 23 of the CPC gives a mandate to the Court to record a lawful compromise and pass a decree in terms of such compromise. Conditions should normally must be satisfied for validity for invoking Order 23 Rule 3 of the CPC, 1908 and for passing of such a decree are as under;

- i. There should be a lawful agreement or compromise
- ii. Compromise has to be in writing and signed by the parties
- iii. The compromise must be recorded by the Court.
- iv. A decree of such compromise can be passed so far as it relates to the parties of the suit and may extend to special matter which is not subject matter of the suit

It is settled law that the Court can refuse to record a settlement where the statue on which suit is founded expressly or impliedly negatives applicability of this rule or if compromise is a nullity or where compromise is not in the interest of the public or institution which a party to the suit or where it would result in substantial failure of justice. Therefore, a compromise which is opposed to public policy, and/or not in the interest of public, is not a valid compromise.

Likewise, if a decree is passed on compromise, which is not lawful, the Court should not enforce the decree in execution.

13. Undisputably, the compromise between the erstwhile members of the Comunidade, and as and the defendant being not in the interest of Comunidade, was contrary to express provisions of Article 153 of the Code of Comunidades. Thus, the agreement between then members of the plaintiffs and the defendants was unlawful agreement, decree could not have been passed.

14. Insofar as, the powers of the Court to recall the order is concerned, it may be stated that in terms of the provisions of Order 23 Rule 3-A of the CPC, no suit shall lie to set aside a decree, on the ground that compromise on which decree is passed is not lawful and therefore, party to the consent decree has to approach same Court which recorded the compromise. In the case of *Sree Surya Developers and promoters Vs N. Sailesh Prasad and others*, (2022) 5 SCC 736. The Apex Court has held that;

On a plain reading of Order 23 Rule 3-A CPC, no suit shall lie to set aside a decree on the ground that the

compromise on which the decree is based was not lawful. An agreement or compromise which is clearly void or voidable shall not be deemed to be lawful and the bar under Rule 3-A shall be attracted if compromise on the basis of which the decree was passed was void or voidable. Party to a consent decree based on a compromise to challenge the compromise decree on the ground that the decree was not lawful i.e. it was void or voidable has to approach the same court, which recorded the compromise and a separate suit challenging the consent decree is not maintainable.

15. Thus, in consideration of the facts of the case and the law relating to compromise or adjustment of the suit claim is concerned, and jurisdiction of the Court to recall the order, in my view the impugned order passed by the trial Court calls for no interference. The petition is accordingly dismissed.

16. Rule is discharged. Petition stands disposed of accordingly.

SANDEEP K. SHINDE,J.