

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.243 OF 2023

- 1 Mr Raphael Domnic Philip Patricio,
aged 62 years, r/o. H/101,
Geeta Omkar CHS Ltd, Geeta Nagar,
Mira Road East, Mumbai - 401107.
Maharashtra.

...Petitioner

Versus

- 1 State of Goa,
through its Chief Secretary,
Secretariat, Porvorim- Goa.
- 2 Chief Town Planner,
Town and Country Planning Department,
Government of Goa, Panaji- Goa
- 3 Village Panchayat Nerul,
through its Secretary, Nerul,
Bardez, Goa – 403 114.
- 4 Mrs Manorama Salgaonkar,
r/o. Fatta Waddo, Nerul, Bardez, Goa.

... Respondents

Mr Yogesh V. Nadkarni with Ms. Simram Khadilkar, Advocates for the petitioner.

Mr Devidas Pangam, Advocate General with Mr S.P. Munj, Additional Government Advocate for Respondent No.1 and 2.

Ms Pranita Narayan Gawandi, Advocate for Respondent No.3.

Mr Jatin Ramaiya, Advocate for Respondent No.4.

CORAM: M.S. SONAK &
BHARAT P. DESHPANDE, JJ.

RESERVED ON : 26th JULY, 2023
PRONOUNCED ON : 31st JULY, 2023

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

1. Rule. Rule is made returnable forthwith. The matter is heard with the consent of both parties at the admission stage for final disposal.

2. Heard Mr Yogesh V. Nadkarni with Ms Simram Khadilkar, learned Counsel for the petitioner, Mr Devidas Pangam, learned Advocate General with Mr S.P. Munj, learned Additional Government Advocate for Respondent No.1 and 2, Ms Pranita Narayan Gawandi, learned Counsel for Respondent No.3 and Mr Jatin Ramaiya, learned Counsel for Respondent No.4.

3. The petitioner preferred present petition with the following prayers clauses

A. For a writ of mandamus or a writ in the nature of mandamus or any appropriate writ, direction or order to Respondent Nos.1, 2 and 3 herein to demolish the illegal construction undertaken by respondent No.4 herein in Survey No.87/1 of Village Nerul, Talukar Bardez, Goa.

B. That pending hearing and final disposal of the Petition, this Hon'ble Court be pleased to direct the Village Panchayat of Nerul (Respondent No.3 herein) to ensure the stoppage of work

being undertaken by the Respondent No.4 herein in Survey No.87/1 of Village Nerul, Taluka Bardez, Goa.”

4. The petitioner is the co-owner of the property bearing Survey No.87/3 of village Nerul. Somewhere in March 2023, respondent No.4 who is the neighbour having adjoining property at survey No.87/1 and touching to the boundary of the petitioner's plot, started illegal construction without obtaining any permission from the authorities and without keeping any setback. The petitioner lodged a complaint with the Village Panchayat /respondent No.3 on 06/03/2023. Respondent No.3 issued a stop work notice on 15/03/2023 and a site inspection was fixed on 20/03/2023. It is alleged by the petitioner that despite the stop work order issued by respondent No.3, the work continued illegally with a very fast speed. Respondent No.3 failed to ensure that the stop work order is effectively implemented. Thus the petitioner approached this Court with the prayers mentioned above.

5. When the matter was taken up on 10/04/2023, we passed the following order:

“1. Issue notice to the respondents returnable on 03.05.2023. Learned Advocate General appears along with Mr S.P. Munj, learned Additional Government Advocate for respondents No.1 and 2.

2. Mr Nadkarni points out that the Panchayat has issued stop-work order on 15th March 2023, but Respondent No.4 disregarding this stop-work order, continues with the construction. He points out that Respondent No.4 has no

permissions from any authority and the construction proceeds in violation of the rules, regulations and bye-laws.

3. Accordingly, till the next date, we direct Respondent No.4 to stop the construction. Further, the Panchayat must enforce its stop-work order dated 15th March 2023, if necessary by obtaining Police protection. The Panchayat must immediately go to the site and prepare a panchanama so that if any further construction is undertaken by Respondent No.4, necessary action can be taken.

4. In addition to the usual mode of service, private service/humdist is allowed. The Petitioner to file an affidavit of service. Further, the notice to indicate that this Petition will be disposed of finally at the stage of admission.”

6. While issuing notices to the respondents we made it clear that the petition will be finally disposed of at the stage of admission itself.

7. Respondent no.4 filed affidavit-in-reply denying the allegations made in the petition. However, claimed that the prayers in the petition stand worked out as the Panchayat has issued a demolition notice. It is further claimed that respondent No.4 is entitled to challenge such notice for which she would take necessary recourse in accordance with the law. Similarly, it is claimed by respondent No.4 that he filed an application for regularization of unauthorized construction in the prescriptive format and the Deputy Collector/SDO is seized with the matter.

8. The learned Counsel Shri Nadkarni strongly contended that the entire construction carried out by respondent No.4 is without any

permission from the concerned authorities and the same is blatantly illegal. Similarly, there is no setback provided by respondent No.4 while carrying out such construction and it is practically touching the structure of the petitioner. He thus submitted that respondent no.4 is now trying to delay the matter by filing a frivolous application for regularization as no such regularization is permissible when there is absolutely no permission to construct. He submitted that respondent No.4 constructed ground plus two storied structures without any permission from the Village panchayat or the Town and Country Planning Department, therefore, the entire structure is illegal which needs to be pulled down.

9. Learned Counsel for respondent no.4 Mr Ramaiya vehemently submitted that the prayers in the petition stand worked out as the Panchayat issued an order of demolition which is dated 19/07/2023. He, therefore, submitted that the petition could be disposed of.

10. Mr Ramaiya then would submit that there existed an old structure and respondent No.4 has constructed a new structure on the plinth of the old structure and therefore no question of keeping setback. He further submitted that respondent No.4 is having a right to challenge the demolition order. Similarly, he claimed that the application for regularization of such structure is already filed before the Deputy Collector which shall be decided in due course and therefore this Court should not interfere any further in the matter.

11. Rival contentions fall for consideration.

12. The petitioner approached this Court with a specific averment that respondent No.4, who is his neighbour and adjacent owner of plot No.87/1 started construction of the entirely new structure by demolishing the earlier one, without taking permission from the concerned authorities. The petitioner who is a resident of Mumbai and visits Goa occasionally was surprised to see an illegal structure coming up in the property of respondent No.4 during his visit on 03/03/2023. The said structure is being constructed without keeping permissible setbacks. Accordingly, he immediately lodged the complaint to respondent no.3/Village Panchayat enclosing photographs. Accordingly, the Panchayat conducted a site inspection, however, no further action was taken.

13. On perusal of the reply filed by respondent no.4, there is no dispute that respondent No.3 /Panchayat issued an order for demolition which is dated 19/07/2023. Respondent No.4 has been directed to demolish such structure within 5 days from the date of receipt of the demolition notice. Respondent No.4 claimed that she is entitled to assail such an order before the appropriate authority. She then claimed that vide order dated 29/09/1976 Collector allotted /awarded the land for the purpose of construction of a house in the name of her late husband. She then claimed that from the last 45 years she along with her family members are residing in the said house. It is further claimed that respondent No.4 did not carry out any illegalities but it is stated in paragraph No.12 that she commenced and carried out some improvement in the existing structure.

14. At this stage, our attention was drawn by Mr Nadkarni to the photographs enclosed to the petition which clearly goes to show that an entirely new structure of ground plus two storied is under construction which is of pillars and slabs. By no stretch of the imagination, such construction could be called as some improvement in the old structure. On the query as to whether respondent No.4 obtained permission from the Village Panchayat or from the concerned authorities to carry out construction or even improvements, Mr Ramaiya for respondent No.4 answered in negative. Though he tried to justify that the improvements are being carried out only on the plinth and the authorities before whom the application for regularization is filed would be able to find out whether there are improvements or new construction. We are unable to accept such arguments for the simple reason that the photographs produced by the petitioner clearly go to show that a completely new structure under construction consisting of ground plus two floors is being undertaken. Not a single permission is placed before us along with the reply filed by respondent No.4. Therefore it is clear that respondent No.4 carried out total illegal construction which could be termed as a brazen act. Such a person is not even entitled to seek any regularization under the Panchayat Raj Act for the simple reason that the entire structure which is found in the photograph is illegal and therefore, the Panchayat vide its notice dated 19/07/2023 directed to demolish it.

15. In the case of *Shanti Sports Club v/s. Union of India* [(2009) 15 SCC 705], the Hon'ble Apex Court has, after considering its several earlier decisions on the subject, taken cognizance of a building constructed in

complete violation of municipal and other laws and emphasized that no compromise should be made with the town planning scheme and no relief should be given to the violators of such scheme on the ground that he has spent the substantial amount on the construction of the building. The Apex Court further stated that it is unfortunate that despite repeated decisions of the Apex Court and other High Courts, illegal construction continues to mushroom, and thereafter, pleas are made for regularization on the grounds of compassion and hardship. The Apex Court then observed that it is high time that the executive and political apparatus of the State take a serious view of the menace of illegal and unauthorized constructions.

16. In *Royal Paradise Hotel (P) Ltd. v. State of Haryana* [(2006) 7 SCC 597], the Hon'ble Apex Court rejected the plea for regularization of construction made in violation of the provisions of the planning and municipal legislation thereby observing that no authority administering municipal laws and other laws involved in the matter, can encourage such violations. Even otherwise, compounding is not to be done when violations are deliberate, designed, reckless or motivated. Marginal or insignificant accidental violations unconsciously made after trying to comply with all the law requirements can alone qualify for regularization, which is not the Rule, but a rare exception.

17. In *Friends Colony Development Committee v. State of Orissa* [(2004) 8 SCC 733], the Hon'ble Apex Court observed that though municipal laws permit deviations from sanctioned constructions being

regularized by compounding, that is by exception. However, unfortunately, with the lapse of time and frequent exercise of the discretionary power conferred by such exceptions, the exception has become the Rule. Only such deviations deserve to be condoned as bona fide or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Therefore, compounding of deviations ought to be kept at a bare minimum.

18. Mr Ramaiya appearing for respondent No.4 failed to show any provision under the Panchayat Raj Act for regularization of unlawful and unauthorized construction. Section 66 of the Panchayat Raj Act, in no uncertain terms, provides that subject to such Rules as may be prescribed, no person shall erect or alter or add to any existing building or reconstruct any building without the written permission of the Panchayat. The proviso introduced by Amendment Act 32 of 2021 clarifies that alteration of a building which consists of a single dwelling unit constructed or in existence before the commencement of this Act shall be permitted to the extent of replacement of tiles roofing with the R.C.C. slab roofing upon production of a certificate of stability of such a building issued by the Registered Structural Engineer.

19. Section 66(1) of the Panchayat Raj Act clearly bars a person from erecting any building, altering or adding to any existing building, or reconstructing any building without the written permission of the

Panchayat. The proviso added by the amendment of 2021 applies to only a single dwelling unit which was constructed or in existence before the commencement of the Panchayat Raj Act. The scope of this proviso is limited to the extent of replacing tiles roofing with R.C.C. slab roofing subject to the production of a stability certificate by the registered structural engineer. For that purpose, the owner of the building must apply for the replacement of roof tiling with RCC slab together with a certificate of the Structural Engineer.

20. In the present matter, there are specific allegations against respondent No.4 of carrying out illegal construction and that too without any permission from the competent authorities. In the reply affidavit, except for denying such contentions, there are no specific averments of obtaining any such permissions from the competent authority. We repeatedly asked learned Counsel Shri Ramaiya to show any permission obtained from respondent No.4 either to carry out any construction or alterations to the old structure, however, none of such permissions was produced. The learned Counsel for respondent No.3 candidly accepted that respondent No.4 did not obtain any permission. He only submitted that respondent no.4 being 83 years old lady who was residing in the old structure along with her family member, started the alterations on the plinth area and therefore the application filed for regularization before the Deputy Commissioner must be decided in accordance with law.

21. We are constrained to note that repeatedly petitions are filed with regard to illegal constructions and most of the parties routinely urged that

either houses or structures collapse while undertaking minor repairs or without carrying out repairs with the permission of the Panchayat. In fact under the guise of repairs, entirely new structures and that too without plans and permissions are found to be erected. Thus the *modus operandi* is to secure permission for minor repairs only from Panchayat, bypassing other authorities. Based on such permissions of minor repairs, but in defiance of all its conditions, the old structure is completely demolished and replaced with entirely new construction and that too with an extended/larger area than the old one. The idea behind it is to pass all the new structures as the old repaired ones.

22. The case of respondent No.4 is worse. There is even no permission to carry out minor repairs obtained from the Panchayat. In brazen defiance of all the provisions of the Panchayat Raj Act and other laws, the old structure was demolished and a completely new ground plus a two-storied structure is being erected, without obtaining any permission and without keeping any setback. The learned Counsel Mr Ramaiya tried to submit that for carrying out construction on the plinth area, there was no need for keeping set back. We are unable to accept such submissions. At the time of constructing a new structure in the place of old one, permission from the competent authorities are must wherein the setbacks are required to be kept. If the permission had been sought from the Panchayat and the Planning Department/Authorities, several statutory conditions, including setbacks, would follow. To avoid statutory compliances, respondent No.4 could not have proceeded with a brazenly illegal construction without bothering to apply and obtain permissions from the Authorities.

23. In the case of ***Commissioner v/s. Tahir Isani*** [2021 S.C.C. OnLine Bom 122], this Court set aside the order permitting regularization of a patently unlawful construction. Said decision was challenged before the Hon'ble Apex Court by instituting Special Leave to Appeal (C) No.4135 of 2021. The Hon'ble Apex Court dismissed the Special Leave to Appeal by observing thus:-

" Heard learned counsel for the Petitioner.

The violation of municipal regulations on construction must be met with an iron fist. That deviation from the regularisation by compounding is only an exception. Only deviations that are bonafide or when the benefit of demolition would be less compared to the disadvantage suffered, can the exception be applied. We do not find any ground to interfere. The demolition was ordered in the year 2001. Till this day, the same is being prolonged. Hence, we decline to interfere with the judgment and order of the High Court. The Special Leave Petition stands dismissed."

24. In Writ Petition No.2181 of 2022 (F) in the case of ***Miguel Francisco Gonsalves v/s. State of Goa and others*** decided by this Bench on 01/12/2022, it was observed that respondent No.5 under the garb of minor repair permission, raised the entire structure and blatantly put up ground plus one RCC structure in open defiance of specific conditions of such minor repairs and two stop work orders were issued by the Panchayat. Accordingly and after considering various decisions it was observed that there is no need for even consideration of irregularities or allowing respondent No.5 to challenge such notices only to delay the proceedings,

directed respondent No.5 to demolish the said structure and on failure, Panchayat was directed to demolish such illegal construction. Similarly, it was observed that the costs of demolition shall be recovered from respondent No.5 since there was no justification to spend taxpayers' money to carry out such demolition and on the polluter pays principle.

25. The said decision was challenged by the person against whom the order was passed, namely Borges Gonsalves, before the Apex Court in Special Leave to Appeal (C) No.22482 of 2022. The Hon'ble Apex Court on 12/12/2022 passed the following order:

“At the initial stage on hearing learned counsel for the petitioner, we had expressed our view that this petition deserved to be dismissed with costs as the petitioner, ex-facie has shown reckless dis-regard for law in coming up with construction which is the subject of dispute in this proceeding. After such opinion was expressed, learned counsel for the petitioner wanted to withdraw the present petition.

Accordingly, the present petition is dismissed as withdrawn.

Pending application(s) if any, shall stand disposed of.”

26. In the case of ***Gurudas Vattu Chati Aldonkar v/s. State of Goa and others*** (WP No.284 of 2022) decided on 29/09/2022, this Court again after considering various decisions on the question of illegal construction, regularization observed that since construction put up by respondent No.3 therein, directed to demolish the same and the costs of such demolition be recovered from the said respondent. The court also held that there was no power vested in Panchayats to regularise such brazenly illegal constructions.

27. The matter in hand though similar to the above petitions, must be dealt with an iron hand. The Court cannot consider the age of respondent No.4 at this stage when there is no dispute that without any permission from the competent authority, such construction has been carried out. Besides, looking to the magnitude of the illegality, it is obvious that the Respondent No. 4's children or relatives have embarked upon this misadventure, and now they seek shelter behind her aged status. The panchayat and planning laws cannot be openly flouted for such reasons.

28. Mr Ramaiya placed reliance on the decision of *Mr Vivek Panvelcar v/s. State of Goa* [2022 SCC OnLine Bom 61] wherein a Division Bench of this Court was dealing with the petition seeking direction to take action against illegal construction carried out by respondent No.5. The concerned authorities issued a stop work order however the construction continued. While arguing the matter, the earlier decisions of this Court in the case of *Nazar Da Silva v/s. State of Goa* [2000(2) Goa L.T. 168] was cited wherein some guidelines were issued.

29. In the case of *Vivek Panvelcar*(supra), the matter was decided on its facts and only direction was issued to the Deputy Collector to ensure that the stop work order is complied with and the Village Panchayat to take further action as indicated. This decision will not help respondent No.4 in any way for the simple reason that in this case not a single permission was obtained from the concerned authorities and a brazenly illegal structure has been erected which consists of ground plus two storied building that too without keeping any setback. There is no denial with regard to the

photographs placed on record by the petitioner about the construction site. The demolition notice dated 19/07/2023 also shows that respondent No.4 failed to produce any document in support of the construction carried out by her in Survey No.87/1. In such circumstances, the question of regularization of such brazenly illegal structure without obtaining any permission, is out of question. By filing such an application to the Deputy Collector, respondent No.4 is only trying to delay the demolition of an illegal structure.

30. In the case of *Miguel Francisco Gonsalves*(supra), this Court has observed in paragraph 45 that the plea of regularization in case of gross violation of rules and regularisations cannot be permitted in view of the decisions of the Apex Court which were discussed earlier. The direction was issued to the Director of Panchayats to bring to the notice of Panchayat and planning authorities about the precedents of the Apex Court on the subject of regularization. It was further observed that the Panchayat and other authorities must recover demolition costs from the lawbreakers as there is no justification for spending tax-payers money on such demolition activities.

31. Based on the above principle as well as the precedents, we direct respondent Nos.1 to 3 to demolish the illegal construction carried out by respondent No.4 in Survey No.87/1 of village Nerul of Bardez Taluka, within a period four weeks from today and recover the entire costs of the work of such demolition from respondent No.4.

32. Respondent No.4 is directed to deposit an amount of Rs.50,000/- with the Director of Panchayats within a week from today as tentative charges. After the demolition, respondent Nos.1 to 3 are free to raise demand from respondent No.4 towards the actual demolition costs. In case the same is not paid, respondents are free to recover such costs in accordance with the law.

33. Respondent Nos.1 and 2 shall depute the Block Development Officer of the concerned area and Secretary of Panchayat who must ensure the demolition as early as possible and within the period specified above. The Block Development Officer or as the case may be Deputy Collector shall provide the demolition squad for the purpose of carrying out such exercise and that too without any requisition from the Village Panchayat. The date for demolition must be fixed by the Secretary of Panchayat which shall be intimated to the concerned authorities. The Secretary of the Village Panchayat/respondent No.3 shall file a compliance report within a period of 8 days from the date fixed as above for the purpose of demolition.

34. The rule is made absolute in the above terms. The parties shall bear their own costs.

35. All concerned shall act on the authenticated copy of this judgment.

BHARAT P. DESHPANDE, J.

M.S. SONAK, J.

Judgment continued

36. At the request of Mr Ramaiya, learned Counsel for respondent No.4, we grant two weeks time to deposit an amount of Rs.50,000/- with the Director of Panchayats instead of one week as mentioned above.

BHARAT P. DESHPANDE, J.

M.S. SONAK, J.

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