Case Pointer
GOA CURRENT CASES

2024(2)GOACC509

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Karnik; Valmiki Menezes]

Writ Petition No. 453 of 2023 **dated 03/10/2024**

Dr Dilip Amonkar

Versus

State of Goa; Secretary - Health, Government of Goa; Secretary - Finance, Government of Goa; Director of Vigilance, Government of Goa; Director - Administration, Goa Medical College & Hospital; Dean,

DELAYED DISCIPLINARY PROCEEDINGS

Delayed Disciplinary Proceedings - Appellant challenged the delayed initiation of disciplinary proceedings 10 years after the incident involving a patient's death - Appellant, exonerated by a Medical Committee, argued no negligence was proven - Despite continued service and extension post-incident, inquiry was started two years after retirement - Court found delay in initiating and concluding the inquiry unjustified, noting the expert committee had already exonerated appellant - Disciplinary proceedings quashed, pensionary benefits ordered to be released. - Petition Allowed

Law Point: Delayed disciplinary proceedings, especially after retirement and exoneration by an expert committee, are unjust and warrant quashing along with the release of withheld retirement benefits.

Counsel:

S D Lotlikar (Senior Advocate), Sailee Keny, Prashil Arolkar

JUDGEMENT

M. S. Karnik, J.- [1] By this petition under Article 226 of the Constitution of India, the petitioner prays for quashing and setting aside the inquiry/disciplinary proceedings initiated belatedly against the petitioner ten years after the actual incident had occurred. It is further prayed that directions be issued to release forthwith the pensionary and retirement/terminal benefits payable to the petitioner including the payment of gratuity.

[2] The facts of the case in brief are as under:

The petitioner was appointed to the post of Lecturer on ad-hoc basis at the Goa Medical College and Hospital (GMC). Over a period of time, the petitioner became the Professor & Head of the Department of Surgery at GMC from 11.12.2002 which post he held right until his retirement at the age of 65 years on 31.12.2018. The incident which was the cause for initiating disciplinary proceedings against the petitioner happened some time in July 2010.

[3] Briefly stated, a Doctor, a specialist in the field of female diseases was treating a patient Ms. 'R'. She was admitted in a private Nursing Home situated in Vasco Da Gama. Upon her clinical examination, the Doctors opined that Ms. 'R' was suffering from acute appendicitis and was in need of undergoing an urgent operation so as to prevent any risk and threat to her life. The surgery was scheduled in the morning of 3rd July 2010. The surgeon normally operating such cases was unavailable and as the operation had to be carried out on an emergency basis, the petitioner's help was requested for. On the assessment of her condition and considering the risk perception, the petitioner after following the standard Alvarado test, proceeded to perform the emergency operation with all the skills at his command taking all due care, caution and diligence in conducting the operation. It was reported that the surgery was completed successfully.

[4] However, on 09.07.2010, the patient complained discomfort and pain and had to be re-admitted. The patient was rushed to GMC for treatment. She had to be operated by a team of Doctors at GMC due to some complications that had arisen. Post operation the patient was found to be stable. Later on, the condition of the patient deteriorated and she unfortunately expired on 29.10.2010.

[5] A medico legal case was recorded by the police. The patient's sister filed a complaint on 02.08.2010 alleging that death of her sister was due to medical negligence. A Committee was formed by the Government under the Chairmanship of Secretary (Health) to conduct an inquiry into the allegations made vide the complaint dated 02.08.2010. The patient's father filed another complaint before the Disciplinary Committee of Goa Medical Council on 07.12.2011. It was alleged that the death was due to the gross negligence of the Doctors including the petitioner.

[6] On the basis of the preliminary inquiry conducted by the Committee, the Director of Vigilance issued a memorandum to the petitioner with the imputations of misconduct and articles of charge by the Directorate of Vigilance. The Disciplinary Committee after conducting a detailed investigation into the complaint, arrived at a decision on 12.09.2016 that none of the charges framed against the petitioner were substantiated and, as such, the petitioner was exonerated of the charges.

[7] The petitioner continued to function as a Professor & Head of the Department of Surgery at GMC till 31.12.2018. The petitioner was also granted an extension of 3 years after attaining the age of 62 and eventually retired on attaining the age of 65.

Two years after the petitioner retired from service, he received a notice dated 21.07.2020 from the Inquiry Authority to conduct the disciplinary proceedings against the petitioner.

[8] Learned Additional Government Advocate, Mr. Arolkar, vehemently opposed the petition.

[9] Heard. The unfortunate incident is of the year 2010. The petitioner continued as Professor & Head of the Department of Surgery at GMC till his retirement in 2018. The petitioner was granted three years extension of service even after attaining the age of 62 years. There is nothing on record to indicate that during his long stint as a Professor & Head of Surgery at GMC, there is any complaint in the discharge of his duties except for the alleged incident. After the disciplinary inquiry was initiated against the petitioner on 05.11.2015, the Disciplinary Committee after conducting a detailed investigation into the complaint made by the victim's father and the allegations/charges made therein arrived at a decision that none of the charges framed against the petitioner are substantiated and as such the petitioner was exonerated of the charges.

[10] We find that the charges levelled against the petitioner have been sufficiently investigated by the Disciplinary Committee of the Goa Medical Council which exonerated the petitioner of all the charges. A team of expert Doctors who were part of the Committee opined that there is no negligence on the part of the petitioner. Thus, the inquiry conducted by the Committee constituted by the Goa Medical Council had exonerated the petitioner. The petitioner had to perform the operation in a private hospital on the request made as a result of an emergency. There is nothing to indicate that as a result of attending to the call for an emergency operation at a private hospital, had resulted in neglect of performing his duties at the GMC. In fact, post this incident of 2010, the petitioner continued as a Professor & the Head of the Department of Surgery till his retirement in 2018 upon grant of three years extension of service was after reaching the age of 62 years.

[11] The inquiry was initiated five years after the incident on the basis of a preliminary report of the Committee. After the inquiry was initiated in 2015, the Committee of the experts Doctors constituted by the Goa Medical Council exonerated the petitioner of all the charges and found that there was no negligence on his part and that all due care and caution was exercised as expected in performing the surgery and post operative care. In the disciplinary inquiry which commenced in 2015, the Inquiry Officer was appointed in 2020 almost two years after the petitioner retired. This petition was filed in September, 2020. It must be mentioned that during the pendency of the proceedings, the inquiry proceeded.

[12] Learned Additional Government Advocate submitted that as the inquiry is at its fag end, the petition should not be entertained only on the ground that there is a delay in completing the nquiry having regard to the gravity of the charges.

[13] During the course of the hearing, the inquiry report of the Inquiry Officer dated 18.09.2024 was placed on record. We have perused the findings and the conclusions arrived at by the Inquiry Officer holding that the articles of the charges against the petitioner are not proved. No doubt, upon considering the inquiry report, the Disciplinary Committee can always take a different view and hence it was urged by learned Additional Government Advocate that directions be issued to complete the inquiry proceedings in a time bound manner. In ordinary course, we would have accepted the submissions of learned Additional Government Advocate. In the present facts, we are not in favour of subjecting the petitioner to any further disciplinary proceedings.

[14] The disciplinary inquiry was initiated after five years post the incident on the basis of a preliminary inquiry report of the Committee constituted by the Goa Medical Council. The petitioner has been ultimately exonerated by the Committee of all the charges levelled against him. The petitioner was not found to be negligent in any manner. The petitioner was competent and qualified to perform the surgery. The petitioner continued for eight years as a Professor and Head of the Department of Surgery after the incident. In fact the petitioner was granted an extension of three years even upon attaining the age of 62 years. But for the unfortunate incident, the track record of the petitioner holding such a responsible position, appears to be without any blemish. The inquiry officer was appointed in 2020, two years after the petitioner retired in the year 2018. The Inquiry Proceedings continued for a period of nine years since the time of its initiation in 2015. The delay is not solely attributable to the petitioner. Apart from the fact that the inquiry officer held the charges against the petitioner as not proved, it is pertinent to note that the Committee consisting of expert Doctors, has already exonerated the petitioner. Though the inquiry is at an advanced stage, in the facts and circumstances of the present case and also on the ground of delay in initiating the inquiry and concluding the inquiry, we are inclined to allow the petition.

[15] The petitioner has suffered enough mental agony on account of the disciplinary inquiry. We rely upon the observations of the Hon'ble Supreme Court in **P. V. Mahadevan vs. Md. T. N. Housing Board**, 2005 6 SCC 636 and State of Andhra Pradesh vs. N. Radhakishan,MANU/SC/0278/1998-(Civil Appeal no. 3503/1997 decided on 07.04.1998) , to support the view that we take.

[16] The petition is accordingly allowed in terms of prayer clause (A) and (B), which read thus:

"(A) For a writ of mandamus or any other writ, direction or order in the nature of mandamus, quashing and setting aside the inquiry/disciplinary proceedings initiated belatedly against the petitioner ten years after the actual incident in question had occurred and sought to be initiated by appointing an Inquiry Officer two years after the retirement of the petitioner; and

(B) For a writ of mandamus or any other writ, direction or order in the nature of mandamus, directing the respondents to release forthwith the pensionary and retirement/terminal benefits payable to the petitioner including the payment of gratuity."

[17] There shall be no order as to costs

2024(2)GOACC513

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Karnik; Valmiki Menezes]

Criminal Writ Petition No. 50 of 2024 **dated 03/10/2024**

Swidel Rodriguez

Versus

State of Goa; Public Prosecutor, High Court of Bombay At Goa; Amit Anant Gaonkar

FIR QUASHING FOR SOCIAL MEDIA POST

Indian Penal Code, 1860 Sec. 153, Sec. 153A, Sec. 295A - Code of Criminal Procedure, 1973 Sec. 482 - FIR Quashing for Social Media Post - Appellant, an 18-year-old student, sought quashing of FIR under Sec. 295A IPC for posting a social media comment on environmental concerns regarding religious rituals in Goa - Comment expressed concern about pollution without any intent to outrage religious feelings - Respondents argued malicious intent, but court found the post lacked any deliberate insult to religion - Court noted appellant's immediate apology and environmental activism - FIR quashed, no evidence of malicious intent found. - Petition Allowed

Law Point: FIRs under Sec. 295A IPC require proof of deliberate and malicious intent - Personal opinions on environmental concerns without intent to insult do not meet the threshold for criminal prosecution.

Acts Referred:

Indian Penal Code, 1860 Sec. 153, Sec. 153A, Sec. 295A

Code of Criminal Procedure, 1973 Sec. 482

Counsel:

Caroline Collasso, Pravin Faldessai

JUDGEMENT

M. S. Karnik, J.- [1] In this petition under Article 226 of the Constitution of India and Section 482 of Cr.P.C., the petitioner prays for quashing and setting aside FIR no. 77/2024 dated 14.05.2024, for offence punishable under Section 295-A of the Indian Penal Code (IPC), registered at the Mapusa Police Station.

[2] The FIR was lodged against the petitioner allegedly for "posting and circulating the derogatory comment on social media in respect of religious rituals performed at Shirgao Bicholim Goa and thereby outraging the religious sentiments of the complainant and others." The petitioner is 18 years old and a student of St Xavier's College at Mapusa. She is a bright student who passed 12th standard with distinction. On 12.05.2024, the petitioner came across a post/reel uploaded by "ingoa24x7", which showcased the emission of smoke in huge wall of smog along with sights of flame bursts before the crowd. The petitioner reposted the same post/reel on her private Instagram account through her story, expressing her concerns regarding the pollution that could be seen in that post/reel. The petitioner commented thus:

> "I don't know how you can call it a culture or a tradition and praise anybody while you cause harm to the environment in such a manner. I might not be the best person at taking care of the environment but at least I don't cause harm to such an extent.
>
> No cause of hatred but be mindful with your acts and take a stand respectful cultures and traditions can be taken forward with respect and mindfulness."

[3] The petitioner learnt that on 14.05.2024, a complaint was made against her by some persons for posting the alleged derogative comment. Following the complaint, the respondent no.2 lodged the FIR for offence under Section 295-A of IPC registered at Mapusa Police Station.

[4] Shri Faldessai, learned Additional Public Prosecutor appearing for the respondent nos. 1 and 2, vehemently opposed the petition. It is submitted that this is a fit case where the investigation must proceed as the petitioner with deliberate and malicious intention of outraging the religious feelings of the complainant has insulted their religious beliefs. Shri Faldessai urged that the petition be dismissed.

[5] We had issued notice to the complainant. There is no appearance on behalf of the complainant though the notice has been duly served through the concerned police station.

[6] Having heard learned Counsel Ms. Caroline Collasso for the petitioner and Shri Faldessai, learned Additional Public Prosecutor for respondent no. 1 and 2, we are of the considered view that the present petition deserves to be allowed for the following reasons:

The petitioner re-posted the reel on her private Instagram account through her story expressing her concerns regarding the pollution that could be seen in her post/reel. A plain reading of her comments would indicate that the same even if taken at its face value are in the context of causing harm to the environment and in fact has in so many words stated that there is no cause of hatred, but a personal opinion was expressed that respectful cultures and traditions can be taken forward with respect and mindfulness.

[7] According to us, the comment was only her perception on environmental impact based on the contents of the post/reel and she had no intention of outraging the religious feelings of any class through the said post. She did not intend to outrage the religious feelings of any class of citizens by reposting the reel or for that matter insulting or attempting to insult the religion or religious beliefs of the complainant. The petitioner is 18 years old and has submitted that she was not aware of the nature of the post/reel and the religiosity aspect. It is the petitioner's case that she merely raised her concerns regarding the pollution that could be seen from the post/reel and that she is a concerned citizen about environmental pollution. The petitioner has posted her concerns with regards to environment on her Instagram previously on issues such as Forest Fire, stagnant water as a breeding ground for mosquitoes etc. The petitioner has also participated in multiple awareness campaigns through her school/college pertaining to measures for safeguarding the environment and actively participated in environment protection drives that involved planting of trees, distribution of paper and cloth bags, etc. The petitioner recently participated in a National level essay writing competition organized by Heartfulness Education Trust, where she had expressed her concerns regarding how human beings are harming the beauty of the nature of earth.

[8] In the petition it is stated that she has utmost respect for all religions and has been brought up with good morals about respect for all religions. After the FIR was registered, the petitioner immediately put out her public apology on her Instagram stating "I sincerely apologize. There was no intention on my behalf to harm or hurt anybody's religious sentiments."

[9] In our opinion, in the facts and circumstances of the present case, even if the comments made by the petitioner are taken at its face value, they do not disclose any intention of outraging the religious feelings of any class or citizens or that the same amounts to insulting or attempting to insult the religion or the religious beliefs of that class, much less there being deliberate or malicious intention.

[10] To arrive at the aforesaid conclusion, we draw support from the decision of the Supreme Court in Ramji Lal Modi vs. State of U. P.,1957 AIR 620 . Their Lordships observed that section 295-A does not penalise any and every act of insult to or attempts to insult the religion or the religious beliefs of a class of citizens, but it penalises only those acts of insults to or attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious

intention of outraging the religious feelings of that class. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section. It only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class.

[11] We also find it significant to make a profitable reference to the observations of the Supreme Court in **Mahendra Singh Dhoni vs. Yerraguntla Shyamsundar and anr.**, 2017 7 SCC 760 Their Lordships held that Section 295-A does not stipulate everything to be penalised and any and every act would tantamount to insult or attempt to insult the religion or the religious beliefs of a class of citizens. The Supreme Court observed that the said provision only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class.

[12] In the facts and circumstances of the present case, we are more than satisfied that the petitioner was in no way trying to hurt the religious sentiments of the complainant and that the comment was made only in the context of her concern for causing harm to the environment.

[13] The petition is accordingly allowed in terms of prayer clause (A), which reads thus:

> "(A) For a writ of certiorari or any other writ, direction, order in the nature of certiorari or any other appropriate writ direction order under Article 226 of the Constitution of India quashing and setting aside the FIR No 77/2024 dated 14/05/2024 under sections 295-A, 153 and 153A of IPC of the Mapusa Police Station

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2024(2)GOACC516

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Writ Petition No 70 of 2024 **dated 25/09/2024**

Raghuvir Sitaram Sawant Son of Sitaram Sawant

Versus

Deelip Laxman Sawant Alias Deelip Tukaram Sawant Son of Late Tukaram Sawant; Deepavati Deelip Swant Wife of Deelip Tukaram Sawant

ILLEGAL CONSTRUCTION

Illegal Construction - Petitioner sought to challenge an appellate court's order reversing a temporary injunction granted by the Trial Court-Plaintiff alleged that defendants had started new construction on the suit property without requisite

permissions-Trial Court granted an injunction to restrain the defendants from carrying out further construction-Appellate court set aside the injunction on technical grounds, but defendants admitted they had no permissions-Court held that illegal construction needed to be restrained immediately, as the defendants were carrying out unapproved works-Restored the Trial Court's injunction. - Petition Allowed

Law Point: Unauthorized construction can be restrained by courts, and technical grounds should not overturn orders preventing illegal activities.

Counsel:

Arjun F Naik, Gaurish Malik

JUDGEMENT

Bharat P Deshpande, J.- [1] Rule.

[2] Rule is made returnable forthwith.

[3] The matter is taken up for final disposal with consent of the parties.

[4] Heard Mr. Naik learned counsel for the Petitioner and Mr. Malik learned counsel for the Respondent.

[5] In the present proceedings, the learned Trial Court after considering the material before it, granted injunction vide order dated 10/03/2022, with a specific relief that the Respondents/Defendants are restrained from carrying out further construction in the suit property till the disposal of the suit.

[6] Petitioner/Plaintiff filed the suit with a specific averment in the plaint that the Respondents/Defendants started a new construction in the suit plot which is by the side of the house of the Plaintiff, without obtaining any permission from the concerned authorities.

[7] After granting of the temporary injunction by the Trial Court, the Respondents filed an appeal wherein the learned First Appellate Court reversed the order of the learned Trial Court vide impugned order dated 03/01/2024, which is challenged in the present proceedings.

[8] Mr. Naik submits that the Plaintiff is claiming to be Tenant of the suit property whereas Mr. Malik appearing for the Respondent submits that the Plaintiff is not having any such right.

[9] However, it is a fact that the Plaintiff is having his house in the suit property and by the side of the said house, a new construction activity started on behalf of the Defendants which triggered in filing of the Civil Suit. The photographs produced on record would clearly go to show that a completely new construction activity started in the suit plot.

[10] Mr. Malik appearing for the Respondent/Defendant fairly admit that no permission was obtained by the Defendants to carry out any construction in the said plot. He submits that the even the construction of the Plaintiff/Appellants is illegal.

[11] Mr. Malik now submits that the Village Panchayat has already issued a Stop Work Notice and restrained the Defendants from carrying out any construction.

[12] The learned Trial Court after considering the material observed that a prima facie case is made out since a totally new and illegal construction was being carried out in the suit plot. The question as to whether the Plaintiff is Tenant or not will have to be gone into, however, the First Appellate Court and that too on some technical grounds reversed a well reasoned order of the Trial Court.

[13] The Defendants admit that they are not having any permission from the competent authorities to carry out construction. The First and foremost step is to stop such illegal construction. It is no doubt true that the Village Panchayat has already taken action against the Defendant and issued a Stop Work Order. That apart, when the civil proceedings are pending and a temporary injunction was granted by the Trial Court on the ground that it is completely illegal activity carried out by the Defendant and that too in neighbourhood of the Plaintiff, the same ought not to have been disturbed on the technical plea of not giving details of the encroachment as alleged.

[14] The learned First Appellate Court completely lost sight that an illegal construction is coming up at the site which requires immediate restraint since the Defendant failed to obtain requisite permissions from the concerned Department.

[15] Accordingly, impugned order passed by the First Appellate Court requires interference in the writ jurisdiction.

[16] The impugned order passed by the First Appellate Court is therefore, quashed and set aside, whereas the order passed by the learned Trial Court is restored.

[17] Rule is made absolute in the above terms.

[18] Petition stands disposed of

2024(2)GOACC518

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Criminal Writ Petition No 113 of 2022 **dated 23/09/2024**

Eleuterio Socorro Marques Alias Socorro El Marques S/o Estevam Floriano Santana Marques

Versus

Antonio Teodoro Marques Alias Anthony Theodore Marques S/o Estevam Floriano Santana Marques

CHEATING ALLEGATION IN PARTITION

Indian Penal Code, 1860 Sec. 415, Sec. 417, Sec. 420, Sec. 418; Code of Criminal Procedure, 1973 Sec. 482, Sec. 155, Sec. 200, Sec. 156 - Cheating Allegation in Partition - Petitioner sought quashing of process issued under Sections 415, 417, 418, and 420 of IPC, alleging fraud in a Deed of Partition executed between him and his brother - Complaint alleged that the petitioner annexed a modified plan to the Partition Deed, different from the one attached to consent terms/decree, to gain more area of the house - Court held that dispute was purely civil as both parties signed and registered the Deed of Partition voluntarily - Without challenging the Partition Deed, complainant could not claim fraud - Impugned order quashed - complaint dismissed - Petition Allowed

Law Point: Civil disputes cannot be converted into criminal cases of cheating without clear evidence of fraud, especially when both parties voluntarily sign and register relevant documents.

Acts Referred:

Indian Penal Code, 1860 Sec. 415, Sec. 417, Sec. 420, Sec. 418

Code of Criminal Procedure, 1973 Sec. 482, Sec. 155, Sec. 200, Sec. 156

Counsel:

Rohit Bras De Sa, Respondent In Person

JUDGEMENT

Bharat P Deshpande, J.- [1] Heard Mr Rohit Bras Desa, learned Counsel for the petitioner and respondent in person.

[2] Rule was issued vide order dated 19.8.2023 and thereafter matter is taken up for final disposal since the respondent is appearing in person and is resident of Mumbai.

[3] Petitioner preferred present petition under Articles 226 and 227 of the Constitution of India read with Section 482 of Cr.P.C. with the following prayers:-

(A) The Petitioner by this Petition, seeks a Writ of Certiorari, or any other writ, order or direction in the nature of Certiorari, under Article 226 and 227 of the Constitution of India r/w section 482 of the Criminal Procedure Code, calling for records and proceedings in criminal case IPC/30/2020/C on the file of the Judicial Magistrate First Class at Panaji, and after considering the legality, correctness and propriety of the summons issued to the Petitioner u/s 415, 417, 418 and 420 of the Indian Penal Code, this Hon'ble Court may be pleased to quash and set aside the complaint against the Petitioner in Criminal case no. IPC/30/2020/C on the file of the Judicial Magistrate First Class at Panaji, C Court, and also further be pleased to quash and set aside, the summons issued to the Petitioner u/s 415, 417, 418 and 420 of Indian Penal Code.

B) Pending hearing and final disposal of this Petition, this Hon'ble Court may be pleased to stay all further proceedings in Criminal Case no. IPC/30/2020/C on the file of the Judicial Magistrate First Class at Panaji, 'C' Court.

[4] Mr De Sa would submit that learned Magistrate while issuing process against the petitioner in Criminal Case No. IPC/30/2020/C, failed to consider that the matter is purely civil in nature and that ingredients of Sections 415, 417, 418 and 420 of IPC are not at all made out even for taking cognizance and issuance of process.

[5] Mr De Sa would submit that petitioner and respondent no.1 are real brothers. A plot along with house exists wherein respondent no.1 filed a Regular Civil suit bearing Regular Civil Suit No. 121/2011/D which was disposed of by filing consent terms and drawing of consent decree on 21.3.2018. Thereafter Deed of Partition was drawn between the parties which was duly registered before Sub Registrar, having a plan showing portion allotted to the petitioner and that of respondent. Thereafter the respondent even filed an application for execution of consent decree. However, suddenly respondent filed a criminal complaint against the petitioner for the offence punishable under Sections 415, 417, 418 and 420 of IPC claiming that the petitioner committed fraud, cheating with regard to plan attached to Deed of Partition and therefore request for issuance of process.

[6] Mr De Sa would submit that after verification of the complainant on oath, learned Magistrate mechanically issued process and that too without observing that the matter is of a civil nature and ingredients of section 415 are not made out.

[7] Mr De Sa would submit that proceedings filed before the Criminal Court are clearly abuse of process of law and only to pressurized the petitioner to concede to the unnecessary demand of respondent who himself applied for execution of consent decree and is a signatory to the Deed of Partition executed before the Sub Registrar.

[8] Mr De Sa would submit that dispute which is clearly a civil dispute, is being coloured as a criminal matter only to take revenge/vengeance. He would submit that such proceedings are required to be immediately quashed under the extraordinary power of this Court under Section 482 of Cr.P.C.

[9] Respondent who is appearing in person would submit that petitioner from the inception had fraudulent intention and in connection with that, petitioner tampered with the plan attached to the Deed of Partition which was registered before the Sub Registrar. He submits that the line of division which was agreed between the parties and shown in the plan annexed to the consent terms is different from the line of partition which is found in the plan attached to the Deed of Partition registered before the Sub Registrar.

[10] Respondent would submit that he did not realise this aspect while signing the Deed of Partition before the Sub Registrar. However, when the petitioner was insisting before the Executing Court that the partition has to be carried out as per the plan

attached to the Deed of Partition, respondent realise that such plan attached to the Deed of Partition is different by showing more area of the house allotted in favour of the petitioner.

[11] Respondent would then submit that complaint filed before the Magistrate discloses all necessary ingredients of the offence of cheating and in fact the Magistrate was satisfied and accordingly process was issued.

[12] Respondent would further submit that a full fledged trial is required to be conducted in order to find out the aspect of cheating and this Court should not interfere in the matter at this stage. In this regard he placed reliance on the following decisions:

1. M/s Indian Oil Corporation V/s M/s NEPC India Ltd. & ors., 2006 AIR(SC) 2780

2. Md. Allauddin Khan V/s The State of Bihar & ors., 2019 6 SCC 107

3. Som Mittal V/s Government of Karnataka., 2008 3 SCC 574

[13] Rival contentions fall for consideration.

[14] Complaint filed before the learned Magistrate would go to show that complainant is resident of Mumbai and presently residing in house no. 407/1 at Bairo Foro, Santo Estevam, Tiswadi, Goa whereas accused therein is his young brother and architect by profession. Parents of the complainant and the accused expired leaving behind the complainant and the accused as their only legal heirs. Complainant filed a Regular Civil Suit No. 121/2011/D for declaration and injunction against the accused and for partition. Accused filed counterclaim in the said suit for physical partition of their joint ancestral property i.e. a plot with a house situated therein at Bairo Foro, Santo Estevam bearing survey no. 20/10 of the village Jua (Santo Estevam). The said suit along with counter claim was disposed of vide consent terms dated 22.3.2018.

[15] Complaint further shows that subsequent to consent decree, complainant and the accused executed a deed of partition dated 27.4.2018 duly registered on 30.4.2018 before the Sub Registrar of Ilhas Tiswadi.

[16] It is the contention of the complainant that as per terms of consent terms/consent decree, the plot/house was supposed to be partitioned in terms of the plan annexed there to. Said plan shows that the plot along with the house was divided into two parts, i.e. Part A allotted to the complainant and part B to the accused. Area of 99 sq. mts of the house was allotted to the complainant whereas an area of 158 sq. mts was allotted to the accused. Since a bigger area was allotted to the accused he monetarily compensated the complainant for the said access built up area.

[17] As far as the plot is concerned, the complainant was allotted 241 sq.mts whereas the accused got 249 sq. mts. However, it was then realised that the area of plot is much larger and accordingly in the Deed of Partition, allotment was changed to 252 sq.mts and 259.12 sq. mts for the complainant and the accused respectively.

[18] Thus it is the contention of the complainant that the partition was supposed to be carried out mainly in terms of the plan annexed to the consent terms/consent decree. Deed of Partition was purely based on the consent terms/consent decree.

[19] Complaint further shows that somewhere in the year 2018 the accused blocked the access of the complainant to the toilet/bathroom which, as per consent terms/decree, was allowed to be used by the complainant for a period of one year. This resulted in filing a Regular Civil Suit by the complainant bearing no.99/2018/D which is pending.

[20] Complaint further shows that an Execution Application No. 26/2018/D was filed before the Civil Court for execution of the consent decree as per plan annexed thereto. However, the accused appeared before the Executing Court and was repeatedly referring to the Deed of Partition. Complainant therefore notice that the accused committed cheating/fraud on him by annexing a plan to the Deed of Partition which is different or modified from the one annexed to the consent terms/consent decree. Plan annexed to the consent terms/consent decree shows the line of partition as the best possible line on division, not the center of the plot. Accused was supposed to annexed the same plan to the Deed of Partition however dishonestly and with clear malafide intention of cheating and to have a wrong gain annexed a different or modified plan to the Deed of Partition by showing the line of partition as line of division (center of the plot).

[21] Verification of the complainant was done under Section 200 of Cr.P.C wherein complainant stepped into the witness box and reiterated his contention made in the complaint.

[22] Learned Magistrate then issued a process against the petitioner/accused for summons dated 22.9.2021 which is challenged in the present petition.

[23] In the case of quashing of a complaint or criminal proceedings under Section 482 of Cr.P.C., clearly depends upon the facts and circumstances of that particular case. The scope and ambit of the power under Section 482 of the Cr.P.C. is considered by the Apex Court in various decisions and a landmark decision in this case is **State of Haryana Vs Ch. Bhajan Lal**, 1992 Supp1 SCC 335 .

[24] The Apex Court categorized the cases where powers under Section 482 of Cr.P.C. could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It reads thus:-

(i) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

(ii) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an

investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(iii) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(iv) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(v) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(vi) Where there is an expressed legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(vii) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

[25] These are the possibilities in which FIR/Complaint could be quashed under the inherent powers of the High Court. However, it is not possible to lay down precise and inflexible guidelines or any rigid formula or to give an exhaustive list of the circumstances in which such power could be exercised.

[26] Decisions cited by respondents are all referring to the decision of **Bhajan Lal**(supra) and therefore, such decisions need not be referred to individually.

[27] Matter in hand and as disclosed in the complaint itself would go to show that the petitioner and the respondent are real brothers who inherited the property from their parents. Civil proceeding by way of civil suit was filed by the respondent wherein counterclaim was filed by the petitioner. Finally said civil proceedings were disposed of on the basis of consent terms filed along with the plan for partition of the said property.

[28] Complaint itself shows that the property was not divided equally amongst the petitioner and the respondents. It is also a fact that the house was also not divided equally amongst them. Larger portion of the house along with plot was allotted to the petitioner whereas a smaller portion was allotted to the respondent. Consent terms itself shows that respondent was compensated monetarily for accepting a smaller

portion of the house and the plot. It is not disputed that the petitioner paid such compensation to the respondent. Consent terms along with plan for partition was signed by both the parties and only on that basis, civil suit filed between the parties was disposed of by drawing a consent decree.

[29] It is a matter of record and fact that after drawing the consent decree, it was realised that the area of the said plot is bigger than the one which is mentioned in the consent terms. Complaint and more specifically in paragraph 2 would go to show that parties realised that the area of the plot was larger than the one mentioned in the plan of the consent terms it was corrected in a deed of partition and the allotment was changed accordingly. Earlier the complainant was allotted an area of 241 sq.mts of the plot but in the Partition Deed it was changed to 252 sq. mts. Petitioner was initially allotted an area of 249 sq. mts which was changed in the Deed of Partition as 259.12 sq.mts.

[30] It is the fact that the Deed of Partition was drawn and executed by the petitioner and the respondent and thereafter it was registered before the Sub Registrar in the year 2018 itself.

[31] Besides, such Deed of Partition along with a plan annexed to it is not challenged till date by the respondent in any Court of law. He simply claims in the present complaint that the plan attached to the Deed of Partition is different then the plan attached to the consent terms. However, plaintiff/respondent admitted that the plan attached to the consent terms was showing less area and when parties realised about the larger area, they decided it to show the same in the Deed of Partition, therefore at one place respondent/complainant admits that plan attached to the consent terms is showing less area and therefore both decided to correct it while executing Deed of Partition.

[32] Since the Deed of Partition is having a plan annexed to it duly signed by both the parties and registered before the Sub Registrar, such documents cannot be termed as executed by cheating and fraud. The very contention of the complainant that the plan annexed to the Partition Deed shows a larger area would itself show that it has to be different from the consent terms and decree drawn thereon. Without challenging the Deed of Partition and the plan annexed to it, it would not lie in the mouth of the complainant to say that such a plan attached to the Deed of Partition is different one. Even otherwise the complainant himself admits that the plan attached to the Deed of Partition is different since a larger area is shown therein in which the party realised only after consent terms and consent decree was drawn.

[33] Besides, the complainant failed to produce any material before the learned Magistrate to show that the line of Partition Deed/Division shown in the plan attached to the consent terms/consent decree and the plan attached to the Deed of Partition is different.

[34] The main thrust of the complainant is on the line of the division shown in both plans. Admittedly these plans were drawn by an expert showing the dimensions. Thus any difference in the line of division could be certified by experts only. Even otherwise perusal of both the plans and basically the line of division, it cannot be said that there is any difference. This observation is drawn prima facie only for the purpose of considering the complaint of cheating.

[35] The dispute which is found in the complaint filed before the Magistrate is only when the petitioner insisted that partition during the execution proceedings shall be carried out as per plan attached to the Deed of Partition. Since such a document is executed by the parties voluntarily and registered before the Sub Registrar that too subsequent to the drawing of decree is required to be considered by the Court for the purpose of partitioning the said property. Thus it is purely a civil dispute. Only because petitioner insisted that division shall be effected as per plan annexed to the Deed of Partition, which is in fact showing a larger area cannot by any stretch of imagination prove ingredients of Section 415 of IPC.

[36] Deed of Partition along with plan annexed to it is duly signed by the complainant and same is registered before the Sub Registrar. Without challenging such Deed of Partition and the plan annexed to it, the complainant cannot be allowed to say that such a plan was inserted by the petitioner/accused only by fraud and cheating. It is a registered document duly executed by both the parties without any undue influence/coercion or fraud at the time of such execution. Having said so, the order of the Magistrate of the issuing process is clearly found to be mechanical, applying its mind to the facts and the documents placed on record. It is clearly a civil dispute between two brothers. Respondent by filing such complaint is clearly trying to give a different colour to civil dispute. Observations of the Apex Court in the case of **Bhajan Lal**(supra) as quoted earlier would clearly apply to the matter in hand and more particularly paragraphs nos. 1,3 and 7.

[37] For all the above reasons, impugned order of issuing the process needs to be quashed and set aside. Accordingly, the impugned order of issuance of process is hereby quashed and set aside. Complaint filed by the respondent before the concerned Magistrate is accordingly dismissed.

[38] Rule is made absolute in the above terms.

[39] Petition stands disposed of

2024(2)GOACC526

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Writ Petition No 804 of 2024, 807 of 2024 **dated 20/09/2024**

Madhukar M Gaikwad

Versus

Ajay Vengurlekar

CROSS-EXAMINATION DELAY

Cross-Examination Delay - Petitioner challenged two orders closing cross-examination and defence evidence opportunities in a civil suit - Trial court closed cross-examination due to failure to deposit costs imposed on petitioner for recalling PW-1 - Petitioner argued delay was unintentional and costs were not deposited because the presiding officer was absent - High Court found merit in allowing cross-examination upon depositing Rs. 10,000 costs, setting aside the impugned orders - Cross-examination and defence evidence ordered to be completed within one month - Orders Quashed

Law Point: Cross-examination and leading of defence evidence can be permitted despite earlier delays if it serves justice, provided the petitioner demonstrates bona fides through compliance with cost orders.

Counsel:

Swapnil Kambli, Sarvesh Kalangutkar

JUDGEMENT

Bharat P Deshpande, J.- [1] Heard Mr. Kambli for the Petitioner and Mr. Kalangutkar for the Respondent.

[2] Since both these matters are connected and pertain to the same civil suit, they are taken up together for final disposal with the consent of the parties.

[3] Writ Petition No. 804 of 2024 is filed thereby challenging the impugned order dated 14.07.2023, by which, the opportunity to cross-examine PW-1 was closed whereas Writ Petition No. 807 of 2024 is filed challenging the order dated 11.08.2023 wherein the opportunity to lead defence evidence was closed.

[4] Mr. Kambli would submit that the Petitioner, who is the Defendant applied for permission to cross examine PW-1 and vide order dated 19.04.2023, such Application was allowed subject to costs of Rs.500/-. The matter was posted for evidence on the next date, however, on that day, since the Presiding Officer was on leave, the matter was simply adjourned to 14.07.2023. He submits that the Petitioner failed to deposit the costs since the Presiding Officer was on leave.

[5] Mr. Kambli submits that on 14.07.2023, the Petitioner reached the Court late and by that time, the impugned order was already passed. He submits that on the next date i.e. on 11.08.2023, the opportunity to lead defence evidence was closed, which is challenged in Writ Petition No. 807 of 2024.

[6] Mr. Kambli submits that the costs were not deposited because the Presiding Officer was on leave and on the next date, the Petitioner reached late. He submits that the Petitioner was ready and willing to deposit the costs, however, the learned Trial Court refused the opportunity and then closed the defence evidence.

[7] Mr. Kalangutkar submits that the Petitioner is deliberately delaying the matter and is not obeying the Court's orders.

[8] Considering the fact that the Application for recall of PW-1 was granted subject to a deposit of costs of Rs.500/- vide order dated 19.04.2023, the learned Trial Court could have allowed the Petitioner to cross-examine the Plaintiff on deposit of such costs. Admittedly, on the next date, the Presiding Officer was on leave. No doubt on 14.07.2023, the Petitioner as well as his Advocate remained absent while passing the order. Mr. Kambli admits that the Petitioner reached late, however, he submits that there was no deliberate intention to delay the matter.

[9] On 26.03.2024, when the matter was taken up by this Court, the following order was passed:

> "1. In order to demonstrate bonafides, the learned Counsel for the Petitioner, upon instructions, undertakes to deposit a cost of Rs.10,000/- in each of these Petitions, for the purpose of setting aside the impugned orders which close the opportunity of the Petitioner for cross examination of the Plaintiff and also to examine the witness on his behalf.
>
> 2. Place the matter on 27.03.2024, by which time, the learned Counsel for the Petitioner states that the costs shall be deposited."

[10] Since the Petitioner has deposited an amount of Rs.10,000 each in both these Petitions, the same could be considered as costs to be awarded to the Respondent/Plaintiff so as to allow the Petitioner to cross-examine PW-1 and then to lead evidence in his defence. However, it is made clear that the Petitioner will cross-examine PW-1 on 21.09.2024 and thereafter, lead defence evidence and complete the same within a period of one month.

[11] The learned Trial Court shall allow the Petitioner to cross-examine PW-1 on 21.09.2024 and complete it on 21.09.2024 itself. No further adjournment shall be granted for cross-examination of PW-1.

[12] It is also made clear that the defence evidence shall be completed within a period of one month from 21.09.2024. The learned Trial Court shall permit the

Defendant/Petitioner to lead the defence evidence. For that purpose, matter could be taken on day-to-day basis.

[13] The undertaking filed by the Petitioner shall be placed before the Trial Court.

[14] The amount which is deposited by the Petition in this Court in both the Petitions as costs shall be paid to the Respondent/ Plaintiff.

[15] For the reasons stated above, both the impugned orders are quashed and set aside.

[16] Rule is made absolute in the above terms.

[17] Parties shall act on an authenticated copy of this Order

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2024(2)GOACC528

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Karnik; Valmiki Menezes]

Writ Petition No 2013 of 2024 **dated 20/09/2024**

Vincent M Dsilva

Versus

State of Goa; Director, Department of Urban Development; Cholu Gauns (Retd)

APPOINTMENT DISPUTE

Real Estate (Regulation and Development) Act, 2016 Sec. 22, Sec. 21, Sec. 20, Sec. 23, Sec. 2 - Goa Real Estate (Regulation and Development) (Appellate Tribunal Members, Officers and Employees Appointment and Service Conditions) Rules, 2017 Rule 4, Rule 3 - Appointment Dispute - Petitioner challenged the appointment of respondent no.3 as a Member of Goa RERA, arguing his appointment was against the Selection Committee's recommendation - Petitioner was ranked higher than respondent no.3 but the State Government appointed respondent no.3 citing experience in social administration - Court found the reasoning flawed and unsupported by records - Quashed respondent no.3's appointment and directed the State Government to appoint the petitioner in line with the Selection Committee's order of preference - Petition Allowed

Law Point: When the government deviates from a Selection Committee's order of preference in appointments, reasons must be based on concrete and justifiable grounds. Unsupported deviations violate statutory provisions and require judicial correction.

Acts Referred:

Real Estate (Regulation and Development) Act, 2016 Sec. 22, Sec. 21, Sec. 20, Sec. 23, Sec. 2

Goa Real Estate (Regulation and Development) (Appellate Tribunal Members, Officers and Employees Appointment and Service Conditions) Rules, 2017 Rule 4, Rule 3

Counsel:

C A Coutinho (Senior Advocate), Ivan Santimano, Devidas Pangam, Deep Shirodkar, J E Coelho Pereira (Senior Advocate), B Fernandes, V Korgaonkar

JUDGEMENT

M.S. Karnik, J.- [1] Rule. The rule is made returnable forthwith. Learned counsel for the respondents waive service.

[2] The petitioner mounts a challenge under Article 226 of the Constitution of India to the appointment of respondent no.3 as a 'Member' of the Goa Real Estate Regulatory Authority under the Goa Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'the Act', for short).

[3] In a nutshell, the petitioner's case is that the duly constituted Selection Committee under the RERA Act recommended the petitioner for appointment as a 'Member'; however, for reasons which do not stand the scrutiny of the provisions of Rule 4 of the Goa Real Estate (Regulation and Development) (Appellate Tribunal Members, Officers and Employees Appointment and Service Conditions) Rules, 2017 (hereinafter referred to as the 'Rules' for short), the Government appointed respondent no.3, which was not according to the order of preference in terms of the Selection Committee's recommendations.

[4] The facts in the present case are thus:-

[5] The petitioner is a retired District Judge having worked in the judiciary in the State of Goa for a period of 27 years. The petitioner was a District and Sessions Judge for 12 years of which 6 years he worked as a Presiding Officer of the Industrial Tribunal and Labour Court, Panaji. The petitioner retired as a District Judge-I in 2022 from Margao. Prior to joining the judiciary, the petitioner practiced as an Advocate for 6 years. He has an unblemished record during his tenure in the judiciary.

[6] After retirement, the petitioner was appointed as an Adjudicating Officer, Goa RERA vide order dated 09.11.2023 in consultation with the Government and has been functioning as an Adjudicating Officer since November 2023 till date. The Adjudicating Officer is not a full-time post but is entitled for remunerations for per case decided and is paid conveyance allowance for attending work. The petitioner has functioned as an Adjudicating Officer in an unblemished

[7] The respondent no.3 retired as District Judge-II in December 2023. Respondent no.3 was a District Judge for a period of 5 years in the State Judiciary since the year 2000.

[8] A post of 'Member' of the Goa RERA under 'the Act' fell vacant consequent to the retirement of the then incumbent. The Registrar (Admin) of the High Court of Bombay at Goa sought willingness of the petitioner and three others including respondent no.3 for the post of Member (Judicial) RERA. The petitioner gave his willingness on 08.04.2024 with a brief biodata. Respondent no.3 also gave his willingness.

[9] The Selection Committee headed by the Senior Judge of the High Court of Bombay at Goa nominated by the Hon'ble Chief Justice, Secretary (Housing), Secretary (Law) and Secretary (Urban Development) in the Government of Goa held its meeting on 27.05.2024 and shortlisted two candidates while forwarding its recommendations to the Government in terms of Rule 3 of Chapter II of the said Rules of 2017. The Selection Committee, for the reasons recorded in the minutes of the meeting held on 27.05.2024, recommended the petitioner and respondent no.3 in that order of preference.

[10] The Government appointed respondent no.3 by a Notification dated 11.07.2024 as a 'Member' RERA. This appointment was not according to the order of preference of the Selection Committee.

[11] After obtaining all the documents under the Right to Information Act, by a letter dated 25.07.2024, addressed to respondent nos.l and 2, the petitioner called upon the respondents to appoint him as 'Member'.

[12] Mounting a challenge to the appointment of respondent no.3 by the State Government, Mr Coutinho, learned Senior Advocate made the following submissions.

(A) The appointment is in breach of the provisions of Section 22 of the Act and Rule 4 of the Rules. The reasons for preferring respondent no.3 over the petitioner are arbitrary and do not stand the scrutiny of rule 4 of the Rules. The Selection Committee on a detailed evaluation and comparative analysis preferred the petitioner over respondent no.3 and, moreover, indicated that it is only if the petitioner is not willing to accept the appointment that respondent no.3 be considered, in which case, the impugned order appointing the respondent no.3 calls for interference. The State Government cannot sit in appeal over the recommendations of the Selection Committee which was made after considering the entire materials on record and by a Committee headed by a Senior Judge of this Court.

(B) This is a fit case which calls for not only quashing and setting aside the appointment of respondent no.3 but the facts necessitate issuance of a mandamus directing the State Government to appoint the petitioner. In support of his submissions, Mr Coutinho relied upon the following judicial

(i) R.S. Mittal V/s. Union of India, 1995 Supp2 SCC 230,

(ii) Km. Neelima Misra V/s. Dr. Harinder Kaur Paintal and Ors., 1990 AIR(SC) 1402,

(iii) S. Chandramohan Nair V/s. George Joseph and Ors., 2010 12 SCC 687,

(iv) State of Punjab V/s. Salil Sabhlok and Ors., 2013 5 SCC 1,

(v) Vivek Krishna V/s. Union of India and Ors.,2022 DGLS(SC) 1321

(vi) K.K. Saksena V/s. International Commission on Irrigation and Drainage, 2015 4 SCC 670.

[13] Learned Advocate General defending the appointment of respondent no.3 submitted thus:-

(A) The file notings of the State Government preferring respondent no.3 over the petitioner clearly reveal that the reasons recorded therein stand the scrutiny of the provisions of the Act and rule 4 of the Rules. The State Government has valid reasons recorded in writing that preferred respondent no.3 over the petitioner. The recommendations of the Selection Committee do not confer a vested right in the petitioner to be appointed. It is ultimately the State Government which is empowered to make the appointment and if such exercise is vested upon valid reasons as recorded, this petition must necessarily fail. In any event, assuming, without admitting, that the order of the State Government does not stand the scrutiny of the Act and the Rules, this Court at the highest can quash the decision and send the matter back to the State Government for reconsideration but under no circumstances this Court can issue a mandamus directing that the petitioner be appointed as a 'Member' RERA.

(B) In support of his submissions, the following judicial pronouncements are relied upon:

(i) U.P. State Road Transport Corporation & Anr. V/s. Mohd. Ismail 8c Ors., 1991 3 SCC 239,

(ii) The Govind Sugar Nills Ltd. and Anr. V/s. Hind Mazdoor Sabha and Ors., 1976 1 SCC 60.

[14] Mr Coelho Pereira, learned Senior Advocate for respondent no.3 vehemently opposed the petition on the strength of the following submissions:-

(A) Respondent no.3 had a distinguished career as a Senior Judicial Officer of the State Judiciary. Respondent no.3 has attained vast experience in the legal field and has been actively involved in social service. This experience gained by respondent no.3 complies with the requirement set out in Section 22 of the Act and it is for this reason that respondent no.3 was preferred over the petitioner. The reasons recorded by the State Government are in writing which satisfy the test of Rule 4. The petitioner cannot claim a vested right to be appointed. The petitioner's case was considered by the State Government but for the reasons recorded, if respondent no.3 is preferred in accordance

with the provisions of law, such a decision cannot be termed as arbitrary or illegal. The impugned decision is compliant with the provisions of the Act and the Rules. In any case, a mandamus cannot be issued directing the appointment of the petitioner. There is a delay in challenging the appointment of respondent no.3 and only on this ground of delay and laches the petition be dismissed. The petitioner was well aware of the decision since he was discharging duties as an Adjudicating Officer with RERA and, therefore, the delay in challenging the order of appointment defeats his claim. Respondent no.3 has already taken over charge and is efficiently discharging duties as a Member RERA. The appointment of respondent no.3 should not be disturbed as it is in consonance with the provisions of the Act and the Rules.

(B) Mr Pereira, learned Senior Advocate relies on the following judicial pronouncements in support of his submissions:-

(i) Smt. Malini M. Xete V/s. The Director of Education, Government of Goa & Ors.,1999 SCCOnLineBom 151

(ii) Oriental Bank of Commerce V/s. Sunder Lai Jain and Anr., 2008 2 SCC 280

(iii) K. Vijaya Lakshmi V/s. State of Andhra Pradesh and Anr., 2013 5 SCC 489

[15] Heard. We have perused the memo of petition, the relevant annexures, the affidavit in reply filed by respondent no.3 and also the records produced by the State Government.

[16] Chapter V of the said Act are provisions relating to the Goa Real Estate Regulatory Authority. The establishment and incorporation of RERA are provided for by Section 20. Section 21 ordains that the Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government.

[17] The relevant provision in the context of the present case is Section 22 which provides for qualifications of Chairperson and Members of Authority. In terms of Section 22, the Selection Committee consisting of the nominee of the Chief Justice of the High Court, i.e. Senior Judge of the High Court of Bombay at Goa, the Secretary of the Department dealing with Housing and the Law Secretary was constituted for making recommendations for appointment as Member RERA.

[18] The recommendations of the Selection Committee were placed before the State Government. The State Government appointed respondent no.3. As the appointment was not according to the Order of the Preference of the Selection Committee, the State Government recorded the following reasons in writing:

> "Mr Cholu M. Gauns may be appointed as member of RERA considering his wide experience in social administration and legal fields."

[19] It is significant to note that the said Act was enacted to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto. The importance of enacting the said Act cannot be lost sight of. Section 2(zd) defines "Member" means the member of the Real Estate Regulatory Authority appointed under Section 21 and includes the Chairperson. Chapter V deals with the Real Estate Regulatory Authority. Section 20 thereunder provides for the establishment and incorporation of the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under the RERA Act. Section 21 ordains that the Authority shall consist of a Chairperson and not less than two whole-time Members to be appointed by the appropriate Government.

[20] Section 22 provides for qualifications of Chairperson and Members of Authority. Section 22 is extracted for convenience as under:

> **"22. Qualifications of Chairperson and Members of Authority.-** The Chairperson and other Members of the Authority shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department dealing with Housing and the Law Secretary, in such manner as may be prescribed, from amongst persons having adequate knowledge of and professional experience of at-least twenty years in case of the Chairperson and fifteen years in the case of the Members in urban development, housing, real estate development, infrastructure, economics, technical experts from relevant fields, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration:
>
> Provided that a person who is, or has been, in the service of the State Government shall not be appointed as a Chairperson unless sucn person has held the post of Additional Secretary to the Central Government or any equivalent post in the Central Government or State Government:
>
> Provided further that a person who is, or has been, in the service of the State Government shall not be appointed as a member unless such person has held the post of Secretary to the State Government or any equivalent post in the State Government or Central Government."

[21] Thus, in terms of Section 22, the Member was to be appointed on the recommendations of Selection Committee consisting of the nominee of the Chief

Justice of the High Court, i.e., the Senior Judge of the Bombay High Court at Goa, the Secretary of the Department dealing with Housing and the Law Secretary. The petitioner and respondent no.3 along with two others were considered. The Selection Committee had to make recommendations from amongst persons having adequate knowledge and professional experience of at least 15 years as this was a case of appointment of a Member. The petitioner as well as respondent no.3 had the requisite experience in the field of law. The Committee recommended a panel of the petitioner and respondent no.3 in that order of preference.

[22] It is pertinent to extract the relevant portion of the minutes of the Selection Committee meeting held on 27.05.2024 which is thus:

> "1. The Second constituted meeting of the Selection Committee to select the Member of the Goa Real Estate Regulatory Authority was held under the Chairmanship of the Hon'hle Shri.....on 27th May 2024 at 5.00 p.m. in the **Conference Room of the Hon'ble High Court of Bombay at Goa at Porvorim.**
>
> The following were present:
>
> 1. Hon'ble Shri. Justice.....Chairperson
>
> 2....., IAS, Secretary (Housing) ..Member
>
> 3....., IAS, Secretary (Law) ..Member
>
> 4.....IAS, Secretary, (Urban Development) ..Convenor
>
> 2. At the outset, the Secretary (Urban Development) briefed all the members about the Selection Committee. which was constituted vide Order No.1/RERA/Chairman & Members/2023/Part file/3898 dated 14th March 2024 under Section 22 of the Real Estate (Regulation and Development) Act 2016. He stated that Smt. Vijaya D. Pol (Retired District Judge), who was a member of the Authority, retired on attaining the age of 65 years on 11.03.2024, one vacancy had resulted in the Member position. This was in view of the provision contained under section 23 of the Real Estate (Regulation and Development) Act, 2016, wherein it is provided that the Chairperson and members shall hold office for a term not exceeding five years from the date from which they enter upon their office, or until they attain the age of 65 years, whichever is earlier and shall not be eligible for re-appointment.
>
> 3. As decided in the meeting dated 03.04.2024, the names of the retired District Judges who would be eligible as per the age and other criteria were sought along with their profile, willingness, and performance appraisal reports with the assistance of the Registrar(Admn), High Court of Bombay at Goa. Accordingly, details of the following four Judicial officers were

received from the Registrar(Admn), High Court of Bombay at Goa, along with Bio Data, posting profdes, and willingness in respect the Retired District Judges who retired from service during the period from 1 January, 2023 till date.

1. Shri Vincent M. D'Silva, Retd. District Judge

2. Shri Narayan Surendra Amonkar, Retd. District Judge

3. Shri Anil Scaria, Retd. District Judge

4. Shri Cholu M. Gauns, Retd. District Judge

Procedure of filling of the vacancy of the Member of Authority:

The Committee members then discussed and deliberated on the suitability of the candidates, having regard to the relevant criteria. The Committee evaluated the curriculum vitae (bio-data) of all four Judicial officers and also considered the work/job profile of the Judicial Officers to recommend a panel for filling the vacancy of a Member of the Goa Real Estate Regulatory Authority. On a comparative evaluation, and upon due consideration and deliberations, the Committee felt the Job profile, experience, and seniority rendered Shri Vincent Silva the most-suited candidate out of the choices available. Apart from having discharged duties as a District Judge for a considerable period, Mr Silva was also the presiding officer of the Industrial Tribunal at Goa. Besides, Mr Silva is presently functioning as an Adjudicating Officer in RERA and so has acquired familiarity with the subject. He is the senior most among the judicial officers considered. The committee also felt that the appointment of some of the candidates might involve logistical difficulties. In any case, upon a cumulative consideration and a comparative evaluation, the Committee felt that Mr Silva was most suited. Therefore, after due deliberations, it was decided to recommend the name of Shri Vincent M. D' Silva for the appointment as a Goa Real Estate Regulatory Authority member. In addition, the Committee, consistent with the provisions of Rule 3(3) of the 2017 Rules, decided to prepare a panel comprising Mr Silva and Mr Cholu Gauns in the order of preference. So, if for any reason Mr Silva does not accept the offer of appointment, Mr Gauns could be considered.

Recommendation of the Selection Committee

As per Rule 3(3) of the Goa Real Estate (Regulation and Development) (Regulatory Authority Chairperson, Members, Officers and other Employees Appointment and Service Conditions) Rules, 2017, the Selection Committee is required to make recommendations to the Government for consideration of

a panel of not more than three persons, in order of preference, to fill the vacancy.

Accordingly, the Committee recommends the names of the following two Officers in the order of their preference:

1. Shri Vincent M. D 'Silva, Retd. District Judge

2. Shri Cholu M. Gauns, Retd. District Judge"

[23] We have perused the original file. The only materials before the State Government was the one which was before the Selection Committee. We do not find any materials in support of the observation of the Government that the respondent no. 3 has a wide experience in social administration. Mr Pereira, learned Senior Advocate did try to impress upon us that respondent no.3 was a member of the Village Panchayat and, therefore, he can be said to have adequate knowledge of social service. Section 22 of the Act provides that the recommendation has to be amongst the persons having adequate knowledge of social service or administration. It is argued by Mr Coutinho, learned Senior Advocate for the petitioner that there is no such concept of social administration nor is it in the contemplation of Section 22. We find that there is absolutely no material to support the observation that respondent no.3 had wide experience in any other field apart from law. The State Government while appointing respondent no. 3 not in the order of preference of the Selection Committee considered his wide experience in social administration and legal fields. In our opinion, the consideration for appointing the petitioner on the basis that respondent no.3 has wide experience in social administration is clearly erroneous and unjustified.

[24] In so far as experience in the legal field is concerned, there is no doubt that the petitioner as well as respondent no.3 have wide experience in the field of law. It is here that the recommendations of the Selection Committee need to be closely looked at as to why the Selection Committee preferred the petitioner over respondent no.3.

[25] Firstly, it needs to be borne in mind that the Selection committee to be constituted under Section 22 comprised of the nominee of the Chief Justice of this Court who was a Senior Judge of the High Court of Bombay at Goa and consists of high-level senior most bureaucrats of the State Government. The willingness in respect of the retired District Judge who retired from service during the period from 1st January 2023 till the relevant date was called. The procedure adopted by the Selection Committee for filling up the vacancy of the Member of Authority is laid down in the Selection Committee's recommendations. The Committee proceeded in the following manner:

(a) the Selection committee discussed and deliberated on the suitability of the candidates having regard to the relevant

(b) The Committee evaluated the curriculum vitae (bio-data) of all four Judicial officers and also considered the work/job profile of the Judicial Officers to recommend a panel for filling the vacancy of a Member of the Goa Real Estate Regulatory Authority.

(c) On a comparative evaluation, and upon due consideration and deliberations, the Committee felt the Job profile, experience, and seniority rendered, the petitioner was the most-suited candidate out of the choices available. The Committee observed that apart from having discharged duties as a District Judge for a considerable period, the petitioner was also the Presiding Officer of the Industrial Tribunal at Goa. Besides, the petitioner is presently functioning as an Adjudicating Officer in RERA and so has acquired familiarity with the subject. The petitioner is the senior most among the judicial officers considered.

(d) The Committee also felt that the appointment of some of the candidates might involve logistical difficulties. In any case, upon a cumulative consideration and a comparative evaluation, the Committee felt that the petitioner was most suited.

(e) Thus, the Committee upon cumulative consideration felt that the petitioner was most suited. Therefore, after due deliberations, it was decided to recommend the name of the petitioner for the appointment as a Member.

(f) The Committee, consistent with the provisions of Rule 3(3) of the said Rules, decided to prepare a panel comprising of the petitioner and respondent no.3 in that order of preference. The Committee specifically observed that if for any reason the petitioner does not accept the offer of appointment, respondent no.3 could be considered.

[26] Accordingly, the Committee recommended the name of the petitioner and respondent no.3 in this order of preference.

[27] Having regard to the recommendations of the Committee, it is obvious that the petitioner and respondent no. 3 though have adequate knowledge and requisite experience in the field of law, the Committee for the reasons as seen in the recommendations, felt that the petitioner was the most suited.

[28] In terms of Rule 4 of the said Rules, the requirement is that the Government shall consider the recommendations of the Selection Committee for the appointment of the Chairperson and the Members in the order of preference as recommended by the Selection Committee. While considering the recommendations, it is obvious that much significance is to be given to the recommendations of the Selection Committee. This is obviously because the Selection Committee comprises of a nominee of the Chief Justice and high ranking officials of the State Government. A reading of Section 22 and Rule 4 indicates that the Government shall consider the recommendation of the Selection Committee for appointment as a Member in the order of preference. A

deviation from the first part of Rule 4 as to the order of preference can be made, only after recording the reasons in writing.

[29] The Selection Committee for reasons extracted herein before found the petitioner most suited and hence recommended the panel of the petitioner and respondent no.3 in that order of preference. The State Government while appointing respondent no.3 recorded the reasons for his appointment 'considering his wide experience in social administration and legal fields'. It is seen that there is no reference to the petitioner being considered which in our opinion is in breach of the first part of Rule 4 which provides that the Government shall consider the recommendations of the Selection Committee for the appointment of Member in the order of preference as recommended by the Selection Committee. We find the reason that respondent no.3 had wide experience in social administration is without any materials and unjustified. Moreover, the petitioner as well as respondent no.3 have a wide experience in the legal field as the recommendations of the Selection Committee would go to show. The Selection Committee on the basis of the materials and upon due deliberations and having regard to the relevant criteria found the petitioner most suited and accordingly recommended the panel in the order of preference. Undoubtedly, the State Government has the power to appoint a person not according to the order of preference, but for that, the State Government has to record the reasons in writing. In the present case, we find that the reasons are not based on any supporting materials and are unjustifiable. It is not possible for us to uphold the reasoning as it does not pass muster of Rule 4 for getting over the recommendations of the Selection Committee. The power to appoint a 'Member' is of the State Government. The exercise of such power has to be in terms of section 22 of the Act and Rule 4 of the Rules. The Selection Committee after finding that the petitioner most suited also observed that if for any reason the petitioner does not accept the order of appointment, respondent no.3 be appointed. There is nothing on record to indicate that the petitioner was given an offer of appointment which he did not accept in which case respondent no.3 could be considered. It is pertinent to note that there is no challenge to the recommendations of the Selection Committee. The petitioner has not alleged any malafide as against the Government.

[30] The decision to appoint respondent no.3 as a Member of RERA calls for interference. The decision of the Government appointing respondent no.3 and the consequent order and Notification appointing respondent no.3 as a Member of Goa RERA is quashed and set aside.

[31] The question now is whether we send the matter back to the State Government for reconsideration or issue a mandamus directing the State Government to appoint the petitioner as urged by the learned Senior Advocate for the petitioner.

[32] Learned Advocate General relied upon the decision in the Govind Sugar Mills Ltd & Anr. (supra) in support of his submission that after quashing the order it is for the Government to reconsider the matter but the Court cannot give peremptory

directions to appoint the petitioner. Reliance is placed on paragraphs 4 and 5 where Their Lordships observed thus:

> "4. In the judgment of this Court delivered a few days ago, namely **M/s Mahabir Jute Mills Ltd. Gorakhpore v. Shri Shibban Lai Saxena & Ors.**, 1975 2 SCC 818 it has been held on a consideration of the provisions of law contained in Section 4K of the Act that after quashing the order of the Government refusing to make a reference the High Court could ask the Government to reconsider the matter but it could not give peremptory directions to make a reference. We may, however, take note of a sentence occurring in the judgment of this Court in the case of **Bombay Union of Journalists & Ors. V/s. State of Bombay**, 1964 6 SCR 22 which reads thus:
>
> "If the appropriate Government refuse to make a reference for irrelevant considerations, or on extraneous grounds, or acts mala fide, that, of course, would be another matter; in such a case a party would be entitled to move the High Court for a writ of mandamus. "
>
> We think wnat was meant to be conveyed by the sentence aforesaid was that the party would be entitled to move the High Court for interfering with the order of the Government and not necessarily for the issuance of a writ of mandamus to direct the Government to make a reference. The mandamus would be to reconsider the matter. It does not seem to be quite reasonable to take the view that after the refusal of the Government to make a reference is quashed a writ of mandamus to make a reference must necessarily follow. The matter has still to be left for the exercise of the power by the Government on relevant considerations in the light of the judgment quashing the order of refusal.
>
> 5. For the reasons stated above we allow this appeal only to the extent that the order of the High Court made in the Special Appeal directing the Government of U.P. and the Labour Commissioner to make a reference under Section 4K of the Act is not sustainable and is set aside. We were informed at the Bar that two references have already been made in pursuance of the said direction. It is plain that the said order made cannot hold good when we have set aside the order of the High Court giving the direction in pursuance of which the references have been made. It will, however, be open to the State Government to reconsider the matter in the light of the judgment of the High Court and within the ambit of well- settled principles of law for exercise of their power of reference and to take such decision in the matter as they may think fit and proper to take in accordance with law. We shall make no order as to costs."

[33] Learned Advocate General then placed reliance on U.P. State Road Transport Corporation and Anr. (supra) to contend that the Court cannot direct the statutory

authority to exercise the discretion in a particular manner not expressly required by law. The observations of the Hon'ble Supreme Court in para 12 are relevant, which read thus:

> "12. The High Court was equally in error in directing the Corporation to offer alternative job to drivers who are found to be medically unfit before dispensing with their services. The Court cannot dictate the decision of the statutory authority that ought to be made in the exercise of discretion in a given case. The Court cannot direct the statutory authority to exercise the discretion in a particular manner not expressly required by law. The Court could only command the statutory authority by a writ of mandamus to perform its duty by exercising the discretion according to law. Whether alternative job is to be offered or not is a matter left to the discretion of the competent authority of the Corporation and the Corporation has to exercise the discretion in individual cases. The Court cannot command the Corporation to exercise discretion in a particular manner and in favour of a particular person. That would be beyond the jurisdiction of the Court."

[34] Mr Coelho Pereira, learned Senior Advocate relied upon the decision in Oriental Bank of Commerce (supra), to impress upon us the pre requisites for issuance of mandamus. It is submitted that in order that a writ of mandamus may be issued, there must be a legal right with the party asking for the writ to compel the performance of some statutory duty cast upon the Authorities. It is submitted that in the present case, this Court cannot issue a mandamus directing the Government to appoint the petitioner. Reference to paragraphs 11 and 12 is profitable and hence extracted hereunder:

> "11. The Principles on which a writ of mandamus can be issued have been stated as under in The Law of Extraordinary Legal Remedies by F.G. Ferris and F.G. Ferris, Jr.:
>
> Note 187 - Mandamus, at common law, is a highly prerogative writ, usually issuing out of the highest court of general jurisdiction, in the name of the sovereignty, directed to any natural person, corporation or inferior court within the jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duly to which the party applying for the writ is entitled of legal right to have performed.
>
> Note 192 - Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive, specific and ministerial duty presently existing and imposed by law upon officers and

others who refuse or neglect to perform such duty, when there is no other adequate and specific legal remedy and without which there would be a failure of justice. The chief function of the writ is to compel the performance of public duties prescribed by statute, and to keep subordinate and inferior bodies and Tribunals exercising public functions within their jurisdictions. It is not necessary, however, that the duty be imposed by statute; mandamus lies as well for the enforcement of a common law duty.

Note 196 - Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion of the Court, subject always to the well-settled principles which have been established by the Courts. An action in mandamus is not governed by the principles of ordinary litigation where the matters alleged on one side and not denied on the other are taken as true, and Judgment pronounced thereon as of course. While mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles. Before granting the writ the Court may, and should, look to the larger public intrest which may be concerned - an interest which private litigants are apt to overlook when striving for private ends. The Court should act in view of all the existing facts, and with due regard to the consequences which will result. It is in every case a discretion dependent upon all the surrounding facts and circumstances.

Note 206.- ...The correct rule is that mandamus will not lie where the duty is clearly discretionary and the party upon whom the duty rests has exercised his discretion reasonably and within his jurisdiction, that is, upon facts sufficient to support his action.

12. These very principles have been adopted in our country. In **Bihar Eastern Gangetic Fishermen Cooperative Society Ltd. v. Sipahi Singh and others**, 1977 4 SCC 145, after referring to the earlier decisions in **Lekhraj Sathramdas Lalvani v. N.M. Shah**, 1966 AIR(SC) 334, **Rai Shivendra Bahadur (Dr.) v. Nalanda College**, 1962 AIR(SC) 1210 and **Umakant Saran (Dr.) v. State of Bihar**, 1973 1 SCC 485, Court observed as follows in paragraph 15 of the reports:

"15.....There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of the officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate Tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right

> under the statute to enforce its performance. ....In the instant case, it has not been shown by respondent No. 1 that there is any statute or rule having the force of law which casts a duty on respondents 2 to 4 which they failed to perform. All that is sought to be enforced is an obligation flowing from a contract which, as already indicated, is also not binding and enforceable. Accordingly, we are clearly of the opinion that respondent No. 1 was not entitled to apply for grant of a writ of mandamus under Article 226 of the Constitution and the High Court was not competent to issue the same."
>
> Therefore, in order that a writ of mandamus may be issued, there must be a legal right with the party asking for the writ to compel the performance of some statutory duty cast upon the authorities. The respondents have not been able to show that there is any statute or rule having the force of law which casts a duty on the appellant Bank to declare their account as NPA from 31st March, 2000 and apply R.B.I. guidelines to their case."

[35] Mr Pereira, learned Senior Advocate also placed reliance on K. Vijay Lakshmi (supra). Para 30 of the said judgment reads as under:

> "30. In view of this constitutional and legal framework, we are clearly of the view that the High Court has erred firstly on the administrative side in discharging its responsibility under Article 234 of the Constitution, and then on the Judicial side in dismissing the writ petition filed by the appellant, by drawing an erroneous conclusion from the judgment in the case of **Union of India V/s. Kali Dass Batish**, 2006 1 SCC 779. Having stated so, the Court cannot grant the mandamus sought by the appellant to issue an appointment order in her favour. As held by this Court in para 17 of **Harpal Singh Chauhan Vs. State of U.P.**, 1993 3 SCC 552, the Court can examine whether there was any infirmity in the decision making process. The final decision with respect to the selection is however to be left with the appropriate authority. In the present matter the Division Bench ought to have directed the State Government to place all the police papers before the High Court on the administrative side, to enable it to take appropriate decision, after due consideration thereof."

[36] Mr Coelho Pereira, learned Senior Advocate submitted that this petition suffers from delay and laches. The Notification of order of appointment of the respondent no.3 is dated 11.07.2024. The petitioner thereafter made application for obtaining relevant documents under the Right to Information Act. The petition is filed on 14.08.2024. We, therefore, do not find any merit in the submission that the petition suffers from delay or laches.

[37] It is significant to note that pursuant to the issuance of the Notification appointing respondent no.3, the petitioner made a detailed representation dated

25.07.2024 addressed to the Chief Secretary, Government of Goa and the Department of Urban Development which is at annexure G at page 38 of the paper book demanding justice including the relief to appoint him to the post as a Member in place of respondent no.3.

[38] Having regard to the well settled legal principles, we would have otherwise refrained from issuing a writ of mandamus directing the Government to appoint the petitioner consequent upon finding that there was an infirmity in the decision making process which has resulted in the quashing of appointment of respondent tno.3. The question before us is whether we adopt the course of calling upon the Government to reconsider the matter for appointment of a Member in terms of the recommendations of the Selection Committee. In the facts of the present case, we are inclined to direct the Government to appoint the petitioner, for the reasons spelt out hereafter.

[39] Considering the composition of the Selection Committee, the purport of Section 22 and Rule 4, the recommendations of the Selection Committee assume significance. Due regard will have to be given to the recommendations of the Selection Committee and more so when the order of preference is forwarded after due deliberations and upon considering all the materials on record. A high degree of sanctity has to be attached to the recommendations of the Selection Committee which cannot be brushed aside lightly. It is therefore that Rule 4 recognises the order of preference and attaches weightage to the Order of preference. If the appointment is not to be in accordance with the order of preference, the same has to be for reasons in

[40] It is not that the recommendation of the Selection Committee giving preference to the petitioner over respondent no.3 is discarded by the State Government for justifiable reasons. There is no whisper as to why the detailed consideration of the Committee recommending the petitioner over the respondent no.3 is brushed aside. Not only that, but there are no compelling reasons much less justifiable reasons brought on record as to why the appointment made is not according to the order of preference by the Selection Committee.

[41] In our view, the reasons in writing purportedly in terms of rule 4 do not justify a departure for the appointment of a Member in the order of preference as recommended by the Selection Committee. No doubt the appointment is to be made by the Government but the same has to be in conformity with the provisions of Section 22 and Rule 4 of the Rules. The Selection committee has for valid reasons recommended that the petitioner be preferred over the respondent no.3. As we find that there is absolutely no justification or material placed on record to deviate from the recommendations of the Selection Committee, we are of the opinion that in the facts of this case, the Government can be directed to appoint the petitioner consequent to the quashing of the appointment of respondent no.3.

[42] The petition is therefore allowed in terms of prayer clause (a), which reads thus:

> "(a) By a writ in the nature of certiorari the decision of the Government taken on 30.06.2024 to appoint Shri Cholu Gauns be quashed and set aside and by an order of mandamus the respondent nos. 1 and 2 be directed to appoint the petitioner as member of Goa RERA."

[43] Rule is made absolute. No order as to costs.

[44] At this stage, Mr Coelho Pereira, learned Senior Advocate for respondent no.3 requested for staying the operation of this judgment for four weeks. We are not inclined to accede to this request. Hence, the request is rejected

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2024(2)GOACC544

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Writ Petition No 640 of 2024 **dated 18/09/2024**

Aqaab Realty Private Limited

Versus

State of Goa; Goa Real Estate Regulatory Authority

EXTENSION REJECTION

Real Estate (Regulation and Development) Act, 2016 Sec. 6 - Extension of Registration of Real Estate Project By The Goa Real Estate Regulatory Authority Regulation, 2021 Reg 4 - Extension Rejection - Petitioner applied to Goa Real Estate Regulatory Authority for a one-year extension of registration under Section 6 of Real Estate (Regulation and Development) Act, 2016 - Petitioner disclosed project completion by 31.12.2027 but sought an extension due to revised plans and pending environmental clearance - Application rejected by the authority based on a Circular requiring the extension request to be made three months prior to the registration's validity expiry - Petitioner argued no personal hearing was given before rejection - Respondent agreed no hearing occurred but cited Regulations requiring applications at least three months before validity expiry - Court observed application fell within regulation, and personal hearing should have been granted - Court set aside the order and remanded matter back to authority for reconsideration with a personal hearing. - Petition Allowed

Law Point: Authority must provide a personal hearing before rejecting an application for registration extension under Section 6 of the Real Estate (Regulation and Development) Act, 2016, considering regulatory guidelines.

Acts Referred:

Real Estate (Regulation and Development) Act, 2016 Sec. 6

Extension of Registration of Real Estate Project By The Goa Real Estate Regulatory Authority Regulation, 2021 Reg 4

Counsel:

Dattaprasad Lawande, Chirag Angle, Geetesh Shetye, Maria Correia

JUDGEMENT

Bharat P Deshpande, J.- [1] Rule.

[2] Rule is made returnable forthwith.

[3] The matter is taken up for final disposal with consent of the parties.

[4] Heard Mr. Lawande along with Mr. Angle learned Advocates for the Petitioner; Mr. Gitesh Shetye learned Additional Government Advocate for the Respondent No. 1 and Ms. Maria Correia, learned Additional Government Advocate for the Respondent No. 2.

[5] A short question in the present proceedings is to order passed by the Goa Real Estate Regulatory Authority [Goa RERA Authority for short] on 23.04.2024 thereby rejecting the application filed by the Petitioner for extension of one year as provided under Section 6 (proviso) of the Real Estate (Regulation and Development) Act, 2016 [RERA Act 2016 for short].

[6] Mr. Lawande learned counsel for the Petitioner would submit that the Petitioner applied for registration under the RERA Act and by such application he has disclosed that he will be completing the project on or before 31.12.2027.

[7] Mr. Lawande would submit that the Petitioner has applied for revised plans as well as for environmental clearance for which fresh permissions are required.

[8] He submits that because of subsequent developments there is a possibility of delay in the project which may not be completed by the period disclosed earlier. Accordingly, he applied for extension of registration on 06/02/2024 under Section 6 of the said Act. However, the concerned Goa RERA Authority vide order dated 23.04.2024 rejected such extension on the ground that as per the Circular dated 17/01/2020, the Petitioner has to apply to the Goa RERA Authority only three months prior to the expiry of the period of validity of registration.

[9] Mr. Lawande would submit that the proviso to Section 6 contemplates a personal hearing before deciding such application for extension. However, no such hearing was given.

[10] Mr. Lawande submits that even the Circular dated 17/01/2020, has been wrongly interpreted as it says that the Petitioner has to apply atleast three months prior to the validity of the registration. He submits that the Petitioner has applied well in

advance since he has already applied for revision of the plans, which may delay the project and it will not be possible for the Petitioner to complete it on or before December, 2027.

[11] Ms. Correia, learned Additional Government Advocate appearing for the Respondent No. 2 would submit that the Government has published the Extension of Registration of Real Estate Project by the Goa Real Estate Regulatory Authority Regulations 2021, with regard to the extension of registration of real estate project. As per the said regulation, the Applicant/Promoter has to apply atleast three months prior to the validity of the registration period for extension as provided under Section 6.

[12] She fairly submits that before passing the impugned order dated 23.04.2024, no personal hearing was given to the Petitioner.

[13] The Regulation No. 4 provided that the Promoter shall apply atleast three months prior to the validity period expires and only in exceptional and unforeseen circumstances the said period of three months may be waived by the Authority.

[14] Thus, the application filed by the Petitioner is well in advance and the word "atleast" found in Regulation No. 4 has to be properly interpreted. The application filed by the Petitioner is clearly coming within the Regulation No. 4.

[15] However, since no personal hearing was given to the Petitioner before rejecting his application, the matter needs to be remanded to the concerned Authority to decide the application filed by the Petitioner afresh and by giving personal hearing as found mentioned under Section 6 (Proviso) of the RERA Act, 2016.

[16] Accordingly, the impugned order is hereby quashed and set aside. The matter is remanded to Goa RERA Authority for deciding the application afresh and by giving an opportunity of personal hearing to the Petitioner. While doing so Authority shall take into consideration the Regulation 2021 framed by the RERA and notified by the Government with regard to extension of time.

[17] Rule is made absolute in above terms

2024(2)GOACC546

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Criminal Writ Petition No 37 of 2024 **dated 18/09/2024**

Ashwini Agni

Versus

Kassim Jamuluddin Shaikh; Gulshan Kassim Shaikh; Abrar Mansuri; Shabana Mansuri; Khairunissa Mansuri; Imran Mansuri; Metropolitan Magistrate 51st Court of Kurla; Pi, Kurla Police Station; State of Goa

INVESTIGATION DIRECTION

Indian Penal Code, 1860 Sec. 383, Sec. 34, Sec. 182, Sec. 384, Sec. 499, Sec. 120B, Sec. 120A, Sec. 506, Sec. 211, Sec. 406 - Code of Criminal Procedure, 1973 Sec. 190, Sec. 482, Sec. 161, Sec. 204, Sec. 203, Sec. 156, Sec. 160, Sec. 200, Sec. 202 - Investigation Direction - Petitioner, a practising Advocate, challenged an order passed by the Metropolitan Magistrate at Kurla directing investigation under Section 202 of Cr.P.C. based on a private complaint alleging offences under various sections of IPC - Petitioner argued that she had no connection with the alleged offences and that the complaint was filed in Mumbai despite the alleged offences taking place in Goa - Respondent alleged involvement of Petitioner in extortion attempts - Magistrate directed inquiry by Kurla Police Station without issuing process - Court observed that investigation was ongoing, and no cause of action had yet arisen for Petitioner to challenge the order - Court rejected Petition as premature, noting that process was not yet issued under Section 204 of Cr.P.C. - Petition Dismissed

Law Point: A challenge to a Magistrate's order directing investigation under Section 202 of Cr.P.C. is premature when no process has been issued, and the investigation is still pending.

Acts Referred:

Indian Penal Code, 1860 Sec. 383, Sec. 34, Sec. 182, Sec. 384, Sec. 499, Sec. 120B, Sec. 120A, Sec. 506, Sec. 211, Sec. 406

Code of Criminal Procedure, 1973 Sec. 190, Sec. 482, Sec. 161, Sec. 204, Sec. 203, Sec. 156, Sec. 160, Sec. 200, Sec. 202

Counsel:

A F Diniz (Senior Advocate), Junaid Shaikh, Kassim Shaikh (Respondent In Person), Nikhil Vaze

JUDGEMENT

Bharat P Deshpande, J.- [1] Rule. Rule made returnable forthwith.

[2] The matter is taken up for final disposal with consent of the parties.

[3] Heard the learned Senior Counsel Mr. Diniz appearing with Mr. Junaid Shaikh for the Petitioner and Respondent No. 1 appearing in person.

[4] The Petition is filed with the following prayers:

a) For a writ of certiorari or a writ in the nature of certiorari, any other writ, direction or order, order under Section 482 of the Criminal Procedure Code thereby bearing Case No. MISC/2994/22 quashing and setting aside the Order dated 16/06/2023 and the application/ complaint under Section 156(3) complaint bearing Case No. MISC/2994/22 filed before the Metropolitan Magistrate Kurla with proceedings initiated thereby, insofar as the Petitioner in concerned.

b) Pending the hearing and final disposal of the Petition the operation and execution of the order dated 16/6/2023 and proceedings under Section 156(3) insofar as the Petitioner is concerned be stayed.

c) Ex parte ad interim relief in terms of prayer clause b.

d) Any other relief order as this Hon'ble Court deems fit and proper.

[5] The Petitioner who is a practising Advocate challenges the order dated 16.06.2023 passed by the learned Metropolitan Magistrate at Kurla, Mumbai in Case No. MISC/2994/2022, thereby directing the Police Officer of the Kurla Police Station to conduct an investigation under Section 202 of Cr.P.C. and to submit the report within four months. The impugned order was passed by the Magistrate at Kurla on a complaint filed by Respondent No. 1 against seven persons including the present Petitioner for the offence punishable under Sections 120A, 120B, 182, 211, 406, 383, 384, 499 and 506 read with Section 34 of the IPC.

[6] Initially, Respondent No. 1 filed a complaint with Kurla Police Station, however, since no cognizance was taken of such complaint, he approached the Metropolitan Magistrate at Kurla by filing an Application under Section 156(3) of the Code of Criminal Procedure. However, by a pursis, Respondent No. 1 requested the concerned Magistrate to consider his Application under Section 156(3) of Cr.P.C. as a complaint filed under Section 190 of Cr.P.C.

[7] The record shows that the said complaint was registered and kept for verification. On 02.05.2023, the Complainant filed an affidavit in lieu of verification of the complaint and then, the case was registered. Finally, on 16.06.2023, the learned Metropolitan Magistrate passed an order on the said complaint as under:-

"Order - Police Officer Kurla Police Station is hereby directed to conduct investigation u/s 202 Cr.P.C. and submit report within 04 months.

Adj. for u/s 202 report."

[8] The Petitioner approached this Court since she received a notice dated 15.09.2023 from the P.I. Kurla Police Station under Section 160 of Cr.P.C. thereby directing her to report to the concerned Police Station for the purpose of inquiry.

[9] Mr. Diniz would submit that the Petitioner, who is an Advocate, appearing for and on behalf of the wife of Respondent No. 1 in the matrimonial matter, had no connection at all with the alleged act of extortion as claimed in the complaint. He submits that there are no allegations against the present Petitioner in the complaint filed before the Kurla Police Station while the Petitioner was acting as an Advocate of Respondent No. 2 i.e. the wife of Respondent No. 1.

[10] Mr. Diniz would submit that the name of the Petitioner appears only when Respondent No. 1 filed a complaint/application under Section 156(3) of the Cr.P.C. He submits that the impugned order is illegal and not tenable since it contravenes the

provisions of Section 202(1)(b) of the Cr.P.C. as the learned Magistrate failed to record the statement of the Complainant and his witnesses. He would further submit that on this count alone, the direction to conduct inquiry is bad in law.

[11] Mr. Diniz would further submit that the Magistrate at Kurla had no territorial jurisdiction to entertain such a complaint as the entire cause of action as alleged in the complaint took place in Goa. He would submit that no part of the cause of action accrued in Mumbai or within the jurisdiction of Kurla Police Station so as to entertain such a complaint.

[12] Mr. Diniz while submitting that this Court has jurisdiction, claimed that the High Court of Bombay at Goa is a common High Court for Maharashtra and Goa and therefore, this Court sitting at Goa has jurisdiction to entertain the Writ Petition and more specifically, under Article 226 of the Constitution of India so as to consider the grievance raised by the Petitioner. Finally, he claimed that the complaint filed before the Kurla Court is an abuse of the process of the Court and law and therefore, it needs to be quashed and set aside with exemplary costs.

[13] Mr. Diniz placed reliance on the following decisions:

(i) A.M. Mohan Vs. The State,2024 SCCOnLine 339;

(ii) **Prakash Ujjalappa Bhogje Vs. State of Maharashtra & Another**, 2007 Supp BCR 172;

(iii) Mohamed Rizwan Memon & Others Vs. State of Goa & Others,2017 DGLS(Bom) 1117;

(iv) **S.V. Puranik Vs. Indian Airlines & Others**, 1991 1 GoaLT 218;

(v) Rahul Sanjay Shingade Vs. State of Maharashtra,2024 DGLS(Bom) 1577;

(vi) Mohd. Nawaz Iqbal Shaikh Vs. State of Maharashtra & Another, MANU/MH/1451/2023

[14] Per contra, Respondent No. 1 appearing in person would submit that the cause of action for filing of the Petition entirely arose within the territorial jurisdiction of the Principal seat at Bombay and thus, this Court sitting at Goa has no jurisdiction to entertain such Writ Petition. He submits that the Petitioner ought to have filed the Petition, if so desired before the Principal seat. He would further submit that the present Petition is not at all maintainable as there is no cause of action for the Petitioner to approach this Court and more so, against the order directing the inquiry to be conducted under Section 202 of Cr.P.C.

[15] Besides, Respondent No. 1 would submit that the Petitioner though acting as an Advocate, was clearly involved in instigating Respondent No. 2 i.e. the wife of Respondent No. 1 in order to extract an amount of Rs.25,00,000/-. Respondent No. 1 would further submit that the Petitioner was also involved in directly contacting

Respondent No. 1 and threatening him whenever he visited Goa and the same was also recorded on the phone.

[16] Respondent No. 1 would further submit that part of the offences alleged in the complaint took place in Mumbai, wherein Respondent No. 1 is permanently residing. He submits that even Respondent No. 2 was residing with him in Mumbai prior to shifting to Goa.

[17] Respondent No. 1 would then submit that the Kurla Police after conducting the inquiry, submitted its report to the concerned Magistrate, however, since stay has been granted by this Court, the matter is pending for further consideration. Respondent No. 1 would submit that the judgments cited by Mr. Diniz are not applicable and distinguishable.

[18] The rival contentions fall for determination.

[19] The first contention of Mr. Diniz is regarding non-compliance with Section 202 of Cr.P.C. In this respect, he would submit that the impugned order passed by the Magistrate directing the Kurla Police Station to conduct an investigation is bad in law. He relied upon the provisions of Section 202(1)(b) of Cr.P.C. Thus, it is the contention of Mr. Diniz that the Court/ Magistrate is duty bound to examine on oath the Complainant and the witnesses present, if any, before postponing the issue of process and directing the Police Officer to conduct the investigation. However, as rightly pointed out by Respondent No. 1 from the Roznama itself, it is clear that on 02.05.2023, the Complainant/Respondent No. 1 filed an affidavit in lieu of verification of the complaint. The same is kept on record and marked as Exhibit-3. Thus, after considering the affidavit in lieu of verification of the complaint, the learned Magistrate complied with the provisions of Section 202(1)(b) of Cr.P.C.

[20] Similarly, the concerned Magistrate was right in directing the inquiry/investigation by the concerned Police Officer instead of conducting the inquiry himself since some of the Accused persons mentioned therein are residing beyond the territorial jurisdiction of the said Magistrate.

[21] The complaint was filed under Section 190 of Cr.P.C., though, initially, it was titled as an application under Section 156(3) of the Cr.P.C. Once such a complaint is received by the Magistrate, he has to proceed under Chapter XV of Cr.P.C., which deals with complaints to the Magistrates and starts with Section 200 of the Cr.P.C. For a better understanding of the provisions, Section 202 of Cr.P.C. is quoted as follows:

> "202. Postponement of issue of process.-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made

by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

[22] The plain reading of sub-section (1) would go to show that the Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance, may, if he thinks fit and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the Accused, and either inquire into the case himself or direct an investigation to be made by a Police Officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

[23] Thus, two things the Magistrate has to comply with on receipt of a complaint. Firstly, he has to verify whether the complaint is with regard to the offence of which he is authorised to take cognizance and secondly, whether the Accused is residing within his jurisdiction. While postponing such process, he has to examine the Complainant and the witnesses present, if any, on oath under Section 200 of Cr.P.C.

[24] The purpose of conducting an inquiry by the Magistrate himself or directing an investigation to be made by a Police Officer is only for the purpose of deciding whether or not, there is sufficient ground for proceeding. The word "proceeding" used therein is to be considered as issuance of process or dismissal of the complaint as found in Sections 203 and 204 of Cr.P.C.

[25] The inquiry/investigation as provided under Section 202(1) of Cr.P.C. is, therefore, only for the purpose of deciding whether or not, there is sufficient ground to proceed. Thus, Section 203 of Cr.P.C. gives power to the Magistrate after taking the statement on oath, if any, of the Complainant as well as witnesses, if any or the result

of the inquiry/investigation under Section 202, enables the Magistrate to form an opinion as to whether there is a ground to proceed, else, he must dismiss the complaint by recording brief reasons. Only if the Magistrate is satisfied upon such inquiry or investigation that there is sufficient ground for proceeding, he may issue process against the Accused mentioned in the complaint i.e. against the Accused or against some of them under Section 204 of Cr.P.C. The matter in hand is only at the stage of conducting the investigation by the Police Officer as directed by the Magistrate under Section 202(1) of Cr.P.C. Thus, the stage of either Section 203 or 204 of Cr.P.C. is yet to arrive.

[26] The question, therefore, before this Court is whether there is any cause of action for the Petitioner to approach this Court against the order dated 16.06.2023 passed by the concerned Magistrate thereby directing an investigation by the Kurla Police Station. At this stage, though the present Petitioner is arrayed as an Accused in a private complaint under Section 190 of Cr.P.C., the learned Magistrate is yet to come to a conclusion/opinion that there is any sufficient ground to proceed with the said complaint. This means that the Petitioner though arrayed as an Accused in the complaint, is not treated as Accused by the Magistrate. Only after issuance of process, that too on the satisfaction of the inquiry/investigation conducted under Section 202(1) of Cr.P.C, the Magistrate has to form an opinion and only then, the party arrayed in the said complaint could be named as an Accused.

[27] The role of the present Petitioner in the said complaint, at this stage, is simply as a Respondent therein, though arrayed as one of the Accused. Unless the Court forms an opinion that there is some ground to proceed under Section 204 of Cr.P.C., it cannot give any cause of action for the Petitioner to approach the Court by challenging the order under Section 202(1) of Cr.P.C. It is only for the Magistrate to satisfy himself. Even the Magistrate himself can conduct the inquiry or he may direct the Police Officer to investigate or submit the report. Thus, in sum and substance, there is no opinion or observation of the learned Magistrate disclosing his mind to take cognizance of such a complaint for the purpose of issuing process.

[28] It is no doubt true that the Accused is entitled to challenge the order of issuance of process for the simple reason that by doing so, the observations of the Magistrate could be challenged in connection with Section 204 of Cr.P.C. However, the matter has not reached the stage of Section 204 of Cr.P.C. and it is only at the stage of investigation under Section 202 (1) of Cr.P.C. It may happen that after the report of the investigation is placed before the Magistrate, he may dismiss the complaint under Section 203 of Cr.P.C. If so, in such circumstances, challenging the order dated 16.06.2023, to my mind would be premature and for that purpose, the Petitioner will not have any specific cause of action.

[29] Mr. Diniz would submit that the Petitioner has received a notice under Section 160 of Cr.P.C. from the concerned Police Officer of Kurla Police Station

directing her to remain present before the said Officer, which according to Mr. Diniz clearly gives the cause of action to the Petitioner to challenge the impugned order dated 16.06.2023. A perusal of the notice dated 15.09.2023 issued to the Petitioner by Kurla Police Station, clearly shows that it is issued under Section 160 of Cr.P.C.

[30] Section 160 of Cr.P.C. reads thus:

> "160. Police officer's power to require attendance of witnesses.- (1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required:
>
> Provided that no male person [under the age of fifteen years or above the age of sixty-five years or a woman or a mentally or physically disabled person] shall be required to attend at any place other than the place in which such male person or woman resides.
>
> (2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence."

[31] A careful reading of the above provision would go to show that it appears under Chapter XII, which deals with information to the Police and their powers to investigate. It further provides that the Police Officer has powers to investigate a cognizable case under Section 156 of Cr.P.C. and also on directions of the Magistrate under Section 190 of Cr.P.C.

[32] However, Section 160 would clearly reveal the power of the Police Officer to require the attendance of witnesses. A Police Officer making an investigation may by an order in writing require attendance before himself or any person appears to be acquainted with the facts and circumstances of the case and such person shall attend as so required. It follows with a recording of statements of the witnesses under Section 161 of Cr.P.C. Thus, the notice issued to the Petitioner by the Kurla Police Station is basically under Section 160 of Cr.P.C. which cannot be construed as giving cause of action to the Petitioner to challenge the impugned order dated 16.06.2023. This notice is issued only to carry out the investigation as directed by the Magistrate and to submit a report before it. A person receiving such notice is bound to appear before the Police Officer and if questioned, is bound to answer truly relating to such a case, other than questions, the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. Thus, the title of Section 160 of Cr.P.C. would clearly go to show that it is a notice requiring the attendance of a witness. It is no doubt true that the Petitioner is arrayed in the complaint as Accused No. 7, however, it

is also necessary to consider that the inquiry or investigation might reveal that the Petitioner is not an Accused, but needs to be considered as a witness.

[33] In the above circumstances, the Petition filed thereby challenging the order dated 16.06.2023 is itself misconceived. The Petitioner has prayed for the issuance of a writ of certiorari or any other writ or direction or order under Section 482 of Cr.P.C. for quashing the complaint filed by Respondent No. 1 before the Magistrate at Kurla. At this stage, it is necessary to note that the Magistrate has directed only to conduct the investigation under Section 202 of Cr.P.C. and has not reached the stage of Section 203 or 204 of Cr.P.C. It is possible that after the report is received from the Kurla Police Station, the Magistrate might form an opinion that no case is made out for issuance of process and accordingly, may dismiss the complaint under Section 203 of Cr.P.C.

[34] Besides, the contentions raised by the Petitioner that the complaint filed before the Magistrate at Kurla has no territorial jurisdiction, cannot be looked into at this stage, since the Magistrate is yet to arrive at such conclusions. The process is not issued against the Petitioner. The stage is only at the investigation level under Section 202 of Cr.P.C. Thus, the status of the Petitioner in the said complaint cannot be equated to that of an Accused. At this stage, the status of the Petitioner in the said complaint is that of non-applicant/Respondent. If the Magistrate considers that there is sufficient material to proceed under Section 204 of Cr.P.C., the Petitioner would get the cause of action to challenge such order along with the complaint even under Section 482 of Cr.P.C., but not prior to it.

[35] The powers under Article 226 of the Constitution of India as well as Section 482 of Cr.P.C. are extraordinary powers. The Court while using such powers must remind itself that it should be used only when it is necessary to set the record right and to remind the concerned Authority about their duty. At present, the Petitioner is only apprehending that the process could be issued against her by the concerned Magistrate. Such apprehension cannot lead to seeking a writ of certiorari or in the like nature and also seeking the exercise of extraordinary jurisdiction of this Court under Section 482 of Cr.P.C.

[36] The contention of Mr. Diniz that the complaint filed before the Magistrate entirely speaks about the incident that took place in Goa and not in Mumbai would be available to the Petitioner only if the Magistrate comes to the conclusion that he is authorized to take cognizance of the said complaint, but not prior to it. Similarly, the Magistrate before issuing the process under Section 204 of Cr.P.C. is duty bound to consider the contentions raised in the complaint including the question of territorial jurisdiction and only thereafter proceed further. The matter in hand has not reached such a stage. Though the Magistrate directed postponement of the issuance of process, it is only against some of the non-applicants/Accused persons mentioned in the complaint that are residing at a place beyond the area in which he exercises his

jurisdiction. Thus, while passing the order dated 16.06.2023, the Magistrate is fully aware that he has to even conduct the inquiry or direct investigation by a Police Officer for deciding whether or not, there is sufficient ground for proceeding.

[37] It further shows that the Magistrate is also aware that while considering the investigation report, he has to satisfy himself whether there is sufficient ground to proceed which also includes the question of territorial jurisdiction of the concerned Magistrate to issue the process.

[38] Respondent No. 1 disclosed that the Kurla Police Station has already submitted its report of the investigation before the concerned Magistrate on 03.10.2023. A copy of this report is placed on record. Thus, it is now for the concerned Magistrate to form his opinion and decide whether or not, there is sufficient ground to proceed. The option under Section 203 of Cr.P.C is also available with the concerned Magistrate. Thus, it would be premature to entertain the present Petition at this stage, specifically when no opinion is formed by the learned Magistrate either under Section 203 of Cr.P.C. or 204 of Cr.P.C.

[39] Having said so, the other ground regarding the jurisdiction of this Court to entertain the Petition on merits, need not be gone into as it is clearly observed that the Petition itself is premature and need not be considered at this stage. Thus, the decisions cited by Mr. Diniz with regard to the jurisdiction of this Court to entertain the Petition could be considered in appropriate matters.

[40] For all the above reasons, the Petition fails and stands rejected

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2024(2)GOACC555

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Criminal Writ Petition No. 769 of 2023 **dated 18/09/2024**

Agnelo Fernandes; Cynthia Fernandes

Versus

State (C B I) Anti-corruption Branch

FREEZING OF SALARY ACCOUNT

Constitution of India - Article 21 - Freezing of Salary Account - Petitioners challenged the legality of an order refusing defreezing of salary account - Bank account seized since 2015 - Salary credited into the account but not withdrawn by Petitioner No. 1 - Petitioners' accounts were frozen as part of a disproportionate assets case - CBI alleged 100% disproportionate assets - Petitioners argued that freezing of salary account violated fundamental rights under Article 21 of Constitution - Salary was legally earned and required for daily needs and children's education - Court observed that

deprivation of legally earned salary would violate Article 21 - Petitioners undertook not to create third-party rights on their plot and house, ensuring security for the case - Sessions Court's order quashed and salary account defreezed. - Petition Allowed

Law Point: Freezing of a salary account legally earned violates fundamental rights under Article 21 when such funds are required for daily living and education.

Counsel:

Neelesh A Takkekar, Asha Desai

JUDGEMENT

Bharat P Deshpande, J.- [1] Heard Mr. Takkekar for the Petitioners and Ms. Asha Desai for the Respondent.

[2] Rule. Rule made returnable forthwith.

[3] The matter is taken up for final disposal with the consent of the parties.

[4] The challenge in the present Petition is to the legality of the order passed on 24.08.2023 by the learned Sessions Court thereby refusing the Application filed at Exhibit-52 for defreezing the Bank Account of Petitioner No. 1 wherein his salary was credited.

[5] Today, a reply is filed on behalf of the C.B.I. clearly admitting that the Bank Account was seized from the year 2015. The salary of Petitioner No. 1 was credited in Bank Account No. 10445875994 with the SBI Bank, Ponda Branch.

[6] Ms. Desai appearing for the Respondent would submit that the statement of account from the said Bank shows that Petitioner No. 1 never withdrew the salary deposited in the said Account.

[7] Mr. Takkekar would submit that a case of disproportionate assets is filed against the Petitioners and during the investigation, their Bank Accounts and also that of their children are freezed thereby preventing them from withdrawing the amount even for their day-to-day expenses. Petitioner No. 1 had to open separate salary account for depositing his salary as he was in service at that time.

[8] The chargesheet is filed and the case is now pending before the concerned Court. The contention of the CBI is that there is 100%, disproportionate assets accumulated by Petitioner No. 1 while rendering services with the concerned Department.

[9] Apart from the Bank Account, the Petitioners have a plot wherein they constructed a house. Mr. Takkekar submits that the valuation of the said plot and the house is more than Rs.70 lakhs as on date, which is the amount of disproportionate assets as alleged by the Respondent.

[10] The SBI Bank Account at Ponda Branch is admittedly the salary account of Petitioner No. 1, yet it was freezed. Admittedly, Petitioner No. 1 received the salary from the Department for the services rendered by him, which is a legal amount received by the Petitioners. The question whether Petitioner No. 1 has withdrawn the amount from the said salary account has to be considered by the Trial Court while appreciating the charges of disproportionate assets levelled against the Petitioners. However, the amount which is legally received by Petitioner No. 1 from his Department as salary, cannot be deprived from using it. It will be against the fundamental rights of life as enshrined in the Constitution under Article 21 thereby depriving the concerned employee from using such salary which he has received by legal means for his day-to-day needs and for educating his children.

[11] As far as the amount calculated for disproportionate assets is concerned, the same could be secured since the Petitioners have given an undertaking that they will not create third party rights with regard to the plot and the house. Though the valuation of the plot, at the relevant time, as per the sale deed is shown much less, as of now, such an asset could be sufficient enough in case the charges levelled against the Petitioners are proved.

[12] The Application was filed for defreezing of the said Account for utilizing such an amount towards the education charges/fees of the children. Since such amount was received by Petitioner No. 1 as his salary and that too for rendering services, upon paying the income tax, he cannot be deprived of using such amount. Accordingly, the impugned order passed by the learned Sessions Court rejecting such an Application as far as SBI Account is concerned needs to be quashed and set aside. The said Account maintained by the SBI Bank, Ponda Branch in the name of the Petitioners stands defreezed.

[13] Rule is made absolute in the above terms. No costs

2024(2)GOACC557

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Karnik; Valmiki Menezes]

Writ Petition No 99 of 2024 **dated 18/09/2024**

Ankita Sandeep Hadfadkar

Versus

State of Goa; Office of Principal Chief Engineer; Dy Director (Administration); Director (Administration)

EMPLOYMENT CARD REQUIREMENT

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 Sec. 4 - Employment Card Requirement - Appellant challenged exclusion from merit list for

Junior Engineer post due to lack of valid Employment Exchange card - Appellant was registered but did not renew card before application submission - Respondents argued Employment Exchange card was a mandatory requirement, and other candidates with similar issues were also excluded - Court held appellant's exclusion was unreasonable and harsh, as her Employment Exchange registration was valid since 2014 - Court directed inclusion of appellant's name in the merit list and reconsideration for unfilled posts under OBC category - Petition allowed

Law Point: Mandatory submission of Employment Exchange card cannot defeat a candidate's right to appointment when registration is otherwise valid and requirements are overly harsh.

Acts Referred:

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 Sec. 4

Counsel:

Prasheen Lotlikar, Maria Correia

JUDGEMENT

M. S. Karnik, J.- [1] Heard Mr Prasheen Lotlikar for the petitioner and Ms Maria Correia, learned Additional Government Advocate for the State.

[2] Rule. he rule is made returnable forthwith at the request of and with the consent of the learned counsel for the parties.

[3] He petitioner prays for the following reliefs:-

> "A. his Hon'ble Court be pleased to issue a Writ of Certiorari or any other writ, order or direction in the nature of Certiorari for quashing and setting aside the merit list of Junior Engineer (Civil) prepared by Respondent no.2 at EXHIBIT G.
>
> B. his Hon'ble Court be pleased to issue a Writ of Mandamus or any other writ, order or direction in the nature of Mandamus commanding Respondent no.2 to prepare a fresh merit list of candidates for the post of Junior Engineer (Civil) by including the name of the Petitioner in the merit list and further consider the Petitioner for the post of Junior Engineer (Civil) under the OBC category, to any one post out of the 6 posts out of 54, which have not been illed from the OBC category.
>
> C. Pending the hearing and inal disposal of the present petition this Hon'ble Court be pleased to restrain respondent no.2 from illing up the 6 vacant posts, out of the 54 posts reserved for the Junior Engineer (Civil) under the OBC category, which have not been illed."

[4] He respondent had invited applications for illing up various posts in the Public Works Department (PWD), including 162 posts of Junior Engineer (Civil) along with

the essential requirements, vide advertisement dated 27.08.2021. he following clauses of the advertisement are relevant:-

C. Only the eligible candidate fulilling the criteria as per Recruitment Rules/advertisement shall apply online and the candidates need not furnish any document at the time of applying for the post. However, candidate shall not be considered, if he/she is found ineligible at the time of veriication of the essential documents, even though has passed the examination.

D. he instructions/guidelines regarding eligibility, etc. available on the Departmental website www.pwd.goa.gov.in, www.goa.gov.in and http.//cbes.goa.gov.in shall strictly be adhered by each and every candidate, which will be made available from 07/09/2021 onwards.

[5] Clause 2 of the document 'Instructions to Candidates' which is titled as 'Documents/Certiicate Required At he Time Of Veriication (along with original)' at sr. no.(ii) records as follows:

'ii) Valid Employment Exchange Card'.

[6] He Respondent had issued General Instructions to all the candidates regarding the Application form, Documents/Certiicate required at the time of veriication (along with original), uploading of candidate photograph and signature with online application, age limit, post wise selection criteria, application of in-service candidates, conditions for examination and soliciting and canvassing. he application form contains the following declaration:-

> "I) son/daughter/wife of _____ hereby state that the contents of the application are true to my own knowledge and I declare that I, possess the requisite essential qualiication and other mandatory requirements for the post. I understand that in the event of particulars or information given herein being found false or incorrect, my candidature for the recruitment is liable to be REJECTED OR CANCELLED EVEN AFTER SELECTION".

[7] Learned counsel for the petitioner submitted that the petitioner was registered with the Employment Exchange and merely on the ground that she did not have an Employment Exchange Card as a reason for rejecting her candidature is unfair.

[8] Ms Maria Correia, learned AGA submits that the petitioner had illed the said application form and submitted the aforesaid undertaking thereby accepting that the requirement of a valid Employment exchange card is a mandatory requirement for the said post and additionally, representing to the respondents that the petitioner possesses the said mandatory requirement. Ms Correia submits that the petitioner did not challenge the mandatory requirement made known to the general public vide the document titled 'Instructions to Candidates'. It is her further submission that there is no

ground in the present petition that the requirement of a valid employment exchange card is not a mandatory requirement.

Ms Correia submits that the State Government had constituted a 3 member committee to conduct an inquiry into the complaints pertaining to the recruitment process. herefore, the respondent reinitiated the recruitment process from the examination stage as per the directions of the Government of Goa. he written re-examination was conducted by Government Polytechnic College, Bicholim on 18.06.2023 and the results of the re-examination were declared on 07.11.2023.

It is further submitted that upon the receipt of results of the written re-examination, the Departmental Selection Committee met and shortlisted the candidates for veriication of their documents. During the veriication process, it was noticed that the petitioner has not produced the Caste Certiicate, Residence Certiicate and Labour and Employment card valid at the time of applying for the post of Junior Engineer (Civil) which was advertised in the year 2021 wherein the last date of receiving application was 27.09.2021.

[9] Ms Correia submits that in light of the above, a notice was issued to the petitioner, thereby calling upon the petitioner to submit the valid Caste Certiicate, Residence Certiicate and Labour and Employment card by 08.12.2023. In response, the petitioner submitted her valid Caste Certiicate and Residence Certiicate within the allotted date and time, however the petitioner failed to produce the valid Employment Card. After the completion of further process, the respondents declared the Merit List by rejecting the names of the candidates who did not fulil the criteria and who had not produced valid documents required at the time of submitting the application. It is stated that there were some more candidates as well who were similarly placed like the petitioner, who also failed to produce the relevant document i.e. the valid Employment card and who were therefore not considered suitable for selection to the post of Junior Engineer (Civil). herefore, the petitioner having failed to produce the mandatory document i.e. the valid Employment card and having given a false declaration, her candidature was rejected.

[10] He rival contentions now fall for our determination.

[11] We ind that the petitioner otherwise possesses all the requisite documents for selection to the post of Junior Engineer (Civil). he petitioner is in fact registered with the Employment exchange since the year 2014. he card was due for renewal in June 2020. However, the petitioner did not apply for renewal and hence she was not issued the Employment card. he fact remains that the petitioner is duly registered and the registration continues in the Employment Exchange.

[12] In our opinion, the rejection of the petitioner on the ground that she did not produce the employment exchange card is unreasonable and arbitrary. he petitioner is otherwise qualiied to be selected to the post of Junior Engineer (Civil). 162 posts of

Junior Engineer (Civil) were advertised. Out of 162, 54 were reserved for the Other Backward Class (OBC) category. he petitioner has a valid caste certiicate and had applied under the OBC category. We are informed that 48 posts were illed in pursuant to the selection process.

[13] Learned AGA Ms Correia submitted that as of now 9 posts in the OBC category are unilled. In our view, in the facts and circumstances of the present case, the rejection of the petitioner's candidature on the ground that she did not possess a valid employment card is unfair and harsh. he petitioner's registration with the Employment Exchange since 2014 continues and there is no dispute on this aspect. In such circumstances the requirement of furnishing employment card cannot be regarded as mandatory so as to defeat the right of the petitioner to be appointed to the post of Junior Engineer (Civil), when she is otherwise qualiied to be appointed. he petitioner's candidature was rejected only because she did not possess a valid employment card. We are not in agreement with the submission of Ms Maria Correia, learned AGA that the requirement of valid employment card be regarded as mandatory.

[14] In support of his submissions, Mr Lotlikar, learned counsel for the petitioner relied on the decision of the Hon'ble Supreme Court in **Union of India and Others v/s. Pritilata Nanda**, 2010 11 SCC 674. Relevant to the present case are paragraphs 16, 17, 18 and 21 which read thus:

> **"16.** In our opinion, there is no merit in the arguments of the learned Additional Solicitor General. In the irst place, we consider it necessary to observe that the condition embodied in the advertisement that the candidate should get his/her name sponsored by any special employment exchange or any ordinary employment exchange cannot be equated with a mandatory provision incorporated in a statute, the violation of which may visit the person concerned with penal consequence.
>
> **17.** he requirement of notifying the vacancies to the employment exchange is embodied in the Employment Exchanges (Compulsory Notiication of Vacancies) Act, 1959 (for short "the 1959 Act"), but there is nothing in the Act which obligates the employer to appoint only those who are sponsored by the employment exchange. Section 4 of the 1959 Act, which provides for notiication of vacancies to employment exchanges reads as under:
>
> "4. Notiication of vacancies to employment exchanges.-(1) After the commencement of this Act in any State or area thereof, the employer in every establishment in public sector in that State or area shall, before illing up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed.
>
> (2) he appropriate Government may, by notiication in the Oicial Gazette, require that from such date as may be speciied in the notiication, the

employer in every establishment in private sector or every establishment pertaining to any class or category of establishments in private sector shall, before illing up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed, and the employer shall thereupon comply with such requisition.

(3) he manner in which the vacancies referred to in sub-section (1) or sub-section (2) shall be notiied to the employment exchanges and the particulars of employments in which such vacancies have occurred or are about to occur shall be such as may be prescribed.

(4) Nothing in sub-sections (1) and (2) shall be deemed to impose any obligation upon any employer to recruit any person through the employment exchange to ill any vacancy merely because that vacancy has been notiied under any of those sub-sections."

18. A reading of the plain language of Section 4 makes it clear that even though the employer is required to notify the vacancies to the employment exchanges, it is not obliged to recruit only those who are sponsored by the employment exchanges. In Union of India v. N. Hargopal4 this Court examined the scheme of the 1959 Act and observed: (SCC pp. 313 & 315, paras 4 & 6)

"4. It is evident that there is no provision in the Act which obliges an employer to make appointments through the agency of the employment exchanges. Far from it, Section 4(4) of the Act, on the other hand, makes it explicitly clear that the employer is under no obligation to recruit any person through the employment exchanges to ill in a vacancy merely because that vacancy has been notiied under Section 4(1) or Section 4(2). In the face of Section 4(4), we consider it utterly futile for the learned Additional Solicitor General to argue that the Act imposes any obligation on the employers apart from notifying the vacancies to the employment exchanges.

* * *

6. It is, therefore, clear that the object of the Act is not to restrict, but to enlarge the ield of choice so that the employer may choose the best and the most eicient and to provide an opportunity to the worker to have his claim for appointment considered without the worker having to knock at every door for employment. We are, therefore, irmly of the view that the Act does not oblige any employer to employ those persons only who have been sponsored by the employment exchanges."

(emphasis supplied)

21. We also agree with the High Court that once the candidature of the respondent was accepted by the authorities concerned and she was allowed to participate in the process of selection i.e. the written test and viva voce, it was not open to them to turn around and question her entitlement to be considered for appointment as per her placement in the merit list on the specious ground that her name had not been sponsored by the employment exchange. In our considered view, by denying appointment to the respondent despite her selection and placement in the merit list, the appellants violated her right to equality in the matter of employment guaranteed under Article 16 of the Constitution."

[15] We are informed that the petitioner now has a valid employment card which was renewed on 12.10.2021. As per the advertisement, the requirement to furnish the employment card was till 27.09.2021.

[16] Hence, we are inclined to allow this petition.

[17] He respondents are directed to include the name of the petitioner in the merit list and further consider the petitioner for the post of Junior Engineer (Civil) under the OBC category, in one of the 9 posts which have not been illed so far from the OBC category. Accordingly, the rule is made absolute and the petition is disposed of with the above direction.

[18] Here shall be no order for costs.

2024(2)GOACC563

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Criminal Miscellaneous Application; Criminal Writ Petition No. 874 of 2023

dated 13/09/2024

Joseph B Braganza; Aldila Braganza

Versus

Bernadette I Dsouza; Antonetto J Dsouza; State of Goa

FALSE EVIDENCE ALLEGATION

Indian Penal Code, 1860 Sec. 193, Sec. 195, Sec. 196, Sec. 191, Sec. 203, Sec. 420, Sec. 200, Sec. 468, Sec. 205, Sec. 471, Sec. 192, Sec. 211, Sec. 199, Sec. 177 - Code of Criminal Procedure, 1973 Sec. 340 - False Evidence Allegation - Appellant filed an application under Section 340 of CrPC, seeking criminal proceedings against respondents for offenses related to forgery and false evidence under multiple sections of IPC - Alleged that respondents submitted forged documents to obtain an NOC for constructing a wall, blocking access to appellant's property - Lower court discharged

respondents in the forgery case, and appellant's writ challenging that discharge was dismissed - Appellant claimed suppression of documents by respondents, including a letter from GCZMA - Court held that no material evidence supported claims of forgery or false evidence - Allegations did not fall under IPC Sections 191, 192, or 199 - Application rejected

Law Point: Allegations of forgery and false evidence must be supported by material proof to warrant action under Section 340 CrPC, and suppression of documents alone does not constitute such offenses.

Acts Referred:

Indian Penal Code, 1860 Sec. 193, Sec. 195, Sec. 196, Sec. 191, Sec. 203, Sec. 420, Sec. 200, Sec. 468, Sec. 205, Sec. 471, Sec. 192, Sec. 211, Sec. 199, Sec. 177

Code of Criminal Procedure, 1973 Sec. 340

Counsel:

Applicant In Person

JUDGEMENT

Bharat P. Deshpande, J.- [1] Heard applicant No.2 in person who is also the Power of Attorney holder of applicant No.1.

[2] The written synopsis is filed along with the documents wherein it has been claimed that this Court should initiate proceedings under Section 340 of Criminal Procedure Code by filing complaint against respondents No.1 and 2 for the offences punishable under Sections 193 to 196 as well as under Sections 177, 199, 200, 203, 205 to 211 of the Indian Penal Code.

[3] The applicant filed Criminal Writ Petition No.874 of 2023(Filing) which came to be disposed of by this Court vide order dated 02.08.2024. The said Criminal Writ Petition was filed thereby challenging the order passed by the Additional Sessions Judge in Criminal Revision Application No.19/2022 decided on 28.03.2023.

[4] By the said Criminal Revision Application No.19/2022, the learned Additional Sessions Judge allowed the said revision filed by the present respondents No.1 and 2 and, accordingly, quashed and set aside the order passed by the learned Magistrate dated 19.01.2022 in Criminal Case No.357/S/2015/C/A.

[5] There is a civil dispute between the present applicant and respondents No.1 and 2 in connection with the property situated at Calangute and basically the dispute is with regard to access.

[6] It is the contention of the present applicant that respondents No.1 and 2 forged the documents of the office of the Member Secretary, GCZMA and produced it before the concerned authorities for the purpose of obtaining No Objection Certificate for

constructing a compound wall and thereby blocking the access leading to the house of the present applicant.

[7] The complaint lodged by the present applicant before the Member Secretary, GCZMA, was thereafter considered and then the Member Secretary reported the matter to Crime Branch, Ribandar. Such complaint referred to some forged documents and more particularly, the letter dated 28.06.2006 clarifying that Survey No. 163/2 of Calangute Village lies beyond 500 mts of the High Tide Line.

[8] Such complaint filed by the Member Secretary, GCZMA, was registered under FIR No.42/2008 by the Crime Branch wherein present respondents No.1 and 2 were shown as accused amongst others. After investigations, chargesheet was filed before the concerned Magistrate for the offence punishable under Sections 468, 471, 420 of IPC.

[9] The learned Magistrate at Mapusa discharged some of the accused persons, however, directed that the charges be framed against present respondent No.1 for the offences punishable under Section 468, 471, 420 of IPC, vide order dated 19.01.2022. Respondent No.1 being aggrieved by such order, filed Criminal Revision Application No.19/2022 before the Sessions Court at Panaji. The said revision was disposed of by Additional Sessions Judge, Mapusa vide its judgment dated 28.03.2023 thereby allowing such revision and quashing the impugned order passed by the Magistrate. Consequently, respondent No.1 was discharged for the offences punishable under Section 468, 471 and 420 of IPC.

[10] The applicant challenged such order of the Revisional Court in Criminal Writ Petition No.874/2023(Filing). By the order dated 02.08.2024, the said Criminal Writ Petition was dismissed thereby maintaining the order of the learned Revisional Court.

[11] The written submissions filed by the applicant would go to show that the main contention is the letter dated 28.06.2006 of GCZMA. It is her contention that respondents deliberately gave false evidence and filed false affidavit in the Criminal Writ Petition thereby concealing from the Court certain facts:-

(i) The letter dated 28.06.2006 was not issued to the said respondents and that said letter is not available in the office file.

(ii) According to the office of NIO, vide letter dated 30.11.2009, the present applicant was informed that their office had last carried out HTL survey for the Village Calangute in the month of February 2001 and as such letter of GCZMA dated 28.06.2006 is fabricated document.

(iii) The office of DSLR vide their letter dated 31.01.2008 brought to the notice of the applicant that the properties bearing No.163/1, 163/2 and 164/1 of Village Calangute were partly falling within 500 mts of HTL, thus proving that from the year 2001, the said survey holdings were partly falling within 200 to 500mts of HTL.

(iv) The letter dated 28.06.2006 with its contents are clearly false and fabricated and used by the respondents for obtaining necessary permissions and by suppressing the fact that the area was within 500mts of HTL.

(v) The handwritten letter addressed by the respondents to GCZMA is false statement to their own record which they are now changing their stand about physical verification and lied to GCZMA about it.

(vi) The respondents gave contrary statement/false evidence about carrying physical verification/measurement of the properties qua HTL and claimed that the survey needs to be rectified.

[12] The applicant further claimed in the written statement that the respondents played fraud upon the Court and also with the other Government offices by submitting such forged documents and, accordingly, obtained approval/NOC thereby depriving the applicant from the use of access. The applicant in the present proceedings heavily relied upon handwritten letter dated 11.02.2008 allegedly addressed by respondent No.1 to the Member Secretary with regard to physical verification of delineation of CRZ line and to correct the discrepancy/error. It is her main contention that respondents suppressed the fact that the letter dated 28.06.2006 is forged document and also deliberately avoided to place other documents along with handwritten letter dated 11.02.2008 and thereby committed the offences. The applicant's main contention is that suppressions also amounts to giving false evidence and thus, action under Section 340 of Cr.P.C. is necessary.

[13] Record shows that Criminal Application (Main) No.73/2018 was filed by the applicant against the present respondents and others with similar prayer and in connection with the same letter of GCZMA dated 28.06.2006.

[14] By detailed order dated 09.05.2024, this Court has observed that suppression of facts as alleged cannot be considered as giving false evidence requiring action under Section 340 of the Code of Criminal Procedure. The matter in hand is in fact similar to the order passed by this Court on 09.05.2024, except the handwritten letter which is now produced by the applicant dated 11.02.2008. Here also, it is the contention of applicant that this letter was suppressed by the respondents.

[15] The Criminal Writ Petition No.874/2023(Filing) was decided by this Court on the basis of chargesheet and the documents filed before the concerned Magistrate and the orders passed therein by the respective Courts. The question of any reply affidavit on behalf of respondents, therefore, would not arise in the said matter.

[16] The present application is filed in Criminal Writ Petition No.874/2023(Filing) thereby alleging that respondents No.1 and 2 suppressed material documents.

[17] First of all, Criminal Writ Petition No.874/2023(Filing) was filed by the present applicant challenging the order of the Revisional Court thereby discharging respondent No.1.

[18] The provisions of Section 340 of Cr.P.C. deals with offences affecting administration of justice. It provides about the procedure in cases mentioned under Section 195 of IPC.

[19] Chapter XI of IPC provides that whoever, being legally bound by an oath or by an express provision of law to state truth, or being bound by law to make declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

[20] Section 192 of IPC deals with fabricating of false evidence whereas, Section 193 deals with punishment for false evidence.

[21] Section 199 of IPC deals with false statement made in declaration which is by law receivable as evidence and provided that whoever, in any declaration made or subscribed by him, which declaration any Court of justice, or any public servant or other person, is bound or authorised by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

[22] The allegations made in the present application is neither coming within the scope of Section 191, 192 or Section 199 of IPC.

[23] While deciding the Criminal Writ Petition No.874/2023(Filing), this Court has considered details of the chargesheet filed by the Crime Branch in connection with the so called fake letter of GCZMA. Observations of this Court from paragraph no.15 onwards would clearly reveal that there is no material to show that present respondents No.1 and 2 committed any forgery by fabricating the letter dated 28.06.2006 and used it as genuine. In fact, the so-called letter was not even established as a forged document or that the same was fabricated by the respondents.

[24] The entire thrust of the present petition is on the letter dated 28.06.2006. The observations of this Court in the earlier proceedings would clearly go to show that even there is no material against respondents No.1 and 2 for the purpose of framing of charges of forgery even though the chargesheet was filed.

[25] Now, along with the present application, the applicant has produced handwritten letter dated 11.02.2008, which is not part and parcel of the earlier proceedings. This letter was not produced before the Investigating Officers. It was not part and parcel of the chargesheet filed against the respondents. Thus, simply because

the applicant came across some letter, it cannot be labelled as giving false evidence. Even otherwise, the contention that the respondents suppressed the material documents from the concerned authorities, cannot, by any stretch of imagination, come within the scope of Section 340 of Cr.P.C.

[26] The sum and substance of the present application is, therefore, not tenable.

[27] Accordingly, the application stands rejected

2024(2)GOACC568

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Writ Petition No 321 of 2023 **dated 13/09/2024**

Pramod Alias Sachin D Kalokhe

Versus

Public Information Officer; Block Development Officer; State Chief Information Commissioner

RTI NON-COMPLIANCE PENALTY

Right to Information Act, 2005 Sec. 6, Sec. 7, Sec. 20, Sec. 8 - RTI Non-Compliance Penalty - Appellant challenged State Information Commission's decision to only issue a warning to the PIO for denying RTI information without valid reason - Court held PIO's response of "information not available" was vague and without proper verification - Court ruled that penalties under Sec. 20 should apply for delay and improper response, quashing the warning and remanding the case for reconsideration on penalties. - Petition Allowed

Law Point: Public Information Officers (PIOs) must provide timely and verified information under the RTI Act - Vague or incomplete responses without cause may attract penalties under Sec. 20.

Acts Referred:

Right to Information Act, 2005 Sec. 6, Sec. 7, Sec. 20, Sec. 8

Counsel:

Apeksha Kalokhe, Nikhil Pai, Adithya Unni, Prashil Arolkar

JUDGEMENT

Bharat P Deshpande, J.- [1] Rule.

[2] Rule is made returnable forthwith.

[3] Matter is taken up for final disposal at the admission stage with consent of the parties.

[4] Heard Ms Kalokhe, learned counsel for the petitioner, Mr N. Pai, learned counsel for the respondent no.1 and Mr P. Arolkar, learned Addl. Govt. Advocate for respondent no.2

[5] The short question which has been raised in the present petition is the action of the State Information Commission in only issuing warning to the Public Information Officer (PIO) and not following the procedure laid down in Section 20 of the Right to Information Act 2005.

[6] Ms Kalokhe submits that petitioner filed an application under Right to Information Act and specifically under Section 7(1) on 28.9.2022 asking respondent no.1 to furnish information as mentioned in paragraph 1 of the said application. In all, four questions/queries were raised seeking information/documents from respondent no.1.

[7] Ms Kalokhe submits that petitioner received a reply dated 11.10.2022 from respondent no.1 thereby answering all the four questions "information not available".

[8] Ms Kalokhe submits that petitioner then filed an appeal before the First Appellate Authority i.e respondent no. 2 against denial of information. The First Appellate Authority vide its order dated 17.11.2022 directed the respondent no.1/Public Information Officer to give information on or before 23.11.2024.

[9] Ms Kalokhe submits that even this deadline was not adhered to. However part information was submitted vide letter dated 25.11.2022 thereby answering question nos. 1 and 4 whereas answer to question nos. 2 and 3 is again the same "information is not available on the official record."

[10] Petitioner being aggrieved by such part information and also delay in furnishing the information, filed Second Appeal before the State Information Commission. While deciding such appeal by the impugned order dated 18.5.2023, State Information Commission observed that information ought to have been given and "not available" is vague and such reply cannot be accepted in respect to Section 7(1) of the said Act.

[11] Ms Kalokhe submits that the Second Appellate Authority observed that Public Information Officer committed irregularities and failed to follow the procedure prescribed under the Act, however instead proceeding under Section 20 of the said Act, Second Appellate Authority only observed to issue warning to the PIO and then dismissed the appeal.

[12] Per contra, Mr Pai appearing for the respondent no.1 would submit that information was furnished with a delay of only 2 days and Second Appellate Authority has considered that there is no case made out for compensating the petitioner. He submits that Second Appellate Authority by observing that the warning would be sufficient concluded that there is no need to proceed under Section 20 of the said Act.

[13] Mr Pai submits that petitioner issued the information as per direction of the First Appellate Authority and therefore appeal has been rightly rejected.

[14] Rival contentions fall for determination.

[15] Provision under Section 7 of the Right to Information Act entitles a person to seek information from the concerned authority and authority who is responsible for furnishing such information is bound to provide it in a time bound manner. It is no doubt true that certain information could be exempted under Section 8 of the Act. PIO is also entitled to reject the application on certain grounds. However, the present matter would clearly go to show that the application was filed with regards to information of the panchayat member of ward no. 3 of the same Village Panchayat. Four questions were raised seeking documents/information. PIO vide his letter dated 11.10.2022 refused to handover such information on the ground that information is not available. Thus it is clear that PIO answered the queries raised by the petitioner and refused to handover information on the ground that such information is not available in his office. By this answer it is clear that PIO even failed to exercise jurisdiction under Section 6(3) of the said Act thereby transferring such application to PIO, who possesses such information. Simply by saying that information is not available, cannot be answer of such queries.

[16] It is matter of record that during the pendency of the appeal filed by the petitioner before the First Appellate Authority, a specific order was passed which is dated 17.11.2022 which reads thus:-

> "The Appellant present in person. The Respondent are representation by Adv. V. Naik. The Respondents are directed to give information before 23rd Nov. 2022. The respondent are given final opportunity to give the information. Matter is disposed."

[17] Roznama, which is produced from the First Appellate Authority, would go to show that though PIO appeared, failed to file any reply and was therefore directed to handover information.

[18] It is matter of record that such information was not furnished to the petitioner on or before 23.11.2022. Letter along with information/documents was furnished to the petitioner on 25.11.2022. Here also information with regard to question nos.1 and 4 was furnished whereas information with regard to question nos. 2 and 3 was not furnished with clarification that such information is not available on the record.

[19] It clearly goes to show that all four questions raised by the petitioner are in connection with residence/ residential house of the panch member of Ward no.3 of the said village panchayat. However, question nos. 2 and 3 were again answered as information not available. PIO failed to disclose or even failed to exercise powers under Section 6(3) for transferring said application to the concerned PIO in whose possession such information is found to be available.

[20] Petitioner being dissatisfied with this information provided in part and by delay of two days, filed an appeal before the State Information Commission. Reply was filed before the State Information Commission by respondent no.1 and thereafter said appeal was disposed of by the impugned order dated 18.5.2023.

[21] Observations of the Second Appellate Authority in paragraph no. 16 reads thus:-

> "16 In the given case, the RTI application dated 28/09/2022 was initially replied on 11/10/2022. In the said reply the PIO mechanically informed the Appellant that "Information is not available". In the said reply, the PIO neither cited exact provision of the Act to reject the request nor gave any reasoning as to why said information is not available. The word 'not available' is vague in as much as it does not suggest what efforts the PIO made to locate the information. It appears that the PIO without any reasonable verification replied the RTI application as "information not available". Such a vague reply cannot be accepted as a response under Section 7(1) of the Act. The PIO has committed irregularity and not followed the provision prescribed by the Act, therefore, I find it appropriate to warn the PIO, Shri. Suresh S. Fadte that he should deal with the RTI applications with due sanctity. However, this being the first lapse as is noted by the Commission, a lenient approach is adopted. The PIO shall be diligent henceforth and deal with the application under the Act with caution and with the spirit and intent with which the Act is promulgated. With the above observation, appeal stands dismissed.
>
> Proceedings closed.
>
> Pronounced in the open court.
>
> Notify the parties."

[22] It is clear from the above observation that the Second Appellate Authority found that the answers given by PIO are vague and it clearly shows that PIO committed irregularities. However, once it is found that information was available but not given, remedy available with the Appellate authority is as provided under Section 20 of the Act which reads thus:-

> "20 Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in

furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees;

Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.

(2)Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him."

[23] A careful reading of the above provision would go to show that the PIO without any reasonable cause refused to hand over the information or give incomplete or misleading information, he shall be imposed with the penalty of Rs.250/- for each day till application is received or information is furnished. Similarly, the Appellate Authority is also empowered to direct the department to conduct disciplinary proceedings in case PIO is found to be negligent or refusing to give information without any reasonable cause.

[24] In the present matter the Second Appellate Authority has clearly observed that the information was not provided without any reasonable cause. The only option with the concerned Second Appellate Authority is to proceed against the concerned PIO under Section 20 of the said Act. It is for the departmental authority to consider whether warning should be given to the concerned officer. The Second Appellate Court, in the present matter, encroached upon the powers of the Disciplinary Authority and issued a warning to the PIO which is not provided under the Act.

[25] For the above disclosed reasons, a second appeal filed before the concerned authority is required to be remanded to the concerned authority only for the purpose of

deciding said matter in accordance with Section 20 of the said Act. As far as observations on merits of the Second Appellate Authority are concerned, there is no need to interfere with it. However, dismissal of the said appeal by issuing warning, needs to be interfered with.

[26] Accordingly, Second Appeal is remanded to the concerned authority only for the purpose of taking up the said proceeding in accordance with Section 20 of the said Act. For this purpose the order of the Second Appellate Authority of issuing warning and dismissal of the Second Appeal is quashed and set aside.

[27] Parties shall appear before the Second Appellate Authority on 30.9.2024 during the afternoon session. The Second Appellate Authority shall decide the matter with regards to penalty under Section 20 of the Act after hearing both the sides, preferably within a period of one month. Rule is made absolute in the above terms.

[28] Petition stands disposed of accordingly.

2024(2)GOACC573

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Writ Petition No. 45 of 2023, 56 of 2023 **dated 10/09/2024**

Anand Visvambora Bandodkar; Sunita Bandodkar; Damodar Anand Bandodkar; Dipiya Damodar Bandodkar; Prashant Anand Bandodkar; Vidyha Prashant Bandodkar

Versus

Antonio Ornelas Piedade Barbosa; Jose Barbosa Alias Jose Mariano Francisco Da Piedade Barbosa; Hazel Lucia Dias; Walter Cabral; Leopoldina Maria Piedade Dias E Barbosa

BRINGING LEGAL HEIRS ON RECORD

Code of Civil Procedure, 1908 - Or. 22R. 10A, Or. 22R. 3, Or. 22R. 9, Or. 22R. 1; Limitation Act, 1963 - Sec. 5; Agricultural Tenancy Act, 1964 - Sec. 58 - Bringing Legal Heirs on record - Petitioners challenged the order allowing legal heirs to be brought on record in civil suits pending sine die due to tenancy disputes - Original plaintiff passed away in 1995 and sole defendant in 2005 - Legal heirs were brought on record in the connected tenancy proceedings, but no application was filed in the civil suit - Appellate Court condoned delay and set aside abatement, bringing heirs into the suit - Petitioners argued the suit abated automatically, as no steps were taken for years - Court held that once legal heirs were brought on record in tenancy proceedings, they must be considered brought in all connected cases - Setting aside abatement upheld. - Petitions Dismissed

Law Point: Legal heirs brought on record in connected tenancy proceedings are deemed to be brought on record in related civil suits, and delay in setting aside abatement can be condoned.

Acts Referred:

Code of Civil Procedure, 1908 Or. 22R. 10A, Or. 22R. 3, Or. 22R. 9, Or. 22R. 1

Limitation Act, 1963 Sec. 5

Agricultural Tenancy Act, 1964 Sec. 58

Counsel:

S D Lotlikar (Senior Advocate), Sayli Kenny, S G Desai (Senior Advocate), Tejas Rane, Shalka Shelke

JUDGEMENT

Bharat P. Deshpande, J.- [1] Rule.

[2] Rule is made returnable forthwith.

[3] Both these matters are taken up for final disposal at the admission stage with consent of the parties.

[4] Both these petitions are filed by the petitioners thereby challenging the orders passed by the First Appellate Authority dated 31.3.2022 in Miscellaneous Civil Appeal Nos.91 of 2016 and 36 of 2019. Petitioners are the original defendants in a suit filed by the Fr Antonio Barbosa (deceased) bearing Regular Civil Suit Nos. 317/2000/III(new) and 318/2000/III(new). In the said suits petitioners/defendants raised issue of tenancy and accordingly an issue to that effect was framed and the suit was kept sine die till the disposal of the decision of Tenancy Court on such issue.

[5] Though initially the learned Civil Court did not refer to the tenancy issue immediately after framing it, such issue was referred to the Mamlatdar somewhere in the year 1997. However, it is a matter of record that sole plaintiff Fr Barbosa expired on 23.8.1995.

[6] Matter was taken up before the Mamlatdar and subsequently sole defendant expired on 15.5.2005.

[7] It so happened that though the suit was kept sine die and the proceedings were taken up before the Mamlatdar in connection with tenancy issue, legal heirs of the original plaintiff and original defendant were brought on record in the tenancy case pending before the Mamlatdar. No application was filed in the suit by the respective parties for bringing legal heirs.

[8] It so further happened that the jurisdiction of the Mamlatdar to consider the tenancy matters would then shifted to the Civil Court and accordingly proceedings before the Mamlatdar were brought back to the Civil Court wherein suit was pending. Thus along with the tenancy issue, suit was also taken up and at that time it was

realised that legal heirs remained to be brought on record in the suit though somewhere on 31.1.2009, Advocate for the defendant filed an application under Order 22 Rule 10-A of CPC informing that sole defendant expired on 15.5.2005. It is also a matter on record that no notice was issued to the learned counsel for the plaintiffs of such intimation since the suit was kept sine die.

[9] Application for bringing legal heirs filed in the suit was contested by the defendants wherein learned Civil Court passed an order dated 26.8.2016 thereby dismissing both the applications filed at Exhs. 22 and 27. Petitioners then filed appeals bearing Misc. Civil Appeal No.91 of 2016 and 36 of 2019 which came to be allowed by the impugned order thereby condoning the delay and setting aside abatement and bringing legal heirs of the parties on record which are challenged in these proceedings.

[10] Mr Lotlikar would submit that Fr Barbosa expired in the year 1995 whereas reference by the Civil Court was much subsequent to it and thus it was without jurisdiction as suit abated automatically. He would submit that such reference itself to the Mamlatdar is bad in law as by that time the suit stands abated for failure to bring on record legal heirs of the sole deceased plaintiff. No application was filed within time in the civil suit for bringing the legal heirs.

[11] Mr Lotlikar would submit that though reference was taken up by the Mamlatdar, memo was filed somewhere in January 2006 stating that defendant/Anand expired. An application was filed for bringing heirs which was vehemently opposed by the respondents/plaintiffs and such order was challenged up to Administrative Tribunal.

[12] Mr Lotlikar, would submit that the respondents/plaintiffs therefore cannot be allowed to appropriate and reprobate with regard to the same contention which they have opposed before the Mamlatdar.

[13] Mr Lotlikar, would submit that an application for bringing legal heirs in the suit was filed in October 2016 i.e. after a period of 20 years from the death of Fr Barbosa which cannot be condoned.

[14] Mr Lotlikar would further submit that proceedings conducted before the Mamlatdar, though on the basis of the reference made by the Civil Court, is totally an independent proceedings and legal heirs were required to be brought on record in the suit within time.

[15] Mr Lotlikar would submit that since the original plaintiff died in the year 1995, reference of tenancy issue made by the Civil Court somewhere in the year 1997 is clearly null and void as such reference was still born.

[16] Mr Lotlikar while arguing the matters would submit that the learned Trial Court was right in rejecting the applications, however, the First Appellate Court committed jurisdictional error by reversing such orders.

[17] He submits that plaintiffs failed to show sufficient cause for condonation of delay and also for setting aside abatement and thus the suit itself stands abated.

[18] Mr Desai appearing for the respondents while supporting the findings of the First Appellate Court would submit that both the original parties were alive when the issues were framed by the Civil Court and thereafter the matter was kept sine die. He submits that as per Tenancy Act and more specifically Section 58(2) of the Tenancy Act, Civil Court is bound to refer such issue to the Mamlatdar and to adjourn the civil suit till the disposal of such issue. Mr Desai would submit that the issue was referred to the Mamlatdar, main suit was kept sine die which clearly show that tenancy issue was required to be decided before proceeding with the suit.

[19] Mr Desai would submit that once legal heirs are brought on record in a subsidiary proceedings, there is no need to bring the legal heirs in the main proceedings. Even otherwise he would submit that the learned First Appellate Court has discussed this aspect in minute detail and thus such order needs no interference in the supervisory jurisdiction of this Court.

[20] From the facts emerging from the First Appellate Court orders impugned in the present proceedings would celery reveal that civil suits were kept sine die once tenancy issues were framed. It shows that parties and the advocates were not required to appear before the Civil Court in the said civil suits. It also shows that no steps or proceedings were conducted in the said civil suit till the disposal of the tenancy issue.

[21] Purpose of Section 58(2) of the Tenancy Act clearly revealed that when an issue is raised regarding claim of tenancy in any civil proceedings, the same is required to be referred to the competent authority i.e Mamlatdar to decide as to whether party claiming is a tenant of the suit proceedings. If Mamlatdar comes to the conclusion that the party claiming is not a tenant, only then the Civil Court can proceed further with the suit. Thus the issue of tenancy framed and referred to the Mamlatdar is the main issue with regard to jurisdiction of the Civil Court to entertain such civil suits. Such jurisdiction depends upon the decision of the Mamlatdar in the tenancy case.

[22] Even if such an issue is referred to the Mamlatdar and registered as a separate case between the so called tenant and the landlord, it cannot be considered as a separate proceedings and independent to the civil suit. The fact that the civil suit is required to be kept sine die till decision of such issue by the competent authority would itself show that it is clearly a connected proceedings and in fact decision of the Mamlatdar would certainly be a factor to be considered in the civil suit.

[23] Keeping in mind the above factual aspects, matter needs to be considered. Admittedly sole plaintiff expired on 23.8.1995 when the suit was in a sine die state. It is no doubt true that somewhere in the year 1997 a suit was taken up. However at that time it was only for the purpose of referring the issue of tenancy to the concerned

Mamlatdar. For that purpose defendant furnished relevant documents for referring the issue of tenancy to the Mamlatdar and then again suit was kept sine die.

[24] After the matter was referred to the Mamlatdar, the sole defendant expired somewhere on 15.5.2005.

[25] It is also a matter of record that an application was filed for bringing legal heirs of the sole defendant, before learned Mamlatdar. Similarly an application for bringing legal heirs of the sole plaintiff was also filed, which is clear from the tenancy proceedings and orders passed therein. Applications for bringing legal heirs of both the parties were allowed by the learned Mamlatdar and accordingly tenancy proceedings continued.

[26] It is also a matter of record that the application filed for bringing legal heirs of the sole defendant Anant was contested up to the Administrative Tribunal however authorities clearly observed that sufficient cause is shown for bringing legal heirs of both the parties in the tenancy proceedings. Thus it is clear that legal heirs of both the deceased parties were brought on record in the tenancy proceedings when the suit was kept sine die.

[27] Matter further shows that though an application was filed under Order 22 Rule10(A) of the CPC in the civil suit by advocate for the defendant disclosing that sole defendant expired, it is also clear that at that time suit was kept sine die and no notice of such application was issued by the civil Court to the learned counsel for the plaintiffs.

[28] Thus, when the suit itself was kept sine die, parties and their advocate were not supposed to attend the proceedings and thus there was no opportunity for them to find out whether the opposite party is alive or dead so as to take necessary steps.

[29] In the case of **Balwant Singh (Dead) Vs Jagdish Singh and others**, 2010 8 SCC 685 the Apex Court while discussing the provisions of bringing legal heirs on record, observed in paragraph 15 that Rule 1 Order 22 of CPC mandates that the death of a defendant or a plaintiff shall not cause the suit to abate if the right to sue survives. In other words, in the event of death of a party, where the right to sue does not survive, the suit shall abate and come to an end. In the event the right to sue survives, the party concerned is expected to take steps in accordance with provisions of Order 22.

[30] Order 22 Rule 3, CPC prescribes that where the plaintiff dies and the right to sue survives, then an application could be filed to bring the legal representatives of the deceased on record within the time specified of 90 days. However, Once the proceedings have abated, the suit essentially has to come to an end, except when the abatement is set aside and the legal representatives are ordered to be brought on record by the Court of Competent jurisdiction in terms of Order 22 Rule 9 (3), of CPC together with provisions of Section 5 of the Indian Limitation Act, 1963, An application for setting aside the abatement has to be treated at par and the principles

enunciated for condonation of delay under Section 5 of the Limitation Act which apply para materia.

[31] In the case of **Mithailal Dalsangar Singh and others vs Annabai Devram Kini and others**, 2003 10 SCC 691 as referred by the First Appellate Court in its impugned judgment, legal heirs brought on record in connected proceedings ensures the benefit for the entire proceedings. Admittedly legal heirs of the deceased plaintiff and the defendant were brought on record in the tenancy proceedings that too by condoning the delay and setting aside abatement, and hence, it cannot be argued that reference by the learned Court to the Mamlatdar was nonest or stillborn.

[32] Once such legal heirs were brought on record in the connected proceedings, the same must benefit to all the proceedings wherein it is required to be brought on record. Thus as held in the case of **Mithailal Dalsangar Singh** (supra) once an application filed before the tenancy Court is allowed by condoning the delay and set aside abatement it would have the effect of bringing legal heirs of both the parties on record not only in the tenancy proceedings but also in the civil suit. All that what remained to be done is the ministerial act of correcting the index of the parties in the suit which was kept sine die till the disposal of the tenancy issue.

[33] Effect of Section 58(2) of the Agricultural Tenancy Act is wide and clear. Once an issue is raised regarding agricultural tenancy, no suit or proceedings shall proceed before a Civil Court until issue of tenancy, is settled, decided, dealt with by competent authority under the Agricultural Tenancy Act. This means that the civil suit filed between the parties was required to be kept sine die till the disposal of the tenancy issue itself. Thus the tenancy issue referred to the Mamlatdar cannot be considered as independent proceedings. In fact, that the Civil Suit is now depending upon the outcome of the tenancy issue. If the original defendant is declared as an agricultural tenant of the suit property by the competent authority, jurisdiction of the Civil Court would be restricted as far as eviction or passing any restriction of such tenant. In fact, the Agricultural Tenancy Act would give a deemed owner's title to such tenant from the tillers date. Thus the impact of the proceedings before the Mamlatdar are bound to decide about the jurisdiction of the Civil Court to entertain the said suit.

[34] Plaintiff specifically disclosed while filing application for bringing legal heirs that since the tenancy issue was taken up by the Civil Court and it was tagged along with the suit, they realised that legal heirs were not brought on record in the suit. However, as observed by the Apex Court in the case of **Mithailal Dalsangar Singh** (supra) this was only a ministerial act to be performed by correcting the cause title of the parties in the suit. Effect of condonation of delay and setting aside abatement in the tenancy proceeding would clearly be required to be considered as bringing them on record in civil suit also. However, since the suit was kept sine die, such application was filed only when suit was taken up along with tenancy issue in view of the change in the jurisdiction of the Mamlatdar to that of the Civil Court.

[35] The learned First Appellate Court in minute detail considered this aspect and allowed said appeal thereby permitting the parties to bring on record the legal heirs, which cannot be termed as inappropriate or illegal or perverse. Findings therein are based on the settled propositions of law and therefore cannot be disturbed in the supervisory jurisdiction of this Court. Accordingly, both the petitions must fail and stand dismissed.

[36] Rule is discharged. Parties shall bear their own costs

2024(2)GOACC579

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Karnik; Valmiki Menezes]

Criminal Appeal No. 28 of 2024 **dated 10/09/2024**

Hira Lohar

Versus

State of Goa

SOLE EYEWITNESS RELIABILITY

Indian Penal Code, 1860 Sec. 302 - Code of Criminal Procedure, 1973 Sec. 164 - Evidence Act, 1872 Sec. 27 - Sole Eyewitness Reliability - Appellant convicted under Section 302 IPC for murdering the deceased by strangulation and assault with a sharp weapon - Prosecution relied heavily on the testimony of a sole eyewitness, Pw.11, who claimed to witness the incident in the light of his mobile phone in an under-construction building - Appellant argued that Pw.11's testimony was unreliable and inconsistent with normal human behavior - Court observed discrepancies in Pw.11's testimony and unnatural conduct, such as his delay in reporting the incident and his claim of witnessing the event in poor visibility - Other laborers present at the scene were not examined, and forensic evidence did not conclusively link the appellant to the crime - Court held that the sole eyewitness's testimony was doubtful and lacked independent corroboration - Conviction set aside - Appellant acquitted. - Appeal Allowed

Law Point: Sole testimony of an eyewitness must be reliable and corroborated by independent evidence, especially when the testimony shows inconsistencies or unusual behavior.

Acts Referred:

Indian Penal Code, 1860 Sec. 302

Code of Criminal Procedure, 1973 Sec. 164

Evidence Act, 1872 Sec. 27

Counsel:
Rohan Desai, S G Bhobe

JUDGEMENT

M. S. Karnik, J.- [1] The challenge in this appeal is to the judgment dated 24th /25th May 2023 passed in Sessions Case No. 19 of 2016 by the District and Sessions Judge, North Goa, Panaji, convicting the appellant-accused for the offence punishable under Section 302 of the Indian Penal Code. The accused was sentenced to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code (IPC). The accused was also directed to pay a fine of Rs.1,00,000/- and in default of payment of fine, the accused was to undergo further imprisonment for a period of 3 years. If the fine amount was paid, an amount of Rs.50,000/- was to be paid as compensation to the relatives of the victim.

[2] The date of the offence is on 15.07.2016. The FIR was lodged on 16.07.2016. The appellant-original accused was arrested for the offence punishable under Section 302 of IPC on the allegation that on 15.07.2016, at around 01.00 hours, at the under-construction site of Poonam Shanti at Shantaban, Merces, Goa, he committed murder of Bishnath Mehar, father of the complainant by strangulating him with the help of a rope like packing material, then hanged him to a cement beam and thereafter inflicted injuries in the stomach of the deceased with a koita. After the matter was committed to the Court of Sessions, the charge was framed. The accused pleaded not guilty.

[3] The prosecution examined as many as 15 witnesses. Pw.1, Basant Mehar, is the complainant i.e. the son of the deceased. Pw.2-Abbuswalcha Ranebennur, is a panch witness. Pw.3- Shahrukh Ali, is the panch witness for inquest panchanama. Pw.4-Jagir Pategoudra was examined as the panch witness for arrest panchanama. Pw.5-Aslam Pathan, was examined as the panch witness for attachment panchanama. Pw.6-Babajan was examined as panch witness for recovery panchanama. Pw.7- Aniket Devidas, was examined as a police witness. Pw. 8-Dr. Madhu Ghodkirekar conducted the post mortem examination on the dead body of the deceased and Pw.9-Dr. Girish Kamat, conducted the medical examination of the accused. Both the Doctors were examined by the prosecution. Pw.10-Abdul Sattar Karadgi was the contractor who had engaged the labourers at the construction site. Pw.11- Amit Dungdung is an eye witness to the incident. Pw.12-Rajesh Naik, is examined as a police witness. Pw.13-Shri Dattaram S. Angre, as a Nodal Officer with the Vodafone/Idea Cellular Company. Pw.14-Shri Shagun Sawant, who is examined as police witness and Pw.15-Shri Krishna Sinari, as the Investigating Officer.

[4] Shri Desai, learned Counsel for the appellant took us through the evidence on record while submitting that the conviction is based on the sole testimony of Pw.11-Amit Dungdung, an eyewitness, whose testimony is untrustworthy and unreliable. It is submitted that he is a tutored witness.

[5] Shri Bhobe, learned Public Prosecutor vehemently opposed the submission of the learned Counsel for the appellant. He submits that the evidence of eyewitness Pw.11-Amit Dungdung, that of Pw.8 the Doctor and the other materials on record are sufficient to make out a case of conviction for the accused. Our attention is invited to the findings recorded by the trial Court which, according to the learned Public Prosecutor, cannot be said to be erroneous. Learned Public Prosecutor submitted that the conviction be sustained in view of the sterling quality of the evidence of Pw.11 and other materials on record corroborated by the recovery of the weapon at the instance of the accused.

[6] Heard learned Counsel. On 15.07.2016, Pw.15-the Investigating Officer, recorded complaint of Pw.1-Shri Basant Mehar to the effect that on 15.07.2016, at around 01.00 hours, at the construction site of Poonam Shanti at Shantaban, Merces, Goa, the accused Hira Lohar, son of Bahadur Lohar, committed murder of his father Bishnath Mehar, aged 48 years, by strangulating him with the help of a rope like packing material, then hanged him to a cement beam and thereafter inflicted injuries on the stomach with a sharp weapon. The offence was registered vide Old Goa Police Station Crime no. 73/2016. On 15.07.2016, the investigating officer arrested the appellant and drew a detailed panchanama at the Old Goa Police Station. The panchanama was drawn in presence of panch witnesses namely Pw.4 and one Pappu Singh (not examined). The accused was wearing short sleeved red coloured T-shirt and blue coloured jeans. The appellant disclosed that he had worn the said T-shirt and jeans at the time of committing the murder of deceased Bishnath Mehar. The clothes were seized. Some reddish colour stains on the T-shirt on front portion at the stomach region which appeared to be blood stains was noticed. One mobile phone was seized from the accused. The T-shirt was seized in the presence of panchas. The mobile phone was then sealed in the presence of the panchas. The T-shirt was sealed and the envelope was marked as exhibit 5 and the mobile was seized and marked as exhibit 7. The panchanama commenced at 18.15 hours and concluded at 18.40 hours. The arrest panchanama is at exhibit 28 which bears the signature of the investigating officer. On 15.07.2016, the investigating officer visited Goa Medical College, Bambolim with a request to conduct post mortem examination over the dead body of the deceased enclosing police report form and inquest panchanama. The cause of death vide autopsy was due to "asphyxia as a result of constriction of neck vide injury no. 1 which was ante mortem and fresh at the time of death." The blood report of the deceased was collected from the blood bank. The department of Forensic Medicine and Toxicology was requested to conduct the medical examination of the accused vide exhibit 62. The report of the medical examination conducted on the accused by Police Surgeon Dr. Girish Kamat-Pw.9 was collected. The blood report of the accused was also collected from the blood bank. The reports of the deceased and the clothes of the deceased were sent for forensic examination.

[7] In the examination in chief, the investigating officer (Pw.15) says that the contractor Pw.10-Abdul Sattar, handed over to the investigating officer railway tickets which were taken from the appellant Hira and the attachment panchanama was prepared in the presence of panch witness-Pw.5 Aslam Pathan and one Mausin Ismail Khan. The said tickets were of the railway journey of appellant Hira from Rourkela to Vasco da Gama. The investigating officer in his evidence deposed that on 16.07.2016, the accused voluntarily disclosed that he wanted to make a disclosure regarding the case and the weapon. The investigating officer secured the presence of two panch witnesses i.e. Pw.6- Babajan and one Mr. Maqbul Khan. A detailed disclosure cum recovery panchanama under Section 27 of the Evidence Act, was conducted. The panchanama commenced at 5.20 hours and concluded at 05.45 hours.

[8] Thus, the prosecution case is that the accused on 14.07.2016 along with deceased Bishnath and the eyewitness Pw.11-Amit Dungdung, came to Goa for work. The accused and the deceased Bishnath had a fight when they reached Margao Railway Station. The reason was that the deceased did not allow the appellant to sleep at night in the train. Thereafter, the three of them came to the construction site. There were other labourers with whom they shared alcoholic drinks. The deceased started harassing the accused and abused him. The deceased and the accused again had a fight. The deceased went downstairs and again came up. He started abusing the accused. The accused asked Bishnath to shut up but Bishnath continued abusing the appellant. Thereafter, the appellant took out a rope like thing from the packing material and strangulated the deceased with the rope. Thereafter, the appellant hanged Bishnath with the rope to a cement beam. The appellant found a koita with which he gave blows on the stomach of Bishnath. When the appellant was assaulting deceased Bishnath, Pw.11-Amit saw him. The appellant threatened Amit Pw.11 not to disclose the incident to anyone. After conclusion of the panchanama at 5.45 hours, the koita was recovered at the instance of the appellant. The koita was found near some bushes between the open area of the under construction building and the compound wall. The koita was blood stained.

[9] The investigating officer denied the suggestion that he purposely did not produce Cw.15-Barju, Cw.16-Sameer, Cw.17- Bikas, Cw.18-Raju, Cw.20-Arjun, Cw.21-Komal, Cw.22-Smt. Budni, Cw.23- Meena and Cw.24-Sudharshan, as they are not supporting the prosecution case. The investigating officer denied the suggestion that he planted blood on the MOs to falsely implicate the accused.

[10] There is only one eyewitness to the incident i.e. Pw.11-Amit Dungdung. Pw.11 in his deposition stated that he is a resident of Jarkhand. He was in need of work. Bishnath approached him in the year 2016 and told him that there is work in Goa where he could earn money. Pw.11 did not have money to buy a train ticket. Bishnath and the appellant, who is also from the same village as Pw.11-Amit, went together to Goa for work. Bishnath purchased a ticket for Hira as well. After getting

down at Margao Railway Station, there was a quarrel between the accused and the deceased. Pw.11-Amit says that the appellant threatened to kill Bishnath as he was annoyed with the harassment. The three of them went to the construction site where they met Barju. Bishnath called one of the labourers and told him that the accused will kill him upon which the said Barju kept quite. The appellant, accused, Pw.11-Amit and the other labourers were enjoying alcohol on the first floor of the under construction building. Pw.11-Amit went to the hut of Komal for having dinner and after having dinner, he again went to the under construction building. Pw.11-Amit was watching a film with Raju along with one Sameer. The accused was talking on his mobile phone with someone whereas the deceased was walking on the ground floor. A quarrel took place between the accused and the deceased. They were abusing each other. The deceased woke Pw.11 from his sleep and told him that the accused threatened to kill him. The other labourers also woke up. The deceased went for a walk. Pw.11 then fell asleep. Pw.11-Amit heard some one coughing at night. He tried to wake up the other boys, however, they did not respond. Pw.11-Amit realized that the sound he heard was that of the deceased. In the light of the mobile phone, he realised that the deceased was not in the room so also the accused.

[11] Pw.11-Amit went to the second floor of the said building but did not find anybody. While Pw.11-Amit was getting down, on reaching the first floor, he again heard the coughing sound. Pw.11- Amit saw that accused was strangulating the deceased with a rope of like material which is used for packing. The deceased was trying to free himself. The accused was strangulating him with force. Pw.11-Amit went back to the room and tried to wake up the other boys, however there was no response. The incident took place on the other side of the first floor. Pw.11-Amit was staying on the other side of the same floor. Pw.11 went back and found that accused was strangulating and hanging the deceased on the cement beam with the help of a rope used for packing. Thereafter, the accused assaulted the deceased with some sharp weapon in the stomach on two to three occasions upon which blood started oozing out. At that time, the accused saw Pw.11- Amit. Pw.11 got scared and started running away. He was caught by the accused and threatened that the incident should not be disclosed to anyone otherwise the deceased would kill him. The incident took place around 01.00 a.m. Thereafter, the accused washed his hands and went to sleep near the other boys. Pw.11 also went to sleep.

[12] Since Pw.11 was frightened, he did not help the deceased and nor informed this incident to anyone. In the morning, the other boys on seeing the deceased hanging, started shouting. The contractor-Pw.10 was informed. Pw.10 came to the site and called the police. Thereafter, Pw.11-Amit was called to the Old Goa Police Station. At the Old Goa Police Station, Pw.11-Amit and others met Pw.1-Basant, the son of the deceased. Pw.11 says that when Basant inquired with him, he told him what he saw in the earlier night. On the same day, the statement of Pw.11-Amit was recorded in the late evening. Section 164 of Cr.P.C. statement of Pw.11-Amit was recorded after ten

days or so. Pw.11 deposed that the accused was wearing red colour T-shirt and blue jeans. Pw.11 deposed that he will not be able to identify the weapon with which the accused assaulted the deceased as he was unable to see properly but it was a sharp weapon.

[13] In the cross-examination Pw.11 deposed that there was no electricity and water connection given to the said building. There was no facility of any kitchen and bathroom in the said building and the labourers were required to go outside for nature's call. The height of the building was around 15 feet. There was no painting or otherwise going on in the said building. Pw.11 deposed that he was using a mobile phone at that time. Pw.11 deposed that he handed over the phone to the police for inspection which was later returned to him. A suggestion was put to Pw.11 that he was not carrying any mobile phone with him when he came to Goa in the year 2016, which he denied. Pw.11 deposed that they were sleeping on the ground floor. The incident happened on the first floor. Pw.11 deposed that he quickly went to the second floor on hearing the noise but he did not find anything unusual. While coming down, he noticed the incident from the first floor. He deposed that there were no other articles found on the first and second floor of the building. He deposed that he tried to wake up the boys, i.e. Sameer, Raju and Barju, who were sleeping in the room. Pw.11-Amit deposed that there was no electricity on any of the floors of the said building. Pw.11 denied that he was instigated by the family members of the deceased and the police to depose against the accused. Pw.11 deposed that there were no doors and windows on the said construction site and that anyone could enter inside. He further says that his mobile phone did not have facility of video recordings.

[14] Pw.1-Basant, i.e. the son of the deceased, in his deposition says that on 15.07.2016 at 13.00 hours, one policeman came to his place and informed that his father Bishnath was found dead at the construction site. Pw.1 immediately went to the Goa Medical College morgue and found the dead body on the stretcher. He identified the dead body to that of his father. Thereafter, he went to Old Goa Police Station and at the Old Goa Police Station, he met Pw.11-Amit, who is a resident of his Village. They were known to each other. Pw.11 told him about the incident. In the cross examination, Pw.11 says that he deposed that he was at Goa Medical College till 4.30 p.m. He came to Old Goa Police Station at around 6.00 p.m.

[15] Dr. Madhu Ghodkirekar was examined as Pw.8. Pw.8 conducted the post mortem examination of the dead body. In the cross-examination, Pw.8 deposed that injury like serial no.1, can be in case of hanging of the body with ligature around the neck. The hanging can be suicidal or homicidal as the case may be. Pw.8 was recalled by the Court as per the order dated 27.03.2023. Pw.8 on recall deposed that as regards her opinion to the exact cause of death, that is, whether suicidal or homicidal, her opinion is limited to within the limits of medical literature. She deposed that only what she could do is to give various possibilities of body being suspended as shown in the

photograph with the background of the autopsy examination findings. So far as the incised wounds are concerned, Pw.8 deposed that the same are post mortem as there were no vital reactions seen in the wound at the time of autopsy. Pw.8, deposed thus:

> "To consider whether this case is post mortem suspension the only finding in the autopsy are post mortem grazed abrasions on the right heel of the deceased which could be caused due to dragging of the dead body. In such cases, one question may arise is whether homicidal hanging, that is, strangulation and then hanging of the body would have to cause two different ligature marks on the neck and to this I say that considering the slipping knot which was for the ligature (hanging material) around the neck of the deceased usually the assailant catches a victim unaware, strangulates with such a ligature and once the victim is unconscious or dead, drags the victim and suspends him in the form of hanging. Partial hanging is when part of the body is touching the ground. Considering all the facts as are evident from the photographs, this is a case of either homicidal hanging or strangulation and post mortem suspension of dead body."

Thus, Pw.8 deposed that the hanging can be suicidal or homicidal as the case may be.

[16] It is pertinent to note that the blood report of the deceased reveals that it is 'O' Rh positive. The blood group sample of the accused reveals that his blood group also is 'O' Rh positive. On the T-shirt of the accused, the blood detected was of group 'A' as per the FSL report. Thus, this does not match with that of the accused. A sealed envelope, which contained exhibit 3 a stained gauge piece by which blood was taken from the floor where the deceased body was lying reveals that the blood group 'A' is detected. A sealed envelope which contained koita is at exhibit H. Results of the examination of the blood group found on the koita revealed that human blood is detected.

[17] From the FSL report, it can be seen that blood found on the T-shirt of the accused which he was wearing at the time of assault does not match with that of the deceased. There are no injuries on the body of the accused. The koita which is recovered at the instance of the accused near the compound wall was found to be stained with human blood. The blood group is not disclosed.

[18] It is pertinent to note that Pw.11, the sole eyewitness says that he saw the incident in the light of his mobile phone. The building was under construction. There was no electricity or light connection in this under construction building. Pw.11-Amit says that though the incident took place in the night between 15.07.2016 and 16.07.2016, he did not report about the incident to anyone till the next date in the evening because he was threatened by the accused not to disclose the incident.

[19] From the deposition of Pw.11-Amit, it is seen that he had handed over the said mobile phone to the police for inspection which was later returned to him, however, the investigating officer in his deposition says that he does not know whether Pw.11 had a mobile phone at the relevant time. This fact assumes relevance as, according to Pw.11, he had watched the incident in the light of his mobile phone. Further Pw.11 deposed that he was sleeping with other labourers and on hearing the shouts of the deceased, though he tried to wake up the other labourers, they did not respond. Pw.11, who was sleeping on the ground floor, went to the second floor only to realize that the incident was happening on the first floor. The accused threatened the Pw.11-Amit not to disclose the incident to anyone. Pw.11 deposed that after the incident, the accused washed his hands and went to sleep next to the labourers and even Pw.11 went to sleep in the same room. It is material to note that the deceased knew Pw.11 very well and in fact paid for the train ticket of Pw.11 to enable him to come to Goa for a livelihood. Pw.11 does not disclose the incident from 01.00 a.m. onwards on 15.07.2016 till 6.00 p.m. of the next day i.e. 16.07.2016. Pw.11 discloses the incident for the first time to the son of the deceased at the Police Station. Thereafter, on the basis of the complaint by Pw.1, the accused was arrested. The explanation of Pw.11 was that he was threatened by the accused. The conduct of Pw.11 on seeing the deceased murdered in front of his eyes who he knew so well and in fact had helped him, going off to sleep along with the accused and not disclosing the incident for such a long time, is quite unnatural.

[20] The Supreme Court on multiple occasions has held that it is not the quantity but the quality of witnesses and evidence that can either make or break the case of the prosecution. It is the duty of the prosecution to prove that the testimonies of the witnesses that it seeks to rely upon are of sterling quality, i.e. fully trustworthy and absolutely free from any kind of blemish. The screams of the deceased shouting for help not being heard by any other labourer except Pw.11, is unusual. The labourers not responding to Pw.11 who was trying to wake them up despite the cries of the deceased for help, the incident being witnessed in the light of the mobile phone and the over all conduct of Pw.11 is inconsistent in the ordinary course of human nature. According to the prosecution, the other labourers who were present at the site and whose statements were recorded, could not be found for the purpose of examination during the trial. Thus, there is no corroboration to the evidence of Pw.11 which is necessary in the present case. The FSL reports do not support the case of the prosecution. Even from the evidence of the Doctor, it cannot be ascertained whether the death is homicidal or suicidal. The version of Pw.1 is not supported by any other direct evidence. In the absence of any other evidence linking the accused to the murder of the deceased, the testimony of PW-11 will have to be discarded as doubtful in the absence of any other direct or circumstantial evidence, ocular or otherwise, linking the accused to the incident.

[21] This case primarily rests solely upon the testimony of PW 11, which is full of blemishes, absolutely uninspiring in confidence. It is the settled principles of law that doubt cannot replace proof. Suspicion, howsoever great it may be, is no substitute of proof in criminal jurisprudence. Only such evidence is admissible and acceptable as is permissible in accordance with law. In the case of a sole eyewitness, the witness has to be reliable, trustworthy, his testimony worthy of credence and the case proven beyond reasonable doubt. Unnatural conduct and unexplained circumstances can be a ground for disbelieving the witness. No doubt, so long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eyewitness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction.

[22] Pw.11 knew the victim, who allegedly saw the assault on the victim and yet kept quite about the incident. The incident was seen by Pw.11 in the light of the mobile phone in an under construction building which had no electricity connection. The under construction building was open and was accessible to all. There were other persons sleeping along with Pw.11. It was only Pw.11 who claims to have heard the screams of the deceased and seen the incident that too in the light of the mobile phone. The Pw.11 deposed that he handed over the mobile phone to the police, yet Pw.5 (I.O.) says that he did not remember if mobile phone was handed over to him. These are circumstances which just do not match up with a convincing prosecution story. We must remember the well established principle in criminal law that if two views are possible in the evidence if adduced in a case, one points to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. As discussed earlier, the conduct of Pw.11 just does not match up to the conduct of an ordinary person who knew the deceased and his family. His testimony, therefore, deserves to be discarded.

[23] We have carefully perused the judgment of the trial Court. In our opinion, the trial Court on the testimony of the sole eyewitness which it found trustworthy, convicted the accused.

[24] For the aforesaid reasons, the appeal is allowed. The impugned judgment and order of conviction of the trial Court is set aside. The appellant is acquitted of the charges levelled against him. He be set at liberty forthwith. Appeal is disposed of

[25] We are informed that the fine amount as well as the compensation which includes the compensation as directed by the trial Court has not been paid by the appellant. Since we are acquitting the appellant-accused, the question of payment of the fine amount by the accused now does not arise. However, so far as compensation

to the kin of the deceased is concerned under the relevant schemes, the said aspect will be determined upon hearing the kin of the deceased.

[26] Issue notice to the Pw.1 on this limited aspect. Place the matter for directions on 25.09.2024. Notice be served through the concerned incharge of the Police Station

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2024(2)GOACC588

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Criminal Application (Bail) No 758 of 2024, 760 of 2024 **dated 10/09/2024**

Shailendra Yeshwant Garad; Saurabh Mahadev Dawne

Versus

State of Goa

BAIL GRANTED

Goa Children's Act, 2003 Sec. 8 - Protection of Children from Sexual Offences Act, 2012 Sec. 12 - Rights of Persons With Disabilities Act, 2016 Sec. 92 - Bharatiya Nyaya Sanhita, 2023 Sec. 126, Sec. 111, Sec. 351, Sec. 131, Sec. 3, Sec. 352, Sec. 192 - Bail Granted - Applicants were charged under various provisions including the Goa Children's Act and POCSO Act for wrongful restraint and abuse towards a handicapped individual and a minor - Incident arose from a parking dispute - Applicant Shailendra also filed a complaint which was not considered initially - Investigation did not show any organized crime involvement - Court observed that the altercation occurred in the heat of the moment and did not warrant continued judicial custody - Applicants granted bail with conditions - Bail Allowed

Law Point: Bail can be granted when an incident arises from a spontaneous altercation, and custodial interrogation is not necessary for further investigation.

Acts Referred:

Goa Childrens Act, 2003 Sec. 8

Protection of Children from Sexual Offences Act, 2012 Sec. 12

Rights of Persons With Disabilities Act, 2016 Sec. 92

Bharatiya Nyaya Sanhita, 2023 Sec. 126, Sec. 111, Sec. 351, Sec. 131, Sec. 3, Sec. 352, Sec. 192

Counsel:

C A Ferreira (Senior Advocate), Vibhav Amonkar, Nehal Govekar, S Karpe, Ritesh Rawal, Pravin Faldessai

JUDGEMENT

Bharat P. Deshpande, J.- [1] Heard learned Counsel for the parties. Case papers are now produced.

[2] Mr Ferreira submits that the complaint lodged by Applicant in B.A.(F) No.758/2024 with Mapusa Police Station was not taken to its logical conclusion. However, he now produces a copy of NC complaint registered on 10.09.2024 i.e. today at 12:15 hours and that too under Section 352, 351(2) of BNS 2023 (NC complaint).

[3] The incident took place on 23.08.2024 at around 23:45 hours. The complaint was lodged at Mapusa Police Station at around 13:51 hours on 24.08.2024.

[4] Along with the said complaint, the Accused by name Shailendra was also in the Police Station along with his written complaint dated 24.08.2024. However, such complaint was not considered by the investigating agency and only today it is registered as NC complaint, when the Accused is in custody from the date of arrest i.e. from 24.08.2024.

[5] Fir No.122/2024 is registered against the present Applicants for the offences punishable under Sections 111, 126, 192, 352, 131, 351(3), 3(5) of BNS 2023 along with Section 8 of Goa Children's Act, Section 92A of the Rights of Persons with Disabilities Act, 2016 and Section 12 of POCSO Act.

[6] Allegation against the Applicants and other Accused persons is that with a common intention, they wrongfully restrained the Complainant who is a handicapped, his students out of which one is minor, abused them with filthy words, insulted the Complainant in public by calling him as handicapped and made serious gestures to assault the Complainant and his students, threatened them with dire consequences and created a riotous situation at the spot.

[7] The application filed by the Applicant before the learned Sessions Court/Children's Court was rejected by order dated 30.08.2024. While rejecting such application, the learned Court observed in para 21 that in the present case, prima facie, Section 111 of BNS is not attracted as it cannot be said that it is a part of organized crime syndicate.

[8] Even otherwise, the complaint dated 24.08.2024 and the investigation carried out till date, prima facie, could not show that the offence lodged against the Applicant and others could be part of an organized crime syndicate.

[9] Though there is no doubt that Applicant by name Shailendra is facing various cases which are found mentioned in para No.1 of the reply itself, it is now reported that only four cases are pending as on date, whereas in remaining matters, said Shailendra has been acquitted.

[10] The fact remains that the complaint was lodged by Shailendra with Mapusa Police Station on 24.08.2024 itself wherein he has disclosed the entire incident and claimed that the Complainant and his associates fired the shots from the instruments which they were carrying in the car thereby creating an impression that such instruments are used as fire arms.

[11] Though along with the complaint, some certificates are produced stating that the said instruments are used in competitions as a sports event, it is clear that such instruments as per the licence are required to be used only as permitted therein i.e. during a practice session and that too in the firing range or during a competition organized by the concerned authorities having permission to do so.

[12] Though the incident occurred on 23.08.2024 as disclosed by both the sides i.e. the Complainant as well as the Accused Shailendra in their respective complaints, it is a fact that no cognizance of the complaint filed by Shailendra was taken by the concerned officer. However, it is now registered as NC complaint and that too at 12:15 hours today only. It is surprising that inspite of a written complaint, no steps were taken by the concerned officer in-charge of Mapusa Police Station.

[13] The allegations against the present Applicant would clearly show that the incident happened on the spur of moment and on a dispute with regard to parking of a scooter in front of a car used by the Complainant and his team members. The hurt certificate shows that there is no external injury caused to the Complainant though there are allegations of assault and giving threats including the minor.

[14] Even though there are cases pending against Accused Shailendra wherein he is attending the matters, peculiar circumstances of the matter in hand would go to show that the alleged incident happened only because of the parking of a vehicle and that too in a spur of moment. Though there are exchange of words and alleged threats, question of custody of the Applicant any further, would not be considered as necessary.

[15] As far as Shailendra is concerned, there are no allegations that he has violated the bail conditions in respect of the matters which are pending against him. In the given circumstances and the fact that the investigation in the present proceedings nowhere require custodial interrogation of the present Applicants who are admittedly in judicial custody, no purpose would be served by denying bail.

[16] Applicants are the permanent residents of the addresses disclosed in the application. Accordingly, they could be released on bail by imposing conditions.

[17] The application accordingly stands allowed. The Applicants shall be released on bail on furnishing personal bond of Rs.25,000/- with one solvent surety in the like amount to the satisfaction of the learned Children's Court and on the following conditions:

i. Applicants shall attend the Police Station as and when called.

ii. Applicants shall not in any manner try to influence the Complainant or the Prosecution witnesses or try to contact them directly or indirectly.

iii. Applicants shall not leave the State of Goa without the permission of the learned Children's Court.

[18] Application stands disposed of in the above terms.

[19] Parties to act on an authenticated copy of this order

2024(2)GOACC591

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Criminal Revision Application No 3 of 2022 **dated 10/09/2024**

State of Goa

Versus

Manjunath Srisangi

VICTIM'S AGE DISPUTE

Goa Children's Act, 2003 Sec. 8 - Protection of Children from Sexual Offences Act, 2012 Sec. 6, Sec. 9, Sec. 10, Sec. 5, Sec. 8, Sec. 11, Sec. 4, Sec. 12 - Victim's Age Dispute - Appellant-State challenged the discharge of the respondent accused from charges under the Goa Children's Act - Victim was above 16 on the date of the incident, but her statement revealed that the accused had committed similar acts when she was under 16 - Court held that the trial court's focus on the incident date ignored prior acts which occurred when the victim was a minor - Impugned discharge order quashed and the case remanded to the Children's Court for trial on all incidents, including those from when the victim was under 16 - Petition Allowed

Law Point: For charges under the Goa Children's Act and POCSO, all incidents involving minors must be considered, including those occurring before the victim reaches the age of 16.

Acts Referred:

Goa Childrens Act, 2003 Sec. 8

Protection of Children from Sexual Offences Act, 2012 Sec. 6, Sec. 9, Sec. 10, Sec. 5, Sec. 8, Sec. 11, Sec. 4, Sec. 12

Counsel:

Pravin N Faldessai

JUDGEMENT

Bharat P. Deshpande, J.- [1] Heard Mr Pravin Faldessai, learned Additional Public Prosecutor for the Applicant State.

[2] Even though the respondent is duly served, he failed to appear in the present matter.

[3] On 28.07.2022, this Court has recorded as under:-

'P.C.

1. Advocate Ryan Menezes submits that he has instructions to appear on behalf of the Respondent and seeks time of two weeks to file Vakalatnama.

2. Time granted. Stand over to 29.08.2022.'

[4] However, till date, no one appears on behalf of the respondent.

[5] The challenge in the present revision is to the order dated 21.09.2021 passed by the learned Children's Court whereby the respondent was discharged from the offence punishable under Section 8(2) of the Goa Children's Act only on the ground that the victim was 16 years 4 months old on the day of the alleged incident which occurred on 14.02.2021.

[6] Mr Faldessai would submit that, first of all, such findings are perverse to the record itself and, more specifically, to the statement of the victim. He submits that though a complaint was filed on 16.02.2021, the alleged incident was much prior to that day and even continued when the victim was minor, i.e. below the age of 16 years.

[7] Mr Faldessai, while pointing out to the statement of the victim would submit that the learned Children's Court completely lost sight of such statement which would clearly go to show that the overt act of the accused started much prior to the date when the complaint was lodged and which actually started when the victim was in the Seventh Standard and probably about a year or so before the alleged incident. The chargesheet came to be filed by the Women Police Station, Panaji, against the respondent for various offences under IPC along with Section 8(2) of Goa Children's Act and Sections 4, 5, 6, 8, 9, 10, 11 and 12 of POCSO Act.

[8] The chargesheet was presented before the Children's Court on the premise that the victim was minor and even below 16 years of age at the time of alleged offence, thereby giving jurisdiction to the Children's Court to try the offences including the offences under the IPC as well as under POCSO Act.

[9] During the investigation, the statement of the victim was recorded and that too, in the presence of Victim Assistance Unit. Medical examination of the victim was carried out and the report is placed on record.

[10] The report clearly shows that the victim is the daughter of the accused. There are serious allegations against the accused by his own daughter. The statement recorded by the investigating agency on 16.02.2021 would clearly reveal that the last such act was committed on 14.02.2021. However, thereafter, the victim has narrated that such acts were performed on her forcibly by the accused even on earlier occasions.

She has narrated the details and stated that such overt acts started when she was in the Seventh Standard. She also disclosed that she left school about a year back.

[11] The impugned order would show that the trial Court has only considered the alleged incident which occurred on 14.02.2021 and not the statement of the victim which discloses some acts performed by the accused on earlier occasions, spanning over a period of around one year prior to 14.02.2021.

[12] The learned trial Court failed to consider such aspects and observed that on 14.02.2021, the victim was above 16 years.

[13] As per the birth certificate, the date of birth of the victim is 30.09.2004. It may be correct that on 14.02.2021 the victim was above 16 years of age. However, that is not the sole incident which the victim has disclosed in the statement. Such overt acts were performed by the accused even prior to 14.02.2021, which are found in the statement of the victim. She has clearly disclosed that such acts started somewhere when she was in Seventh Standard, which means, around a year prior to 14.02.2021. Thus, if said statement is taken into account as the date of starting of such acts which is required to be taken into account as offences under the Children's Act, the victim was certainly below the age of 16 years. Thus, the observations of the learned Children's Court in the impugned order are found to be perverse and incorrect.

[14] The impugned order, therefore, needs to be interfered with. Accordingly, the order dated 21.09.2021 in Sp. Case No.29/2021, thereby discharging the accused/respondent for the offence punishable under Section 8(2) of the Goa Children's Act, 2002, is hereby quashed and set aside. The matter is, therefore, remanded back to learned Children's Court since it is reported that the chargesheet was returned to the Investigating Officer for presenting it before the learned Sessions Court/POCSO Court.

[15] The concerned Sessions Court/POCSO Court is, therefore, directed to hand over the chargesheet to the Children's Court. The case which was registered before the Children's Court bearing Sp. Case No.29/2021 is, accordingly, restored.

[16] The respondent to appear before the Children's Court on 23.09.2024 at 10:00AM. In the meantime, the file shall be transferred to the Children's Court.

[17] Copy of this order be forwarded to the learned Principal District & Sessions Judge, North Goa, for issuing necessary directions to the concerned Court.

[18] Revision Application stands disposed of

2024(2)GOACC594

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Karnik; Valmiki Menezes]

Criminal Writ Petition No 591 of 2024 **dated 09/09/2024**

L

Versus

State; Police Inspector Womens Police Cell; XYZ

FALSE PROMISE OF MARRIAGE

Indian Penal Code, 1860 Sec. 90, Sec. 376, Sec. 420, Sec. 375 - Code of Criminal Procedure, 1973 Sec. 164 - False Promise of Marriage - Appellant sought quashing of FIR under Sec. 376 and 420 IPC, where the complainant alleged sexual relations on the false promise of marriage - Court observed that the relationship appeared consensual, as complainant willingly accompanied appellant on multiple occasions despite knowing complications related to marriage - No prima facie case of rape established as complainant's consent was not induced by deception - FIR and chargesheet quashed. - Petition Allowed

Law Point: Consensual relationships between adults do not constitute rape unless it is proven that consent was obtained through deception or a false promise of marriage from the outset.

Acts Referred:

Indian Penal Code, 1860 Sec. 90, Sec. 376, Sec. 420, Sec. 375

Code of Criminal Procedure, 1973 Sec. 164

Counsel:

Arun Bras De Sa, Kyle Dsouza, Mark Valadares, S G Bhobe, Rohan Desai, Ashay Priolkar, Pranav Pathak

JUDGEMENT

M.S. Karnik, J.- [1] Writ Petition No.546 of 2024 was wrongly tagged with Criminal Writ Petition No.591 of 2024(F). Detag Writ Petition No.546 of 2024 from Criminal Writ Petition No.591 of 2024(F). List the Writ Petition No.546 of 2024 on 18.09.2024.

[2] This petition seeks to quash and set aside FIR No.3 of 2024 dated 25.01.2024 lodged against the petitioner by respondent no.3 and the Chargesheet No.4 of 2024 dated 22.03.2024.

[3] The petitioner claims to be a reputed musician by profession. The complainant is aged 38 years and the petitioner 32 years. As per the complaint dated 25.01.2024 lodged by Ms XYZ to the Women's Police Station, it is alleged that the petitioner

committed offences punishable under Sections 376 and 420 of IPC. It is alleged that she met the petitioner on 28.10.2023 at the October fest at Inox Panaji when she had gone for a show along with her friend. The petitioner was performing for an event at the October Fest. Since then they became friends and started chatting with each other on Instagram. On 07.01.2024, the petitioner told the complainant that he wants to talk to her grandmother and in front of the complainant the petitioner told her grandmother that he wants to marry the complainant but she was not ready. The complainant's grandmother told the petitioner regarding her past to which the petitioner said that her past does not

[4] On 08.01.2024, the petitioner took the complainant for dinner at his friend's restaurant. Since it was too late, the petitioner requested the complainant to stay at his flat. At night, the petitioner forcibly had sex with the complainant. The complainant was upset. The petitioner told her not to worry as he had promised her that he would marry her. The next day in the evening the petitioner dropped the complainant home.

[5] The petitioner informed the complainant that he had told his mother regarding their relationship and that she would accept their relationship. On 10.01.2024, the petitioner and the complainant went to the complainant's relative's place. The petitioner informed the complainant's relative that he wants to marry her and even if his family does not support him, he will go ahead with the marriage. On 11.01.2024 at 04.00 hrs. when the complainant was at her relative's place, the petitioner came into her bedroom and with consent had a sexual relationship.

[6] On 14.01.2024 at 23.00 hrs. the petitioner took the complainant to his flat and again with consent had sexual relationship. The complainant asked the petitioner whether he would marry her. The petitioner promised that he would marry the complainant. The petitioner had a sexual relationship with the complainant on as many as 7 occasions on the promise of marrying her.

[7] Since 19.01.2024, the petitioner started ignoring the complainant. He told her that his mother is not accepting their relationship. Since 23.01.2024, the petitioner had stopped talking to the complainant and was not receiving her calls. The complainant did a pregnancy test on 25.01.2024 at around 08.30 hours and found that she was pregnant. It is alleged that the petitioner cheated the complainant and raped her under the pretext of marriage. The statement of the complainant was recorded under Section 164 CrPC. The Chargesheet came to be filed on 22.03.2024 for the offences punishable under Sections 376 and 420 of IPC.

[8] This petition is filed for quashing the FIR and the chargesheet. The complainant has filed an affidavit in reply opposing the petition.

[9] Learned counsel for the petitioner, relying on the decisions in Deepak Gulati V/s. State of Haryana,2013 SCCOnLineSC 477, **Sonu V/s. State of UP & Anr.**, 2021 18 SCC 517, Pramod Pawar V/s. State of Maharashtra & Ors.,2019 SCCOnLineSC

1073, Dr. Dhruvaram Sonar V/s. State of Maharashtra,2018 SCCOnLineSC 1073, XYZ V/s. State of Maharashtra & Ors.,2023 DGLS(Bom) 1327 and **Shri Mahendra Ladu Sawant V/s. State & Ors.** [WPCR No.3 of 2020] submitted that the FIR deserves to be quashed and set aside. It is submitted that even if the allegations in the FIR and the materials in the chargesheet are taken at its face value and accepted in its entirety, even prima facie do not constitute any offence or make out a case against the accused. It is submitted that the FIR and the chargesheet disclose a consensual relationship between two adults not on the pretext of marriage.

[10] Mr S.G. Bhobe, learned Public Prosecutor for the State and Mr Rohan Desai, learned counsel for the complainant opposed the petition. It is submitted that a chargesheet has been filed and, therefore, the petitioner's remedy is now to approach the Trial Court seeking appropriate reliefs. It is further submitted that on a false promise to marry the complainant, the petitioner took advantage of the complainant and had physical relationship with her. The petitioner always had an intention to cheat the complainant right from inception and, therefore, the ingredients of Sections 376 and 420 are clearly made out. Mr Desai relied upon a decision of the Hon'ble Supreme Court in **Yedla Srinivasa Rao V/s. State ofA.P.**, 2006 11 SCC 615 and that of this Court in Deepesh Bhaskar Arkashi &: Ors. V/s. State of Maharashtra and Anr.,2024 SCCOnLineBom 2362 in support of his submissions that in the present case, the petitioner made a false promise to marry the complainant, which he never fulfilled. It is further submitted that the decisions relied upon by the learned counsel for the petitioner are after the conclusion of the trial and, therefore, even in the present case having regard to the materials on record the petitioner should be made to face the trial.

[11] Heard learned counsel for the parties.

[12] Before we proceed to consider the submissions of learned counsel, it would be useful to refer to the judicial pronouncements on the subject. In Pramod Pawar V/s. State of Maharashtra (supra), the Hon'ble Supreme Court considered the decisions in Deepak Gulati V/s. State of Haryana (supra), Yedla Srinivas Rao V/s. State ofA.P. (supra), **Uday V/s. State of Karnataka**, 2003 4 SCC 46, Dhruvaram Murlidhar Sonar V/s. State of Maharashtra (supra) and **State of Haryana V/s. Bhajan Lal**, 1992 Supp1 SCC 335. Their Lordships considered the scope and ambit of the Court's power under Section 482 CrPC and in para 6 laid down as under:

> "Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under the CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as

it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently followed and reiterated by this Court. In **Inder Mohan Goswami V/s. State of Uttaranchal**, 2007 12 SCC 1, this Court observed:

"23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent powers to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of the court, and

(iii) to otherwise secure the ends of justice."

[13] State of Haryana V/s. Bhajan Lai (supra), conducted a detailed study of the situations where the Court may exercise its extraordinary jurisdiction and laid down a list of illustrative examples where quashing of FIR may be appropriate. At this juncture, it would be pertinent to make a reference to some of the tests in paragraph 102 which are relevant to the present

'102.....(1) Where the allegations made in the first irmation report or the complaint, even taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

[14] We must bear in mind that in deciding whether to exercise jurisdiction under Section 482, this Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The Limited question is whether on the face of the FIR and the materials on record even if accepted in their entirety constitute any offence. A profitable reference needs to be made to the observations in paragraphs 8 to 18 of Pramod Pawar V/s. State of Maharashtra & Ors. (supra) which read thus:

"8. In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation oi competing evidence presented. The limited question is

whether on the face of the FIR, the allegations constitute a cognizable offence. As this Court noted in Dhruvaram Murlidhar Sonar V/s. State of Maharashtra (supra):

"13. It is clear that for quashing proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."

9. The present proceedings concern an FIR registered against the appellant under Sections 376, 417, 504, and 506(2) IPC and Sections 3(1)(u), (w) and 3(2)(vii) of SC/STAct. Section 376 of the IPC prescribes the punishment for the offence of rape which is set out in Section 375. Section 375 prescribes seven descriptions of how the offence of rape may be committed. For the present purposes only the second such description, along with Section 90 IPC is relevant and is set out below:

"375. Rape - A man is said to commit "rape" if he - under the circumstances falling under any of the following seven descriptions-

Firstly -

Secondly. - Without her consent.

Explanation 2. - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."

"90. Consent known to be given under fear or misconception - A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or"

10. Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent", a "consent" based on a "misconception of fact" is not consent in the eyes of the law.

11. The primary contention advanced by the complainant is that the appellant engaged in sexual relations with her on the false promise of marrying her, and

therefore her "consent", being premised on a "misconception of fact" (the promise to marry), stands vitiated.

12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In Dhruvaram Sonar (supra), which was a case involving the invoking of the jurisdiction under Section 482, this Court observed:

"15. .....An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of."

This understanding was also emphasised in the decision of this Court in **Kaini Raj an V/s. State of Keralr**, 2013 9 SCC 113

"12.... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the significance of the moral quality of the act but after having fully exercised the choice between resistance and asset. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

13. This understanding of consent has also been set out in Explanation 2 of Section 375 (reproduced above). Section 3(1)(w) of the SC/ST Act also incorporates this concept of consent:

"3(1)(w)(i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent;

Explanation.-For the purposes of subclause (i), the expression "consent" means an unequivocal voluntary agreement when the person by words, gestures, or any form of nonverbal communication, communicates willingness to participate in the specific act:

Provided that a woman belonging to a Scheduled Caste or a Scheduled Tribe who does not offer physical resistance to any act of a sexual nature is not by reason only of that fact, is to be regarded as consenting to the sexual activity:

Provided further that a woman's sexual history, including with the offender shall not imply consent or mitigate the offence;"

14. In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In **Anurag Soni V/s. State of Chhattisgarh**, 2019 13 SCC 1, this Court held:

"12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 of the IPC and can be convicted for the offence under Section 376 of the IPC."

Similar observations were made by this Court in Deepak Gulati v State of Haryana (supra):

"21.... There is a distinction between the each of a promise, and not fulfilling a promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused... "

15. In Yedla Srinivasa Rao V/s. State of Andhra Pradesh (supra) the accused forcibly established sexual relations with the complainant. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the complainant. When the complainant became pregnant, the accused refused to marry her. When the matter was brought to the panchayat, the accused admitted to having had sexual intercourse with the complainant but subsequently absconded. Given this factual background, the court observed:

"10. It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would

marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent."

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati (supra), this Court observed:

"21.....There is a distinction between the mere each of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently."

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court

is assured of the fact that from the very beginning, the accused had never really intended to marry her." (Emphasis supplied)

17. In Uday V/s. State of Karnataka (supra) the complainant was a college going student when the accused promised to marry her. In the complainant's statement, she admitted that she was aware that there would be significant opposition from both the complainant's and accused's families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The court observed that in these circumstances the accused's promise to marry the complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors:

"25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. 1 nere is nardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married." (Emphasis supplied)

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and

> reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

[15] In the present case, we have carefully examined the allegations in the FIR, the statement of the prosecutrix recorded under Section 164 of CrPC and the other materials on record. At this stage, we have to be mindful that we cannot adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. We find that even if the allegations made in the complaint and the materials on record are taken at its face value, what is revealed from the statement under Section 164 is that on 08.01.2024, the complainant had gone out for dinner with the petitioner and as it was late, the complainant stayed in the flat of the petitioner. In the middle of the night, the petitioner entered the complainant's bedroom and had forcible sexual intercourse with her. The complainant cried and asked him as to why he had committed this act, when he told her that he treats her like his wife and he had promised to get married with her. On the next day after lunch, the petitioner dropped the complainant home. From the allegations, it is seen that the prosecutrix did not consent to the sexual relationship. There was thus no consent or the promise of marriage.

[16] In the complaint, it is stated that on 11.01.2024 in the early morning at 04.00 am, when they had gone to her relative's place, the petitioner came to her bedroom and had sexual relationship with consent.

[17] Learned counsel for the petitioner submitted that there are several improvements in the statement recorded under Section 164. The complainant alleges that up to 19.01.2024, the petitioner had sexual relationship with the complainant on several occasions. The complainant stated that from 19.01.2024 the petitioner started ignoring her and saying that his mother is not ready for marriage on account of her past wherein a civil registration was done in the year 2013 with some other man which was cancelled after 5 to 6 years. On 23.01.2024 the petitioner told her that his mother is not ready for the marriage.

[18] On the basis of the allegations taken at its face value what transpires is that the petitioner had proposed marriage. To our mind, the first instance of the sexual relationship was not on account of a false promise to marry because it is the complainant's case that the petitioner had a forcible sexual relationship with her and then convinced her that, in any case, he is to marry her. Thus, there does not exist a situation where the consent was on the petitioner's false promise to marry the complainant.

[19] In the complaint, it is then stated that on the subsequent occasions, the sexual relationship was by consent. It is further material to note that the petitioner had indicated to the complainant that he had informed his mother regarding their relationship and that she would accept the relationship. It was only on 19.01.2024 that the petitioner told the complainant that his mother was not accepting the relationship. Thereafter, it is alleged that the petitioner started avoiding the complainant. Learned counsel for the petitioner submitted that there is a complete variance between what is stated in the complaint and the contents of the Section 164 statement. It may be so but it is not possible for us to adjudicate upon the veracity of the facts alleged.

[20] The Hon'ble Supreme Court has observed that in a case of this nature, two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. It is pertinent to note that at the relevant time, the complainant was 38 years of age. The complainant had willingly accompanied the petitioner who was 32 years of age to the locations mentioned in the complaint and in the Section 164 statement. It is alleged that the petitioner had given her an assurance that he would marry her. On the first occasion, it is stated by the complainant that the petitioner had forcible sexual relations with her against her wish. The complainant had in close proximity thereafter voluntarily accompanied the petitioner on several occasions resulting in physical relations with the consent. The complainant though in her complaint says that on several occasions the physical relations was by consent, however, in the Section 164 statement she says that such consent was on the promise that the petitioner would marry her. The complainant is sufficiently mature to understand the consequences of such a relationship. The complainant says that the petitioner stopped meeting her after informing the complainant that his mother is opposing the marriage on account of a civil registration in 2013 with some other man which was cancelled.

[21] Section 90 provides that any consent given under a misconception of fact would not be considered valid so far as the provisions of Section 375 are concerned and thus such a physical relationship would be tantamount to committing rape. The physical relation between the parties had developed with the consent of the complainant and though she alleged that on the first occasion, the petitioner had forcible sexual relation, it is alleged that there were 7 instances when the petitioner and the complainant had sexual relations with consent. The complainant voluntarily stayed with the petitioner and even travelled with him to different places. Thus, the complainant had adequate knowledge and significant maturity to understand the consequences associated with the act she was consenting to. The complainant was capable of understanding the complications and issues surrounding her relationship with the petitioner. The petitioner informed the complainant that his mother was against the marriage where after the petitioner stopped meeting her. In the facts and

circumstances of the present case, we fail to comprehend the circumstance of the charge of rape levelled against the petitioner. In any case, we are satisfied that on a careful study of all the relevant circumstances and upon viewing the totality of the sequence of facts commencing with the incident on 08.01.2024 culminating in the last incident on 19.01.2024, it appears to be a case of consensual relationship rather than forcible sexual relationship to constitute a charge of rape against the petitioner.

[22] The petition, therefore, succeeds and is allowed. The FIR No.3 of 2024 dated 25.01.2024 registered at Women's Police Station at Panaji and the consequent final report/chargesheet is quashed and set aside.

2024(2)GOACC605

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Writ Petition No 1010 of 2024, 1074 of 2024; 531 of 2024 **dated 04/09/2024**

Civil Application (Review); Dr Eugene Dsilva; M/s Esperanca

Versus

Esperanca; Dr Eugene Dsilva

AWARD ENFORCEMENT STAY

Arbitration and Conciliation Act, 1996 Sec. 34 - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 Sec. 14 - Award Enforcement Stay - Appellant sought review of the order directing payment of 55% of rent and profit share, while the remaining 45% was deposited with the bank for loan repayment - Appellant argued payment already made to the bank was not accounted for - Respondent claimed entitlement to the full rent and profit under the arbitration award - Court held that existing payments to the bank should be credited to other partners' shares, while 55% should be deposited in court for the fourth partner's share - Bank guarantee for profit share secured, so no additional deposit needed for that amount - Review Petition Partly Allowed

Law Point: Payments made to the bank in a mortgage situation can be credited towards other partners' shares - Arbitration award enforcement stays may be granted with partial deposits depending on secured bank guarantees.

Acts Referred:

Arbitration and Conciliation Act, 1996 Sec. 34

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 Sec. 14

Counsel:

Shri J E Coelho Pereira (Senior Advocate), V Braganza, Bernard Fernandes, S D Lotlikar (Senior Advocate), Sailee Kenny

JUDGEMENT

Bharat P. Deshpande, J.- [1] Both these applications filed for review of the order passed by this Court on 22.03.2024, in Writ Petition No.531 of 2024, are taken together.

[2] The Civil Application (Review) No. 1010/2024 (F) is filed by the Petitioner, whereas the Civil Application (Review) No. 1074/2024(F) is filed by Respondent in Writ Petition No. 531/2024(F).

[3] Heard Shri J.E. Coelho Pereira, Senior Advocate with Mr. V. Braganza and Mr. Bernard Fernandes, Advocates for the Applicant in CAREV.1010 of 2024(F) and Respondent in CAREV.1074 of 2024(F) and Shri S. D. Lotlikar, Senior Advocate with Ms. Sailee Kenny, Advocate for the Respondent CAREV.1010 of 2024(F) and Applicant in CAREV.1074 of 2024(F).

[4] Writ Petition No. 531 of 2024(F) was filed challenging the order passed by the learned District Court, Panaji, dated 05/02/2024, in a stay application filed along with an arbitration appeal, challenging impugned award.

[5] The Petitioner, Dr Eugene D'Silva claimed in the petition that an award was passed by the learned Arbitrator, CAREV.1010.2024.F. & CAREV.1074.2024.F.IN WP.531.2024.F thereby directing the Petitioner to pay the rent along with arrears and also the share in the profit in terms of profit sharing agreement from the date of award.

[6] The Petitioner filed an appeal under Section 34 of the Arbitration and Conciliation Act before the District Court, North Goa, Panaji, together with an application for staying of the said award. The learned District Court while disposing of the stay application, passed an impugned order dated 05/02/2024, thereby directing the Petitioner to deposit the entire award amount in the Court as a condition precedent for staying of the award.

[7] The Petitioner challenged such an order of the District Court on the said application on various grounds. Initially, on 29/02/2014, this Court passed the following order:-

(1) The challenge in this petition is against the impugned order passed by the learned District Court rejecting the application for a stay of the award.

(2) Mr. Pereira would submit that the petitioner executed a lease in the year 2010 for running a hospital wherein there was a specific clause that the said premises should not be mortgaged. However, he submits that the respondent/lessor in the year 2013 mortgaged the said property to Bank of Maharashtra and obtained the loan. Subsequently, the respondent defaulted in repayment of the loan which invited the

Bank to take action under the SARFAESI Act for recovery of the loan. Mr. Pereira would submit that the petitioner received a notice under Section 14 of the SARFAESI Act directing him to make the payment of the monthly rent. Accordingly, the petitioner deposited the arrears more than Rs.23 Lakhs and continues to pay the rent of the said premises directly to the Bank of Maharashtra. He submits that the statement of accounts is enclosed showing that the rent up to the last month is paid to the said bank directly by the petitioner.

(3) Mr. Pereira would submit that the respondent/lessor initiated arbitration proceedings against the application for recovery of rent and profit share. The learned Arbitration Tribunal passed an award directing the petitioner to pay the arrears of monthly rent from 13/07/2010 as well as the minimum share of profit in terms of the profit sharing agreement dated 13/07/2010, for a period commencing from 01/04/2015 together with interest @16% p.a.

(4) Mr. Pereira would submit that the petitioner challenged such award before the District Court under Section 34 of the Arbitration and Conciliation Act and also filed an application for stay. He submits that even though the petitioner has placed the bank statement and other documents to show that the petitioner has directly paid arrears of rent to the tune of more than Rs.23 lakhs to Bank of Maharashtra and he is regularly depositing the rent with the said bank. The stay was granted subject to depositing the entire amount. Mr. Pereira would submit that the petitioner has already paid the arrears of rent and he is paying rent regularly to the bank, therefore, depositing it again for the purpose of obtaining stay would severely prejudice the applicant.

(5) Mr Pereira would submit that as far as the profit share amount is concerned, the same is not calculated however the petitioner is ready and willing the furnish Bank Guarantee of such profit sharing amount in this Court on estimated basis within one week.

(6) Issue notice to the respondent, returnable on 14/03/2024. Apart from regular service service by other mode is also permitted.

(7) The stay of the impugned award is granted subject to furnishing bank guarantee with this Court in connection with the estimated profit sharing amount of Rs.40,98,099.50.

(8) Parties are put to the notice that the matter could be taken up for final disposal at the admission stage itself since a limited ground is involved in the present matter and the challenge to the award under Section 34 of the Arbitration and Conciliation Act is already pending before the District Court.

[8] While issuing notice, this Court directed the Petitioner to furnish bank guarantee in this Court in connection with estimated profit sharing amount of Rs.4098099.50/-(Rupees Forty Lakhs Ninety Eight Thousand and Ninety-Nine Rupees

only). Accordingly, Petitioner furnished such bank guarantee for an amount of Rs.41,00,000/-(Rupees Forty-One Lakhs only) on 12.03.2024.

[9] The matter was thereafter taken up for final disposal and by order under review dated 22.03.2024, this Court modified the order of District Court as found in paragraph 12 which reads as under:-

12. In view of the above discussion, the impugned order needs modification as under:

1. The petitioner/lessee shall pay 55% of the rental amount and the profit share in terms of the lease deed dated 30.5.2010 to Mrs Maria Inez Estibeiro. The amount in this regard, payable till date shall be calculated and deposited in the Court where the proceedings under Section 34 of the Act are pending. Mr Pereira, learned Senior Counsel for the respondent undertakes to make such deposit within a period of four weeks from today. Upon such deposit being made, the same would be permitted to be withdrawn by Mrs Maria Inez Estibeiro subject to her furnishing a bank guarantee for the amount permitted to be withdrawn, to the satisfaction of the learned Court.

2. The petitioner/lessee shall henceforth deposit every month 55% of the lease amount and the profit share with the learned Court seized of the application under Section 34 of the Act. The learned Court upon such deposit being made, would pass suitable orders regarding its release in favour of Mrs Maria Inez Estibeiro on such terms and conditions as it deem fit and proper.

3. The petitioner/lessee shall continue to deposit 45% of the lease amount and the profit share with the Bank of Maharashtra, which will be appropriated to the share of the other partners of the firm as and when accounting of the claimant firm shall take place.

4. The amount deposited by the petitioner/lessee with the Bank of Maharashtra, till date, will have to be appropriated to the share of the other partners, who have created mortgage of the property.

5. The petition is disposed of accordingly in the above terms. Conferring the circumstances, there shall be no cost.

[10] The Petitioner as well as the Respondent filed an application for review on different grounds.

[11] The Petitioner claimed in the review application that though the Petitioner has furnished the Bank guarantee of more than Rs.41,00,000/-(Rupees Forty One Lakhs only) in connection with profit sharing agreement, same has not been considered while passing the impugned order. It is also claimed that the Petitioner has deposited the entire rent with bank of Maharashtra under the notice of taking possession since bank of Maharashtra started recovery proceedings under Securitization and Reconstruction of Financial Assets and Enforcement of Security

Interest Act of 2002 (SARFAESI Act for short) and under the threat of dispossession, the Petitioner was forced to deposit the rent on monthly basis with Bank of Maharashtra.

[12] Mr. Pereira learned senior counsel appearing for the Petitioner would submit that the Petitioner is now directed to deposit entire arrears as found in the award, without considering payment already made to Bank of Maharashtra. He would, therefore, submit that the mortgage created is totally against the agreement, and therefore the Petitioner cannot be burdened of paying the amount which he has already deposited with the Bank of Maharashtra

[13] Mr Pereira submits that the notice issued under Section 14 of the SARFAESI Act is still not withdrawn by the bank. He therefore submits that the bank guarantee furnished by the Petitioner needs to be taken into account together with the amount already paid to the Bank of Maharashtra, which is around Rs.30,00,000/- (Rupees Thirty Lakhs only).

[14] Per contra, Mr. Lotlikar learned senior counsel appearing for the Respondent would submit that learned District Court rightly observed that the stay shall be subject to deposit of the entire awarded amount since it is a money decree. He submits that the Respondent/Partnership Firm has nothing to do with mortgage created by the three partners. Besides, he submits that there are no proceedings pending against the Firm under the SARFAESI Act and such proceedings were discontinued. He would submit that the rent which is due to the Firm is required to be paid as per the award. Whereas the Petitioner without considering the claim of the Firm, voluntarily decided to deposit the rent with the Bank. He would submit that the rent is due to the Firm and not to the partners. Mr Lotlikar would submit that as per the lease agreement, there is no prohibition for creating any third-party interest, as the lease in favour of the Petitioner is protected. He would then submit that the partners have no power to mortgage and therefore such mortgage will not bind the Firm.

[15] Mr. Lotlikar would further submit that there is no apprehension of dispossession qua the Petitioner hence direction by the District Court needs no interference.

[16] Mr. Lotlikar submitted that the observations of this Court in the impugned order and more particularly bifurcating the rent between the Firm and the three partners, is against the provisions of the Partnership Act. He submits that such procedure could be adopted only at the time of dissolution of Partnership Firm.

[17] The review of the impugned order is sought by both parties on different grounds. The Petitioner claimed that the bank guarantee submitted by the Petitioner in this Court with regard to profit sharing agreement has not been considered at all.

[18] The above submission is having force. While passing the order on 29/02/20204 as quoted above, the Petitioner was directed to furnish a bank guarantee

in connection with the estimated profit sharing amount. Accordingly, the Petitioner furnished a bank guarantee of an amount of Rs.41,00,000/- (Rupees Forty-One Lakhs only). Thus, the amount which is awarded by the learned Arbitral Tribunal with regard to the profit sharing agreement dated 31/07/2010, and as per clause (ii) of the award, is secured on behalf of the bank guarantee guarantee furnished by the Petitioners. Accordingly, the operative part of the order as far as profit sharing amount is concerned, certainly requires to be modified.

[19] The contentions of Mr Pereira regarding payment made to Bank of Maharashtra is concerned, same has been taken care of in the order as found mentioned in paragraph 12(4). This Court has clarified that the amount deposited by the Petitioner with the Bank of Maharashtra till date will have to be appropriated to the share of three partners who created the mortgage. Thus, the Petitioner will have to calculate the amount deposited with Bank of Maharashtra as the amount of the share of remaining three partners which comes to 45%, the remaining share of the fourth partner/Partnership Firm comes to 55% which infact needs to be deposited together with arrears, in the Court for the purpose of staying of the award.

[20] At this stage, the question before this Court is only regarding stay of the award, which is admittedly a money degree. Either the Petitioner is required to give a bank guarantee or to deposit the amount with the Court, for the purpose of seeking a stay of the impugned award. For this purpose, this Court is not required to go into as to whether SARFAESI proceedings were pending or not, or whether three partners are entitled to mortgage the entire suit property with the bank. All these aspects will have to be gone into in an appeal filed under Section 34 of the Arbitration and Conciliation Act.

[21] Accordingly, the order requires modification as far as profit sharing agreement is concerned since such an amount is secured by furnishing a bank guarantee of Rs.41,00,000/- (Rupees Forty One Lakhs only). Such bank guarantee needs to be transferred to the District Court till the disposal of the appeal. The Petitioner is therefore not required to deposit the arrears of profit sharing agreement, as far as all partners are concerned or the Firm is concerned. However, it is required, to be clarified that the rent which is of the share of the fourth partner that is 55% will have to be deposited along with arrears.

[22] The second application filed on behalf of Respondent is only on the ground that no interference is necessary with the order passed by the District Court and that the bifurcation which has been ordered by this Court is against the provisions of the Partnership Act.

[23] While passing the order under review dated 22/03/2024, this Court has observed that the share of the fourth partner in the Partnership Firm is 55%. It is also no doubt true that remaining three partners mortgaged entire suit property with Bank

of Maharashtra for loan which they failed to clear and accordingly, proceedings under Section 14 of the SARFAESI Act were initiated. The Petitioner received a notice under Section 14 of the said Act thereby directing them to deposit the rent directly with the Bank, failing which possession will have to be handed over. Thus, at the relevant time, there was a threat of dispossession, however, as pointed out by Mr. Pereira the notice issued under Section 14 of the SARFAESI Act is still not withdrawn by the Bank of Maharashtra, even though the proceedings filed before the concerned authority were disposed of.

[24] Mr. Pereira has pointed out that recently the Petitioner has received a notice from the Bank of Maharashtra dated 04/07/2024, a copy of which is placed at page 43, in his review petition, wherein the Petitioner has been directed to handover possession of the premises to the bank at the earliest. It is no doubt true that the Bank of Maharashtra considered that the period of lease is expiring in July 2024 which is incorrect as the agreement shows that the lease will be expiring on 31st July 2025, thus, the fact remains that bank of Maharashtra is still pursuing the matter.

[25] In such circumstances, the order passed by this Court and more particularly, directing Petitioner to deposit the rent equivalent to 55% of share of the fourth partner with the direction that such share shall be appropriated to the shares of the respective partners when the accounting of the firm shall take place, need no interference in review.

[26] This is only an interim arrangement as per the shares of the partners. This Court is not intending to decide the claim of each partner over the said rent, however, since the Petitioners have deposited a substantial amount in the Bank of Maharashtra, which is directly going into the loan account obtained by three partners, it was only observed that such amount deposited till date shall be considered as the share of three partners who created the mortgage that is 45%.

[27] The contention of Mr. Lotlikar that bifurcation carried out by this Court is not proper, has no substance, since such bifurcation is only an interim arrangement with a direction that such amount of the Firm and other partners shall be appropriated to their respective shares at the time of carrying out accounting process of the said Firm.

[28] Thus, application filed on behalf of the Respondent for review is of no substance.

[29] Accordingly, the order passed by this Court dated 22/03/2024, is modified as follows;

(1) Petitioner/Leasee shall pay 55% of the rental amount in terms of Lease Deed dated 30/05/2010 by depositing it along with arrears in the Trial Court. Learned Trial Court shall decide whether such amount should be paid to Ms. Maria Inez Estibeiro who is the fourth partner of the Firm on such conditions as it deemed fit or to invest it

in any Nationalised Bank till the disposal of the appeal. Such amount shall be calculated and deposited within a period of four weeks from today.

(2) The Petitioner/Leasee shall henceforth deposit rent every month amounting to a share of 55% of the lease amount in the Court. The learned District Court would be free to pass suitable orders regarding such monthly deposit.

(3) The Petitioner/Leasee shall continue to deposit 45% of the lease amount with Bank of Maharashtra, which accounts to the share of three partners, and that, such amount shall be appropriated to the shares of three partners as and when accounting of the firm shall take place.

(4) The amount deposited by the Petitioner/Leasee with the Bank of Maharashtra, till date shall be appropriated to the shares of three partners who created the mortgage of the property.

(5) The deposit of 55% of the share of the fourth partner, Ms. Maria Inez Estibeiro (arrears), and the future rent, per month, shall be appropriated to the share of Ms. Maria Inez Estibeiro as the partner of the said Firm, as and when accounting of the said firm shall take place

(6) The bank guarantee furnished by the Petitioner shall be considered towards the profit sharing agreement amount and shall be transferred to the District Court, which shall be operative till the disposal of the appeal.

32. With these observations, both the review petitions stand disposed of.

2024(2)GOACC612

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Civil Revision Application; Miscellaneous Civil Application; Civil Application No 2060 OF 2023; 1286 of 2024; 2061 of 2023 **dated 04/09/2024**

Gold Dust; Kanak Sawant and 23 Ors

Versus

Kanak Sawant and 23 Ors; Gold Dust

REJECTION OF PLAINT

Code of Civil Procedure, 1908 Or. 6 R. 4, Or. 7 R. 11 - Limitation Act, 1963 Art. 58 - Specific Relief Act, 1963 Sec. 39, Sec. 34, Sec. 37, Sec. 38 - Rejection of Plaint - Appellant challenged rejection of plaint under Order VII Rule 11 CPC claiming no cause of action and that suit was time-barred - Respondents filed suit challenging Relinquishment Deed executed in 2006, discovered in 2020 - Court found claim of coercion by deceased Meena only applicable during her lifetime, which was never

raised - Delay in challenging deed barred by limitation under Article 58 of Limitation Act - , plaint rejected - Application allowed

Law Point: Challenge to a deed based on coercion, fraud, or undue influence must be raised within the lifetime of the party affected - Limitation applies from the date of knowledge of such deed, not from subsequent discovery.

Acts Referred:

Code of Civil Procedure, 1908 Or. 6R. 4, Or. 7R. 11

Limitation Act, 1963 Art. 58

Specific Relief Act, 1963 Sec. 39, Sec. 34, Sec. 37, Sec. 38

Counsel:

Gaurish Agni, Kishan Kavlekar, Parikshit Sawant

JUDGEMENT

Bharat P Deshpande, J.- [1] Heard Mr. Gaurish Agni with Mr. Kishan Kavlekar, learned Counsel for the Applicants and Mr. Parikshit Sawant, learned Counsel for the Respondents.

[2] Present revision is filed challenging the impugned order whereby the learned Trial Court rejected application under Order VII Rule 11 (a) and (d) of the Civil Procedure Code (C.P.C. for short) filed by the Applicants/Defendants No.19 and 20.

[3] A suit is filed for Declaration, cancellation of Deed of Relinquishment and Sale Deeds, Permanent and Mandatory Injunction under Sections 34, 37, 38 and 39 of the Specific Relief Act. The said suit is filed by Respondent No.1 and 2 against the other Respondents as well as the Applicants. Respondent No.1 is the daughter of Mrs. Meena Kumar Sawant and original Defendant No.1 Kumar Hari Sawant. Respondent No.2 is the husband of Respondent No.1.

[4] For the sake of brevity and convenience, parties are hereinafter called as Plaintiff and Defendant as arrayed in the suit.

[5] The suit is filed basically challenging the Deed of Relinquishment executed by Mrs. Meena Kumar Sawant, the mother of Plaintiff No.1 and registered on 21/04/2006, and subsequent Sale Deed executed by Defendant No.1 and others in favour of the other Defendants including Defendants No.19 and 20/Applicants herein.

[6] The Plaintiffs claimed that Deed of Relinquishment executed by Mrs. Meena Kumar Sawant on 21/04/2006 through the Power of Attorney executed in favour of Defendant No.2 Mr. Kamalakant is a void document and the same was executed by fraud, coercion and undue influence. The Plaintiffs claimed that Mrs. Meena Kumar Sawant was suffering from cancer and residing separately from her husband/Defendant No.1 at the relevant time. The Power of Attorney was executed under coercion in favour of Defendant No.2/Kamalakant. Mrs. Meena Kumar Sawant immediately

revoked the said Power of Attorney by issuing notice. At the relevant time, Plaintiff No.1 was minor and thereafter she went to complete her studies out of Goa. The said Meena Kumar Sawant passed away somewhere in 2014 and somewhere in the year 2022 when the Plaintiff No.1 was searching for the papers in the premises of Defendant No.1 who was diagnosed as a patient of COVID, came across certain documents i.e. Deed of Relinquishment, the Sale Deeds by which the suit property was sold to different persons including Defendants No.19 and 20. It is, therefore, her contention that the Deed of Relinquishment which was signed only by her mother is a void document obtained under misrepresentation, coercion and fraud and also that there was no consent of her husband while executing such document. Accordingly, all subsequent transactions with regard to the share of her mother are null and void. It is her contention that a cause of action to file suit arose on 14/09/2020 when Plaintiff No.1 came across the Deed of Relinquishment allegedly executed by her mother.

[7] Defendants No.19 and 20 who are the subsequent purchaser, appeared and filed an application under Order VII Rule 11 (a) and (d) of CPC which came to be rejected by the learned Trial Court on 19/08/2023 upon which the present revision is filed.

[8] Mr. Agni would submit that the suit/plaint is required to be rejected as there is no cause of action and secondly the reliefs claimed therein are barred by law of limitation. He would submit that the mother of Plaintiff No.1 by name Meena executed a Power of Attorney in favour of Mr. Kamalakant and on the basis of such Power of Attorney, Relinquishment Deed was executed in the year 2006. By the said Deed, mother of Plaintiff No.1 relinquished her disposable quota in the property. The mother of Plaintiff No.1 was alive till 2014 and she never challenged either the Power of Attorney or the Relinquishment Deed and subsequent transfer of part of the suit property in favour of third party.

[9] Mr. Agni would submit that from the year 2014 i.e. after death of mother of Plaintiff No.1, till the year 2022, there was no challenge thrown to the said documents including the Sale Deed even though Plaintiff No.1 was residing with Defendant No.1 i.e. her father.

[10] Mr. Agni would further submit that the suit was filed in the year 2022 challenging the Relinquishment Deed executed in the year 2006 and consequently the Sale Deed executed thereafter. He would submit that the main contention of the Plaintiff is that the Relinquishment Deed or the Power of Attorney was executed under duress, coercion and undue influence upon the mother of Plaintiff No.1.

[11] Mr. Agni would submit that except these three words disclosed in the suit, there are no specific pleadings as to what was the duress, coercion and undue influence exercised upon the mother of Plaintiff No.1 for the purpose of executing Power of Attorney. Besides, such aspect is particularly available to the mother of Plaintiff No.1

by name Meena and not to Plaintiffs as such alleged coercion, duress or undue influence was allegedly executed upon Ms. Meena and not upon the Plaintiffs.

[12] Mr. Agni would submit that the knowledge of Plaintiffs about such deeds in the year 2022 cannot by any stretch of imagination would be construed as the cause of action and that too in favour of the Plaintiffs.

[13] Mr. Agni would submit that in the subsequent proceedings, mother of Plaintiff No.1 was a party where she herself admitted that on the basis of Power of Attorney, Relinquishment Deed was executed and later on the suit property was sold to different persons. While pointing out to the tenancy case, Mr. Agni would submit that Mrs. Meena was one of the party to the said proceedings wherein she along with others filed an amendment and disclosed that the suit property was sold to third party and accordingly, the said tenancy case was disposed of.

[14] Mr. Agni would further submit that Plaintiff No.1 had no right in the suit property till the time of death of her mother. Thus, till December, 2014 when both of her parents were alive, the Plaintiff has no right in the suit property. The Relinquishment Deed was executed in the year 2006 and the same could have been challenged by only mother of Plaintiff No.1 on the ground of duress, coercion or undue influence since such facts are only available to the person against whom the same are exercised and no other person could challenge the documents on these grounds.

[15] Mr. Agni would submit that the Plaintiffs placed reliance on two letters which were found as signed by Mrs. Meena wherein she alleged that the Power of Attorney was executed by duress, coercion and undue influence. He submits that such letters could have been a basis for filing a suit by Mrs.Meena to challenge the Relinquishment Deed and subsequently the Sale Deeds. However, till her death which occurred in December, 2014, no such challenge was thrown and thus the period of limitation expired as far as challenging such documents by Mrs.Meena. The Plaintiffs cannot by clever drafting or by illusion, creating some story claim a cause of action which cannot be and could not have been considered for the purpose of deciding the actual cause of action.

[16] Mr. Agni would submit that Order VI of CPC mandates that the pleadings with regard to undue influence, duress or coercion must be explicit and give particulars. In the absence of such particulars, mentioning simply undue influence or duress would not be considered as cause of action.

[17] Mr. Agni would then submit that part of the suit property was purchased by Defendants No. 19 and 20 in the year 2006. Plots were made and one of such plots was even sold to the aunt of Plaintiff No.1 who is one of the Defendants in the suit. Two plots were sold to Defendant No.21. In all five buildings have been constructed and the construction of remaining buildings commenced somewhere in the year 2016 and that

too after obtaining necessary permissions. He submits that there is clear suppression of these facts which are clearly within the knowledge of the Plaintiffs who are very much present in Goa.

[18] Mr. Agni would then submit that there are no pleadings in the suit that the mother of Plaintiff No.1 by name Mrs.Meena had no knowledge of Relinquishment Deed and thereafter the Sale Deeds of the suit property, during her life time. He submits that Relinquishment Deed was duly registered with the Registrar of documents. Similarly, the Sale Deeds were also registered in the year 2006 itself. He would submit that such registration of a document is itself a notice to the parties as well as to the public. Thus, Mrs.Meena had knowledge of the execution of the mucRelinquishment Deed and the Sale Deeds, however, she did not challenge it till December, 2014 when she died.

[19] He would further submit that the Plaintiffs, therefore, have no cause of action to file the suit after a period of 16 long years from the date of the Relinquishment Deed and the Sale Deeds. The pleadings in this respect are vague and camouflage the main cause of action by creating an illusory cause of action. He would submit that there are no averments about the dates when the mother of Plaintiff No.1 started residing separately from her husband/ Defendant No.1. He submits that the mother of Plaintiff No.1 was very much conscious of her rights which is clear from her two letters which she wrote to the Power of Attorney and thereafter issued a public notice thereby revoking the Power of Attorney. However, before revoking of such Power of Attorney, the Deed of Relinquishment was already executed, and that too within the knowledge of Mrs. Meena. No grievance was raised by her. She could have challenged the Relinquishment Deed on the grounds which are now raised by the Plaintiffs. In fact, she herself being a party to the pleadings in a tenancy matter admitted about relinquishing the right and selling of the property.

[20] Mr. Agni would further submit that plaint along with all the documents are required to be considered for the purpose of finding about actual cause of action and the limitation which the learned Trial Court has completely failed to do so.

[21] Mr. Agni would further submit that the contention of the Plaintiffs that the Deed of Succession is void ab initio, cannot be challenged after a period of limitation is over. Even for declaration that the document is void ab initio, proceedings are required to be filed within time.

[22] Mr. Agni would submit that as per the Power of Attorney Act, there is a presumption that an act performed by such Power of Attorney Holder possesses the power given to him, unless it is proved otherwise. Finally, he claimed that Article 58 of the Limitation Act deals with limitation to challenge a document and sought declaration when the right to sue first accrues. In this case, the right to sue first accrues to Mrs. Meena, however, she did not challenge it and thus, the Plaintiff No.1 who was

not having any right in the suit property during the lifetime of her mother, is not entitled to claim any relief as tried to be made in the present proceedings.

[23] Mr. Agni relied on following decisions: T. Arivandandam v. T.V Satyapal and anr,1977 0 Supreme(SC) 313, The Church of Christ Charitable Trust & Educational Society v. M/S Ponniamman Educational Trust,2012 0 Supreme(SC) 427, Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra)(D) Thr LR s & Ors,2020 0 Supreme(SC) 442, Raghwendra Sharan Singh v. Ram Prasanna Singh (Dead) By LR s,2019 0 Supreme(SC) 283, Popat and Kotecha Property v. State Bank Of India Association Staff,2005 0 Supreme(SC) 1091, **K. Akbar Ali v. K. Umar Khan & Ors** [SLP(CIVIL)/3 1844/2018], **Rajendra Bajoria and Ors v. Hemant Kumar Jalan and Ors** [SLP(CIVIL)/2 779-2782/2019], S.P.Chengalvaraya Naidu(dead) by LRs v. Jagannath (dead) by Lrs and ors,1993 0 Supreme(SC) 1014, Elumalai @ Venkatesan & Anr v. M. Kamala and Ors,2023 Livelaw(SC) 65, **Xavier D'Souza and Anr v. Luis D'Souza and anr** [High Court of Bombay at Goa FA/22/2008] and **Shripad Yesso Naik and Ors v. Vasudev Yesso Naik and Ors** [High Court of 336 Bombay at Goa 69 SA/18/2018].

[24] Per contra, Mr. Sawant appearing for the Plaintiffs would submit that when a document is ab initio void, there is no requirement of any declaration but it can be challenged at any time and in any proceedings. He would submit that the Relinquishment Deed was executed allegedly by the Power of Attorney of Mrs. Meena without a consent of her husband i.e. Defendant No.1 which is a mandatory provision. He submits that such consent could have been made proper by a judicial process however no such proceedings were filed and thus the Deed of Relinquishment is itself void ab initio.

[25] Mr. Sawant would then submit that the plaint disclosed cause of action which has to be gathered from the bundle of facts pleaded in the plaint and therefore, the learned Trial Court has rightly concluded that there is a cause of action mentioned in the suit.

[26] Mr. Sawant would then submit that the Plaintiff No.1 was not aware of the Deed of Relinquishment since she was a minor at the relevant time and subsequently, went to take education outside Goa. Though Plaintiff No.1 returned to Goa, she was not aware about the Sale Deeds and other documents executed by the parties, however, when Defendant No.1/her father was diagnosed with Covid-19, he was put in isolation and at that time Plaintiff No.1 went to the house and during search, she found the Relinquishment Deed somewhere in the year 2022. Mr. Sawant would submit that this is the cause of action for the Plaintiff to challenge the Relinquishment Deed as well as Sale Deed as prior to that she had no knowledge.

[27] Mr. Sawant would further submit that the Plaintiffs also came across two letters addressed by her mother Mrs.Meena to Mr. Kamalakant wherein she clearly

disclosed that the Power of Attorney was executed by undue influence, duress and coercion and therefore she revoked such Power of Attorney by writing letters to them. Mr. Sawant would then submit that the mother of Plaintiff No.1 herself disclosed about coercion, undue influence which has been pleaded now by the Plaintiffs and since the documents itself is void ab initio, same could be challenged at any time and no limitation is necessary for it.

[28] Mr. Sawant would then submit that the question of limitation as well as cause of action as pleaded in the plaint is infact a mixed question of facts and law which requires a full fledged trial and the same cannot be decided only by considering the pleadings and the documents.

[29] Mr. Sawant relied on following decisions:

Prem Singh and Others v/s. Birbal and others, 2006 5 SCC 353, **Hilton Builders & Textiles Pvt. Ltd. v/s. Special Paints Limited & Anr**, 2014 7 AllMR 188, **Ganesh Keshav Patole v/s. Sheetal Sikandar Darne and another**, 2018 4 MhLJ 238, **Manguesh Gaonkar and others v/s. State of Goa and others** [PILWP 27/2018], Cross Country Hotels Ltd and Another v/s. Bhupinder Kumar Malhotra and others,2021 SCCOnLIne(Bom) 500 and H.S. Deekshit and Another v/s. Metropoli Overseas Limited and Others,2022 SCCOnLine(SC) 2024.

[30] Rival contentions fall for consideration as under.

[31] It is well settled that for deciding application under Order VII Rule 11 CPC, the plaint and the documents relied upon in the plaint can only be looked into to arrive at the conclusion whether there exists a cause of action and whether the suit is within limitation. Once it is found that there is no cause of action, there is no option with the Court but to reject the case. It is no doubt true that the remedy under Order VII Rule 11 CPC is drastic however the purpose is not to permit the party to unnecessarily protract the proceedings and to put an end to sham litigations so as to prevent wastage of judicial time. It is also well settled that the entire plaint has to read in a meaningful manner for the purpose of ascertaining the actual cause of action and the aspect of limitation. By clever drafting, the Plaintiffs cannot be allowed to bring the suit within the period of limitation. Only because some averments are made claiming to be cause of action, the Court is not duty bound to accept it as a real cause of action for filing of the suit.

[32] In order to ascertain factual aspect and more particularly the pleadings in the plaint together with documents relied upon, the plaint requires to be read in more meaningful manner so as to find out whether the cause of action mentioned therein is actually cause of action and whether the suit is without limitation.

[33] For this purpose the prayers in the suit/claim reads thus:

a) For judgment and decree of declaration that the deed of relinquishment of rights dated 21/04/2006 recorded at folio at 01 to 02 of deed book No. 690 is illegal, bad in law and void, ab- initio and is not binding on the plaintiffs and consequently stands cancelled.

b) For judgment and decree directing the Sub Registrar of Ilhas Panaji to cancel the registration of the said deed of relinquishment of rights dated 21/04/2006 from its record.

c) For judgment and decree of declaration that sale deed 28/11/2006 registered under registration No. 199 at pages 294 to 315 Book 1 volume No.1061 is illegal, bad in law and void ab-inito and is not binding on the plaintiffs and consequently stands cancelled.

d) For judgment and decree directing the Sub Registrar of Ponda to cancel the registration of the said sale deed dated 28/11/2006 from its record.

e) For judgment and decree of declaration that sale deed 28/11/2006 registered under registration No. 200 at pages 1 to 22 Book 1 volume No.1062 is illegal, bad in law and void ab-inito and is not binding on the plaintiffs and consequently stands cancelled.

f) For judgment and decree directing the Sub Registrar of Ponda to cancel the registration of the said sale deed 28/11/2006 from its record.

g) For judgment and decree of declaration that sale deed 29/01/2007 registered under registration No. 353 at pages 1 to 32 Book 1 volume No.1073 is illegal, bad in law and void ab-inito and is not binding on the plaintiffs and consequently stands cancelled.

h.) For judgment and decree directing the Sub Registrar of Ponda to cancel the registration of the said sale deed 29/01/2007 from its record.

i) For judgment and decree of declaration that sale deed 03/04/2013 registered under registration No.1132/13 at pages 212 to 227 Book No.1 Volume No.2308 is illegal, bad in law and void ab-inito and is not binding on the plaintiffs and consequently stands cancelled.

j) For judgment and decree directing the Sub Registrar of Ponda to cancel the registration of the said sale deed 03/04/2013 from its record.

k) For judgment and decree of declaration that mutation order dated 06/11/2008 passed by Mamlatdar of Ponda incorporating name of M/s Gold Dust the defendant No.19 in occupant's column of Form I & XIV of the suit property bearing survey No. 50/0 is illegal bad in law and nonest and is not binding on the plaintiffs and consequently set aside.

l) For judgment and decree of declaration that mutation order dated 07/11/2008 passed by Mamlatdar of Ponda incorporating name of M/s Gold Dust the defendant No.19 in occupant's column of Form I & XIV of the suit property bearing survey No. 51/0 is illegal bad in law and nonest and is not binding on the plaintiffs and consequently set aside.

m) For Judgment and decree of declaration that mutation orders both dated 14/05/2015 passed by the Mamlatdar of Ponda incorporating name of M/s Scholar Builders Pvt. Ltd. the defendant No.21 in occupant's column of Form 1 & XIV of the suit property bearing survey Nos. 50/0 and 51/0 are illegal bad in law and nonest and is not binding on the plaintiffs and consequently set aside.

n) For judgment and order of Permanent Injunction restraining defendants Nos. 14, 19, 20, and 21 their family members, agents, servants, labourers, workers, representatives, person/ persons claiming through or under the defendants Nos. 14, 19, 20, and 21 from in any manner inferring with the suit property and or suit plots A, B, C, D and B-1 and or interfering with the plaintiffs use and enjoyment thereof and or from carrying out any construction and or any work in the suit property / suit plots A, B, C, D and B-1 and or changing the nature of the suit property/ suit plot A, B, C, D and B-1 in any manner.

o) For judgment and order directing the defendant Nos. 14, 19, 20, and 21 not to create third party rights in respect of the suit property / suit plots A, B, C, D and B-1 pending the hearing and final disposal of the suit.

p) For judgment and order of Mandatory Injunction directing the defendants Nos. 14 and 21 to demolish any kind of structures, buildings or construction made in the suit property / suit plots A, B, C, D and B-1 and restore the land beneath the same to its original condition.

q) For judgment and order pending the hearing and final disposal of the suit restraining the defendants Nos. 14, 19, 20, and 21 their family members, agents, servants, labourers, workers, representatives, person/ persons claiming through or under the defendants Nos. 14, 19, 20, and 21 from in any manner inferring with the suit property and or suit plots A, B, C, D and B-1 and or inferring with the plaintiffs use and enjoyment thereof and or from carrying out any construction and or any work in the suit property and the suit plots A, B, C, D and B-1 and or changing the nature of the suit property / suit plots A, B, C, D and B-1 in any manner.

r) For any other and further reliefs as the Hon'ble Court deems fit and proper.

s) For Costs.

[34] As discussed earlier, Plaintiff No.1 is a daughter of deceased Meena and Defendant No.1 Kumar Hari Sawant. Deceased Meena expired somewhere in December, 2014. The Plaintiff No.1 was minor at the relevant time. It is claimed in the

suit/plaint that the marriage of deceased Meena and Defendant No.1 Kumar was without any ante-nuptial contract and thus, it was under the Communion of Assets. Both the Plaintiffs are the heirs and legal representatives of late Meena who expired on 13/12/2014. The Plaintiffs filed inventory proceedings No.72/2020/D in the Civil Court upon the death of her mother Meena. Paragraph 5 of the plaint shows that for the first time on or about 14/09/2020 and after obtaining the certified copy of the Deed of Relinquishment dated 21/04/2006, the Plaintiffs came to know or became aware that her late mother Meena relinquished her disposable quota on 21/04/2006 itself and when she was minor.

[35] Plaintiff No.1 then claimed that she passed SCC in the year 2010 and thereafter passed 12th standard in the year 2012. She got admitted in the Engineering College at Assagao and she completed her education in Bachelors in the year 2017. In the year 2018, she went to Pune for the purpose of taking coaching to answer the entrance exam for higher education. She had to return to Goa somewhere in 2020 due to the outbreak of Covid pandemic. Till that time Plaintiff No.1 was not aware of the Relinquishment Deed executed by her mother in the year 2006.

[36] The plaint para No.7 further discloses that on 02/08/2020 father/Defendant No.1 tested positive for Covid-19 and was under home isolation till 18/08/2020. On 05/08/2020, father/Defendant No.1 asked Plaintiff No.1 to go to his office situated on the ground floor of Hotel Sapna Apartments, Patto Panaji and collect keys of the flat which is situated in Greenland Co-operative Housing Society at Campal which was earlier occupied by her mother deceased Meena and to clean said flat as the Plaintiff's father/Defendant No.1 wanted to stay in the said flat during his isolation period. Accordingly, Plaintiff No.1 collected the keys of the said flat, from his office. While searching the keys of the said flat in the office of father, she came across a file containing papers of Regular Civil Suit No.88/ 2012/C which was filed by Mrs. Lalita Upendra Sawant @ Srujana Suresh Halarnkar against the father of Plaintiff No.1 and one Anil D'Souza and others. In the said file there was written statement filed by her father /Defendant No.1 and Anil D'Souza together with copies of two Sale Deeds dated 28/11/2006. Plaintiff No.1 clicked photographs from her mobile phone of the plaint and noted the details of two Sale Deeds as well as the Relinquishment Deed referred in the Sale Deeds. After going through the plaint of Regular Civil Suit No.88/2012/C, Plaintiff No.1 for the first time learnt that said Lalita Sawant who is an aunt of Plaintiff No.1 filed a suit since the suit property was sold by her father to said Anil D'Souza/ Defendant No.20. She also got the knowledge for the first time that her mother Meena relinquished rights by Deed dated 21/04/2006.

[37] Further in paragraph 10 of the plaint, Plaintiffs claimed that after collecting the key of the flat, Plaintiff No.1 went to Greenland Co-operative Housing Society at Campal along with one maid and while cleaning the said flat, she found in one cupboard a file containing medical papers in the name of her deceased mother Meena

along with such papers. She also found copies of two letters both dated 26/04/2006 addressed by her mother to Sidharth Kamalakant Sawant and Kamalakant Sawant along with an envelope addressed to Sidharth Sawnat which was returned by the postal authorities having endorsement "Intimation delivered on 28/04/2006". The Plaintiff No.1 also found two newspapers namely "Gomantak Times" dated 26/04/2006 and the receipt dated 25/04/2006 in the said cupboard disclosing that the public notice was issued by her mother thereby revoking the Power of Attorney executed by her in favour of Kamalakant and Sidharth on 10/01/2006 on the ground that such documents were executed by using undue influence, duress when Meena was undergoing treatment for cancer.

[38] The Plaintiffs then disclosed in paragraph No.12 of the plaint that Plaintiff No.1's parents were at loggerheads and litigating for divorce in the Court of law. The Plaintiff No.1 was minor at the relevant time however the relation between her parents were not cordial. It is only when Plaintiff No.1 found the copies of such documents, she became aware about the execution of Deeds on the strength of Power of Attorney which was executed due to undue influence and duress.

[39] The plaint further discloses that on the basis of such Deed of Relinquishment, the Defendant No.1 executed Sale Deeds in favour of other defendants on 28/11/2006. By virtue of such Sale Deeds the Defendants became owners of part of the said property. It is specifically claimed that subsequent documents executed on the basis of Relinquishment Deed itself is void document. Various documents have been referred by the Plaintiffs in the subsequent paragraphs including the correspondence and finally the plaintiffs claimed that since the said documents are void ab-initio, the Plaintiffs are in legal and physical possession of the suit property.

[40] Though it is admitted that various plots have been sold and buildings have been erected after obtaining necessary permissions from the respective departments, the cause of action is found mentioned in paragraph Nos. 61 and 62 wherein the Plaintiffs claimed that such cause of action raised on 14/09/2020 for cancellation of deed of relinquishment and the sale deed when the plaintiff No.1 came across such documents which were allegedly executed by her mother. She claimed that further cause of action had arisen a week back when the Plaintiffs noticed that an attempt made by Defendant No.21 to further carry out construction in a suit plot B. Accordingly, the plaintiffs claimed that the suit is with limitation.

[41] Two aspects are required to be looked into in an application filed under Order VII Rule 11 of C.P.C. As it is claimed by the Defendant that first of all there is no cause of action for the Plaintiff and secondly, the suit is barred by law of limitation. As discussed earlier, Plaintiff claimed in paragraphs number 61 and 62 that cause of action arose for them on 14.09.2020 for claiming the declaration that the Deed of Relinquishment is void and the Sale Deeds executed thereafter are required to be declared as null and void. Though, the cause of action is required to be considered as a

bundle of facts and it has to be gathered from the proceedings that is the pleadings in the plaint and the documents referred therein. The plaint would clearly go to show that various documents have been referred therein, including the suit filed by Mrs Lalitha Sawant against Defendant no. 1 and one, Mr Anil Dsouza bearing Regular Civil Suit No. 88 of 2012. These averments are found in paragraph 8 and 9 of the plaint. Similarly, the Plaintiff referred to various documents with regard to the sale transactions which are found from paragraph no. 26 onwards. Thus, these documents which are part and parcel of the plaint could be relied upon to find out whether there is cause of action and whether the suit is within limitation.

[42] In the case **T Arivandanam** (supra), the Apex Court while dealing with Order VII Rule 11 (a) of C.P.C. observed in paragraph 8 that while scrutinizing the plaint, it is the bounden duty of the Trial Court to ascertain materials for the cause of action. The cause of action is a bundle of facts which taken with the law applicable to them, gives the Plaintiff the right to relief against the Defendant. Every fact that is necessary for the Plaintiff to prove to enable him to get the decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". The cause of action must include some act done by the Defendant since in the absence of such an act, no cause of action can possibly accrue.

[43] Further in paragraph 13, the Apex Court observed that it is a settled law that where the document is sued upon and its terms are not set out in the plaint, but referred to in the plaint, such documents get incorporated by reference in the plaint.

[44] Thus, a statement made in the pleadings with reference to a particular document would entail the Court to consider such documents as part of the pleadings.

[45] In the case of **Manguesh Gaonkar and others v/s. State of Goa and others** [PILWP 27/2018] (supra), the Apex Court, while considering provisions of Order VII, Rule 11 of the CPC, discussed the ratio laid down in the case of **T. Arivandanam** (supra) and then observed in paragraph 15 that the reading of the averments, made in the plaint should not only be formal, but also meaningful. If clever drafting has created the illusion of cause of action and a meaningful reading thereof would show that the pleadings are manifested, vexatious and meritless, in the sense of not disclosing a clear right to sue, then the Court should exercise its powers under Order VII Rule 11 C.P.C., such suit has to be nipped in the bud at the first hearing itself.

[46] The Apex Court further in paragraph 18 in the case of **Rajendra** (supra) confirmed the findings. It is considered that the relief claimed in the plaint could not be granted in favour of the Plaintiff and this has been affirmed in paragraph number 19 while placing reliance in the case of the **Dahiben V. Arvindbhai Kalyanji Bhanusali**, 2020 7 SCC 366 and further quoted the observation in the case of **Dahiben** (supra) and more specifically in paragraph 23.3 to 23.6, which reads thus:-

23.6. Under Order 7 Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinising the averments in the plaint [**Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I**, 2004 9 SCC 512] read in conjunction with the documents relied upon, or whether the suit is barred by any law."

23.4. In Azhar Gandhi [**Azhar Hussain v. Rajiv Hussain v. Rajiv**, 1986 Supp1 SCC 315. in **Manvendrasinhji Jadeja v. Vijaykunverba, Gandhi, Followed Ranjitsinhji**, 1998 2 GLH 823: 1998 SCCOnLineGuj 281] this Court held that the whole purpose of conferment of powers under this provision is to ensure that a litigation which is meaningless, and bound to prove abortive, should not be permitted to waste judicial time of the court, in the following words: (SCC p. 324, para 12)

> "12. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless, and bound to prove abortive should not be permitted to occupy the time of the court, and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation, the court readily exercises the power to reject a plaint, if it does not disclose any cause of action."

23.5. The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order 7 Rule 11 are required to be strictly adhered to

23.6. Under Order 7 Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinising the averments in the plaint [**Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I**, 2004 9 SCC 512] read in conjunction with the documents relied upon, or whether the suit is barred by any law."

[47] In the case of **Shripad Naik** (supra) learned Single Judge of this Court, while dealing with a similar aspect and the question of limitation observed that the suit was filed after a period of 16 years challenging the impugned Wills executed in the year 1985. It was further observed in paragraph 37 that the burden of proving that the suit was instituted within prescribed period of limitation was on the Plaintiffs and thus, such pleadings were necessary. However, by clever or vague drafting, the Plaintiffs cannot attempt to pass off a suit instituted after the prescribed period of limitation as one instituted within. A bald assertion, without anything further that the Plaintiffs came to know of the impugned Wills only in the last week of December 1998, when the first defendant allegedly informed them about the same, is ordinarily not sufficient to bring a suit within limitation

[48] Further, the single judge in the case of **Shripad Naik** (supra) observed in paragraph 44 that when a document is registered, the date of registration becomes the date of deemed knowledge. In other cases, where a fact could be discovered by due diligence, then deemed knowledge to be attributed to the plaintiff because a party

cannot be allowed to extend the period of limitation by merely claiming that he had no knowledge. These observations are relevant for the purpose of The contentions raised by the Plaintiff is that she had no knowledge of the Relinquishment Deed till the year 2020.

[49] In the case of **Prem Singh** (supra), the Apex Court while dealing with the limitation and Section 3 observed in paragraph 17 that when a suit is filed by the Plaintiff for cancellation of a transaction, it would be governed by Article 59. However, even if Article 59 is not attracted, the residuary Article would be. Article 59 would be attracted when coercion, undue influence, misrepresentation, or fraud, which the Plaintiffs asserts is required to be proved. Article 59 would apply to a case of such instruments. It would, therefore, apply when a document is prima facie valid. However, it would not apply only to instruments which are presumptively invalid. The Apex Court also observed that when a document is valid, no question arises of its cancellation, however, when a document is void ab initio, the decree for setting aside would not be necessary as the same is non-est in the eyes of law as it would be a nullity.

[50] The Apex Court further observed in paragraph 27 that there is a presumption that a registered document is validly executed and thus, prima facie would be valid in law. The onus would be on a person who leads evidence to rebut such presumptions.

[51] In the case of **Hilton Brothers** (supra), the learned Single Judge of this Court, while dealing with the aspect of cause of action observed that the pleadings in the plaint accompanying with the documents would have to be taken into account and the Court must presume those facts as true and cannot look into the defence set out. The Court needs to consider whether on the facts pleaded by the Plaintiff treating them to be true, a cause of action is disclosed or not.

[52] In the case of **Ganesh** (supra), the learned Single Judge of this Court while considering the aspect of limitation, observed that it could be mixed question of fact and law on the basis of the pleadings in the plaint

[53] In the case of **Cross Country Hotels** (supra) the Division Bench of this Court was dealing with the aspect of return of plaint and also rejection of plaint as barred by limitation and it does not discuss the cause of action. The said decision is restricted to the facts and circumstances, of the matter therein as it was purely, decided on such facts, peculiar to the matter.

[54] In the case of **Salim D. Agboatwala** (supra), the Apex Court while dealing with an application under Order VII Rule 11 (d) C.P.C considered that the averments made in the plaint, may or may not be true, but if the Plaintiff succeed in establishing the said averment, the issue of limitation cannot be put against the Plaintiff.

[55] Keeping in mind, the above settled proposition of law referred by both the learned counsel, let us examine the plaint in order to find out whether the so-called

cause of action mentioned therein is illusory cause of action and whether the suit is within limitation.

[56] As discussed earlier in detail, Plaintiff No. 1 is the daughter of Miss Meena who expired in the year 2014. It is her contention that the marriage between Meena and Defendant No. 1 Mr. Kumar was of communion of assets. Thus, till the death of one of the spouse, inheritance is not open. Accordingly, Plaintiff No. 1, though the daughter of Mrs. Meena and Mr. Kumar, had no right in their property or even inheritance till the death of Meena, which occurred in 2014.

[57] Secondly, it is the contention of the Plaintiff that Mrs. Meena was residing separately from her husband Mr. Kumar and there was a divorce proceeding pending between them. Be that as it may, the fact remains that Mrs. Meena executed the Power of Attorney in favour of Mr. Kamlakant Sawant in January 2006. On the basis of such power of attorney, she relinquished her disposable quota in favour of other members of the family and such relinquishment deed was registered on 21.04.2006 before the Civil Registrar of Tiswadi Taluka. It is, therefore, clear from these averments that Mrs. Meena had knowledge of execution of Deed of Relinquishment through power of attorney. However, she did not challenge it till her last breath. Mrs. Meena expired somewhere in December 2014, that is after 8 years from executing the Deed of Relinquishment. Admittedly, Plaintiff No. 1 was minor at the relevant time, and since she had no right in the said properties of the couple, the question of Plaintiff challenging such deed of relinquishment would not arise specifically, when such deed was never challenged by Mrs. Meena during her lifetime.

[58] The Plaintiff would then claim that somewhere in August 2020, when she was searching for the key of the flat, in the office of Defendant No. 1 found the papers of Regular Civil Suit No.88 of 2012, and then while searching the flat where Mr.Meena used to reside she came across some letters which she claimed as cause of action for filing of the suit as well as limitation.

[59] First of all, the contention of the Plaintiff that the power of attorney executed by Mrs. Meena was under, duress, coercion, and undue influence, and therefore such power of attorney and subsequently, the Relinquishment Deed are null and void. In this respect, the Plaintiff in paragraph 10 claimed that she found two letters addressed by her mother to Mr. Kamlakant and Mr. Siddhart dated 26.04.2006 wherein Mrs. Meena has revoked the power of attorney in favour of Mr. Kamlakant on the ground that it was executed by her under undue influence, duress and coercion. It is required to note here that Deed of Relinquishment was registered before the Office of Registrar on 21.04.2006 whereas the alleged letter referred to by the Plaintiff and purportedly signed by her mother Mrs. Meena is dated 26.04.2006. It means that before issuing such a letter of revocation of the power of attorney, the Relinquishment Deed was executed.

[60] Even otherwise, the grounds of undue influence, duress or coercion were only available to late Mrs. Meena for the purpose of challenging the Relinquishment Deed though she revoked the power of attorney as alleged. The fact remains the that till her death which occurred somewhere year 2014, no suit or any proceedings were filed by Mrs. Meena for cancellation of the Relinquishment Deed or subsequent Deeds on the ground that the power of attorney was obtained from her by using undue influence, duress or coercion.

[61] It is necessary to know that such grounds of undue influence, duress or coercion are only applicable to the person who executes a document under such undue influence, or coercion. If such person is not challenging the Deeds on such grounds, in spite of the knowledge, his or her successor cannot be allowed to challenge such documents by illusory cause of action stating that the Plaintiff got the knowledge of such undue influence, duress only in the year 2020.

[62] Besides, the documents relied upon by the Plaintiff would clearly go to show that the letters relied upon by the Plaintiff dated 26.04.2006, only refer to the words "undue influence and duress". No details are disclosed as to in what manner such undue influence and duress was exercised against Mrs. Meena for the purpose of signing of the power of attorney and by whom. Even the plaint is silent about such contentions.

[63] It is well settled that pleadings are required to be made in detail by disclosing particulars in respect of fraud, duress, undue influence. Order VI Rule 4 of C.P.C mandates that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, or wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars shall be stated in the pleadings. Thus, by using only these words of undue influence or duress is not sufficient enough to launch the prosecution, which is clearly time barred by claiming that the plaintiff had no knowledge of it.

[64] One more aspect needs to be considered on the basis of alleged letters signed by Mrs. Meena on 26.04.2006 and forwarded to Mr. Kamlakant and Mr. Siddhart. If it is considered that these letters are signed by Mrs. Meena then it would reveal that she herself had a cause of action to file the proceedings for cancellation of Deed of Relinquishment on the ground that the Power of Attorney was executed under duress and undue influence. The plaint nowhere says that Mrs.Meena had no knowledge of the Deed of Relinquishment during her lifetime.

[65] On the other hand, there is material to show that Mrs. Meena had full knowledge of not only the Relinquishment Deed but the Sale Deed executed by her husband Mr.Kumar in favour of third parties in the year 2006, itself, disposing of the part of the property. This contention/fact is clear from the Judgement passed by Mamlatdar of Ponda on 09.08.2011 i.e. during the lifetime of Mrs. Meena. The said

proceedings were filed by one **Mr. Vinayak Nagesh Gaonkar and others Vs. Hari Upendra Sauto and Others.** Mrs. Meena along with her husband Mr.Kumar are parties as legal representatives of deceased Hari and shown as Respondent Nos. 2(b) and 2(c) in the judgment itself. The observation of the learned Mamlatdar and more specifically on page No. 11 (internal page) would reveal that the Opponents which includes Mrs. Meena filed an application for amendment of the Counter claim somewhere in the year 2011 which was allowed by adding the averments that the said Opponents Nos. 2 to 18 by virtue of two separate Sale Deeds dated 28.11.2006 and 28.11.2006 respectively, sold the entire suit property to Mr. Anil D'Souza and as such they are entitled for a declaration that the Applicants therein (Vinayak Nagesh Goankar) are not the tenants of the said property.

[66] There is a clear reference to these proceedings in the pleadings and the documents enclosed by the Plaintiffs. It further shows that even Meena who was one of the parties in the said proceedings filed an amendment application disclosing that the said property was sold to Mr. Anil Dsouza vide two Sale Deeds.

[67] Similarly, the copies of the Sale Deeds which are produced on record along with the plaint and more particularly dated 20.11.2006, there is clear reference to the Relinquishment deed executed by Mrs. Meena on 21.04.2006.

[68] One Sitabai Sawant raised objections to the mutation entries carried out in the name of Anil Dsouza which resulted in filing of the suit. There is reference in the plaint in respect of such suit which the Plaintiff found in the office of the Defendant No.1 somewhere in the year 2020. Thus, there is ample material on record to show that Mrs. Meena was fully aware of the deed of Relinquishment and the subsequent Sale Deeds executed in the favour of the third parties. She was alive till 2014 but failed to challenge it on any of the grounds.

[69] The period of limitation for challenging a Deed on the ground of fraud or otherwise is 3 years from the date of knowledge of such fraud, undue influence, or coercion. It is clear from Plaintiff's own documents that Mrs. Meena had clear knowledge as found mentioned in the said letter that the Power of Attorney was executed by duress or undue influence. Inspite of this knowledge she did not challenge either the execution of the Power of Attorney or the Deed of Relinquishment. Therefore, the period of limitation would clearly apply from the date of such knowledge by Mrs. Meena and not from the date of knowledge of the Plaintiffs herein. Admittedly, the Plaintiff being the daughter of Mrs. Meena and Mr. Kumar had no right in the said property till the death of Mrs. Meena. Even otherwise, a challenge could have been raised by Mrs. Meena during her lifetime on the ground of duress or undue influence which she failed to do. Thus, the so called cause of action which is disclosed in the plaint is an illusory cause of action which is not available to the Plaintiff.

[70] The contention that the Plaintiff is in possession of the suit property is again a statement which requires to be considered as made only for the creation of a cause of action. The documents placed on record would clearly go to show that Sale Deeds were executed in the year 2006, itself. Subsequently, Defendant Nos. 19 and 20 developed the said property by constructing buildings and by disposing of the flats therein. The construction activity commenced by obtaining the necessary permissions from the competent authority. The necessary conversion, licenses and other permissions were obtained by the Defendants from the year 2016 onwards and even few buildings are also erected therein. Thus, it is clear from the record that the Plaintiffs are not in possession of the suit property.

[71] The contention of Mr. Sawant that the Relinquishment Deed is ab initio void since there is no consent in writing of the husband of Mrs. Meena which is mandatory under the prevailing law. Even if it is considered that the Relinquishment Deed is ab initio void, the same was never challenged by Mrs. Meena during her lifetime when infact she had such an opportunity. When the Plaintiff filed a suit in the year 2022, she had to show that the suit was within limitation.

[72] For any action of declaration, there is a period of limitation as provided under the Limitation Act. It cannot be argued that the suit can be filed at any point of time on the ground that the document is ab initio void. In this case, the Relinquishment Deed was acted upon and further interest was created by executing Sale Deeds in favour of third parties. Thus, even if it is considered that the Relinquishment Deed is ab initio void, the same was never challenged by Mrs. Meena till her lifetime and infact by her silence or acquiescence, she permitted other parties to act upon it.

[73] Thus, the suit filed on the illusory cause of action is clearly required to be thrown out. The Plaintiff cannot claim the cause of action for itself on the ground that she was not aware of such deeds when infact Mrs. Meena had knowledge but did not challenge during her lifetime. After execution of Deed of Relinquishment and subsequently, the Sale Deed, Mrs. Meena was alive for more than 7 years. The registration of Deed of Relinquishment and the Deed of Sale before the Competent Authority is itself considered to be knowledge of execution of such documents to the concerned parties. Accordingly, the facts which are disclosed in the plaint would not constitute any cause of action in favor of the Plaintiff to launch the proceedings.

[74] Since the Plaintiffs are challenging the Deed of Relinquishment and subsequently the Sale Deeds which were executed way back in the year 2006, the suit is clearly barred by law of limitation as any declaration to that effect is required to be filed within a period of 3 years from the date when cause of action first accrues.

[75] The plaint would clearly go to show that it is an attempt of clever drafting so as to bring the suit within limitation as well as by creating illusory cause of action in favour of the Plaintiffs. Such attempt would therefore require to be nipped in bud.

[76] It is also found from the record that the Plaintiff has cleverly suppressed about the fact that there are 5 buildings coming up in the suit property and the construction is going on the basis of license issued by the competent authority. This also shows that by clever drafting the Plaintiffs are claiming that they are in possession of the suit property only because the documents are ab initio void.

[77] For all the above reasons, the impugned order passed by the learned Trial Court requires interference as to findings therein are not as per the settled proposition of law in respect of Order VII Rule 11(a) and (d) of C.P.C.

[78] Revision is therefore, allowed. The impugned order is accordingly quashed and set aside.

[79] The application filed under Order VII Rule 11 (a) and (d) of C.P.C. by Defendant Nos. 19 and 20 stands allowed.

[80] Accordingly, the plaint stands rejected.

[81] Parties shall bear their own costs.

2024(2)GOACC630

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Karnik; Valmiki Menezes]

Writ Petition No 1645 of 2024 **dated 04/09/2024**

Sugandha Sakharam Sawant

Versus

State of Goa; Custodian, Caixa Economica De Goa; Union of India

FAMILY PENSION CLAIM

Family Pension Claim - Petitioner sought release of family pension and arrears following the death of her husband, a retired employee who had previously secured a court order for permanent status and pension benefits - Husband retired in 2007 but passed away in 2024 after receiving pension benefits as directed by court - Petitioner, the widow, was entitled to family pension under applicable rules - Court allowed the petition, directing respondents to release family pension and arrears within six weeks but denied interest at 18% on delayed payments. - Petition Allowed

Law Point: A widow is entitled to receive family pension after the death of a pensioned employee - Courts may allow arrears but deny interest on delayed pension payments unless specific grounds justify it.

Counsel:

Vithal Naik, Ajay Borkar, S N Joshi, Swapna S N Joshi, Raviraj Chodankar

JUDGEMENT

M. S. Karnik, J.- [1] This petition filed under Articles 226 and 227 of the Constitution of India seeks a direction to respondent No.1 - State of Goa to forthwith release family pension in favour of the petitioner that was payable with effect from February 2024 along with interest at the rate of 18% per annum. It is further prayed that the arrears of pension payable to the late Sakharam Sawant be released in favour of the petitioner.

[2] The facts of the case in brief are as follows:

The petitioner's husband late Sakharam Sawant was initially employed as "Messenger" with respondent No.1 w.e.f. 01.10.1977 on a month to month basis without granting permanent status. In a Writ Petition bearing No.20/2002 filed by late Sakharam Sawant in this Court, by order dated 03.04.2003 the petition came to be disposed of directing the respondents herein to grant late Sakharam Sawant a permanent status with all consequential benefits w.e.f. 01.10.1991. By order dated 16.10.2006, the post held by late Sakharam Sawant was re-designated whereupon he was appointed as Peon in the office of respondent No.1 w.e.f. 01.10.1991. The employee retired on superannuation w.e.f. 30.10.2007. The employee filed Writ Petition No.301 of 2009 challenging the arbitrary action on the part of the respondents of not granting and not paying the pension and all other retiral benefits. By order dated 12.02.2013, this Court directed the respondents to grant and pay the pension and all other retiral benefits to the employee. The employee expired on 02.01.2024 at Goa Medical College, where he was undergoing medical treatment.

[3] The employee's son - Yeshwant Sawant addressed a communication dated 09.01.2024 to respondent No.1 about his death and that he is survived by the petitioner as his widowed spouse. Relying on the copy of the marriage and death certificate which was submitted to the office of respondent No.1 vide application dated 24.01.2024, a request was made to complete necessary formalities to determine and release the family pension payable to the petitioner after the death of the employee.

[4] Having heard learned counsel for the petitioner and learned counsel for the respondents, we are of the opinion that the present petition needs to be allowed. This Court had allowed the writ petition filed by the employee for being granted permanent status from 01.10.1991. Post retirement, the employee again had to file Writ Petition No.301 of 2009, when this Court by judgment dated 12.02.2013 directed the respondents to grant and pay to the employee all pensionary and other retiral benefits with interest at the rate of 12% per annum. Thus, the employee was in receipt of pensionary benefits. The employee died on 02.01.2024. The petitioner was designated as a person who was entitled to receive family pension after the death of employee. There is no serious dispute that under the applicable rules and regulations the petitioner is entitled to receive a family pension after the death of the employee. The

petition deserves to be allowed in terms of prayer clause (a) except the bracketed portion which reads thus: -

(a) Issue a Writ of Mandamus or in nature of mandamus directing and commanding the Respondent No.01 to forthwith release the family pension in favour of the Petitioner that was payable to the Petitioner with effect from February 2024 (along with interest at the rate of 18% per annum.)

[5] The respondents are directed to forthwith release the family pension in favour of the petitioner with effect from February 2024 along with arrears within a period of six weeks from today.

[6] The respondents are directed to release the arrears of pension, if any, which was payable to late Sakharam Sawant in favour of the petitioner within a period of six weeks from today.

[7] The petition is disposed of. No order as to costs.
