

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.131 OF 2022

AND

MISC. CIVIL APPLICATION NO.300 OF 2023

Mr Ramnath alias Devanand R. Naik

Aged 55 years, H.No.773/19,

Opp. Bina Punjani Hair Studio,

Chogam Road, Alto Porvorim, Goa.

....Petitioner

Versus

1. State of Goa

Through Secretary Revenue,

Secretariat, Porvorim, Goa.

2. The Administrator of Comunidades

(North Zone), Near Mapusa Civil and

Criminal Courts, Mapusa,

Bardez, Goa.

3. The Comunidade of Pilerne

Office of the Comunidade of Pilerne,

Pilerne, Bardez-Goa.

Through the Administrator of Comunid-

ades of North Zone,

Mapusa, Bardez, Goa.

4. Comunidade of Serula

Having its office at West Coast Resid-

ency, 1st Floor, Opp. Bank of India, Por-

vorim, Bardez, Goa-403521,

Through the Administrator of Comunid-

ades of North Zone,

Mapusa-Bardez, Goa.

5. Mr Rajesh Kamlakant Joshi

S/o. Mr Kamlakant Joshi,
R/o. House No.734, Shantinagar,
Village Socorro, Bardez, Goa.Respondents

Mr Raunaq Rao with Ms T. Souto, Advocate for the Petitioner.

Mr Shubham Priolkar, Additional Government Advocate for
Respondent Nos.1 and 2.

Mr P. A. Kamat, Advocate for Respondent No.4.

Mr Y.V. Nadkarni with Mr N. Noronha and Mr Nilay Naik,
Advocate for Respondent No.5.

Mr Estifano C. D'Mello, Attorney of Comunidade of Pilerne –
present in person.

CORAM: M. S. SONAK, J.

Reserved on: 6th OCTOBER 2023

Pronounced on: 9th OCTOBER 2023

JUDGMENT:

1. Heard Mr Raunaq Rao for the petitioner, Mr Shubham Priolkar, learned Additional Government Advocate for respondent nos.1 and 2, Mr Estifano C. D'Mello, the Attorney of Comunidade of Pilerne, Mr P.A. Kamat for respondent no.4 and Mr Y.V. Nadkarni with Mr N. Noronha for respondent no.5.

2. Rule. The rule is made returnable immediately given this Court's order dated 18.08.2022. In the said order, a notice was issued to the respondents indicating that this petition shall be heard finally at the admission stage.

3. The challenge in this petition is to the order dated 02.11.2021 made by the Administrator of Comunidades, North Zone, Mapusa, Bardez-Goa (Administrator) discharging the notices issued in petitioner's complaints dated 25.01.2017 and 30.01.2017 as regards fifth respondent's possession of Comunidade property admeasuring around 70 sq. mtrs., partly surveyed under no.56/1 of Village Pilerne and partly under Survey No.389/1 of Village Socorro (Comunidade property).

4. Initially, the petitioner's complaints were allowed by the Administrator by his detailed order dated 13.06.2018. However, by judgment and order dated 04.07.2019 in Writ Petition No.1075/2019, instituted by the fifth respondent, this Court set aside the Administrator's order dated 13.06.2018 and remanded the matter to the Administrator for deciding the same afresh, in the light of the observations made in the said judgment and order.

5. On remand, the Administrator, by the impugned order dated 02.11.2021, has discharged the notices issued on the petitioner's complaints. In effect, the Administrator has now dismissed the petitioner's complaints. Hence, the present petition.

6. Mr Raunaq Rao, learned Counsel for the petitioner, submits that the impugned order is manifestly wrong and the reasoning therein suffers from perversity. He submits that merely because the wrongful possession by the fifth respondent was restricted to an area of 70 sq.mtrs., the Administrator was not justified in holding that the substantive and procedural provisions in Chapters V and VI of the

Code of Comunidades were not applicable. He submits that the Administrator has completely misconstrued the scope of Article 64 and the other Articles in the Code of Comunidades. He submitted that the reasoning of the Administrator directly conflicts with a decision of this Court in *Shri Sebastian Francisco Pinto & Ors. V/s. Shri Roque Aleixe Rebello & Anr.*¹.

7. Mr Rao submitted that the Administrator's attempt to distinguish the binding precedent in *Shri Sebastian Francisco Pinto & Ors.* (supra) amounts to perversity. He submitted that the so-called contract between the Comunidade of Pilerne and the fifth respondent was a nullity and, consequently, the fifth respondent was an encroacher or in any case in wrongful possession of Comunidade property.

8. Mr Rao submitted from the sub-division plan approved by the Planning Authorities, it is evident that the Comunidade property measuring 70 sq. mtrs. was an open space which could not have been allotted for commercial use by the fifth respondent. He referred to the Goa (Regulation of Land Development and Building Construction) Act, 2008 and the Goa Land Development and Building Construction Regulations, 2010 to submit how the open space could not have been converted for commercial use by the Comunidade of Pilerne. He submitted that this aspect though squarely raised, was not even considered by the Administrator in the impugned order. Mr Rao relied upon *'Down Mangor Valley, Residents' Welfare Association and*

¹ 1991 (2) Goa L.T. 210

*Anr. V/s. Mormugao Municipal Council, Goa & Ors.*² to submit that open spaces cannot be used for commercial purposes.

9. Mr Rao submitted that the commercial activities undertaken by the fifth respondent from the Comunidade land were not backed by any Panchayat resolution or legal permission. The Additional Director of Panchayats set aside the so-called NOC issued by the Official of the Panchayat vide order dated 19.11.2020. The fifth respondent's revision before the Principal District Judge was also dismissed. Mr Rao submitted that the activity undertaken by the fifth respondent is patently illegal and unauthorised.

10. Mr Rao relied on *Trajano D'Mello and Anr. V/s. State of Goa & Ors.*³, *Nazir Ahmad V/s. King-Emperor*⁴, *Cherukuri Mani w/o. Narendra Chowdari V/s. Chief Secretary, Government of Andhra Pradesh & Ors.*⁵, *Chandra Kishore Jha V/s. Mahavir Prasad & Ors.*⁶ to submit that the so-called allotment favouring the fifth respondent was ultra vires and ex facie without jurisdiction. He submitted that the so-called allotment was nothing but an attempt to fritter away Comunidade property for a song by the attorney of the Comunidade.

11. For all the above reasons, Mr Rao submitted that the impugned order be set aside, and the petitioner's complaints be allowed.

² AIR 2002 Bom 258

³ (2016) 5 Bom CR 146

⁴ AIR 1936 Privy Council 253

⁵ (2015) 13 SCC 722

⁶ (1999) 8 SCC 266

12. Mr Shubham Priolkar, the learned Additional Government Advocate, candidly submitted that the Administrator's order was indefensible. He submitted that neither the Managing Committee nor the General Body of the Comunidade had the power to allot the Comunidade property to the fifth respondent. He submitted that the substantive and procedural provisions in the Code of Comunidades had to be followed, and even after following the same, approval of the Government was a must. He submitted that as a normal rule, the Comunidade property can be given out by auction and not by some private arrangement between the attorney or other members of the Managing Committee.

13. Mr Priolkar relied on *Upama Gauns & Anr. V/s. The Administrator of Comunidade, Panaji & Anr.*⁷ to submit that the scope of the Administrator's powers under Articles 371 and 372 of the Code of Comunidades was quite wide, and in a matter of this nature where the so-called allotment favouring the fifth respondent was not consistent with the Code of Comunidades, the Administrator should have exercised the powers vested in him by the said provisions.

14. Mr Estifano C. D'Mello, the Attorney of Comunidade of Pilerne (respondent no.3) submitted that the Managing Committee of a Comunidade has full power to deal with the Comunidade properties. He submitted that the Attorney is the fiscal agent of the Comunidades and, therefore, has full powers to deal with the properties of the Comunidades so that the Comunidades can earn revenue. He submitted that there was nothing wrong with the grant

⁷ WP No.1009/2019 decided on 09.12.2019

of a permanent lease to the fifth respondent by the previous Managing Committee. He submitted that after he took over in 2018, he placed the matter before the General Body of the Comunidade which approved the allotment favouring the fifth respondent. He, therefore, submitted that this petition may be dismissed.

15. Mr P.A. Kamat appearing for the Comunidade of Serula (respondent no.4) submitted that the Comunidade property which is the subject matter of this petition, in fact, belongs to the Comunidade of Serula and not the Comunidade of Pilerne. He submitted that this controversy was raised before the Lokayukta, and on the directions of the Lokayukta, the Survey Authorities were directed to prepare a report. He submitted that in terms of this report, the Comunidade property belonged to the Comunidade of Serula and not the Comunidade of Pilerne. He, therefore, submitted that the Comunidade of Pilerne had no right or authority to deal with the Comunidade property or allot the same to the fifth respondent or any other party. On this ground, Mr Kamat submitted that the Administrator's impugned order deserved to be set aside.

16. Mr Nadkarni, appearing for respondent no.5, submitted that this was a case of allotment of only 70 sq. mtrs. of Comunidade property, which was otherwise useless to the Comunidade. He submitted that the petitioner wishes to encroach upon the Comunidade property. He submits that the petitioner is not even a member or component of the Comunidade of Pilerne. He, therefore, submits that the petitioner is not a proper relator and the petition should be dismissed on this ground alone.

17. Mr Nadkarni submits that this is not a case of allotment either under Chapter V or Chapter VI of the Code of Comunidades. He, therefore, submits that the Managing Committee and the General Body had full power to deal with the Comunidade property, of which the Comunidade was the absolute owner. He submitted that ample powers were vested in the General Body and the Managing Committee in terms of Articles 64 and 153 of the Code of Comunidades.

18. Mr Nadkarni submitted that this was certainly not a case of encroachment or trespass on the Comunidade property, and, therefore, the Administrator was justified in refusing to exercise powers under Articles 371 and 372 of the Code. He submitted that there was no error, much less jurisdictional error, in the impugned order made by the Administrator.

19. Mr Nadkarni submitted that even if some procedural irregularities were detected in the allotment made favouring the fifth respondent, considering the circumstance that only 70 sq. mtrs. of land was allotted and the petitioner was not a proper relator, this Court should not exercise its extraordinary and equitable jurisdiction in the matter.

20. Mr Nadkarni submitted that the Comunidade property was not at all any statutorily marked open space, even on the plan relied upon by the petitioner. He submitted that the Comunidade property was only some left out area owned by the Comunidade, and, therefore, the legislation quoted by Mr Rao was inapplicable.

21. Mr Nadkarni submitted that the Administrator correctly distinguished the decision in *Shri Sebastian Francisco Pinto* (supra). He submitted that even the other decisions relied upon by Mr Rao turn on their own facts and are inapplicable to the present matter.

22. For all the above reasons, Mr Nadkarni submitted that this petition may be dismissed.

23. The rival contentions now fall for our determination.

24. The Comunidade of Pilerne (respondent no.3) and the fifth respondent executed a contract/agreement dated 27.10.2012, in terms of which the Managing Committee of the Comunidade purported to allot the Comunidade property to the fifth respondent “*on permanent lease basis for the installation of a kiosk*” on certain terms and conditions.

25. One of the terms and conditions required the fifth respondent to pay early rent of ₹5,250/- (Rupees Five Thousand Two Hundred and Fifty only) (clause 3). Another condition requires the fifth respondent to obtain NOC from the competent Authorities before starting the work of installation of kiosk on the Comunidade property (clause 6).

26. As regards the condition concerning the obtaining of NOC, it appears that such NOC was obtained by the fifth respondent from the Panchayat based on a purported Panchayat resolution. However, in the proceedings taken out by the present petitioner before the Additional Director of Panchayats it was established that there was no

such resolution. Accordingly, the Additional Director, by judgment and order dated 19.11.2020, set aside the NOC. The fifth respondent instituted a Civil Revision Application No.6/2021 before the Adhoc District Judge-I, North Goa at Panaji. This was dismissed by judgment and order dated 02.01.2023. Thus, it is apparent that as of date, one of the conditions for obtaining NOC was not fulfilled by the fifth respondent.

27. Mr Nadkarni, however, pointed out that the fifth respondent has filed proceedings to challenge the orders made by the Additional Director and the District Court by invoking Article 227 of the Constitution. Since the challenge is pending, this circumstance is not presently being considered against the fifth respondent.

28. The fundamental issue in this petition is whether the Managing Committee of Comunidade of Pilerne could have granted the Comunidade property on a “*permanent lease basis*” to the fifth respondent for commercial purposes? The other question is whether any so-called ratification by the General Body of the Comunidade was sufficient for regularising the grant of Comunidade property on a permanent lease basis to the fifth respondent?

29. The Attorney of the Comunidade of Pilerne and Mr Nadkarni strongly relied upon the provisions of Article 64 of the Code of Comunidade to justify such an allotment. Article 64(1) proves that the Managing Committee shall have the powers to lease out the property and hold any auction of the property of Comunidades. However, the provisions of Article 64 have to be read with the

provisions in Chapter IV, Chapter V and Chapter VI of the Code. Besides, the provisions of Article 64 have to be read along with the provisions in Articles 30, 31 and 153 of the Code of Comunidades.

30. Subject to several compliances provided in the Code and after obtaining the approval of the Government, the Managing Committee may be empowered under Article 64(1) to lease out the property of the Comunidade. However, Article 64(1) does not authorise the Managing Committee of the Comunidade to lease out Comunidade property, bypassing the various substantive and procedural provisions in the Code of Comunidade or bypassing the requirement of obtaining the Government approval for leasing out the Comunidade property, and that too without any auction.

31. The contention, almost identical to that which is now raised by the Attorney of the Comunidade and Mr Nadkarni was raised in *Shri Sebastian Francisco Pinto* (supra). However, such contention was turned down by the learned Single Judge of this Court (G.D. Kamat, J., as His Lordship then was), by holding thus:

“Admittedly the suit plot belongs to the Comunidade of Serula. This institution, that is, the Comunidade like many other Comunidades existing in this State are governed by Diploma Legislative No. 2070 called the Code of Comunidade 1961. In fact it replaces the earlier Code in force. These are mainly village institution belonging to certain class of shareholders with some definite control by the Government. The Managing Body is either elected or appointed and that too for a definite period. The income of the Comunidades is from the receipt of income from the properties or from the grant of land on lease or aforamento basis. The Comunidades

*are entitled to grant lease of their properties and that too based on its classification for certain varied periods for examples paddy fields for a period of 3 years, coconut garden for a period of 9 years and in special cases this period could be increased. Properties are also granted on emphyteusis basis and that too after following the elaborate procedures laid down by the Code. In both these cases it must be seen that there cannot be any grant of lease or *aforamento* unless there is a public auction held and that too after following the elaborate procedure laid down in the Code. The object it appears is that since the lands are held by the institution and its affairs are managed by persons either elected or selected by Government must yield the largest or the highest income as otherwise it will be open to a Managing Body to grant lands for a songs. I have not come across any provision in the Code which empowers the Managing Body to create any lease in favour of any person without holding an auction or at least no provision has been shown to me. It is indeed true that a reference has been made to Article 64 of the Code which under the subheading competence of the Managing Body only enables the Managing Committee to grant leases which by no stretch of imagination can mean that leases or emphyteusis can be created without following the procedure set down in the body of the Code. The trial Court has placed reliance on Article 64 which in my view misplaced for it only gives powers to the Managing Body which by itself does not mean that a go-by can be given to procedure of auctions. The respondents who have come to the Court are not armed with any valid lease created in their favour by the Comunidade.”*

32. The decision in *Shri Sebastian Francisco Pinto* (supra) was cited before the Administrator. The said decision was binding upon the Administrator. However, the Administrator chose to distinguish the said decision on the specious plea that *Shri Sebastian Francisco Pinto*

(supra) concerned the grant of 500 sq. mtrs. of Comunidade land and the present case concerns the grant of only 70 sq. mtrs. of Comunidade land. This attempt to distinguish binding precedent on such ground amounts to perversity. This binding precedent could not have been bypassed by the Administrator based upon such feeble and irrelevant reasoning. Ultimately, it is the ratio decidendi or the principle which was important and not the area of the allotted Comunidade property. There is no provision in the Code of Comunidade or at least none was pointed out where Comunidade property less than 500 sq. mtrs. could be allotted, bypassing the substantive and procedural requirements in the Code or without the approval of the Government. Therefore, the Administrator was not at all justified in side stepping the binding precedent in *Shri Sebastian Francisco Pinto* (supra).

33. The contract based upon which the fifth respondent claims allotment refers to the resolution of the Managing Committee dated 06.10.2012. Such a resolution is not placed on record by any of the parties. Even the Attorney of the Comunidade of Pilerne was not prepared to place the same on record. This contract/agreement dated 27.10.2012 (on pages 117-118 of the paperbook) refers to the allotment by the Managing Committee to the fifth respondent “***on a permanent lease basis***”. The allotment of even long-term leases of Comunidade lands is governed by Chapter V of the Code of Comunidades comprising Articles 317 to 323.

34. Article 318 provides that applications for long-term leases shall be addressed to the Government and processed in the administration

office. The details of what the application should contain are also set out in Article 318. The number of years for which the lease is intended and the tentative rent which is offered must also be stated by the applicant desirous of a long-term lease of Comunidade property.

35. Articles 319 to 322 provide for a detailed procedure without which there is no question of grant of long-term leases by the Comunidade. Besides, such leases are to be granted by auction and not some private arrangement between the members of the Managing Committee and the fifth respondent. The detailed procedure involves inspection with three experts, determination of base price by the experts, etc. Since the application is required to be addressed to the Government, it is obvious that the Government has to approve the grant of such a long-term lease.

36. Perhaps realising that none of the provisions in Chapter V or for that matter Chapter VI dealing with the grant of *aforamento-emphyteusis* were complied with by the fifth respondent or the Comunidade of Pilerne, both these parties took up a bold stand that the allotment of the Comunidade property in this case was not made in Chapters V and VI of the Code of Comunidade. No explanation was however offered in respect of the contract/agreement dated 27.10.2012 in which the allotment was described as one on a permanent lease basis.

37. Fortunately, no argument was advanced that the grant of a permanent lease is not the same thing as the grant of a long-term lease. It is apparent that after it became clear that the allotment could not be

justified under Chapters V and VI of the Comunidades, a stance was taken that the allotment was not relatable to Chapters V and VI of the Code of Comunidades. Unfortunately, the Administrator bought this argument and based thereon concluded that a permanent lease could be granted by the Managing Committee of the Comunidade bypassing substantive and procedure requirements in the Code and most importantly without any approval from the Government. The reasoning of the Administrator, with respect, is quite perverse and manifestly erroneous. Most of the provisions of the Code have been overlooked by the Administrator.

38. Article 153 of the Code of Comunidade provides that the Government is empowered to grant emphyteusis and long-term leases. Therefore, the provisions in Chapters V and VI of the Code have to be read along with Articles 153(9) and 153(10) of the Code from which it is quite clear that the power of granting emphyteusis and long-term leases is conferred upon the Government and not the Managing Committee or the general body of the Comunidade under the Code of Comunidades.

39. Article 5 of the Code of Comunidades provides that the Comunidades shall be under the administrative tutelage of the State, in terms established in this Code, and its immovable properties may be granted on emphyteusis and alienated in the manner provided in this Code. Thus, apart from the responsibility of tutelage conferred to the Government, this Article specifically provides that immovable properties of the Comunidade may be alienated in the manner provided under the code and not otherwise.

40. Article 30 of the Code of Comunidades provides that the Comunidade shall deliberate on emphyteusis, sale or exchange of land [see Article 30(4)(f)]. Similarly, Article 30(4)(j) provides that the Comunidade shall deliberate in general about all the extraordinary acts not provided for in the statement of income and expenditure or in the provisions of the Code, as well as relating to any matters about which the opinion is called for. Assuming that there is some merit in the contention of the Comunidade and the fifth respondent that the allotment in the present case was unique, in the sense that it was an extraordinary act not provided for in the Code of Comunidades, then perhaps the General Body of the Comunidade could have deliberated upon the same. But even after such deliberations, the general body's resolution to allot would not produce legal effects unless the same was approved by the Government under Article 31 of the Code.

41. However, at this stage it is necessary to sound a caution that the extraordinary acts not provided for in the Code of Comunidades do not mean acts that are prohibited by the Code of Comunidades or acts for which provisions have been made in the Code of Comunidades but the acts have been committed in breach of those provisions. Here, the Comunidade or rather its Managing Committee has purported to grant the permanent lease to the fifth respondent, bypassing entirely the requirement of Government approval and the procedural and substantial provisions contained in the various Articles in the Code of Comunidades including, but not restricted to the Articles in Chapters V and VI of the Code of Comunidades. Such an act cannot be called an extraordinary act not provided for in the Code of Comunidades.

Otherwise, Article 30 would be interpreted as a charter by the Comunidades to commit acts in defiance of the provisions of the Code or in breach of the provisions of the Code. The extraordinary acts referred to in Article 30(4)(j) are only such bonafide and legal acts which the Code of Comunidades does not prohibit but for which there may not be any specific provision.

42. In any case, even if we assume that the act of allotting the Comunidade property to the fifth respondent on a permanent lease basis was covered under Article 30(4)(j), still, in terms of Article 31 of the Code, the deliberations on such an Act or the decision of the General body of the Comunidade regarding such an act, would not be enforceable without the approval of the Government. This is clear from the provisions of Article 31 of the Code of Comunidades, which reads as follows:

*“Art. 31 - The deliberations referred to in Nos.1 and 2 of the preceding article are executable immediately;
Sole § The deliberations referred to in clauses (a) to (f) and (h) to (j) of No.4 of preceding article shall be devoid of any enforceability without the approval of the Government, without prejudice to the consultation with the Director of Health Services regarding creation of medical posts.”*

43. As noted earlier, the resolution dated 06.10.2012, based upon which the Managing Committee assumed powers to allot the Comunidade property to the fifth respondent on a permanent lease basis, was never produced. In any case, the Managing Committee of the Comunidade would have no such powers for making an allotment of Comunidade property on a permanent lease basis. Clearly, the so-

called contract or agreement dated 27.10.2012 is a nullity and based upon the same, the fifth respondent's status is no better than that of an encroacher. The fifth respondent's status based upon such a contract or an agreement is entirely wrongful. The Administrator, in such circumstances, was duty-bound to exercise his powers under Sections 371 and 372 of the Code of Comunidades. The Administrator could not have avoided this responsibility based on the manifestly incorrect reasoning in the impugned order and by sidestepping the binding precedent in *Shri Sebastiano Francisco Pinto* (supra).

44. The Managing Committee's resolution dated 24.04.2018 purports to grant no objection to the fifth respondent to continue to use the open area that is the Comunidade property for commercial purposes. Again, this is some sort of ratification of a nullity. The Managing Committee has no such powers of allotting or ratifying the allotment of Comunidade property on a permanent lease basis without complying with substantive and procedural provisions and moreover obtaining the approval of the Government. The General Body's resolution dated 22.04.2018 also seeks to ratify the Managing Committee's action. This resolution is also ultra vires because even the General Body of the Comunidade cannot allot Comunidade property on a permanent lease basis bypassing the substantive and procedural requirements of the Code and moreover without the approval of the Government.

45. Therefore, the resolution of the Managing Committee and the General Body adopted in the year 2018 also confer no legality on the null and void allotment made by the Managing Committee favouring

the fifth respondent. Based on such resolutions, no legality whatsoever can be conferred on the wrongful possession of the fifth respondent. All these aspects were completely ignored by the Administrator, thereby vitiating the impugned order.

46. The Code of Comunidade provides for detailed procedures in matters of allotment of Comunidade lands, whether with or without auction. Any allotment bypassing such procedures is unsustainable and confers no rights on the allottee. In *Nazir Ahmad* (supra), the Privy Council referred to the Rule in *Taylor V/s. Taylor*⁸, in which it is held that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

47. The above rule was followed by the Hon'ble Supreme Court in *Cherukuri Mani w/o Narendra Chowdari* (supra) in which it was held that where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provision of law, without deviating from the prescribed procedure. This rule was also applied in *Chandra Kishore Jha* (supra) when the Hon'ble Supreme Court observed that it was a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner.

⁸ L.R. 1Ch. D. 426

48. The arguments about the allotment being only 70 sq. mtrs. cannot be accepted. A principle is at stake. If the allotment of 70 sq. mtrs. of Comunidade land is approved despite the clear breach of the provisions of the Code, then, there is nothing to prevent the Managing Committees or even the General Bodies of the Comunidades in the State from frittering away the Comunidades properties without any regard to concerns of transparency or without acquiring the best possible price for the Comunidade properties, which are ancient institutions.

49. The normal rule is that the Comunidade properties are to be leased out or otherwise allotted through a public auction for which a base price has to be fixed. There are some exceptions to this rule, but the exceptions do not apply in the case of allotment of Comunidade lands for commercial purposes. Therefore, the circumstance that, in this case, only 70 sq. mtrs. of Comunidade property has been allotted is quite irrelevant. Based upon this consideration, the Administrator was not justified in dismissing the petitioner's complaints. So also based upon this consideration, even this Court cannot shirk the exercise of its extraordinary and equitable jurisdiction. In any case, there is no equity in the fifth respondent's claim to the Comunidade property.

50. The learned Additional Government Advocate who was appearing for the Administrator quite candidly accepted that the Administrator's impugned order was indefensible. He submitted that neither the Managing Committee nor the General Body of the

Comunidade was empowered under the Code of Comunidades to allot Comunidade property on a permanent lease basis for commercial purposes bypassing the Government or otherwise not complying with the various Articles in the Code of Comunidades. However, it is clarified that this matter is not being decided on the concession. The provisions of the Code and the relevant precedents are considered to conclude how the view taken by the Administrator in the impugned order is manifestly wrong and in excess of jurisdiction.

51. Mr Nadkarni's and the Administrator's contention about the fifth respondent not being an encroacher, trespasser or in wrongful possession of Comunidade property cannot be accepted. Based on this contention, Mr Nadkarni and the Administrator reasoned that powers under Articles 371 and 372 of the Code were not exercisable. Mr Priolkar, learned Additional Government Advocate correctly cited in *Upama Gauns & Anr.* (supra) in which the learned Single Judge of this Court (Dama Seshadri Naidu, J.) has analysed the scope of the proceedings under Articles 371 to 373 of the Code of Comunidades.

52. The Court has held that Article 371 deals with summary eviction of a person unauthorisedly occupying land vested in Comunidades. A person may have been plainly in unauthorised or wrongful occupation, or his possession, once lawful, may have, with the passing of time, turned wrongful or illegal. The illegality could be in the face of the Code or on the expiry or termination of the lease. The termination of the lease, among other reasons, could be for the lessee's violating any conditions annexed to the tenure. The reasoning of the Administrator or, for that matter, submissions of Mr Nadkarni

in the context of provisions of Articles 371 and 372 of the Code cannot be accepted given the decision of this Court in *Upama Gauns & Anr.* (supra).

53. Even otherwise, once it is found that the so-called allotment of the Comunidade property to the fifth respondent was void ab initio, the fifth respondent cannot still claim that he was not liable to be summarily evicted under Articles 371 and 372 of the Code of Comunidades.

54. Incidentally, reference can be made to Article 373 of the Code of Comunidades, which provides that the Attorney of the Comunidade is obliged to denounce the encroachment on Comunidade lands. This Article provides that the Attorney who does not denounce the encroachment of land, as soon as it comes to his knowledge, shall be dismissed from office and shall forfeit in favour of the Comunidade the allowance to which he was entitled to the service rendered up to the date of the discovery of the encroachment of land. The procedure for addressing the denouncement is set out in Article 374 of the Code.

55. The issue as to whether the property belongs to Comunidade of Pilerne or Comunidade of Serula cannot be and need not be considered in this petition. It is open to the respective Comunidades to take out appropriate proceedings before the appropriate forum for resolution of this issue. Therefore, Mr Kamat's contentions on this point are not considered but left open.

56. Since it is clear that the so-called allotment favouring the fifth respondent was void ab initio or, in any case, manifestly contrary to the provisions of the Code, there is no necessity to go into the issue of user of open space for commercial purposes. In any case, the petitioner is at liberty to file complaints before the planning or the local authorities in this regard. If such complaints are filed and if by then the encroachment is not removed by the Administrator, such authorities will have to take action in accordance with law after complying with principles of natural justice and fair play.

57. Mr D'Mello's arguments about an attorney being a fiscal agent of the Comunidade or the Managing Committees or the General Bodies of the Comunidades having unfettered rights to deal with the Comunidade property cannot be accepted. Though the Comunidade may be the owners of their properties, they are not free to deal with their properties as private owners. The code provides for some statutory fetters which cannot be bypassed by the Comunidades or even the Government. The alienations of Comunidade properties in breach of the Code are impermissible and cannot be encouraged. Besides, this position is no longer *res integra*.

58. In *Raghupati R. Bhandari, son of Ramkrishna Bhandari; Comunidade of Bandora V/s. Comunidade of Bandora*⁹, the Division Bench of this Court, has analysed the scheme of the Code and held 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

⁹ 2021 G.L.D. OnLine 3605

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 interests of the Comunidades and its members. The Hon'ble Supreme Court dismissed the Special Leave Petition No.6767/2022 on 19.09.2022, challenging the decision of the Division Bench in the case of *Raghupati R. Bhandari* (supra).

59. The Division Bench, after referring to the provisions of the Code and the commentaries of scholars like **Dr Rui Gomes Pereira and Serra e Moura**, held that though the Comunidades may be the owners of their lands, the Comunidades still 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 have 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.

60. The Division Bench relied upon the decision of the Hon'ble Supreme Court in the case of *Chenchu Rami Reddy and Anr. V/s.*

*Government of Andhra Pradesh and Ors.*¹⁰, where the Hon'ble Supreme Court, in the context of devasthan property held 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 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).

61. The Hon'ble Supreme Court observed that 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

¹⁰ (1986) 3 SCC 391

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.

62. In *Martha Luis V/s. State of Goa and Ors.*¹¹, the Division Bench of this Court held that the Comunidades are under the tutelage of the State Government and, therefore, there is a duty and responsibility cast on the State Government to ensure that the Comunidade properties are not frittered away, particularly by encroachments. The Bench held that there was a public interest in ensuring that encroachments and easy regularisations of such encroachments did not fritter away the properties of the Comunidade.

63. The argument of locus standi in a case where a petition was instituted by a non-member of the Comunidade seeking to protect the Comunidade properties was rejected by the Division Bench in *Trajano D'Mello and Anr. V/s. State of Goa and Ors.*¹². In any case, in such matters, the message is more important than the messenger. The Administrator's impugned order, if not interfered with, could be used by Managing Committees or General Bodies of Comunidades to allot Comunidade properties on permanent leases without following the provisions of the Code of Comunidade or without the approval of the Government. Accordingly, such matters cannot be dismissed on the plea that the petitioner lacks locus standi. Such a dismissal would be

¹¹ (2012) 2 Bom CR 661

¹² (2016) 5 Bom C.R. 146

contrary to the approach suggested by the Hon'ble Supreme Court in *Chenchu Rami Reddy (Supra)*

64. Besides, in this case, the petitioner has shown sufficient interest to maintain the present petition. The Petitioner is also an allottee of Comunidade property based upon an allotment approved by the Government. The property which is the subject matter of this petition touches the petitioners' allotted land. The Petitioner has denied any intentions to encroach upon Comunidade property and has undertaken not to do so. It was based upon the petitioner's complaints that the matters landed before the Administrator. Even the Administrator did not accept the fifth respondent's contention based upon the alleged lack of locus standi in the petitioner. Therefore, the contention about the Petitioner not being a proper relator cannot be accepted.

65. For all the above reasons, this petition is allowed and the Administrator's impugned order dated 02.11.2021 is set aside. Similarly, the petitioner's complaints are allowed and the fifth respondent is directed to remove his kiosk and restore the Comunidade property to the Comunidade of Pilerne within two months from today. If this is not done, then, the Administrator is directed to remove the encroachment and restore the property to the Comunidade of Pilerne within a period of one month commencing from the expiry of the period of two months granted to the fifth respondent.

66. It is clarified that merely because the Comunidade property is directed to be restored to the Comunidade of Pilerne does not mean that this Court has adjudicated upon or decided the controversy between the Comunidade of Pilerne and Comunidade of Serula in the context of the Comunidade property. That issue is expressly kept open. The restoration is ordered to the Comunidade of Pilerne because the fifth respondent was unlawfully allotted the Comunidade property by the Comunidade of Pilerne and for no other reason.

67. The rule is made absolute in the above terms.

68. There shall be no order for costs.

M. S. SONAK, J.

NITI K
HALDANKAR

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NITI K HALDANKAR
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