

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.37 OF 2009

La Marvel Residents Welfare Association,

a Society registered under the Societies Registration Act, 1860, through its President, Shri Evaristo Fernandes, having office at G4, La Marvel Colony, Raj Bhavan Road, Dona Paula, Goa- 403 004.

... Petitioner

V/s.

- 1 North Goa Planning & Development Authority having office at Mala Link Road, Panaji-Goa.
- 2 State of Goa, through its Chief Secretary, having office at Secretariat, Porvorim, Bardez- Goa.
- 3 The Chief Town Planner Town and Country Planning Department, Government of Goa, Panaji- Goa.
- 4 Real Estate Agency, through its Partner, Shri Kedar Kakodkar, having office at 318, Govinda Building, M.G. Road, Panaj- Goa.
- 5 Pradip Burman
5/7, Shantiniketan, New Delhi – 110 021.
- 6 Greater Panaji Planning and Development Authority, through its Member Secretary having office at Mala Panaji, Goa. Respondents.

Mr. P. Sawant, Advocate for the Petitioner.

Ms. Sapna Mordekar, Additional Government Advocate for Respondent Nos. 2 and 3.

Mr. Rohit Bras De Sa, Advocate for Respondent No.4.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. T. Mashelkar, Advocate for Respondent No.5.

**CORAM:- G. S. KULKARNI &
BHARAT P. DESHPANDE, JJ.**

DATED :- 9th December, 2022

ORAL JUDGMENT: (Per BHARAT P. DESHPANDE,J.)

The petitioner society approached this Court with the following prayers:

(A) This Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction, quashing and setting aside the Impugned Order dated 29/07/2008 (ANNEXURE "Q" to the Petition);

(B) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, commanding the Respondent Nos.1, 2 and 3 to demolish the illegal construction carried out by the Respondent No.4 in the Plot indicated as "Promenade" in La Marvel Colony, at Dona Paula;

(C) Pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to stay the Impugned Order dated 29/7/2008 (ANNEXURE "Q" to the Petition) and direct the Respondent Nos.1, 2 and 3 to take action against the illegal construction carried out by the

Respondent No.4 in the Plot indicated as “Promenade” in La Marvel Colony, at Dona Paula;

(D) For ad-interim ex-parte relief in terms of Prayer Clause (C) herein above;

(E) For such other and further relief that this Hon'ble Court deems fit and proper;

2. It is the grievance of the petitioner that the respondent No.4 illegally constructed a compound wall around the open space claiming to be a “Promenade” at La Marvel Residential Colony, Dona Paula. A complaint was lodged to the concerned authority and thereafter respondent No.1 issued demolition order on 01/04/1999. However, respondent no.3 remanded the matter back to respondent No.1 for a fresh consideration. Since there was no decision passed by respondent No.1, the petitioner filed Writ Petition No.28 of 2008 before this Court. Vide order dated 22/01/2008, this Court directed respondent No.1 to complete the proceedings within eight weeks. Respondent No.1 thereafter passed the impugned order dated 29/07/2008 observing that “Promenade” is not a part of the open space and accordingly, the Show Cause Notice issued against the owner/respondent was withdrawn which is challenged in the present petition.

3. We have heard the learned Counsel Shri P. Sawant for the petitioner, learned Additional Government Advocate Ms. Sapna Mordekar for respondent Nos. 2 and 3, Shri Rohit Bras De Sa, learned

Advocate for respondent No.4 and learned Senior Counsel Shri Sudin Usgaonkar along with Ms. T. Mashelkar for respondent No.5.

4. Mr. Sawant appearing for the petitioner strongly contended that the impugned order dated 29/07/2008 passed by the Member Secretary of respondent No.1 is without any reason and therefore such order needs to be quashed and set aside. He argued that in the Sale Deed of all the members of the said society, the plot is shown as open space. However, subsequently encroachment was made on it by construction of a compound wall and restricting the entry claiming to be a "Promenade". He then submitted that the representations filed to the authorities were not considered at all. He relied upon the letter from respondent No.4 dated 01/04/1998 addressed to the petitioner along with the paper cutting and claimed that such open space was admittedly kept for the use of the society members and therefore subsequently the same could not have been challenged by restricting the entry of other members and by constructing a compound wall.

5. Mr. Sudin Usgaonkar appearing for respondent No.5 has clearly pointed out that there is no order or plan issued by the Planning Department directing to keep such plot as open space as required statutorily under the development rules and regulations. According to him, said plot of land was always owned and possessed by the

developer and even if there is some mention of such plot as open space in the plan attached to the Sale Deeds of the individual plot owners, at the most it could be a promise to keep such place as open place between two individuals and that such promise if breached cannot be enforced by taking recourse to writ jurisdiction. The alternative efficacious remedy available to the petitioner was only to file civil suit thereby enforcing such contentions in the Sale Deed or the Agreement to Sale.

6. Rival contentions fall for our consideration.

7. The impugned order passed by respondent No.2 dated 29/07/2008 clearly shows that all contentions have been considered and only thereafter the Show Cause Notice issued was withdrawn. The documents were perused by the concerned authority and it was concluded, on the basis of such documents that the "Promenade" is not a part and parcel of the open space which is claimed by the petitioner.

8. We have considered the impugned order dated 29/07/2008 at Annexure Q in quite detail and found that reasons are given before coming to the said conclusion. Therefore such an order cannot be considered as an order without any reason. The main contention of the petitioner is that respondent No.1 failed to discuss reasons while

passing such orders. Such contention is ex-facie incorrect and therefore, cannot be taken into account.

9. The learned Shri Sawant failed to point out any order or plan of Sub-division of the said land approved by the Development Authority wherein open space claimed by the petitioner is shown as reserved as open space which is statutorily required under the development rules and regulations.

10. Mr. Sawant then tried to canvas that such plans were required to be produced by respondent No.1 and also by the developer. We are unable to accept such contention. The petitioner approached this Court with a specific assertion. It is the petitioner who has to produce such records or documents in support of his pleadings. The respondents claimed that such open space was never a subject matter of a statutory requirement by keeping it as open space forever under the development rules and regulations.

11. The petitioner, therefore, failed to show any statutory right over the said space to be enjoyed as open space for the benefit of the members of the petitioner. Similarly any letter addressed by the developer or the owner giving assurance to keep open space, cannot be enforced in writ jurisdiction. It can be considered as a promise made and accepted which could be enforced under the provisions of contract

Act and also under the provisions of Specific Relief Act. The contention of Mr. Sawant for the petitioner is that there was promise on the part of the developer to keep said space as open space and hence the petitioner got right to use it as open space cannot give rise to entertain a Writ Petition.

12. Having said so, we are not inclined to grant any relief as claimed in the present petition.

13. The petition stands rejected. Parties shall bear their own costs.

BHARAT P. DESHPANDE, J.

G. S. KULKARNI, J.

MEENA
VISHAL
BHOIR

Digitally signed by
MEENA VISHAL
BHOIR
Date: 2022.12.14
16:44:06 +05'30'