January 2023

Current's

GOA
CURRENT CASES

Editor
Rahul Mhaskar
(Advocate)

Mode of Citation
GoaCC

CURRENT DIGITECH

Published and Printed by:
Amit Nanda
for **CURRENT DIGITECH**
Gr. Floor, Karanjia Building,
651 J.S.S Road, Marine Lines (E),
Mumbai - 400 002
Tel.: (022) 22012143 * 22018485
E-mail: jainabook@gmail.com

Co-publishers:
BROADWAY PUBLISHING HOUSE
Ashirwad Building,
1st Floor, Near Cauclo Island,
18th June Road,
Panjim, Goa.
Tel.: (0832) 6647037
E-mail: bbcbooks@rediffmail.com

Annual Subscription : Rs. 3,100
Registered Post Charges : Rs. 240 (Optional)

Web Store : www.currentpublications.com
Mobile App : 'Current Publications'

*Published and Printed by Amit Nanda on behalf of Current Digitech. Ground Floor, Karanjia Building, 651 J.S.S Road, Marine Lines (E), Mumbai - 400002 Tel.: (022) 22012143 * 22018485 E-mail: jainabook@gmail.com*

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bothered to identify - Any finding on this substantial question of Law will make no difference because there is no legal evidence about execution or drawal of Gift Deed, which is a factor which goes to root - Appeal dismissed.

Gifts - External form of gifts of immobile assets - Gifts' Mortis Causa' - Applicability of - Upon conjoint construction of Articles 1457 and 1759 of Portuguese Civil Code, it is apparent that Article 1457 will apply only to Gifts which are to produce their effect upon donor's death where such Gifts are in nature of disposition of last wishes of donor - Therefore, at least title of Article 1457 refers to "Gifts' Mortis Causa" - Further, even plaintiffs understood Deed to give Fottu right to possess suit properties only after demise - If donor makes Gifts in contemplation of death or as expressing his last wishes in contemplation of death, then such Gifts will have to be construed in context of rules applicable to testamentary disposition, that is, Wills - Have to be construed in light of provisions of Article 1759 and or provisions of Code concerning testamentary dispositions - Article 1759 indeed provides that testamentary disposition shall lapse and have no effect in relation to heirs or legatees if such heir or legatees die before testator. [*Subash Fotu Bhandari; Sudir Bhandari; Shubada (Shraddha) Bhandari; Sudesh Bhandari; Shubhada Bhandari; Sachin Bhandari; Shreya Bhandari; Sushila Subhash Bhandari; Pandurang Fotu Bhandari; Mridula P Bh vs. Vassant Data Quenim Robolo; Mohinibai Keni; Khushalchand V Keni; Rekha K Keni; Vinayanand V Keni; Shaila V Keni; Premchand V Keni; Suhas Alias Radha Premchand V Keni; Chirag Keni; Roshini Keni; Roshan 2023(1)GoaCC 95*]

EXPRESSION "ABROAD"

Petition - Removal of Mahazans form voter list on ground that on ground that they do not have a permanent residence in Goa - Held - Article 24 of the Devasthan Regulations expressly permits the enrolment of members (mazanes) residing abroad, provided they satisfy the legal requirements - There is no dispute that the expression "abroad" means beyond the territories held by the Portuguese before Goa's Liberation on 19.12.1961 - The decision-making process leading to the deletion or the attempted deletion of 2352 Mahazans was flawed - The process violated the principles of natural justice and fair play and was aimed at overreaching the judicial process - The Secretary/Clerk acted ultra vires - The Managing Committee cannot simply resile from its earlier position by claiming that there can be no estoppel against the law - Petition allowed. [*Ramnath Vasudev Shanbhag; Dasa Ranga Shanbhag; Ashok Ranga Shanbhag; Lakshminarayana P Shanbhag; Vasanth Narayan Shanbhag; Madhav Keshav Shanbhag; Vasudev Damodar Shanbhag; Anirudh Aravind Pai; Anil M vs. Administrator of Devalaya; Managing Committee of Shree Ramnath Damodar Saunsthan; General Body of Shree Ramnath Damodar Saunsthan; Raunak Kamat Bambolkar; Nishad Nandan Hegde Dessai 2023(1)GoaCC 39*]

ILLEGAL CONSTRUCTION

Illegal construction - Show cause was issued - Petition was filed stating therein that even after issuance of show cause, illegal construction is carrying on - Held - During course of argument, parties stated that now construction is stopped - Since the main grievance of petitioner was inaction after issuance of show cause notice and the stop work order, Court dispose of this petition now that this grievance is substantially redressed - Rule disposed off. [*Dayanand U Narvekar S/o Late Tato Yeshwant Alias Uttam Narvekar vs. State of Goa; Chief Officer, Mormugao Municipal Council; Director of Municipal, Panaji-goa; Police Inspector, Vasco Police Station; Radha Panjikar W/o Rohidas Panjikar 2023(1)GoaCC 1*]

MUTATION CERTIFICATE

Mutation - Certificate of - When impugned orders were made under EPA, survey records clearly indicated petitioners' names as occupants - Petitioners have pleaded how at every stage, i.e. at stage of purchase, mutation or obtaining permissions from various statutory authorities, notices had been published in newspapers - There was no justification for making impugned order/certificate without even minimum compliance with principles of natural justice and fair play - No justification for not communicating impugned order/ certificate to petitioners - Impugned order under Sections 5 and 24 of EPA, quash and set aside - Mutation and order deletion of name of Custodian and restoration of petitioners' names in survey records concerning said property. [*Matangee Builders Pvt Ltd; M L S Marketing Pvt Ltd; United Realtech Pvt Ltd vs. Union of India; Custodian of Enemy Property For India; State of Goa; Mamlatdar of Bardez; Deputy Collector (Revenue) North Goa 2023(1)GoaCC 20*]

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PERMANENT INJUNCTION

Suit seeking recovery of possession and permanent injunction - Appellant relied upon a certificate issued by the Communidade and a Gift deed - Held - The Survey Book/Tombo was never produced or summoned for production - The terms and conditions subject to which the property Naicachem-batlem was granted were never established - Since identifying the suit property is one of the crucial issues in this matter, a certificate of this nature can hardly qualify as some titled document - The Gift Deed was executed on 8.2.1958, there is no reference to the boundaries of the gifted property - Even based on this Gift Deed of and in the absence of proper

identification of the suit property, the appellants cannot get any relief by way of recovery of possession or even injunction - Field Surveyor/ Commissioner reported that it was impossible to ascertain the exact correspondence of the old cadastral survey - The appellants, burdened with the task of at least identifying the suit property in respect of which they claimed their reliefs, failed to identify the suit property so - In any case, the appellants, having failed even to identify the suit property, much less establish their title to the same, cannot build any superstructure based upon some deficiencies in the cross-examination of their witnesses - Appeal dismissed. [*Pundolik Rama Gad; Rama Pundalik Ga; Janaki Rama Gad; Laximikant Pundalik Gad; Siddhesh Laxmikant Gad; Sarvesh Laxmikant Gad; Savita Laximikant Gad; Namdev Pundalik Gad; Namita Namdev Gad; Sanjay Pund vs. Ganesh P Deulkar; Mohan Alias Puttu Ganesh Deulkar; Damodar Ganesh Deulkar; Manguesh Ganesh Deulkar; Suvarna Prakash Priolkar; Prakash Kanta Priolkar; Pratiksha Prakash Priolkar; Parth Prakash Priolka 2023(1)GoaCC 24*]

PERMANENT INJUNCTION

Appeal is directed against judgments and decrees made by the first appellate Court and the Trial Court, respectively, declining the relief of permanent injunction - The doctrine of part performance in Section 53-A of the Transfer of Property Act is an equitable doctrine - Once the two Courts rightly dismissed the suit for specific performance, the Appellant's so-called possession became unauthorised and illegal, no question of protecting such illegal and unauthorised possession - Appeal is dismissed with costs. [*Ussein Gazi Son of Z A Gazi vs. Razia Shaikh 2023(1)GoaCC 120*]

PREPONDERANCE OF PROBABILITY

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QUANTUM OF COMPENSATION

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Chaudhary; New India Assurance Co Ltd 2023(1)GoaCC 126]

RELAXATION OF STANDARD OF SUITABILITY

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RENEWAL CERTIFICATE

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SELECTION PROCESS

Selection process - Arbitrariness - Held - Selection process could not be held to be arbitrary for adopting the procedure of overall evaluation of the candidate without fixing marks for each of the items - A case of arbitrariness or unreasonableness warranting judicial review is made out simply because the process could have been much better - Besides, in such selections, some element of subjectivity is inevitable, but to the extent reasonably possible, the same should be based upon some reasonably ascertainable objective criteria - Petition dismissed. [*Dr Liberia Dsouza; Dr Prithika E vs. State of Goa; Goa Dental College and Hospital; Department of Public Health; Dr Anosca Lira Menezes; Dr Cora Abigail Coutinho 2023(1)GoaCC 2*]

Case Pointer
GOA CURRENT CASES

2023(1)GoaCC1

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak; Bharat P Deshpande]

Writ Petition No. 2208 of 2022 **dated 15/11/2022**

Dayanand U Narvekar S/o Late Tato Yeshwant Alias Uttam Narvekar

Versus

State of Goa; Chief Officer, Mormugao Municipal Council; Director of Municipal, Panaji-goa; Police Inspector, Vasco Police Station; Radha Panjikar W/o Rohidas Panjikar

ILLEGAL CONSTRUCTION

Illegal construction - Show cause was issued - Petition was filed stating therein that even after issuance of show cause, illegal construction is carrying on - Held - During course of argument, parties stated that now construction is stopped - Since the main grievance of petitioner was inaction after issuance of show cause notice and the stop work order, Court dispose of this petition now that this grievance is substantially redressed - Rule disposed off.

[Para 8]

Counsel:

V Gadnis, S Parab, C Padgaonkar

JUDGEMENT

M. S. Sonak, J.

[1] Rule. The Rule is made returnable forthwith at the request and with the consent of the learned counsel for the parties.

[2] Heard Mr V. Gadnis for the petitioner, Mr Padgaonkar for respondent no.2, Mr. S. Parab, learned Additional Government Advocate for the State and Ms Radha Panjikar - respondent no.5 and her son Mr Hrishabh Panjikar are present in the Court.

[3] Respondent No.5 hands in a reply which is taken on record.

[4] In this case, the Municipality had issued a show cause notice to respondent no.5 based on the complaint of the petitioner that respondent no.5 was carrying on an illegal construction. The Municipality also issued a stop work order. There was some allegation that despite the stop work order, the respondent no.5 was continuing with the works.

[5] Ms Panjikar who is present in the Court now states that no construction is going on at present. This position is also not disputed by the learned counsel for the petitioner.

[6] Mr Padgaonkar states that respondent no.5 has already filed response to the show cause notice and the matter is posted for final hearing on 16.11.2022. Mr Padgaonkar states that the Chief Officer of the Council will give a hearing to both the petitioner as well as the respondent no.5 and dispose of the show cause notice as expeditiously as possible and in any case not beyond 05.12.2022. The petitioner and the respondent no.5 to cooperate with the municipal authorities for the expeditious disposal of the show cause notice.

[7] Mr Padgaonkar states that the decision on the show cause notice will be communicated to both the parties on or before 05.12.2022. We accept this statement and direct the Chief Officer to act accordingly.

[8] Since the main grievance of the petitioner was inaction after issuance of the show cause notice and the stop work order, we dispose of this petition now that this grievance is substantially redressed.

[9] We clarify that we have not examined the rival contentions about the legality or otherwise of the construction because we think that these matters must be examined at the first instance by the municipal authorities. Therefore all contentions of all parties on this issue are expressly left open.

[10] Rule is disposed of in the above terms without any order for costs

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2023(1)GoaCC2

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak; Bharat P Deshpande]

Writ Petition No 232 of 2022, 254 of 2022 **dated 18/11/2022**

Dr Liberia Dsouza; Dr Prithika E

Versus

State of Goa; Goa Dental College and Hospital; Department of Public Health; Dr Anosca Lira Menezes; Dr Cora Abigail Coutinho

SELECTION PROCESS

Constitution of India - Articles 16, 226 and 14 - Goa (Appointment to the Post Residents in the Goa Medical College) Rules, 1998 - Rules 6, 4, 3 and 8 - Selection process - Arbitrariness - Held - Selection process could not be held to be arbitrary for adopting the procedure of overall evaluation of the candidate without fixing marks for each of the items - A case of arbitrariness or unreasonableness warranting judicial review is made out simply because the process could have been much better - Besides, in such selections, some element of subjectivity is

inevitable, but to the extent reasonably possible, the same should be based upon some reasonably ascertainable objective criteria - Petition dismissed.

[Paras 50 to 59]

Law Point- A case of arbitrariness or unreasonableness warranting judicial review is made out simply because the process could have been much better.

Acts Referred:

Constitution of India Art. 16, Art. 226, Art. 14

Goa (Appointment to the post Residents in the Goa Medical College) Rules, 1998 Rule 6, Rule 4, Rule 3, Rule 8

Counsel:

S D Lotlikar, Sailee Kenny, D J Pangam, S Parab, S S Kantak, Preetam Talaulikar, Neha Kholkar, Saicha Desai, Linette Esmeralada Da Costa Rodrigues, Maria Correia

JUDGEMENT

M.S. Sonak J.

[1] Heard the learned Counsel for the parties.

[2] Rule. The Rule is made returnable immediately with the consent of and at the request of the learned Counsel for the parties.

[3] The learned Counsel agree that substantially common issues of law and facts arise in both these petitions and, therefore, both these Petitions can be disposed of by a common judgment and Order. However, Writ Petition No.254/2022 is taken as the lead petition.

[4] The Petitioners challenge the selection and appointment of Respondent No.4 to the post of Senior Resident in the Goa Dental College and Hospital against the vacancies advertised on 4/4/2022.

[5] The Petitioners' main contentions are as follows:

(A) The applicable rules provide precedence and not merely a preference to the candidates who have studied and have acquired a postgraduate degree through the Goa Dental College and Hospital. Therefore, since the Petitioners have studied and acquired the postgraduate degree through the Goa Dental College and Hospital, they ought to have been selected and appointed as the Senior Residents in precedence of the Respondents who have, admittedly, acquired the postgraduate degree of some other Dental College and Hospital from outside the State of Goa;

(B) In any case, and without prejudice, the selection in preference to the Petitioners was arbitrary and unreasonable. The Petitioners contend that there was no transparency in the selection process and, in any case, the declared selection process was deviated from for no good or valid reasons.

(C) In W.P. 254/2022, Petitioner contended that a defective advertisement was published and selection procedures were manipulated only to favour Respondent 4, daughter of the H.O.D in the concerned Department. Therefore malafides were involved in the selection process.

[6] Mr Lotlikar, the learned Senior Advocate for the Petitioners, elaborating upon the above contentions, submitted that the applicable rules have always been interpreted as rules providing precedence and not merely preference. He submitted that since last year, the rules have been misinterpreted as providing only a preference, provided all other parameters are equal. He presents that from the context, it is apparent that the rules provide for precedence and not merely a preference. He submits that a candidate who has studied and passed the postgraduate degree from the Goa Dental College and Hospital is best suited for Senior Residency.

[7] Mr Lotlikar presents that the Authorities have also had an opportunity to appraise the performance of such candidates over 4 to 7 academic years. He submits that the rules refer to a particular order for preference. He presents that from this, it is clear that the candidates included in the first category must be considered before the candidates in the second category can be considered and so on.

[8] For all the above reasons, Mr Lotlikar submits that the selection and appointments are a product of misinterpretation of the applicable rules are liable to be struck down. Therefore, he offers that the Petitioners must be selected and appointed on a correct interpretation of the rules. He relies on **Government of Andhra Pradesh vs. P. Dilip Kumar and another**, 1993 2 SCC 310; **Yatinkumar Jasubhai Patel and ors. vs. State of Gujarat and ors.** (Civil Appeal No.7939 of 2019 decided on 4/10/2019) and **Secretary, A.P. Public Service Commission vs. Y.V.V.R. Srinivasulu and ors.**, 2003 5 SCC 341 in support of his contentions.

[9] Mr Lotlikar, without prejudice to the above contentions, submits that at least until the last year, in terms of the information furnished under the R.T.I., the selections were based on 30 marks towards B.D.S. qualification, 30 marks towards M.D.S. qualification, 15 marks towards speciality related activities, like publications, presentation and others, 5 marks towards experience and 20 marks towards oral interview involving presentation and knowledge of the subject.

[10] Mr Lotlikar submits that there was a departure from this procedure for this year without any tangible reasons other than to favour the selected candidates. He submits that such a departure focussed entirely on 20 marks in the oral interview, where manipulations were easily possible and practised. He submits that Respondent No.4 is a daughter of a Professor in the same Department and these procedures were only to favour her. He presents that the advertisement was at variance with the rules and was also only to favour her. He submits that all this points to the arbitrariness in the selection process.

[11] Mr Lotlikar submits that the criteria for selection were never disclosed by the Respondents earlier. However, after selection, the Petitioner was furnished an extract of the marks obtained by the Petitioner at the oral interview. Even this chart refers to teaching/clinical experience and publications. However, marks were allotted only for the oral interview, which was a farce. He points out that the affidavit of the Dean, who was a member of the Selection Committee, clarifies that the aspects of experience and publications were not considered or rather, all postgraduate candidates were treated on an equal footing when it comes to experience or publications, and the selections were purely based on evaluation of the marks at the oral interview.

[12] Mr Lotlikar submits that this opaque procedure by which the selection committee vested unfettered and unguided discretionary power resulting in Petitioners being awarded one and two marks lesser than the selected candidates. Accordingly, Mr Lotlikar submits that the selection and appointment of Respondent No.4 in both Petitions is a product of arbitrariness. Opacity and unreasonableness.

[13] Apart from the above two main contentions, Mr Lotlikar submitted that the selection is vitiated because there was a variance between the advertisement and the rules. He submitted that the advertisement referred to obtaining BDS/MDS from the Goa Dental College and Hospital as a "desirable qualification". He offers that such a variance vitiates the entire selection process.

[14] For all the above reasons, Mr Lotlikar submitted that the Petitions are liable to be allowed, and the selections and appointments of Respondent No.4 in each of these Petitions are liable to be quashed and set aside. Instead, the Petitioners must be directed to be appointed as Senior residents.

[15] Mr D.J. Pangam, the learned Advocate General, submitted that the applicable rules, in terms, provide for a "preference" and not a "precedence". He offered that this is clear from the rules themselves, as also the context. He submits that if the Rule is interpreted as one of precedence or providing almost 100 % reservation for the candidates who have acquired postgraduate degrees from the Goa Dental College and Hospital, then the Rule would be violative of Articles 14 and 16 of the Constitution of India. He submitted with Mr Kantak that even if two interpretations were possible (though in this case, they were not), the interpretation that saves the Rule from unconstitutionality must be adopted. They relied on **Secretary (Health), Department of Health and F.W. and another vs. Dr. Anita Puri and ors.**, 1996 6 SCC 282; **Bibhudatta Mohanty vs. Union of India and ors.**, 2002 4 SCC 16; **State of U.P. and anr. vs. Om Prakash and ors.**, 2006 6 SCC 474; **Maharashtra Public Service Commission, through its Secretary vs. Sandeep Shriram Warade and ors.**, 2019 6 SCC 362 and Y.V.V.R. Srinivasulu (supra) in support of their contentions.

[16] The learned Advocate General pointed out that in Y.V.V.R. Srinivasulu (supra), the decision in P. Dilip Kumar (supra) was distinguished and limited. He

pointed out that in Parmar Alpaben Sanabhai (supra), the Division Bench of the Gujarat High Court held that a rule providing for virtual precedence or reservation to candidates from a university in Gujarat would be violative of Articles 14 and 16 of the Constitution of India.

[17] The learned Advocate General submitted that there was no arbitrariness or unreasonableness involved in the selection process. He offered that the post of Senior Resident was only a tenure post for three years. The Selection Committee considered experience, publications and performance at the oral interview. He submitted that there was no requirement to award separate marks under each heading. He relied on **Keshav Ram Pal (dr), Reader and Head of Sanskrit Department vs. U.P. Higher Education Services Commission, Allahabad and ors.**, 1986 1 SCC 671 and **Kiran Gupta and ors. vs. State of U.P. and ors.**, 2000 7 SCC 719 in support of these contentions.

[18] Mr. S.S. Kantak, learned Senior Advocate appearing for the Respondents in Writ Petition No. 232/2022, supplemented the contentions of the learned Advocate General. He submitted that the publications and experience are implicit during postgraduate study. He, therefore, offers that there was no infirmity in treating all P.G. candidates on an equal footing and basing the selection on the performance during the oral interview. He relies on **Governing Body Asom Jyoti Junior College vs. Indira Devi and ors.,2016 SCCOnLineGau 165** and **The Chairman Tangedco and anr. vs. Priyadaarshini** (Civil Appeal No.6470/2021 decided on 27/10/2021) in addition to the decisions relied upon by the learned Advocate General.

[19] In rejoinder, Mr Lotlikar mainly reiterated his original submissions and dealt with the authorities cited on behalf of the Respondents. He submitted that the State was not justified in misinterpreting the Rules or urging that a rule of institutional precedence for employment was unconstitutional. He offered that a classification based upon such a premise would not fall foul of Articles 14 and 16 as urged by the Advocate General.

[20] The rival contentions now fall for our determination.

[21] The selections and the appointments to the post of Senior Resident at the Goa Dental College and Hospital are governed by the Goa (Appointment to the post Residents in the Goa Medical College) Rules, 1998. Though these rules pertain to the posts of Residents in the Goa Medical College, by an order dated 18/12/1989, the Government has provided that the Goa (Appointment to the posts of Senior Residents in Goa Medical College) Rules, 1989 shall also apply mutatis mutandis to the Goa Dental College and Hospital. Though this Order refers to the 1989 rules that the 1998 Rules supersede, by resorting to the General Clauses Act, the Order would have to be construed as referring to the 1998 Rules. There was no dispute on this score. In fact, the Petitioners relied upon the 1998 Rules to support their Petitions.

[22] Rule 4 of the 1998 Rules referred to eligibility for the post of Senior Residents, and the same is transcribed below for the convenience of reference:

> "4. Eligibility for the post of Senior Residents:- Every candidate applying for the post of Senior Resident (except the super speciality of Cardiology, Nephrology, and Neuro-Surgery) shall possess the following qualification, namely:-
>
> (a) A recognized 'Medical qualification included in the First or Second Schedule of Part II of the Third Schedule (other than licentiate qualifications), to the Indian Medical Council Act, 1956 (Central Act 102 of 1956). Holders of qualification included in Part II of the Third Schedule should also fulfil the conditions stipulated in section 13 (3) of the said Indian Mcdical Council Act, 1956.
>
> (b) A postgraduate degree qualification in the concerned speciality.
>
> Provided that if no such candidate with postgraduate Degree qualification in the concerned speciality is available then candidates with three years experience as Junior Residents in the concerned speciality may be considered for a period of six months.
>
> Explanation: - If the Senior Resident, with three years experience as a Junior Resident in the speciality concerned is selected for a short tenure of six months. obtains his/her post graduate degree in the concerned speciality then he/she may be considered for extension for Senior Residency for the stipulated period; however, the total period of Senior Residency shall not extend three years duration."

[23] The Petitioners' entire case is based upon Rule 6 of the 1998 Rules, entitled **"Preferences"**. The Petitioners contend that though the Rule may be entitled "Preferences", the same, in fact, provides for precedence and not merely preference. To appreciate and evaluate this star contention, Rule 6 of the 1998 Rules is transcribed below for the convenience of reference:-

> "6. Preferences:- (1) While selecting candidates for appointment to the post of Senior Residents, except for the post of Senior Resident in Cardiology/ Nephrology/Neuro-Surgery, preference Shall be in the following Order:-
>
> a) Candidates who have studied and have acquired postgraduate degree through the Goa Medical College:
>
> b) Candidates who have worked in the Goa Medical College as Junior Residents in the concerned speciality for a period of three years.
>
> (c) Candidates with postgraduate degree acquired through colleges other than the Goa Medical
>
> (2) In case of appointments to the post of Senior Residents in Cardiology/ Nephrology/Neuro-Surgery, where a candidate with postgraduate degree in

the concerned speciality i.e D. M. (Cardiology)/D. M. (Nephrology)/M. Ch. (Neuro-Surgery), is not available, then preference shall be given in the following Order, while selecting candidates for the said pot:

(a) M. D. in General Medicine (for the posts in Cardiology/Nephrology) or M. S. in General Surgery (for the posts in Neuro-Surgery) acquired through the Goa Medical College;

(b) 3 years Junior Residency in Medicine (for the posts in Cardiology/ Nephrology) or 3 years Junior Residency in Surgery (for the posts in Neuro-Surgery) done in the Goa Medical College:

(c) M. D. in General Medicine (for the posts in Cardiology/Nephrology) or M.S. in General Surgery (for the posts in Neuro-Surgery) acquired through Colleges other than the Goa Medical College:"

[24] The 1998 Rules do not provide any specific selection process guidelines. However, Rule 3 provides that the Departmental Selection Committee shall comprise the Dean, Goa Medical College, the Head of the Department in the concerned speciality and the Director of Administration. Further, Rule 8 provides that the eligible candidates will be called for an oral interview and shall not be entitled to any TA/DA for appearing for the interview.

[25] Initially, the Petitioners had raised a challenge to the composition of the Departmental Selection Committee. However, this challenge was specifically given up and not pressed during arguments.

[26] Regarding the ground that Rule 6 provides for precedence and not a preference, we must say at the outset that a plain reading of Rule 6 does not support such a contention. The Rule is entitled "Preferences". The expression "in the following order," upon which much stress was laid by Mr Lotlikar, only means that when it comes to giving preference, the candidates who have studied and acquired postgraduate degrees through the Goa Dental College and Hospital would be preferred over the candidates who have worked in the Goa Dental College and Hospital as Junior Residents in the concerned speciality and, further, these candidates would have a preference over the candidates with a postgraduate degree acquired through the colleges other than the Goa Dental College and Hospital.

[27] Therefore, the expression "in the following order" in Rule 6, does not lead to the construction that as long as the candidates who have studied and acquired postgraduate degrees through the Goa Dental College and Hospital are available, there is no question of even considering other candidates like the candidates who may have obtained postgraduate degrees through the colleges other than Goa Dental College and Hospital. Hence, this expression does not convert a rule providing for preference into a rule providing for precedence or, even further, a rule providing for cent per cent reservation in favour of the candidates who have studied and acquired postgraduate

degrees through the Goa Dental College and Hospital. If this was the intention, surely the Rules should have been more precise and differently worded.

[28] Mr Lotlikar's contention that Rule 6, until the last year, was interpreted or construed as a rule providing for precedence and not merely a preference is not supported by any material placed on record. Firstly, there are no pleadings on this aspect. Secondly, the State has denied this position. Finally, the learned Advocate General submitted that at no stage was Rule 6 construed or interpreted as a rule providing precedence and not just a preference. The learned Advocate General went to the extent of submitting that construing Rule 6 as one of precedence or providing cent per cent reservation for the candidates who have studied and acquired postgraduate degrees through the Goa Dental College and Hospital would expose the Rule to the vice of unconstitutionality under Articles 14 and 16 of the Constitution of India. In these Petitions, we need not go into the issue of Constitutionality, but suffice to record the stand of the State of Goa on this subject.

[29] Even the context in which Rule 6(1) is placed does not support the contention advanced on behalf of the Petitioners. For instance, Rule 4 of the same 1998 Rules, which concerns the eligibility for the post of Senior Resident, inter alia, provides that a minimum qualification shall be a postgraduate degree in the concerned speciality. However, the proviso to this Rule provides that if no such candidate with a postgraduate degree qualification in the concerned speciality is available, then candidates with three years of experience as Junior Residents in the concerned speciality may be considered for a period of six months.

[30] The language in Rule 4 clearly indicates that as long as a candidate with a postgraduate degree qualification in the concerned speciality is available, there is no question of considering a candidate without a postgraduate degree qualification but having three years of experience as a Junior Resident in the concerned speciality. This is clearly a Rule of precedence where one class of candidates elbow out or secure en block precedence over the other. Thus, the rules are pretty clear about where they intend to provide precedence. Such precedence is, however, neither provided in Rule 6 nor the scheme of the 1998 Rules. Therefore, neither the text of Rule 6 nor the context in which it is placed supports the construction proposed by Mr Lotlikar.

[31] P. Dilip Kumar (supra), the mainstay of Mr Lotlikar's contention, is not of much assistance to the Petitioners because, in that case, though the Rule was not very clear, the executive instructions or the Memo dated 13/10/1978 issued to supplement the Rule, had clarified that for any particular year the list of eligible candidates with postgraduate qualification shall be first considered in Order of their seniority and only after such a list was considered, cases of ordinary graduates shall be considered.

[32] The Memo further clarified that the expression “preference shall be given” occurring in the said Rule, was meant that everything, such as the passing of prescribed tests, maintaining merit, suitability, fitness, etc., being equal, preference

shall be given at every selection or preparation of panel for appointment as Assistant Engineers to the holders of postgraduate qualifications. After providing the said preference, the claims of less qualified candidates who are also eligible for appointment would be considered. Therefore the combined or conjoint reading of the Rule supplemented by the Memo made the Rule of precedence, and not simple preference, evident.

[33] The Hon'ble Supreme Court, on an interpretation of the Rule, read with the Memo dated 13/10/1978, concluded that the postgraduates were to be treated as a class entitled to en block precedence over candidates lacking the postgraduate qualification, admittedly a higher qualification. Accordingly, they were to be given precedential treatment over others who might have secured more marks in the open category. The Hon'ble Supreme Court also noted that the High Court, in Writ Petition No.2568/1982, had already issued directions to this effect that bound the parties.

[34] In the present case, Rule 6(1) is not ambiguous, nor are there any executive instructions like the Memo dated 13/10/1978. Instead, the State's stance is clear that Rule 6 provides only a rule of preference, not a precedence. Thus, P. Dilip Kumar (supra) is clearly distinguishable.

[35] In Y.V.V.R. Srinivasulu (supra), the Hon'ble Supreme Court considered the decision in P. Dilip Kumar (supra). It held that the same not only turned on the peculiar scheme and context of the service rules under consideration but also that the said decision did not proclaim to lay down any general rule of universal application for all cases. As a matter of fact, even the said decision admitted the possibility of more than one interpretation too, and, therefore, was wholly inapplicable in the context and requirement of the provisions involved in the case of Y.V.V.R. Srinivasulu (supra).

[36] In Y.V.V.R. Srinivasulu (supra), the Hon'ble Supreme Court held that the meaning of “preference” when selection is made based on merit assessed through the competitive examination and interview, would mean other things being qualitatively and quantitatively equal, those having additional qualification would be preferred. It does not mean en bloc preference irrespective of inter se merit and suitability. Therefore, it cannot work as a reservation or complete precedence.

[37] In Dr Anita Puri (supra), the Hon'ble Supreme Court held that when an advertisement stipulates a particular qualification as the minimum qualification for the post and further stipulates that preference would be given for higher qualification, the only meaning it conveys is that some additional weightage has to be given to the higher candidates with higher qualification. Therefore, it cannot be construed as a person with a higher qualification is automatically entitled to be selected and appointed. In adjudging a person's suitability for the post, the expert body like Public Service Commission, in the absence of any statutory criteria, has the discretion of evolving its mode of evaluation of merit and selection of the candidate. Hence, the High Court was wholly in error in holding that a person possessing an M.D.S. degree

was entitled to be selected and appointed even though Respondent No.1 did not possess an M.D.S. degree (preferential qualifications) and had secured higher marks in the selection process.

[38] In Bibhudatta Mohanty (supra), a preference was provided for an S.S.C. passed candidate. However, the Hon'ble Supreme Court held that the preference clause for higher qualification does not mean that irrespective of the fulfilment of other norms, S.S.C. passed has to be preferred. Where any rule or guideline provides preference in respect of some higher qualification, it only means that all other requirements being equal, a person possessing higher educational qualification will be preferred. Therefore, it cannot be considered the sole criterion for preference in selection and appointment.

[39] Thus, even the precedents on the subject do not assist the construction proposed by Mr Lotlikar on behalf of the Petitioners. Moreover, even a plain reading of Rule 6(1) of the 1998 Rules does not support the Petitioners' contention that the Rule provides for a "precedence" even though it refers to "preferences".

[40] For all the above reasons, the Petitioners' first contention about Rule 6(1), providing for precedence and not merely a preference, will have to be rejected.

[41] Regarding arbitrariness and unreasonableness, we note that the rules alone do not provide any statutory criteria for selections and appointments. The rules only provide for the constitution of the Departmental Selection Committee (Rule 3), and Rule 8 provides that the eligible candidates will be called for an oral interview.

[42] Without any prescribed statutory criteria, the Departmental Selection Committee will, undoubtedly, have the power to adopt some selection criteria. But this is not a charter to adopt unfair, opaque or arbitrary criteria. The criteria to be adopted must be fair and transparent, having some reasonable nexus with the assessments of the candidates for the job requirements. As far as possible, the criteria must be determined in advance and declared so that the candidates have a fair idea of what is expected of them. In addition, there must be some consistency in following the adopted criteria rather than applying random criteria for each position or selection. However, as long as the criteria adopted are not arbitrary or unreasonable, typically, a power of a judicial review would not be exercised by a writ Court.

[43] The material on record does prima facie suggest that for some selections in 2021, the Departmental Selection Committee adopted the following criteria for selection to the post of Senior Residents:

SR. NO.	NAME	BDS (30)	M.D.S. (30)	SPECIALTY RELATED ACTIVITIES (15)			E.X.P.E.-R.I.E.N.C.E. (05)	ORAL INTERVIEW (20)		TOTAL	RE-MARKS
1	2	3	4	5			6	7		8	9
				Publi-cation (a)	Presen-tation (b)	Other (c)		Presen-tation (a)	Subject (b)		

[44] However, the affidavit filed by the Dean of the Goa Dental College and Hospital explains that the above criteria were not followed for selecting the post of Senior Residents in 2022. There was no clarity, however, on the criteria followed. The selections for 2021 were also challenged, but before the Petitions could be finally decided, the Petitioners in said Petitions were granted Senior residency. Therefore the Petitions were not pressed.

[45] Instead, for the selection in 2022, with which we are presently concerned in these Petitions, the tabular chart that gives some inkling of the criteria adopted by the selection committee reads as follows:

Sr. No.	Name	Documents Verified	Interview 20 Marks	Experience		Publications	
				Teaching	Clinical	Published	Non Published

[46] From the returns filed before us and the consolidated mark list produced before us, it is evident that the Petitioner in Writ Petition No. 254/2022 secured 16 marks out of 20 in the interview and Respondent No.4 (selected candidate) secured 18 marks out of 20 marks. Similarly, the Petitioner in Writ Petition No.232/2022 secured 15 marks out of 20 and Respondent No.4 (selected candidate) secured 16 marks out of 20.

[47] Mr Lotlikar did submit that there was no reason pointed out in the affidavit for deviation from the selection criteria in the year 2021, which amounts to arbitrariness and unreasonableness. He also submitted that failure to award separate marks for experience and publications suggests arbitrariness and unreasonableness.

[48] Finally, Mr Lotlikar presents that the affidavit filed by the Dean makes it clear that the experience or publications were not even considered, and the entire selection was based on oral interviews. He submits that the oral interviews were a farce because no questions were posed to the Petitioners about their ability to discharge functions related to the post of Senior Resident. He submitted that even otherwise, cent per cent emphasis on oral interviews is arbitrary and unreasonable, mainly because Senior Residents are usually fresh graduates and instances of manipulation are rampant. He presented that the circumstance of one of the selected Respondents being a daughter of the H.O.D. also cannot be ignored from the context of the opaque selection process.

[49] Mr Lotlikar emphasized upon paragraph 20 of the Dean's affidavit, which reads as follows:

> "20.1 say that it is pertinent note that all postgraduate doctors stand on equal footing when it comes to the criteria of publication and presentation since most of them have done publications and presentations during their post-graduation courses. I further say that the Departmental Selection Committee

therefore has decided to conduct an evaluation based only on Oral interviews. I say that Oral interviews plays an important role in ascertaining/judging the candidate's personality, perception, ability, capacity and suitability. It is denied that the Oral interview was solely aimed at collecting information relating to the Petitioners testimonials and other related matters alone."

[50] Mr Lotlikar submits that from the above, it is evident that the entire evaluation was based only on oral interviews and nothing else. He presents that based on such subjective criteria fraught with all kinds of illegalities, the fact that Petitioners had studied and obtained their postgraduate degrees from the Goa Dental College and Hospital could not have been brushed aside. Additionally, he submits that the Petitioners' proficiency, by way of experience and publications, could not also have been brushed aside in the manner in which the same has been brushed aside.

[51] Although the statement in paragraph 20 of the Dean's affidavit is slightly disturbing, the same will have to be considered in the context of other statements in the affidavit and the pleadings in the Petition. For example, the Petitioners have admitted that the Selection Committee evaluated their certificates and testimonials. The Dean's affidavit also says so. In addition, the Petitioners have also admitted that they were questioned about their testimonials and certifications during the oral interviews.

[52] Therefore, though the statement in paragraph 20 of the Dean's affidavit appears to be a rather widely worded generalization, from the context, we accept the learned Advocate General's submission that the marks awarded for the interviews were based upon holistic consideration of not only performance of the candidates during the interviews, but also in the context of their experience and publications on which the candidates were interviewed.

[53] Besides, the learned Advocate General has made a statement before this Court that until some statutory criteria are prescribed for the selection of senior residents, the Departmental Selection Committees, in the course of oral interviews, will give full consideration to aspects like experience and publications so that there is no scope for allegations, even though the allegations in the present case were improper. He maintains that even in the present case, due credence was given to aspects like experience and publications when evaluating the certificates and testimonials of the candidates. He, therefore, submits that the statement in paragraph 20 of the affidavit of the Dean may be construed in its context and other statements in the affidavit and the pleadings in the Petitions.

[54] The tabular chart produced before us indicates that the Petitioner had two years of teaching experience but no clinical experience. Further, the Petitioner had seven publications (published) and three publications (non-published ?). Similarly, Respondent No. 4 had no teaching experience but two years of clinical experience. Besides, she had eight publications (published). Thus, though it is not for us to go into the comparative merits of the eligible candidates, it is not as if there was any wide

disparity between the experience/publication qualifications of the two candidates. The position is somewhat similar in the connected Petition, as well. Therefore, the statements in the Dean's affidavit appear to be in the context of these particular circumstances rather than some generalization of the status of all postgraduate candidates who may have quantitatively and qualitatively diverse sets of publications or experience.

[55] In these peculiar facts, even though we must record that we were somewhat disturbed by the statement in paragraph 20 of the Dean's affidavit and the lack of clarity on the precise criteria adopted, we think that no case is made out not to defer to the evaluation of the selection committee or infer any arbitrariness or unreasonableness in the selection process, warranting exercise of our extraordinary jurisdiction under Article 226 of the Constitution of India and quashing the selection process. This is more so because though allegations of malafide have been made, they are not made out as discussed later.

[56] The contention about the award of separate marks for each of the three heads cannot be accepted without any statutory criteria to this effect. In Keshav Ram Pal (supra), the Hon'ble Supreme Court has held that there cannot be any rule of thumb regarding the precise weight to be given to the various parameters. It must vary from service to service according to the requirements of the service, the minimum qualifications prescribed, the age group from which the section is to be made, the body to which the task of holding the interview test is proposed to be entrusted and a host of other factors. It is a matter of determination by experts. It is a matter for research. It is not for Court to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives. The contention about the obligation of the Interviewing Board to subdivide the marks under various sub-heads was, thus, rejected by the Hon'ble Supreme Court.

[57] Similarly, in Kiran Gupta (supra), the Supreme Court refused to set aside the selection process because separate marks were not awarded for factors like personality, knowledge of the subject, knowledge of current ideas and problems of the educational work, diagnostic attitude towards them; general knowledge, administrative ability regarding school management, self-expressive and impressive views, achievement in curricular activities of the regional and State levels. The Supreme Court, on careful consideration of such factors, concluded that overall evaluation, rather than awarding of marks for each item, will lead to proper and correct results. The Court also held that the selection process could not be held to be arbitrary for adopting the procedure of overall evaluation of the candidate without fixing marks for each of the items noted above.

[58] Therefore, while we think the selection committee must strive to adopt more transparent and pre-declared criteria for such selections, based on the pleadings and the material placed before us in the present matters, we do not think that a case of arbitrariness or unreasonableness warranting judicial review is made out simply

because the process could have been much better. Besides, in such selections, some element of subjectivity is inevitable, but to the extent reasonably possible, the same should be based upon some reasonably ascertainable objective criteria.

[59] In these cases, based on pleadings and the material placed before us, we accept the learned Advocate General's statement that necessary clarification would be issued about invariably taking into account the experience and publications for awarding marks at the oral interviews for selection to the post of Senior Resident until some statutory criteria are provided for such selections and appointments. Consistent with the statement of the Advocate General, the concerned Authorities must issue this clarification before any other posts of Senior Residents are filled up so that there is no ambiguity when the Departmental Selection Committee is convened for the selection of Senior Residents. The Committees or the Authorities must also consider pre-disclosure of the proposed criteria and strive to maintain consistency.

[60] The contention about malafides is not well established. However, just as no candidate must be favoured because she is the daughter of the H.O.D., such a daughter must also not be unduly punished or prejudiced on this count. Therefore, this fortuitous circumstance of birth and parentage must be irrelevant in selections for a public post. No material suggests that the H.O.D has played any role in the selection process. There are no pleadings about his alleged role. The allegation is vague and is denied. There was no case to allege malafides in W.P. no. 232/2022 because the selected candidate's father was not H.O.D. Based upon vague allegations without anything to back the same, no malafides can be inferred. The candidate's father was not even impleaded as a party. No finding of malafides can be recorded behind his back. Therefore the case based upon malafides is not made out.

[61] There is some problem with the advertisement issued. But it would not be correct to say that this mistake has any nexus with the allegation of malafides. The advertisement incorrectly refers to the preference requirement as a desirable qualification. Besides, it includes a reference to passing B.D.S from Goa College. Though these are mistakes, neither the Petitioners nor the selected respondents suffered or gained anything from them. This is also not a case where some other candidates could have been misled into not applying due to such mistakes. The mistakes, though they should be avoided in future, do not appear to have had any significant bearing on the selection process this year. Therefore based on such mistakes, the selection process does not need to be upset.

[62] Thus, for all the above reasons, we dismiss these Petitions by accepting the statement of the Advocate General and directing the Authorities to act accordingly before making any further selections for posts of senior residents. Accordingly, the Rule in both Petitions is disposed of in the above terms. Consequently, in the facts of the present cases, there shall be no order for costs

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2023(1)GoaCC16

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak; Bharat P Deshpande]

Writ Petition No 1261 of 2022 **dated 29/11/2022**

Fransalian Education Society

Versus

State of Goa; Inspector, General of Societies; Fr Valerian Carvalho (Msfs)

RENEWAL CERTIFICATE

Societies Registration Act, 1860 Sec. 3B, Sec. 3C, Sec. 4A, Sec. 3 - Renewal certificate - Issuance of - Section 3(C) of said Act was not attracted in present circumstances - Therefore, the Inspector General of Societies could not have refused renewal by resorting to Section 3(C) provisions of said Act - No other ground to decline renewal - Mere issuance of such renewal certificate will not prevent or prejudice - Respondent from pursuing claim of his removal or complaints about mismanagement of affairs - Those are independent matters which will have to be looked into by the appropriate authorities in accordance with the law - Similarly, suppose the Inspector General of Societies has any material for initiating action under the said Act against the governing body - Inspector General of Societies is free to resort to such action in accordance with the law

[Paras 19]

Law Point- Mere issuance of such renewal certificate will not prevent or prejudice

Acts Referred:

Societies Registration Act, 1860 Sec. 3B, Sec. 3C, Sec. 4A, Sec. 3

Counsel:

M Correia, C Padgaonkar

JUDGEMENT

M.S. Sonak, J.

[1] Heard Mr Shivraj Gaonkar for the Petitioner, Ms M. Correia, learned Additional Government Advocate for respondents nos.1 & 2 and Mr C. Padgaonkar for respondent no.3.

[2] Rule. The rule is made returnable immediately at the request of and with the consent of the learned Counsel for the parties.

[3] The Petitioner challenges an order dated 12.05.2022 made by the Inspector General of Societies, Panaji-Goa, which reads as follows:

"No.DRN/RS/42/2022 Dated: 12/05/2022

ORDER

Whereas an application for renewal was filed by Fr. Jerard Sahayaraj P. (msfs) except the Registration Certificate to be renewed, and whereas one of the Ex-Member, and claiming to be the Member of the Committee, Fr. Valerian Carvalho filed an objection for the said renewal.

And further Fr. Valerian Carvalho approached the Court of the Civil Judge Senior Division at Mapusa, Goa, in Reg. Civil Suit No.167/2021/G, for restraining the Renewal of Registration Certificate, and still the hearing in the said Court is pending for its decision.

Thereafter the Applicant for Renewal of Registration Certificate approached the Bombay High Court, at Porvorim-Goa, in Writ Petition No.397/2022(F), wherein the Court has directed this Office i.e the Respondent No. 2, to dispose the Renewal Application seeking Renewal of Application on or before 12/05/2022, and the decision also to be communicated to the Parties accordingly.

Accordingly since there is dispute amongst the Members in the Society, the matter is, referred to the Government under Section 3(C) for appropriate decision in the matter.

Sd/-

(Arjun Shetye)

District Registrar North/

Inspector General of Societies

Panaji-Goa

Copy To:

1. Fr. Valerian Carvalho

2. Fr. Jerard Sahayaraj P.(msfs)"

[4] There is no dispute that the Petitioner was registered as a Society under the provisions of the Societies Registration Act for the first time in the year 1978, that is, after the coming into force of the Societies Registration Act, 1860 or its extension to Goa after liberation.

[5] All these years, the Society's registration has been renewed from time to time by the Authorities. However, when the Petitioner applied for renewal on 10.06.2021, the same was not disposed of.

[6] The Petitioner instituted Writ Petition No.397/2022(F) before this Court pointing out that the possible reason for non-disposal was some complaints made by respondent no.3, who was removed as a member of the Society. Ultimately, this Court, by its order dated 05.04.2022, disposed of Writ Petition No.397/2022(F) after the

learned Advocate General made a statement that the Inspector General of Societies will now dispose of the Petitioner's application seeking renewal of the registration on or before 12.05.2022 and the decision will be communicated to the parties within the said period. At that stage, this Court was apprised of the position that respondent no.3 had already instituted a suit contesting his removal as a member of the Society.

[7] The Inspector General of Societies then issued the above-referred impugned order dated 12.05.2022. The perusal of the impugned order would indicate that the Inspector General of Societies has not bothered to take any decision but has attempted to only refer the matter to the Government under Section 3(C) of the Societies Registration Act for "appropriate decision in the matter".

[8] The above approach of the Inspector General of Societies conflicts with the statement made by the learned Advocate General on his behalf. In any case, even otherwise, the so-called decision or the approach of the Inspector General of Societies is contrary to the law under which he is expected to function.

[9] Section 3(B) of the Societies Registration Act provides that subject to the provisions of sub-section (2), a certificate of registration issued under Section 3 shall remain in force for a period of five years from the date of issue. Further, sub-section 2 provides that a Society registered under Section 3, whether before or after the commencement of the said Act, shall, on an application made to the Inspector-General on the expiration of the period referred to in subsection (1) and on payment of fees specified in sub-section (3) be entitled to have its certificate of registration renewed for five years, at a time.

[10] Proviso to sub-section (2) of Section 3(B) of the said Act provides that in case of a Society registered before the commencement of the said Act, the Inspector-General of Societies shall refuse to renew the certificate of registration, if, after giving an opportunity of showing cause against such refusal, he is satisfied that any of the grounds mentioned in Section 4(A) exist in respect thereof. Sub-section 3 of Section 3(B) of the said Act refers to the payment of fees about which there is no dispute.

[11] Section 3(C) provides that if any question arises whether any Society is entitled to get itself registered in accordance with Section 3 or to get its certificate of registration renewed in accordance with Section 3B, the matter shall be referred to the Government, and the decision of the Government thereon shall be final. In this case, the Inspector General of Societies has purported to invoke Section 3(C) of the said Act.

[12] As noticed earlier, Section 3(B)(2) of the said Act speaks about entitlement for renewal in five years at a time. The proviso to this sub-section is directed in the case of Societies registered before the commencement of the said Act. However, the petitioner Society was registered after the commencement of the said Act. Therefore, prima facie, this proviso will not apply.

[13] In any case, even the proviso contemplates the issue of a show-cause notice if it is proposed to refuse renewal. Further, the Inspector General of Societies will have to be satisfied at least prima facie about the existence of grounds mentioned in Section 4(A) of the said Act.

[14] Section 4(A) of the said Act deals with the power of the Inspector-General to call for information or returns from governing body of Society and provisions relating thereto. Sub-clause (1) refers to the Inspector General serving or causing to serve on the governing body entrusted with the management of the affairs of any society registered under this Act, a notice requiring it to furnish in such manner as may be prescribed, information or returns relating to persons employed by the Society, their conditions of employment and such other matters relating thereto, as may be prescribed.

[15] Admittedly, respondent no.3 was never an employee of the Society, but he was only a member of the Society before his removal. The issue of his removal is the subject matter of the suit instituted by respondent no.3, being Regular Civil Suit No.161/2021/G in the Court of Civil Judge Senior Division at Mapusa Goa. Merely because respondent no.3 may have also sought relief to restrain renewal of the registration certificate, the Inspector General of Societies, in the absence of any order, whether interim or final restraining him from granting renewal, could not have avoided deciding the issue by reference to Section 3(C) of the said Act.

[16] Section 3(C) of the said Act was not attracted in the present circumstances. Therefore, the Inspector General of Societies could not have refused renewal by resorting to Section 3(C) provisions of the said Act. Mr Gaonkar pointed out that this very Officer, on being approached by respondent no.3 with the dispute about his removal, had declined to interfere but suggested that Respondent no.3 approaches the civil Courts. This is evident from his communication dated 12.04.2021. Mr Gaonkar correctly expressed surprise that this very Officer changed his stance, entertained the dispute, and virtually declined renewal based upon the same dispute.

[17] The Inspector General of Societies was not required to go into the disputes between respondent no.3 and the Petitioner. However, Mr Padgaonkar pointed out that respondent no.3 had made serious allegations about mismanagement. Merely because such allegations have been made, renewal of registration cannot be refused without any regard to the impact on the operations in the schools managed and operated by the Petitioner. Furthermore, respondent no.3 is already before the civil Court in the context of his removal as a member of Society. In any case, the Inspector General of Societies is not expected to take sides or deny or delay renewal on such grounds.

[18] Accordingly, we quash and set aside the impugned order dated 12.05.2022 and direct the Inspector General of Societies, within a week from today, to issue the necessary renewal certificate. This is because we were informed that but for the

pendency of Respondent no. 3's dispute concerning his removal from the Society, there was no other ground to decline renewal.

[19] However, we clarify that the mere issuance of such renewal certificate will not prevent or prejudice respondent no.3 from pursuing the claim of his removal or the complaints about mismanagement of affairs. Those are independent matters which will have to be looked into by the appropriate authorities in accordance with the law. Similarly, suppose the Inspector General of Societies has any material for initiating action under the said Act against the governing body. In that case, the Inspector General of Societies is free to resort to such action in accordance with the law. However, based on such grounds, renewal cannot be presently refused.

[20] The rule is accordingly made absolute in the above terms. However, on this occasion, we refrain from imposing any costs on the Inspector General of Societies

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2023(1)GoaCC20

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak; Bharat P Deshpande]

Writ Petition No 218 of 2022 **dated 16/11/2022**

Matangee Builders Pvt Ltd; M L S Marketing Pvt Ltd; United Realtech Pvt Ltd

Versus

Union of India; Custodian of Enemy Property For India; State of Goa; Mamlatdar of Bardez; Deputy Collector (Revenue) North Goa

MUTATION CERTIFICATE

Constitution of India Art. 226 - Enemy Property Act, 1968 Sec. 5, Sec. 18, Sec. 24 - Mutation - Certificate of - When impugned orders were made under EPA, survey records clearly indicated petitioners' names as occupants - Petitioners have pleaded how at every stage, i.e. at stage of purchase, mutation or obtaining permissions from various statutory authorities, notices had been published in newspapers - There was no justification for making impugned order/certificate without even minimum compliance with principles of natural justice and fair play - No justification for not communicating impugned order/ certificate to petitioners - Impugned order under Sections 5 and 24 of EPA, quash and set aside - Mutation and order deletion of name of Custodian and restoration of petitioners' names in survey records concerning said property

[Paras 14, 15]

Law Point - Orders under EPA or consequent mutations made in breach of principles of natural justice and fair play were quashed and set aside.

Acts Referred:

Constitution of India Art. 226

Enemy Property Act, 1968 Sec. 5, Sec. 18, Sec. 24

Counsel:

M B Dcosta, Karishma Betquecar, Raviraj Chodankar, Siddhesh Patkar

JUDGEMENT

M. S. Sonak, J.

[1] Heard learned Counsel for the parties.

[2] Rule. The Rule is made returnable immediately at the request and with the consent of the learned Counsel for the parties.

[3] The petitioners challenge the order and certificate, both dated 27.09.2010 under Sections 5 and 24 of the Enemy Property Act, 1968 (EPA) and the mutation order in respect of property surveyed under No.97/3, Marra Village, Bardez Goa, effected based on the impugned order and certificate under the EPA.

[4] The predecessors in title of the petitioners purchased the above property (said property) in 1996 after issuing a public notice at the time of purchase. The present petitioners purchased the said property in the year 2006. They applied for mutation in the survey records, and based upon such application; the Talathi issued public notices in the newspapers having circulation in the locality. In the absence of any objections from any parties or authorities and based on the sale deed of 2006, the necessary mutation was carried out.

[5] The petitioners' names were included in the survey records (Form I & XIV) on 11.11.2006. On 15.11.2006, NOC was granted for amalgamation and construction of buildings in the said property. On 06.12.2006, the concerned Deputy Collector issued a Conversion Sanad and Village Panchayat issued a construction license. The petitioners have pleaded that on 10.03.2021, the petitioners paid the infrastructure tax for the building after completing an assessment. On 07.03.2022, the petitioners even sold a portion of the said property after issuing a public notice dated 03.09.2021, duly published in the newspapers having circulation in the locality.

[6] At this stage, when the petitioners applied for survey records (Form I & XIV), the petitioners were shocked and surprised to note that by Mutation Case No.79488, in December 2021, the petitioners' names were deleted and substituted with the name of "Custodian of Enemy Property" in the occupant's column. The petitioners have pleaded that this mutation comprising the deletion of the petitioners' names and the inclusion of the Custodian's name was effected without any notice to the petitioners or the minimum compliance with the principles of natural justice and fair play. Based on this, the petitioners instituted the present petition.

[7] After the petition was instituted, the petitioners were supplied with copies of the order and certificate dated 27.09.2010 under Sections 5 and 24 of the EPA, based

upon which the mutations were carried out. The petitioners have pleaded that neither the petitioners nor their predecessor in the title were heard before such order was made, nor was such order ever served upon the petitioners or their predecessor in title. Accordingly, the petitioners amended the petition and challenged the order and certificate dated 27.09.2010.

[8] Though the respondents have filed their returns, there is no denial of the fact that the impugned order and certificate dated 27.09.2010 were passed without the issue of any show cause notice or any other notice to the petitioners or their predecessor in title. Further, there is no record of communication/ service of these order/certificate to the petitioners or their predecessors in title. The basis for declaring the said property as the enemy property is also far from clear.

[9] Similarly, there is no denial of the fact that before mutation was effected in the survey records, no notice was issued, or there was no compliance with the principles of natural justice and fair play. Mr Patkar learned Additional Government Advocate only submitted that the mutation authorities complied with the request made by the Custodian based upon the impugned order/ certificate dated 27.09.2010.

[10] The petitioners are companies incorporated under the Indian Companies Act 1956. The order declaring their property as enemy property or deleting their names from the survey records visits the petitioners with serious civil consequences. Therefore, before such orders could be made or change effected, the concerned authorities were duty-bound to comply with the principles of natural justice and fair play. Admittedly, there was no such compliance in the present case.

[11] The issues raised in this petition are substantially covered by at least three decisions of this Court in **Shane Francisco Dias vs. Union of India**, 2020 1 BCR 186 , **Natalina Gonsalves, through Legal Heirs & Ors. vs. Union of India,2021 SCCOnLineBom 458** and **Nagaraj Avaghan vs. State of Goa & Ors. (Writ Petition-Stamp Number Main No.1606 of 2020 decided on 31.01.2022)** . All contentions raised in the counter filed on behalf of respondents no.1 and 2 were duly considered by the Division Benches of this Court and orders under the EPA or the consequent mutations made in breach of principles of natural justice and fair play were quashed and set aside.

[12] Mr Chodankar, however, pointed out that the petitioners have an alternate and efficacious remedy available under Section 18 of the EPA. He submitted that the petitioners can always file a representation to the Central Government against declaring their property as enemy property. Further, if such representation is rejected, the petitioners have the remedy of instituting an appeal to this Court. He submitted that this petition may, therefore, not be entertained.

[13] As noted earlier, at least three Division Benches of this Court considered and rejected similar contention based on the availability of alternate remedies. To the specific query as to whether any of the decisions had been challenged, Mr Chodankar

learned Standing Counsel for the Central Government replied that they had not been challenged. In any case, where the impugned order/certificate has been made in a flagrant breach of principles of natural justice and fair play, a petition under Article 226 of the Constitution of India can be entertained despite the petitioners having an alternate remedy available. This is a well-accepted exception to the convention based on alternate remedies.

[14] In the present case, by 2010 when the impugned orders were made under the EPA, the survey records clearly indicated the petitioners' names as occupants. The petitioners have pleaded how at every stage, i.e. at the stage of purchase, mutation or obtaining permissions from various statutory authorities, notices had been published in the newspapers. In such circumstances, there was no justification for making the impugned order/certificate without even minimum compliance with the principles of natural justice and fair play. Further, there was no justification for not communicating the impugned order/ certificate to the petitioners. Until the institution of the present petition, the petitioners have pleaded that they were not even aware of the impugned order/certificate.

[15] For all the above reasons and the reasoning in the three decisions of the Division Benches that we have referred to above, we quash and set aside the impugned order/certificate dated 27.09.2010 under Sections 5 and 24 of the EPA. Further, we also quash and set aside Mutation No.79488 and order deletion of the name of the Custodian and restoration of petitioners' names in the survey records concerning the said property bearing Survey No.97/3, Marra Village, Bardez, Goa. Such mutation is to be carried out within two months from today.

[16] However, we grant liberty to the respondents to take fresh steps in relation to the said property in terms of the EPA, 1968 and Enemy Property rules, 2015 should, in the opinion of respondents no.1 and 2, there exist grounds for taking such steps. However, such steps should include adequate notice to the petitioners so that there is no complaint of breach of principles of natural justice and fair play.

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

[18] There shall be no order for costs

2023(1)GoaCC24

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak]

Second Appeal No. 113 of 2006 **dated 14/11/2022**

Pundolik Rama Gad; Rama Pundalik Ga; Janaki Rama Gad; Laximikant Pundalik Gad; Siddhesh Laxmikant Gad; Sarvesh Laxmikant Gad; Savita Laximikant Gad; Namdev Pundalik Gad; Namita Namdev Gad; Sanjay Pund

Versus

Ganesh P Deulkar; Mohan Alias Puttu Ganesh Deulkar; Damodar Ganesh Deulkar; Manguesh Ganesh Deulkar; Suvarna Prakash Priolkar; Prakash Kanta Priolkar; Pratiksha Prakash Priolkar; Parth Prakash Priolka

PERMANENT INJUNCTION

Evidence Act, 1872 - Section 116 - Suit seeking recovery of possession and permanent injunction - Appellant relied upon a certificate issued by the Communidade and a Gift deed - Held - The Survey Book/Tombo was never produced or summoned for production - The terms and conditions subject to which the property Naicachem-batlem was granted were never established - Since identifying the suit property is one of the crucial issues in this matter, a certificate of this nature can hardly qualify as some titled document - The Gift Deed was executed on 8.2.1958, there is no reference to the boundaries of the gifted property - Even based on this Gift Deed of and in the absence of proper identification of the suit property, the appellants cannot get any relief by way of recovery of possession or even injunction - Field Surveyor/ Commissioner reported that it was impossible to ascertain the exact correspondence of the old cadastral survey - The appellants, burdened with the task of at least identifying the suit property in respect of which they claimed their reliefs, failed to identify the suit property so - In any case, the appellants, having failed even to identify the suit property, much less establish their title to the same, cannot build any superstructure based upon some deficiencies in the cross-examination of their witnesses - Appeal dismissed.

[Paras 35, 36, 38, 45, 46, 48 and 78]

Acts Referred:

Evidence Act, 1872 Sec. 116

Counsel:

S D Lotlikar, T Sequeira, Sudin Usgaonkar, T Mashelkar

JUDGEMENT

M S Sonak, J.

[1] Heard Mr S. D. Lotlikar, learned Senior Advocate, along with Mr T. Sequeira for the appellant and Mr Sudin Usgaonkar, learned Senior Advocate, who appears along with Ms T. Mashelkar and Shukr Usgaonkar for the respondents.

[2] The appellants are the original plaintiffs in Regular Civil Suit No.15/72/C seeking recovery of possession of the plot beneath the hut(house) occupied by Respondents (defendants) in the suit property and a permanent injunction to restrain the respondents - defendants from excavating or digging or causing damage or injury to the suit property.

[3] The suit property is described in the plaint as follows:

> "1. The plaintiffs are the owners and proprietors of the property known as "Naicachem Betullem", situated at Usgao and bears matriz no. 492, herewith for brevity sake is known as 'the said property'." The plaintiffs state that the said property has been surveyed in the recent survey under three survey numbers. The portion thereof on the northern side of the road is surveyed under survey nos.75/2 and 75/4 alongwith the properties belonging to Vasant Krishna Prabhu, Kusta Jagu Parab, Gopal Jagu Parab, Buka Jagu Parab, Shiva Parab, Shiva Anant Parab and Gurudas Shiva Parab. The suit property is distinct from the property belonging to Vasant Krishna Prabhu, Kusta Jagu Parab, Gopal Jagu Parab, Buka Jagu Parab, Shiva Anant Parab and Gurudas Shiva Parab and the same is identified in the plan annexed hereto and marked as Exhibit "A". The portion of the said property below the road is surveyed under no. 74/2. in the Record of Rights in the name of the plaintiff no. 1 alonwith the aforementioned Vasant Krishna Prabhu and others as occupants in respect of survey nos. 75/2 and 75/4. As far as the portion below the road, namely survey no. 74/2, is concerned, the name of the plaintiff no. 1 has been entered as the sole occupant thereof. Plaintiffs shall rely upon the Record of Rights in respect of survey nos. 75/2, 75/4 and 74/2 of Usgao Village, Ponda Taluka, and the survey plan alongwith the sketch annexed hereto as Exhibit "A". The said property is partly an agriculture land and partly cashew garden which belonged to Raghunath Ragoba Porobo.."

[4] The reference to survey nos.75/2, 75/4 and 74/2 of Usgao Village, Ponda Taluka, was after the amendment of the plaint.

[5] The Trial Court decreed the suit on 30.07.1985. The first appellate Court dismissed the respondents' Appeal on 16.06.1996. However, this Court, on 17.08.998, allowed the Second Appeal and remanded the matter to the trial Court, requiring the Trial Court to consider the cadastral survey plan and other documentary evidence for deciding the main controversy in the suit. This was because one of the main controversies in the suit revolved around identifying the suit property.

[6] As against the judgment and order dated 17.08.1998 in Second Appeal No.28/1996, the appellants instituted Civil Appeal No.5550/1999 before the Hon'ble

Supreme Court. This Appeal was disposed of by order dated 15.02.2005. The Hon'ble Supreme Court did not interfere with the judgment and order dated 17.08.1998 but directed the trial Court to dispose of the suit within six months and, in case any appeal was to be preferred against the decree of the trial Court, then, even the appellate Court was directed to dispose of the Appeal within six months of its institution.

[7] The Hon'ble Supreme Court noted that the High Court had concluded that the courts below should have taken into consideration the survey plan carried out by the government agencies and, accordingly, remitted the matter back to the trial Court for a fresh decision in accordance with the law on the aspects that the High Court pointed out after hearing the parties again. The Hon'ble Supreme Court held that it was not inclined to interfere with the order of the High Court, remanding the matter to the trial Court. The order of the Hon'ble Supreme Court is reported in **Pundalik Rama Gad & Anr. V/s. Ganesh Putu Deulkar & Ors.**, 2005 12 SCC 285 .

[8] In 2005, the plaintiffs amended the plaint in an attempt to identify the suit property with corresponding new survey numbers. On 12.04.2005, the respondents filed an additional written statement in response to the amended plaint. On 11.08.2005, the appellant further amended the plaint to incorporate the details of the survey allegedly conducted in the presence of the respondents. Finally, on 20.08.2005, the respondents filed additional written statements in response to the amended plaint.

[9] By judgement and decree dated 31.12.2005, the trial Court decreed the suit. However, the first appellate Court vide judgement and decree dated 09.08.2006 in Regular Civil Appeal No.10/2006 allowed the Appeal and set aside the trial Court's decree dated 31.12.2005. Hence, this Second Appeal.

[10] This Second Appeal was admitted on 08.03.2007 on the following substantial questions of law:

> 1. Whether, on established facts, the Appellants were entitled to the benefit of estoppel under Section 116 of the Indian Evidence Act, and whether the respondents were precluded from denying the title of the Appellants to the suit property?
>
> 2. Whether the conclusion drawn by the trial Court that the suit property belonged to the respondent is perverse being based on the old cadastral survey plan which had lost its evidential value after promulgation of new survey had come into existence and in view of the fact that the same was incomplete and also in view of the fact that survey plan cannot be a document of title and surveyor's report cannot be proof of ownership of property, particularly in the face of the fact that surveyor's report contradicted the case of the defendants?

[11] On 13.10.2022, after hearing the arguments for some time, two further substantial questions of law were formulated. The same read as follows:

(a) Whether, the First Appellate Court could have at all entertained the plea of the respondents, that they were owners in possession of any part of the property surveyed under no.75/1, 75/2 or 75/4 in as much as no such plea was taken in any of the written statements validly filed before the trial court, and whether the additional written statement dated 26.08.2005 in which such a plea was sought to be raised, for the first time was to that extent liable to be discarded as going beyond the scope of amendment to the plaint in response to which it was filed?

(b) Whether, the findings of the First Appellate Court to the effect that the appellants failed to prove their possession in respect of the suit property, given in reversal of the findings to the contrary of the trial court, is perverse; being rendered by ignoring the fact that the appellants and their predecessors being in possession of the suit property was not at all controverted by the respondents in the course of cross-examination of plaintiff no.1/PW1; and when on the contrary the possession of the appellants and their predecessors in title was in terms admitted by the respondents by claiming that such possession was attributable to a tenancy which the predecessors of the respondents had created in favour of the predecessors of the appellants, which was totally de horse the written statement and otherwise unsubstantiated?

[12] With the consent of the learned Counsel for the parties, the hearing was deferred to 20.10.2022 to afford a sufficient opportunity for the parties to address the Court on the additional substantial questions of law along with the substantial questions of law initially framed.

[13] The Appeal was finally heard on 20.10.2022, 10.11.2022 and 11.11.2022. On the conclusion of the appellants, the matter was reserved for orders.

[14] Mr Lotlikar learned Senior Advocate for the appellants submitted that since as many as three witnesses, including the Court Commissioner, could not identify the property in the context of the documents produced by other parties, this Court must advert to the other pieces of evidence and circumstances from the record. He submitted that other pieces of evidence or circumstances, by a standard of preponderance of probabilities, establish that the appellants are the owners in possession of the suit property, except the portion beneath the hut put up by the respondents under a licence issued by the appellants. He submits that since both parties have led evidence, the issue of burden of proof is only academic, and the appellants could not have been non-suited for failure to precisely identify the suit property despite all attempts.

[15] Mr Lotlikar submits that the approach of the first appellate Court was perverse because the first appellate Court not only held that the appellants had failed to prove their case but went further to hold that the respondents were the owners in possession of the suit property. In doing this, the first appellate Court misconstrued the deposition of DW5, a Surveyor/Expert examined by the respondents.

[16] Mr Lotlikar submitted that the evidence of DW5, in fact, probabilises the appellants' version because this witness states that the suit property is surveyed under nos.75/1, 75/2, 75/4 and 74/2. Mr Lotlikar submits that the new survey records indicate the name of the appellants in survey nos.75/2 and 75/4, along with some other persons. He pointed out that survey no.74/2 bears the appellant's name exclusively. He points out that the respondents' names do not appear in any of these new survey numbers. He submits that this crucial aspect has been overlooked by the first appellate Court and, therefore, the appellate decree warrants interference.

[17] Mr Lotlikar submits that the appellants produced a certificate from the Comunidade of Usgao followed by a registered Gift Deed that could be regarded as title documents. In contrast, the respondents did not produce any documents of title. He pointed out that there was no dispute about all properties in the vicinity, including the suit property earlier belonging to the Comunidade of Usgao. He submits that the first appellate Court failed to give due credence to this documentary evidence.

[18] Mr Lotlikar submits that none of the documents produced by the respondents were documents of title. He offered that, in any case, the documents refer to some person with the surname "Deulkar". However, the respondents failed to establish any kind of relationship with this so-called predecessor-in-title. He submits that the first appellate Court overlooked this crucial aspect.

[19] Mr Lotlikar submits that PW1 had categorically deposed about the location and nature of the suit property. He also deposed about the possession and enjoyment of the suit property. He deposed about the boundaries of the suit property. He deposed about the licence issued to respondents to construct a hut in the suit property. He submits that most of his evidence was unchallenged for want of effective cross-examination or denials. He submits that in the absence of any denials or effective cross-examination, the testimony of PW1 should have been accepted. The provisions of Section 116 of the Evidence Act would also apply in such a situation. He relied on **Muddasai Venkata Narsaiah (D) V/s. Muddasani Sarojana**, 2016 AIR(SC) 2250, **A.E.G. Carapiet V/s. A.Y. Derderian**, 1961 AIR(Cal) 359 and **K. Prabhakar Reddy & Ors. V/s. Lakkaraja Munirathnam & Ors., MANU/AP/0455/2022** in support of these contentions.

[20] Mr Lotlikar submits that the respondents had never taken any plea in their original written statement about the suit property bearing survey nos.75/1(part), 75/2(part) or 75/4(part). He submits that the appellants' amendment of the plaint was restricted to further describing the suit properties. In the guise of filing an additional written statement, the respondents could not have raised the plea about they being the owners in possession of property surveyed under no.75/1(part), 75/2(part), 75/4(part). Mr Lotlikar submits that an additional written statement, in response to an amended plaint, must be restricted only to the amendments and should not travel beyond or seek to amend the original plea or raise some additional pleas. He relies on **Gurdial Singh**

& Ors. V/s. Raj Kumar Aneja & Ors., 2002 AIR(SC) 1003 in support of this proposition.

[21] Mr Lotlikar submitted that the oral and documentary evidence on record established at least the appellants' possession of the suit property. He submits that there was no serious challenge during cross-examination, even on this aspect. He submits that even the defence evidence had admitted the appellants' possession, though DW1 qualified the same as possession of a lessee for a lease granted for only two years. He submits that though the appellants were not lessees but owners of the suit property, the respondents, admitted de facto possession. Finally, he proposes that based on the possessory title, the suit ought to have been decreed for the first appellate Court should not have interfered with the decree issued by the trial Court.

[22] Mr Lotlikar submits that the possessory title is good against the whole world except the actual owners. He submits that respondents have miserably failed to establish any link to the suit property, much less any title. Therefore, based on the possessory title, the suit should have been decreed against the respondents. He relies on **Somnath Barman V/s. Dr. S.P. Raju & Anr.**, 1970 AIR(SC) 846 and **Rame Gowda (dead) by LR s V/s. M. Varadappa Naidu (dead) by LR s**, 2004 1 SCC 769 in support of this proposition.

[23] Based upon all the above submissions, Mr Lotlikar urged that the substantial questions of law as formulated in this Appeal may be answered in favour of the appellants and against the respondents. Accordingly, he urged that this Appeal be allowed, the decree of the first appellate Court be set aside, and the trial Court's decree restored.

[24] Mr Sudin Usgaonkar contested the contentions on behalf of the appellants. He submitted that the suit was for recovery of possession and permanent injunction. Therefore, relief of declaration of ownership was intrinsic. He offered that the appellants - plaintiffs, had to stand or fall on their own feet and could not derive any advantage from the alleged weakness of the respondents' case. He submits that there was no weakness in the respondents' case. The first appellate Court, the final Court on facts, correctly appreciated the original and documentary evidence on record and dismissed the suit. He submits that the decree of the first appellate Court warrants no interference considering the restricted scope of the Second Appeal. He submitted that none of the questions formulated arise or, in any case, constitute substantial questions of law.

[25] Mr Usgaonkar submitted that the appellants produced no documents of title, and the so-called title documents do not relate to the suit property. He offers that identification of the suit property was crucial, and the appellants have miserably failed in such identification. Finally, he submits that the respondents produced clear and cogent, oral and documentary evidence based upon which the suit was correctly dismissed.

[26] Mr Usgaonkar submitted that title issues can never be decided by estoppel or any alleged cross-examining failure. He proposes that the entire evidence on record has to be read and construed holistically. He submits that not only was the appellants' case challenged, but the respondents led positive evidence to contradict such a case. Finally, he offers that the decisions relied upon by Mr Lotlikar are distinguishable and do not apply to the fact situation in the present case.

[27] Mr Usgaonkar submitted that the cadastral survey document could not be brushed aside as suggested by the appellants. He relies on **Varsha K. Sawant & Ors. V/s. Chief Secretary, Government of Goa State & Ors.,2016 SCCOnLineBom 2561**. He submits that identification of the suit property in such matters is crucial, and in the absence of effective identification, the plaintiffs'/ appellants' case must fail. He relies on **Narayan Babu Velip & Ors. v/s. Dhillan Sada Dessai**, 2014 5 BCR 627 and **Ganesh Mallu Dessai V/s. Gopinath Kusta Fotto Dessai, MANU/MH/ 0901/2021** in support of these propositions.

[28] Mr Usgaonkar submits that there was sufficient crossexamination and, in any case, based on any alleged lack of crossexamination, no title can be conferred upon the appellants when they fail to identify the suit property and also produce any title documents. He relies on **Raju Purushottam Warurkar V/s. Bokey Printers, Amravati**, 2018 1 MhLJ 756, in support of this proposition.

[29] Mr Usgaonkar also relied on **Vaman Govind Raut & Ors. V/s. Sitaram Narayan Raut & Ors.**, 2014 4 BCR 429 , **Kamakshi Builders V/s. Ambedkar Educational Society & Ors.**, 2007 12 SCC 27 , **Canbank Financial Services Ltd. V/s. Custodian & Ors.**, 2004 8 SCC 355 and **Pant Nagar Mahatma Phule Co-op. Hsg. Society Ltd. & Ors. V/s. State of Maharashtra & Ors.**, 2016 3 BCR 249 in support of various contentions advanced by him.

[30] Based on the above, Mr Usgaonkar urged dismissing this Appeal.

[31] The rival contentions now fall for determination.

[32] By instituting the suit, the appellants claimed recovery of possession of the portion beneath the hut in the suit property and for a permanent injunction to restrain the respondents from otherwise interfering with or damaging the suit property. These reliefs were claimed based on the premise that the appellants are the owners in possession of the suit property (except the portion beneath the hut, in respect of which ownership but not possession was claimed).

[33] Such ownership and possession were claimed on the specific plea that the Comunidade of Usgao, which owned most of the lands in the vicinity, had granted the suit property to the predecessor in title of the appellants to Rogunata Raghoba Porobo, the predecessor in title of the appellants. The appellants relied upon a certificate issued by the Comunidade dated 22.02.1972 in support of this assertion. The appellants also relied upon a Gift Deed dated 08.02.1958 by which Sazo Porobo and his wife Deuqui, the son and daughter-in-law of Rogunata Raghoba Porobo, gifted the suit property to

the appellants Pundolica Rama Gad and his wife, Xantabai. Therefore, it is incorrect to say that the suit was filed based upon only some prior possession or a possessory title as claimed by Mr Lotlikar during his arguments.

[34] Now the certificate dated 22.02.1972 issued by the Comunidade of Usgao records that the property "Naicachem - batlem" was leased by the Comunidade to Rogunata Raghoba Porobo under No.27 in the records of archives of the Comunidade. This certificate was issued by the Escrivao of the Comunidade (clerk) on perusing the Survey Book (Tombo) 2nd B. No. one of the above Communidade of Usgao.

[35] The Survey Book/Tombo was never produced or summoned for production. The terms and conditions subject to which the property Naicachem - batlem was granted were never established. There is no reference to any description of the property other than the denomination Naicachem - batlem. No boundaries are described, and no cadastral survey is referenced. There is no reference to any matriz number. There is no reference to any inscription or description documents.

[36] Since identifying the suit property is one of the crucial issues in this matter, a certificate of this nature can hardly qualify as some titled document. In any case, on this document and without proper identification of the suit property, the appellate Court was justified in holding that this is not a title document based on which the appellant can obtain recovery of possession or even an injunction against the respondents.

[37] The second title document is consequential to the first. However, though this Gift Deed was executed on 08.02.1958, this Gift Deed only refers to property Naicachem - batlem described in the office of the land Registrar under no.2078. Significantly, no attempt was made by the appellants to produce the description record from the land Registrar's office under no.2078. There is no explanation why such a description document was never produced because one of the crucial issues in this matter was identifying the suit property.

[38] Besides, though the Gift Deed was executed on 08.02.1958, there is no reference to the boundaries of the gifted property. There is no reference to the matriz number or cadastral survey number. There is no reference to any inscription number. Therefore, even based on this Gift Deed of 08.02.1958 and in the absence of proper identification of the suit property, the appellants cannot get any relief by way of recovery of possession or even injunction.

[39] The appellants are the plaintiffs. Therefore, it is for the appellants as plaintiffs to establish their case. Their entire case cannot be based upon some alleged deficiencies in the respondents' defence. The appellants cannot create a superstructure based entirely on some weaknesses in the respondents' case. The burden is squarely on the appellants - plaintiffs. Only after some credible evidence is brought on record would the onus shift upon the respondents - defendants.

[40] The appellants examined Jaydatt Nilu Shet Parkar (PW6) as their expert/Surveyor. However, this witness could not correspond or correlate the suit property with the two so-called title documents produced by the appellants. Similarly, the appellants, apart from appellant no.1 Pundalik Gad (PW1), examined Ragurai Prabhu (PW2), Narana Atma Parab (PW3), Jayu Prabhu (PW4) and Gopal Prabhu (PW5) as witnesses. The evidence of none of these witnesses, either jointly or severely, was sufficient to correlate the suit property with the so-called title documents produced by the appellants. Moreover, there were serious discrepancies in the pleaded boundaries. The problem was compounded since the so-called title documents contained no boundaries whatsoever. The appellants thus failed to identify the suit property by correlating the evidence with the so-called title documents or even the pleadings in the plaint.

[41] Vidhyadhar Verenkar, an expert/Surveyor, examined by the respondents, did not fare any better. He also had considerable difficulties in identifying the suit property or the property claimed to be owned and possessed by the respondents. Even the evidence of Court witness Maya Amonkar (CW1) from the DSLR was not of much assistance in identifying the suit property or correlating the suit property to the documents relied upon by the parties, including, in particular, the so-called title documents relied upon by the appellants.

[42] The issue of identification of the suit property being most crucial, this Court, by its order dated 25.01.2012, appointed a Commissioner for identifying the properties bearing matriz no.491 and 492 of Usgao village. This is because the appellants had claimed that the suit property corresponds to matriz no.492. Still, the respondents contended that the property which they claim ownership and possession corresponds to 491 and old cadastral survey no.97.

[43] The respondents had claimed that they had their ancestral house in matriz no.491, corresponding to old cadastral survey no.97. After its demolition, the respondents had put up a small house and were in the process of constructing a bigger house when the appellants instituted the suit. Accordingly, this Court appointed the Commissioner to identify the property bearing matriz nos.491 and 492 of Usgao village after considering the then promulgated survey record of Usgao village.

[44] This Court's order dated 25.01.2012 reads as follows:

> "Mr. S. D. Lotlikar, Senior Advocate with Ms. V. Palyekar, Advocate for the Appellants.
>
> Mr. Sudin Usgaonkar, Advocate with Ms. G. Dalvi, Advocate for the Respondents.
>
> Coram: F. M. REIS, J.
>
> Date:25 th January 2012
>
> P.C.

After hearing Shri Lotlikar, learned Senior Counsel appearing for the Appellants and Shri Usgaonkar, learned Counsel appearing for the Respondents for sometime and taking note of the nature of the dispute raised in the above Appeal, both the learned Counsel, by consent, have agreed that the Directorate of Land Survey. Panjim, be directed to depute a Field Surveyor to identify the property bearing Matriz no. 491 and 492 of Usgao Village on the now promulgated Survey Records of Usgao Village. The parties agree to furnish the promulgated Survey Plan as well as the true copy of the Matiz Record to the concerned Surveyor and any other document which he may so desire including the Cadastral Survey Plan of the property bearing no. 97 of the same Village. The report is to be submitted within four weeks. The Field Surveyor shall submit his bill for fees and expenses which shall be borne by both the parties equally. The Director of Land Survey is accordingly directed to comply with the above prayer of the learned Counsel appearing for both the parties.

2. Place the matter for further hearing after receipt of the Commissioner's report. The parties are directed to appear before the Directorate of Land Survey, Panjim, on 03.02.2012 at 10.00 a.m. and abide by his further direction."

[45] Based on the above order, Yogesh Mashelkar, Field Surveyor/Commissioner, filed his report on 27.02.2022. He reported that it was impossible to ascertain the exact correspondence of the old cadastral survey no.97 to matriz nos.491 and 492 of the Usgao village. Therefore, on the ground, he could not identify the properties under matriz nos.491 and 492 of Usgao village.

[46] Therefore, it is evident that the appellants, burdened with the task of at least identifying the suit property in respect of which they claimed their reliefs, failed to identify the suit property so. Moreover, even Mr Lotlikar did not dispute that the appellants failed to identify the suit property. Therefore, in his oral arguments and the written brief, he contended that the other evidence on record and surrounding circumstances must be focused upon. He also relied upon certain deficiencies in the respondents' version. Based on these factors, Mr Lotlikar submitted that the trial Court was justified in decreeing the suit and the first appellate Court was not justified in reversing the decree.

[47] There is no dispute that in this matter, the standard of proof to be applied is one of the preponderance of probabilities. However, in such a matter, the initial burden is always upon the appellants - plaintiffs, and if the appellants - plaintiffs fail even to identify the suit property ordinarily, his suit must fail. To this effect are the observations in Narayan Babu Velip (supra) and Ganesh (supra).

[48] The appellants failed to establish that the two documents they produced were indeed title documents to the suit property. Even dehors the two documents, the oral evidence was deficient in identifying the suit properties or correlating the suit properties to the so-called title documents. Even the three surveyors before the trial

Court and the Commissioner appointed by this Court failed to identify the suit property or correlate the suit property to the so-called title documents of the appellants. In such a situation, the appellants' suit was rightly not decreed by the first appellate Court.

[49] Regarding the contention based upon other evidence or surrounding circumstances, reference will have to be made to the cadastral survey record and the matriz document relied upon by the respondents. The respondents claim that these are their title documents based upon which their predecessors- in-title and after them the respondents have been owning, possessing and enjoying the property from which the appellants seek to oust them.

[50] Now, a matriz document or, for that matter, even a cadastral survey document cannot ordinarily be regarded as any document of title. These are basically survey documents that might have relevance in the context of possession. However, based on these documents, it is not as if the respondents had instituted any suit or counterclaim in seeking any declaration of ownership. Besides, these documents would also qualify "other evidence", which the appellants seek to rely upon in support of their case. Therefore, this Court remanded the matter with specific directions to consider the cadastral survey document. The Supreme Court affirmed this order. Therefore, these documents and their legal effect will have to be considered.

[51] The respondents had consistently claimed that the property owned, possessed and enjoyed by them and the property in which they had their ancestral house, followed by the house which is described in the plaint as a hut and the foundation that they were laying when the suit was instituted, is the property bearing cadastral survey no.97 and matriz no.491. They have also claimed that this property admeasures 5950 square metres and have pleaded the boundaries. They have also described the property by stating its physical characteristics, the number and type of trees therein, etc.

[52] The cadastral survey document Exhibit DW1/B refers to a rustic property named Naicachem batulem, registered under no.97 in the name of Pundolica Xettee Deulicar, residing in Usgao. This document states that the property is demarcated with ten cut stone landmarks and a loose stone fence.

[53] Furthermore, the cadastral survey document records that the property is not leased since the quit rent of four tanges is paid to the Comunidade. This document also states that the property admeasures 5950 square metres being, 4600 square metres of the coconut groove, 1320 square metres of barren land and cashew tree plantation and 30 square metres of times. Even the boundaries of the property are provided. Significantly, this document records that there exists in this property the residential house of the owner. The extract of this document is dated 12.01.1968.

[54] The respondents have also relied upon the matriz document Exhibit DW1/D, which again provides the property's boundaries and notes that the property is enrolled in the name of Panda Deulcar.

[55] As in the case of the appellant's witnesses, even the respondents' witnesses could not clearly and accurately depose to the boundaries. From this, the description of boundaries indicated in these old documents appears to have changed over the years. The neighbouring properties are sold, new surveys are undertaken, and certain earlier physical characteristics like spilling waters do not remain. Therefore, the appellants cannot draw much mileage based upon the weakness in respondents' evidence on the aspect of tallying of boundaries accurately. Even the appellants' witnesses were unable to depose accurately to the boundaries.

[56] In Varsha K. Sawant (supra), the substantial question of law concerned the evidentiary value of a cadastral survey record in the absence of a land registration document. The learned Single Judge of this Court held that though it is well settled that the entries in the survey record can neither create nor defend a title and even though the matriz record by itself is not a document of title, the same is an instance to be considered in the claim of title by a person in whose name such entry stands.

[57] In the context of the record of the cadastral survey, the Court referred to Article 274 of decree 3602, which provides that the cadastral survey is conducted after a minute observation of the title documents of all the adjoining owners. The Court held that in such circumstances, the survey entries could not be easily quashed or brushed aside unless cogent evidence establishes that the entries are incorrect. The Court found that in the case before it, the respondents had failed to produce any document contrary to the entries in the survey plan.

[58] Thus, on evaluation of the oral and documentary evidence produced by the appellants and the respondents, the first appellate Court, which is usually the final Court regarding factual findings, was not unjustified in reversing the trial Court's decree. Based on the oral and documentary evidence on record and by applying the standard of preponderance of probabilities, there is nothing unreasonable or perverse in the assessment of the first appellate Court about the appellants' failing to discharge the burden, which was cast upon them or that the respondents succeeding in discharging the onus that might have shifted upon them.

[59] Irrespective of the issue of burden or onus, even upon evaluating the oral and documentary evidence on record led by both parties, the first appellate Court's assessment cannot be faulted as perverse or unreasonable. The first appellate Court has analysed the evidence in some detail and offered convincing reasons to reverse the Trial Courts decree. The first appellate Court came into close quarters with the reasoning of the Trial Court and, for cogent reasons, reversed the Trial Court's decree. Therefore, the substantial question of law, based upon so-called perversity, will have to be answered against the Appellants.

[60] The substantial question of law based upon the doctrine of estoppel under Section 116 of the Evidence Act hardly arises in this matter. In any case, based upon this provision, no relief can be granted to the appellants in the facts and circumstances

of the present case. Pundalik Gad (PW1), in his deposition, spoke about permission being given by the appellants to the respondents to construct a hut in the suit property. Though there is not much cross-examination on this aspect, it is not as if the respondents have admitted this position. Suppose the examination-in-chief and the cross-examination of PW1 are construed holistically. In that case, there is no scope to conclude that this aspect has gone unchallenged or that there is any admission on this aspect.

[61] In the written statement, the respondents specifically denied having constructed the hut after obtaining permission from the appellants. Instead, the respondents have consistently asserted ownership and possessory rights based upon which they built the house and were in the process of constructing another house in the vicinity. The respondents, in their evidence, squarely deposed about the construction of a house (hut) in their own right and not based upon any alleged permission from the appellants. The suggestions on this aspect during cross-examination were also rightly denied.

[62] In the absence of clear admissions or convincing evidence about the hut being constructed by the respondents, based upon permission or a licence issued by the appellants, the principle of estoppel under Section 116 of the Evidence Act can hardly be invoked. Section 116 of the Evidence Act provides that no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

[63] As noted by the first appellate Court, there is no proper identification of the suit property. Further, there is no evidence about the appellants' title to the suit property, particularly in the absence of its precise identification. Further, there is still no evidence about the appellants being in possession. There is also no evidence about the hut being constructed by the respondents based upon some permission or licence by the appellants. Therefore, because the cross-examination of PW1 may not have been of a high standard, no title or possessory rights can be claimed by the appellants only for that reason.

[64] In Kamakshi Builders (supra), the Hon'ble Supreme Court has held that the title is not created by estoppel. Acquisition of a title is an inference of law arising out of a certain set of facts. If a person does not acquire title in law, the same cannot be vested only because of acquiescence or estoppel on the part of others. These observations were made in the context of Sections 116 and 114 III.(g) of the Evidence Act.

[65] Thus, for all the reasons mentioned above, the first substantial question of law will have to be answered against the appellants.

[66] As regards the second substantial question of law, though the first appellate Court may have held that the respondents have established title relying upon the old

cadastral survey plan, the same is mainly in the context of the proposition that the cadastral survey plan cannot be simply brushed aside. Suppose the first appellate Court's judgement and decree are read and construed holistically. In that case, it is apparent that the first appellate Court, on the touchstone of preponderance of probabilities, has found favour with the respondents' version as compared to the appellants' version.

[67] Therefore, it is not as if the first appellate Court has conferred or acknowledged the respondents' title to the property based on the old cadastral survey no.97 and matriz no.491. The appellate Court has merely held that the old cadastral survey records and the Matriz documents render the respondents' case more probable. There is no perversity in the record of this finding because the appellants, in this case, have miserably failed to identify the suit property and correlate the suit property to the so-called title documents. As noticed earlier, the documents produced by the appellants can hardly qualify as title documents in the absence of any proper description of the suit property or its identification and correlation with the other evidence on record.

[68] Besides, this is a case where the appellants, as plaintiffs, were seeking recovery of possession and permanent injunction. Though the appellants may not have sought the specific relief of declaration, such declaration was, to a certain extent, implicit in a prayer for recovery and permanent injunction. Moreover, the appellants had never based their case on a mere possessory title but claimed ownership based on certain documents, which according to them, were title documents. In such a situation, the burden was always on the appellants, and the appellants could not take any advantage of any alleged weakness in the respondents' - defendants' case.

[69] In Pant Nagar Mahatma Phule Co-op. Hsg. Society Ltd. (supra), the Division Bench of this Court, has held that parties seeking a declaration of title must stand or fall on their own feet and cannot take advantage of the defence's weakness. The Division Bench relied upon **Union of India V/s. Vasavi Co-operative Housing Society Ltd.**, 2014 2 SCC 269 in which it is held that it is trite law that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

[70] The Court held that the legal position is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title, and that can be done by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. The Court held that even title set up by the defendants was found against them in the absence of the establishment of the plaintiff's own title, the plaintiff must be non-suited.

[71] In the context of the second substantial question of law, the observations in Varsha K. Sawant (supra) are also quite relevant. The first appellate Court also found

serious faults in the new survey. The first appellate Court noted that there were names of several other parties along with the appellants' names in the survey nos.75/2 and 75/4. Incidentally, though the appellants claim possession and title of survey no.75/1, in which the hut is located or where the respondents attempted further constructions, the appellants' names do not figure in this survey records. Besides, the first appellate Court pointed out that the survey records do not even reflect the existence of the hut, about the existence of which there is no dispute between the appellants and the respondents.

[72] Based upon all the above factors, even the second substantial question of law will have to be answered against the appellants.

[73] The substantial question of law about the additional written statement travelling beyond the amended plaint will also have to be answered against the appellants. This is because when the plaint was instituted in 1972, the survey was incomplete, and the parties did not have to refer to survey numbers 74 or 75 and parts thereof. After completing the survey, the appellants amended the pleadings to refer to the new survey numbers. The appellants admittedly made mistakes by omitting reference to survey no.75/1. However, both parties proceeded on the premise that no such error was committed, and the parties led evidence in the context of survey no.75/1.

[74] Therefore, there was nothing wrong in the respondents also pleading that their house (hut) or construction which they had commenced was in survey no.75/1 and that they claimed ownership and possession of property surveyed under no.75/1. Thus, the principle in Gurdial Singh (supra) was not attracted in this case. The substantial question of law at (a) in the order dated 13.10.2022 will also have to be decided against the appellants.

[75] In so far as the substantial question of law (b), in the order dated 13.10.2022, it is true that there were some deficiencies in the cross-examination of PW1. However, if the evidence of PW1 is read and construed holistically, it is not as if the respondents admitted some critical points in PW1's deposition. Besides, this deposition will have to be read and construed in the context of pleadings where the respondents pleaded about not having put up the hut's construction with the appellants' permission but in their own right.

[76] The respondents, in their evidence, including in response to their cross-examination, have denied the aspects that the appellants now wish the Court to treat as proved. In such circumstances, the principle in Muddasani Venkata Narsaian (D) th. Lrs. (supra) or A.E.G. Carapiet (supra) and K. Prabhakar Reddy (supra) would not apply.

[77] In Raju Purushottam Warurkar (supra), a single judge of this Court in the context of A.E.G. Carapiet (supra) has explained that no general proposition is laid down in A.E.G. Carapiet (supra). The Court held that when both sides lead evidence, it

is for the Court to see if a case of retrenchment is made out. If no case was made out based on the evidence led by the employer, the mere want of cross-examination on the part of the employee would make no difference.

[78] This is not a case where there was a complete failure to challenge or deny certain portions of PW1's testimony. In any case, the appellants, having failed even to identify the suit property, much less establish their title to the same, cannot build any superstructure based upon some deficiencies in the cross-examination of their witnesses. Therefore, even the final substantial question of law will have to be answered against the appellants.

[79] For all the above reasons, this Appeal is liable to be dismissed and is hereby dismissed. However, there shall be no order for costs.

[80] If any misc. applications are pending in this Appeal, even they are hereby disposed of

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2023(1)GoaCC39

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak; R N Laddha]

Writ Petition No 158 of 2022 **dated 29/07/2022**

Ramnath Vasudev Shanbhag; Dasa Ranga Shanbhag; Ashok Ranga Shanbhag; Lakshminarayana P Shanbhag; Vasanth Narayan Shanbhag; Madhav Keshav Shanbhag; Vasudev Damodar Shanbhag; Anirudh Aravind Pai; Anil M

Versus

Administrator of Devalaya; Managing Committee of Shree Ramnath Damodar Saunsthan; General Body of Shree Ramnath Damodar Saunsthan; Raunak Kamat Bambolkar; Nishad Nandan Hegde Dessai

EXPRESSION "ABROAD"

Code of Civil Procedure, 1908 - Order I, Rule 8 - Trade Unions Act, 1926 - Section 6 - Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 - Section 2 - Petition - Removal of Mahazans form voter list on ground that on ground that they do not have a permanent residence in Goa - Held - Article 24 of the Devasthan Regulations expressly permits the enrolment of members (mazanes) residing abroad, provided they satisfy the legal requirements - There is no dispute that the expression "abroad" means beyond the territories held by the Portuguese before Goa's Liberation on 19.12.1961 - The decision-making process leading to the deletion or the attempted deletion of 2352 Mahazans was flawed - The process violated the principles of natural justice and fair play and was aimed at overreaching the judicial process - The Secretary/Clerk acted ultra vires - The

Managing Committee cannot simply resile from its earlier position by claiming that there can be no estoppel against the law - Petition allowed.

[Paras 80, 86, 122 and 142]

Law Point- Article 24 of the Devasthan Regulations expressly permits the enrolment of members (mazanes) residing abroad, provided they satisfy the legal requirements.

Acts Referred:

Code of Civil Procedure, 1908 Or. 1R. 8

Trade Unions Act, 1926 Sec. 6

Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 Sec. 2

Counsel:

J P Mulgaonkar, S Bangera, Devidas J Pangam, Maria Correia, S G Bhobe, Parag Wagle, S S Kantak, Abhijit Kamat, Neha Kholkar, S Desai, G K Sardessai

JUDGEMENT

M.S. Sonak, J.

[1] Heard learned Counsel for the parties.

[2] Rule. The rule is made returnable immediately at the request of and with the consent of the learned Counsel for the parties.

[3] The challenge in this petition is to removal of 2352 Mahazans out of a total of 3084, including the petitioners, from the list of capable Mahazans entitled to vote for constituting the Managing Committee of Shree Ramnath Devasthan Saunsthan, Zambaulim, (R-2). The Managing Committee, by proposing such large-scale deletions, has altered the status quo prevalent for at least the last 30 years or thereabouts. Moreover, the removal/deletion is on the sole ground that these 2352 Mahazans allegedly do not have a permanent residence in Goa. Therefore, the Managing Committee's interpretation of Articles 6 and 9 of the bye-laws, 1900 does not entitle them to vote.

[4] For the elections scheduled on 13.03.2022, this Court, with the parties consent, made an order dated 08.03.2022, transcribed below for the convenience of reference.

> "Heard Mr. G. K. Sardessai, learned Advocate for the petitioners, Mr. D. Pangam, learned Advocate General with Ms. Maria Correia, learned Additional Government Advocate for respondent No.1, Mr. S. G. Bhobe, learned Advocate for respondent No.2 and Mr. Parag Wagle, learned Advocate for respondent No.3.
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> 2. After this matter was heard for some time, with the consent of the learned Counsel for the parties, which consent, in turn, is based on the instructions the learned Counsel have received from the party whom they represent, the following interim arrangement is ordered:

i. The elections to the Managing Committee of Ramnath Damodar Devasthan, Zambaulim scheduled for 13/03/2022, shall now be conducted on 20/03/2022. Necessary notice about the changed date will be published by respondent No.2 on the notice board as also in three newspapers i.e. in Marathi, Konkani, and English, latest by 11/03/2022.

ii. The elections will be conducted by the Administrator of Devalaya i.e. the Mamlatdar of Sanguem. The respondent No.2 to render all assistance to the Mamlatdar for the conduct of these elections.

iii. The petitioners and the Mahazans, who are now described as non-Goans, whose names have been deleted from the list of capable Mahazans of the Devasthan i.e. the list dated 15/01/2022 and found in the earlier list of December 2020 are permitted to cast their vote at the elections now rescheduled for 20/03/2022.

iv. Similarly, the Mahazans whose names appear in the list dated 15/01/2022 are also permitted to cast their vote at the above elections.

v. The Mahazans referred to in clauses (iii) and (iv) above shall cast their votes separately in different ballot boxes for which appropriate arrangement shall be made by the Administrator/Mamlatdar and after the voting is complete, both the sets of boxes will be sealed by the Mamlatdar/ Administrator, until further orders. This means that the petitioners and those Mahazans who have been described as non-Goans and whose names appear in December 2020 list and the remaining Mahazans will have to vote in separate ballot boxes. These ballot boxes will have to be identified and sealed by the Mamlatdar/Administrator.

vi. The sealing will have to be carried out by the Mamlatdar/Administrator in the presence of the candidates. The candidates therefore to remain present if they so desire at the time of the conclusion of the voting.

vii. The ballot boxes sealed and segregated as above shall remain in the custody of the Mamlatdar/Administrator and the further action shall be in terms of the further orders that will be made in this petition.

3. The aforesaid interim arrangements are without prejudice to the rights and contentions of all the parties.

4. The aforesaid interim arrangements have been made with the consent and the same were necessary in the facts and circumstances of the present case.

5. Place this matter for further consideration on 22/03/2022.

6. Mr. G.K. Sardessai has now filed the Vakalatnama on behalf of the petitioners and the Advocates, earlier appearing for the petitioners, are now discharged from appearing any further in the matter.

7. All concerned to act on the basis of an authenticated copy of this order."

[5] Based on the above interim arrangements, the polling has taken place, and the votes of the Goan and non-Goan Mahazans have been cast in separate ballot boxes. The ballot boxes have been sealed. The members of the erstwhile Managing Committee (R-2), whose terms have already expired, continue to govern the affairs of Damodar Devasthan (said temple). Therefore, learned Counsel for the parties requested the early disposal of this petition. The learned Advocate General also joined in the request for early disposal of this petition. Accordingly, this matter was finally heard.

[6] In **Shri Vinayak Kamat Tarcar V/s. State of Goa through the Chief Secretary & Ors.**, 2000 2 BCR 727 a coordinate Division Bench has observed the fate of the bye-laws under the Devasthan Regulations of 1886 after the coming into force of the Devasthan Regulations, 1933. Therefore, learned Counsel for the parties were requested to address this Court on the said decision, along with their submissions on the other issues that arise in this petition.

[7] Mr. Mulgaonkar learned Senior Advocate for the petitioners submitted that the decision-making process leading to the impugned decision is in breach of principles of natural justice and fair play. The Managing Committee has attempted to overreach judicial orders and orders made by the General Body of Mazanias. He elaborated on this aspect by reference to pleadings and documents on record.

[8] Mr. Mulgaonkar, in the context of Shri Vinayak Kamat Tarcar (supra), submitted that this decision is an authority for the proposition that the bye-laws, even if they continue in force, must be interpreted consistent with the Devasthan Regulations 1933. In case of a conflict, the bye-laws will have to yield. However, he submitted that the first attempt must be to interpret the bye-laws in harmony with the Devasthan Regulations, 1933. He submitted that the interpretation proposed by the Managing Committee would destroy such harmony and even render the bye-laws ultra vires.

[9] Mr. Mulgaonkar submits that Article 6 of the bye-laws only prevents non-Goan Mahazans from participating in 'acts of management.' However, this Article has nothing to do with elections and, in any case, does not prevent the non-Goan Mahazans from voting at elections to constitute the Managing Committee. He submits that this is how the provision has been correctly interpreted for several decades by several Managing Committees. He submitted that in the absence of any clear provision in the Devasthan Regulations or the bye-laws, the right to vote that has been exercised for several decades could not be denied. He relies on **Bokajan Cement Corporation Employees Union V/s. Cement Corporation of India Ltd.**, 2004 1 SCC 142 .

[10] Mr. Mulgaonkar submits that on account of historical reasons like the inquisition and forcible conversion, several Mahazans had to flee from Goa while it was under Portuguese rule. He presents that after liberation, the position is different.

He submits that the provisions of the bye-laws are required to be construed, bearing in mind the historical perspectives and the provisions of the Constitution of India.

[11] For all the above reasons, Mr. Mulgaonkar submits that rule be made absolute in this petition by granting the reliefs.

[12] Mr. Bhobe, learned Counsel for the Managing Committee (R-2), submitted that if following Shri Vinayak Kamat Tarcar (supra), the bye-laws are held as repealed, then it is strange that the petitioners do not seek the right to contest elections but restrict their relief only to vote at such elections. He submits that grant of any such relief to the petitioners will disturb the level playing field, and the petitioners, having chosen not to press the right to contest elections, cannot now be granted the limited relief of the right to vote at such elections.

[13] Mr. Bhobe submits that the General Body enacted the bye-laws in 1900, and they have to be construed from the context of the laws and the historical perspective. He proposes that the expression 'acts of management' in Article 6 of the bye-laws includes the right to vote. He submits that any other interpretation would permit the non-Goan Mahazans to achieve indirectly what the law or the bye-laws prevent them from attaining directly. Therefore, he proposes that such non-Goan Mahazans, by exercising their right to vote in the elections to constitute the Managing Committee, would indirectly control the Management and acts of Management of the said temple.

[14] Mr. Bhobe submits that merely because non-Goan Mahazans were allowed to vote for the last several decades does not create an estoppel. He presents that the names of such non-Goan Mahazans were included in the catalogue and list due to inadvertence, and the petitioners or other similarly placed non-Goan Mahazans cannot take advantage of the situation simply because such situation may have continued for more than three decades. Therefore, he submitted that there could never be any estoppel against the law and legal interpretation.

[15] Mr. Bhobe also pointed that out of the 16 petitioners who have instituted this petition, one of the petitioners has since expired. Fourteen petitioners were enrolled in the catalogue and list of Mahazans in 1994. Only the father of one of the Mahazans was enrolled in the year 1970. He submits that all this was due to inadvertence, and no rights can be claimed because of such inadvertence on the part of the previous Managing Committee.

[16] Mr. Bhobe submits that a joint reading of Article 6 and 9 of the bye-laws makes it clear that only the Mahazans, who are permanent residents in Goa and whose ancestors were Portuguese subjects, are entitled to vote and be voted at elections to the Managing Committee of the said temple. He submits that the requirement of ancestors being Portuguese subjects must now be construed as residents now governed by the provisions of the Common Civil Code, 1867. He submitted that even those Mahazans who may have permanent residence in Goa but are not subjected to the Common Civil

Code of 1867 are barred from voting or contesting elections to Managing Committees of the said temple.

[17] Mr. Bhobe submitted that the incumbent members of the Managing Committee had not contested the elections held on 13.03.2022. He, therefore, presents that they have no personal interest in clinging to power. He submits that they have not overreached any judicial order, and the so-called change to stance is based on a correct interpretation of bye-laws no.6 and 9. He submitted that there is no estoppel in such matters, and hard cases make good law.

[18] Mr. Bhobe submitted that in terms of the administrator's circular dated 02.12.2021, Managing Committees have to revise their catalogue and prepare a revised list of capable Mahazans within a timeline prescribed. He submits that the Clerk/ Secretary, therefore, prepared the revised list of capable Mahazans though the earlier catalogue of Mahazans was not altered. He offered there was no intention of overreaching any judicial orders, and the Managing Committee had only implemented the law.

[19] Mr. Bhobe submitted that though some objections may have been raised in the returns filed by the Managing Committee, at the outset Managing Committee would welcome a ruling from this Court on the entitlement of non-Goan Mahazans to vote for elections to the Managing Committee rather than require the parties to secure adjudication on this issue from the Administrative Tribunal. He submitted that the issue of entitlement is an issue of law since no serious factual disputes are involved in the matter. He submitted that the law as it now stands debars non-Goan Mahazans from the right to vote.

[20] Mr. Bhobe finally submitted that the catalogue of Mahazans as contemplated by Article 23 and the list of capable Mahazans as contemplated by Article 25 are different and distinct. He offered that, in the present case, the names of non-Goan Mahazans have been correctly included in the catalogue of Mahazans, and such catalogue remains intact. However, he submits that the Clerk/Secretary of Devasthan on 15.01.2022 has prepared the list of capable Mahazans under Article 25 of the Devasthan Regulations, deleting the names of 2352 non-Goan Mahazans. He submits that objections were filed by about 277 non-Goan Mahazans, which were rejected by the Managing Committee on 09.02.2022.

[21] Based on the above submissions, Mr. Bhobe urged the dismissal of this petition.

[22] Mr. D. Pangam, the learned Advocate General, submitted that the issue of the repeal of bye-laws did not directly arise in Shri Vinayak Kamat Tarcar (supra). He submitted that the stray sentence in paragraph 11 should therefore not be construed as its ratio. He offered that Article 437 of the Devasthan Regulations only repeals rules, whether special or general, to the contrary. Therefore, he submits that the ratio of Shri

Vinayak Kamat Tarcar (supra) is that the rules or bye-laws made by the General Body of the Mazanias must not conflict with the Devasthan Regulations, 1933.

[23] Mr. Pangam, by reference to the provisions of Articles 1,3,17, 30(5),31(1), and 31(3), submits that the bye-laws can always provide for additional qualifications or disqualifications when it comes to the right of the Mahazans to vote or be voted for the offices of the members of the Managing Committee and their substitutes. He submitted that providing such additional qualifications or disqualifications does not render the bye-laws ultra vires the Devasthan Regulations, 1933. He drew an analogy with the bye-laws of a cooperative society and relied on **Sambha V/s. State of Maharashtra**, 1996 2 MhLJ 182 , **Kashinath V/s. Ahmednagar Zilla Maratha Seva Nagari Sahakari Patsanstha & Ors.,2021 SCCOnLineBom 4554** and **Uttam Ambadas Gawali V/s. State of Maharashtra & Ors.**

[24] Mr. Pangam also submitted that bye-laws are nothing but a contract between the members, and as long as they do not conflict with the principal Act, that is, the Devasthan Regulations, 1933, they bind all the members. He relied on **Zoroastrian Cooperative Housing Society Ltd. & anr. V/s. District Registrar, Cooperative Societies (Urban) & Ors.**, 2005 5 SCC 632 in support of this contention.

[25] Mr. Pangam submitted that the expression 'acts of management' in Article 6 of the bye-laws would include the right to vote or to be voted to the Managing Committee. He submitted that this is why the subject of the right to vote and be voted for the offices of the Managing Committee has been treated separately under Article 31(3) of the Devasthan Regulations, 1933. He submitted that non-Goan Mahazans have a right to participate in the meetings of the Mazanias and even vote there on all subjects except at elections to the Managing Committee.

[26] Finally, Mr. Pangam submitted that the Administrator of Devalayas (Mamlatdar) has no concern with non-Goan Mahazans being granted or denied the right to vote. However, his submissions were to assist this Court in deciding the main issue raised in this petition. He, therefore, made it clear that he was not taking any sides in this matter.

[27] Mr. S.S. Kantak learned Senior Advocate for respondents nos.4 and 5 submitted that Shri Vinayak Kamat Tarcar (supra) may not have correctly decided because no reference was made to several provisions of the Devasthan Regulations, including Article 428. He submitted that all parties have correctly proceeded on the basis that the bye-laws of 1900 are still operative, and none of the parties should now be permitted to resile from this position.

[28] Mr. Kantak submitted that respondents nos.4 and 5 had objected to the continuance of non-Goan Mahazans in the catalogue of Mahazans because Articles 6 and 9 of the bye-laws interdict such Mahazans. He submitted that the Managing Committee correctly dismissed the objections of the non-Goan Mahazans because of

the interdict in the bye-laws and the provisions in Article 32(2) of the Devasthan Regulations, 1933.

[29] Mr. Kantak submitted that the right to vote for the members of the Managing Committee amounts to taking part in the acts of Management. He relies on the **Life Insurance Corporation of India V/s. Escorts Ltd. & Ors.**, 1986 AIR(SC) 1370 , Commissioner of Gift-Tax V/s. Raghu Hari Dalmia & Ors.,2002 255 ITR 300 and **63 Moons Technologies Limited (Formerly known as Financial Technologies India Limited) & Ors.**, 2019 18 SCC 401 to submit that equity shareholders have a right to elect the Director of a company and through them participate in the Management of the company. He submitted that a similar analogy must be drawn in this case.

[30] Mr. Kantak submitted that only persons with the surnames specified in the bye-laws of 1900 and their descendants have a right to Mahazanship. He presents that most of the petitioners are 'Shanbhags,' and since such a name is not to be found in the bye-laws of 1900, the petitioners cannot claim even Mahazanship of the said temple.

[31] For all the above reasons, Mr. Kantak submitted that this petition may be dismissed.

[32] Mr. Parag Wagle, learned Counsel for respondent no.3, submitted that since no appeal was preferred to the General Body, he is not in a position to make any submissions in this matter.

[33] Mr. Mulgaonkar, in his rejoinder, submitted that none of the respondents should now be permitted to set up some case that was not the basis for denying the non-Goan Mahazans the right to vote. He clarified that the petitioners had not applied to contest in elections; therefore, the issue of their right to contest does not arise, at least in this petition. He submits that Mr. Kantak's interpretation of the bye-laws is flawed and several surnames have changed over the last 300 to 400 years. He offers that the qualifications for becoming a Mahazan relate to the gotras, not the surnames. He submits that this position has been accepted for the last several hundred years without contest. He offers that even the surnames of the objectors represented by Mr. Kantak find no place in the bye-laws.

[34] Mr. Mulgaonkar submitted that the bye-laws impose no restrictions on voting rights. Therefore, the bye-laws cannot be regarded as an interdict under Article 32(2) of the Devasthan Regulations. He submits that the expression “interdict” has a special meaning, like incapability due to a Court order. He, therefore, presents that this petition may be allowed.

[35] The rival contentions now fall for our determination.

[36] Before we evaluate the rival contentions, reference to the background facts becomes necessary to appreciate the circumstance in which the present challenge has landed before us.

[37] The Ramnath Damodar Saunsthan (said temple) is administered by a Managing Committee (R-2) elected by the body of members (mazanias) every three

years in terms of the Devasthan Regulations 1933 (see Article 40). The body of mazanias comprises the Mahazans of the said temple.

[38] In 1900, the body of members (mazanias) framed bye-laws which the then Portuguese Government duly approved. In terms of Article 3 of these bye-laws, the founder Mahazans or "cullav s" (khulaves) are only "goud -sarospoth" (Goud Saraswat) Hindu Brahmins, male descendants of the original gauncars of Margao, "Motho - gramacares" (Mathgramkars), originating from four gotras or tribes known as "counxagotra" "caxeapagotra" 'barodvaja gotra" and "votchgotra", the preference for the performance of devotional acts being regulated by the sequence in which they are mentioned.

[39] Up to December 2020, neither party has pleaded or referred to any controversies concerning the preparation of a catalogue of mahazans in Article 23 or the list of capable Mahazans in Article 25 of the Devasthan Regulations, 1933. Accordingly, in December 2020, the Managing Committee prepared a catalogue of Mahazans, and the Clerk prepared a list of capable Mahazans entitled to vote at elections of the Managing Committee scheduled in March 2021. This catalogue and list comprised 3084 Mahajans, including the Mahazans who may not have had a permanent residence in Goa (for convenience, referred to as the 'non-Goan Mahazans).

[40] On 30.01.2021, respondents nos.4 and 5 (Raunak and Nishad) lodged their objections to including 2352 non-Goan Mahazans in the catalogue and the list of capable Mahazans.

[41] The above objections were almost entirely based on Articles 6 and 9 of the bye-laws of 1900, which read as follows:

Article 6 - Foreigners descending from the Mahazans who reside temporally in Goa, or anywhere else, are considered Mahazans for all purposes and shall enjoy the preeminence and prerogative of the Mahazans with local nationality excepting the acts of Management.

Article 9 - The administration of temple and funds shall always be carried out by administrative Committee constituted under the Regulations in force, the Mahazans residing in Goa and Portuguese subjects of four votes of which the body of Mahazans is composed being part of the same in any case."

[42] By order dated 10.02.2021, the Managing Committee, in the exercise of powers under Article 26 of the Devasthan Regulations, 1933, rejected the objections made by Raunak and Nishad.

[43] Raunak and Nishad appealed to the body of mazanias (General Body) under para 2 of Article 26 of the Devasthan Regulations, 1933.

[44] The body of mazanias (General Body), by its order dated 14.03.2021, dismissed the above appeal and upheld the order of the Managing Committee dated 10.02.2021.

[45] Raunak and Nishad then appealed to the Administrative Tribunal, again in terms of para 2 of Article 26 of the Devasthan Regulations, 1933. This appeal was numbered Devasthan Appeal No.3/2021 by the Tribunal.

[46] Though Raunak and Nishad had applied for deletion of the names of 2352 non-Goan Mahazans from out of 3084 Mahazans from the catalogue of Mahazans and the list of capable members, they did not implead even a single non-Goan Mahazan as a respondent to Devasthan Appeal No.3/2021. The entire attempt was perhaps to secure some orders behind the backs of such so-called non-Goan Mahazans.

[47] Initially, the Managing Committee resisted the claims of Raunak and Nishad by filing a reply on 11.06.2021. In this reply, the Managing Committee claimed that the appeal was based on a misconception of Articles 25 and 26 of the Devasthan Regulations provisions. The Managing Committee went on to state that Raunak and Nishad have misinterpreted the scope of the Devasthan Regulations and 'thereby seeking to delete names of Mahazans whose names are included after following the procedure laid down in the Devasthan Regulations.'

[48] The Managing Committee, in its reply before the Tribunal, pointed out that the objections of Raunak and Nishad based on Articles 25 and 26 of the Devasthan Regulations read with Articles 5 and 6 of the bye-laws of 1900 had been duly considered by the Managing Committee and after that the General Body. After deliberating on the same, the objections were rejected. The Managing Committee, in its reply at paragraph 6, stood by its decision dated 10.02.2021 and the General Body's decision dated 14.03.2021.

[49] Paragraph 6 of the Managing Committee's reply before the Tribunal reads as follows:

> "6. It is respectfully stated that the rejection of the objection raised by the Appellant to the catalogue of the Mahajans is perfectly legal and valid, as the said catalogue has been maintained by the Devasthan in accordance with law. The interpretation sought to be given by the Appellant, as is apparent form the grounds urged in the appeal, is contrary to the provisions of law and such an interpretation would instead of furthering the object of the Devasthan Regulation would go against the provisions as laid down in the Devasthan Regulation."

[50] The Managing Committee justified the inclusion of the names of the non-Goan Mahazans in the catalogue and the list of capable Mahazans by pleading the following in paragraph 8 of its reply dated 11.06.2021 before the Tribunal.

> "8. As a matter of fact, when the applications for including the names as Mahajans are received by the Managing Committee, the same are processed in accordance with the provisions of Devasthan Regulations. All such applications are considered by the Respondent no.2 in its meeting and upon deliberation of the same ascertaining the fact vis-a-vis the Devasthan

Regulations the same are either considered or rejected, after the Committee decides to accept the request to include the names as Mahajans the said names is included in the list of Mahajans. Such exercise has been undertaken by the Respondent no.2 from time to time, as and when the said applications are received and the same are processed and considered in accordance with law."

[51] The Managing Committee finally prayed that Raunak and Nishad's appeal be dismissed with exemplary costs. This reply dated 11.06.2021 was supported by an affidavit of Shri Sandesh Kunde, Secretary/Clerk of the Managing Committee, who stated that he was conversant with the facts of the case and that he solemnly affirms that the contents of the reply are based on his personal knowledge and records to which he has access.

[52] After all this, sometime in September 2021, the Managing Committee began to sing a different song for something more than what meets the eye. Though no pleadings were filed before the Tribunal to retract from the reply dated 11.06.2021 or the legal and factual contentions pleaded therein, the Managing Committee members possibly reached some understanding with Raunak and Nishad, based upon which the Tribunal was persuaded to make an order dated 15.09.2021.

[53] An impression was created before the Tribunal that such order if made, would be quite innocuous. However, based on this order, the Managing Committee usurped free rein to uphold Raunak and Nishad's objections and delete almost 2352 Mahazans from the list of 3084 capable Mahazans. All this was behind the backs of the Mahazans, whose names were attempted to be deleted.

[54] By grossly misinterpreting and even perhaps making unauthorized additions to the Tribunal's order dated 15.09.2021, the Secretary/Clerk of the Managing Committee published a notice (bearing no date) in the daily Lokmat (see page 183 of the paper book). This notice reads as follows:

"As per the directions of the Administrative Tribunal by its order dated 15/09/2021, the managing Committee has prepared a list of capable mahazans as per Article 25 of Devasthan Regulations and by keeping in mind clause 5, 6 and 9 of the Saunsthan Bye Laws.

Only those mahazans who are permanent residents of Goa are eligible to be added to the list of capable mahazans and are entitled to vote as well as participate in the administration of the temple.

The said list of capable mahazans is drawn from the December 2020 catalogue of mahazans prepared by the managing Committee as mandated by the Devasthan Regulations Act. The said list of capable mahazans will be kept in the Saunsthan office for inspection from 01/11/2021 till 15/11/2021. (9.00 am. to 12.00 noon / 3.00 pm to 6.00 pm).

If any capable mahazan, originally featuring in the December 2020 catalog of mahazans, doesn't find his name featuring in the list, then a claim to that effect

may be filed before the Managing Committee along with proof that he is a permanent resident of Goa. Apart from other documents which may be considered on case to case basis, the electoral roll of last 03 (three) Goa state assembly elections would be considered as the main criteria to ascertain permanent residence. If the capable mahazan is between the age of 18 to 33 years, then he may produce Bonafide certificate issued by respective educational institutions in Goa along with Goa state electoral roll to determine permanent residence in Goa.

All such claims to be submitted to Managing Committee in writing along with supporting documents by 20/11/2021.

The said above notice is as per Managing Committee resolution dated 15.10.2021 passed as per the order dated 15/09/2021 passed by Administrative Tribunal. Shree Ramnath Damodar Saunsthan

Sd/-

Secretary

Sandesh Kunde"

[55] The above notice was quite misleading because it gives an impression that the Tribunal's order dated 15.09.2021 had declared that only those Mahazans who are permanent residents of Goa are eligible to be added to the list of capable Mahazans and entitled to vote for elections to the Managing Committee of the said temple. The notice states that it is as per Managing Committee's resolution dated 15.10.2021 passed as per the order dated 15.09.2021 by the Administrative Tribunal. The Tribunal had nowhere held that only those Mahazans who are the permanent residents of Goa are eligible for inclusion in the list of capable Mahazans or entitled to a vote.

[56] After publishing the misleading notice, a list of capable Mahazans was notified on 31.10.2021, deleting the names of almost 2352 Mahazans from out of 3084 Mahazans in the list of capable Mahazans. However, there is no clarity on whether this deletion was by the Managing Committee or the Clerk/Secretary.

[57] The deletion was solely on the ground that the said Mahazans did not have a permanent residence in Goa and, therefore, in terms of Articles 6 and 9, were not entitled to take part in the acts of Management, which, according to the Managing Committee or its Clerk included the right to vote.

[58] The above stance of the Managing Committee or its Clerk was diametrically opposed to its view reflected in the order dated 10.02.2021 rejecting objections filed by Raunak and Nishad on identical Grounds. Moreover, the body of mazanias (General Body), by upholding the Managing Committee's order dated 10.02.2021, had maintained this very stance. Yet, despite all this, the Managing Committee or its Clerk proceeded to effect such large-scale deletions under the Tribunal's order dated

15.09.2021. Moreover, they obtained this order without disclosing the full implications and behind the backs of those who would be most affected.

[59] The petitioners instituted Writ Petition No.2360/2021(Filing No.), apprehending that the deletions proposed by the Managing Committee might be given effect. However, since the Managing Committee's mainstay was the Tribunal's order dated 15.09.2021, the petitioners challenged the said order. Accordingly, this Court, by order dated 24.11.2021, not only stayed the Tribunal's order dated 15.09.2021 but also stayed the list of capable Mahazans dated 31.10.2021 and restrained the Managing Committee and the general body of the Devasthan from finalizing the same or acting in furtherance of the same.

[60] This Court ultimately disposed of the Writ Petition No.2360/2021(Filing No.) by order dated 04.01.2022. The Tribunal's order dated 15.09.2021 was set aside. Devasthan Appeal Nso.3/2021 instituted by Raunak & Nishad was restored to the Tribunal for reconsideration. The list/notice dated 31.10.2021 was also set aside. Raunak and Nishad were granted liberty to implead the present petitioners or at least some of them in a representative capacity by resorting to the proceedings under Order I Rule 8 of CPC. However, all parties' contentions were left open for determination by the Tribunal in Devasthan Appeal No.3/2021.

[61] The basis of the order dated 04.01.2022 was the insistence upon compliance with principles of natural justice and fair play. In effect, this Court did not approve the attempt of the Managing Committee to delete the names of the non-Goan Mahazans based on the Tribunal's order dated 15.09.2021 obtained behind the backs of such non-Goan Mahazans. Further, to grant the fair opportunity to all parties, this Court restored Devasthan Appeal No.3/2021 before the Tribunal made orders for impleadment of non-Goan Mahazans at least in a representative capacity and requested the Tribunal to dispose of the appeal on merits. This order was made after hearing Raunak, Nishad, the Managing Committee, and the General Body of the said temple.

[62] Based on this Court's order dated 04.01.2022 and the consequent remand, it was expected that the parties would pursue the appeal and secure a verdict on their respective versions concerning the interpretation of Article 6 of the bye-laws from the Tribunal. Until such a decision, it was expected from the Managing Committee that the status quo would not be disturbed and there would be no deletions of the names of Mahazans on the alleged grounds that they did not have any permanent residence in the State of Goa.

[63] The Managing Committee, possibly to overreach the orders made by this Court and to pre-empt the Tribunal from deciding Devasthan Appeal No.3/2021 on merits, caused the Secretary to notify a list of capable Mahazans on 31.12.2021 deleting 2352 Mahazans from out of the 3084 Mahazans in the catalogue of Mahazans prepared under Article 23 of the Devasthan Regulations.

[64] The above list was published in the newspaper on 14.01.2022 and displayed in the Committee office on 15.01.2022. Mr. Bhobe submitted that the Secretary/Clerk undertook this exercise under Article 25 of the Devasthan Regulations. Mr. Bhobe, however, maintained that the catalogue of Mahazans prepared under Article 23 of the Devasthan Regulations was intact, and the names of the non-Goan Mahazans were continued in it.

[65] Some of the non-Goan Mahazans protested the attempted deletions by addressing representations. Such representations were considered as objections under Article 26 of the Devasthan Regulations and disposed by the Managing Committee on 09.02.2022 by taking a view diametrically opposed to its earlier stance in the order dated 10.02.2021. The Managing Committee even ignored the general body's order dated 14.03.2021, approving the Managing Committee's order dated 10.02.2021. The order dated 09.02.2022 declares the non-Goan Mahazans as "incapable Mahazans" because they do not have a permanent residence in Goa.

[66] Article 32 of the Devasthan Regulations provides the four circumstances in which the Mahazans may become "incapable." None of these circumstances were even remotely attracted to the non-Goan Mahazans.

[67] The petitioners also filed their objections on 18.01.2022 to the Managing Committee's attempt at deletion of their names. However, they instituted the present petition on 19.01.2022, alarmed by the actions of the Managing Committee that appeared to be determined to delete their names.

[68] On 09.02.2022 and 08.03.2022, this Court made orders facilitating the holding of elections scheduled on 13.03.2022. In terms of these orders, the Goan Mahazans and the non-Goan Mahazans have cast their votes in separate ballot boxes. Both the ballot boxes are sealed, and the Managing Committee, whose term has already expired, continues to govern the said temple's affairs.

[69] The learned Counsel for the parties, including, in particular, Mr. Bhobe, the learned Counsel for the Managing Committee, submitted that though objections based on alternate remedy, etc. had been raised in the reply, he was not pressing the same because the Managing Committee wished to have an adjudication on this issue from this Court. He also submitted that there are no seriously disputed facts, and the matters can be decided based on the pleadings and the materials produced on record by the parties. Finally, the learned Counsel submitted that it would be better if the case is decided on merits to clarify the entitlement of non-Goan Mahazans to vote at elections to constitute the Managing Committee.

[70] Thus, in the above circumstances, the matter was finally heard on 19.07.2022 and 25.07.2022. The arguments concluded on 26.07.2022, and the case was reserved for orders.

[71] Mr. Mulgaonkar, as noted above, has attacked the impugned decision deleting 2352 out of 3084 Mahazans on the ground that the decision-making process

was wholly flawed and even otherwise, the impugned decision was unsustainable on merits.

[72] In our opinion, there is much substance in Mr. Mulgaonkar's contention that the decision-making process leading to the impugned decision was flawed. Our reasons for this finding are discussed hereafter.

[73] The Managing Committee virtually attempted to overreach or short circuit judicial orders, including this Court's order dated 04.01.2022, setting aside Tribunal's order 15.09.2021 and restoring Devasthan Appeal No.3/2021 before the Tribunal for adjudication on merits.

[74] The basis and the purpose for making the order dated 04.01.2022 was to grant all the parties, including, in particular, the parties whose names were proposed to be deleted, a fair opportunity of adjudication before the Tribunal. Any action for the deletion or otherwise could have begun subject to the outcome of Devasthan Appeal No.3/2021.

[75] On the earlier occasion, the Managing Committee reached an arrangement with Raunak and Nishad and persuaded the Tribunal to make an order dated 15.09.2021, based upon which the Managing Committee attempted to delete 2352 Mahazans from out of 3084 Mahazans from the list of capable Mahazans. The full implications of such an order were never made clear to the Tribunal. All this was achieved behind the backs of these 2352 Mahazans.

[76] On this occasion, the Managing Committee did not even bother about the pendency of Devasthan Appeal No.3/2021, and under cover of circular dated 02.12.2021, again caused its Secretary/Clerk to delete the names of 2352 Mahazans. This entire subterfuge was to defeat the judicial orders and avoid adjudication through Court/Tribunal. This introduces a serious flaw in the decision-making process.

[77] The Managing Committee, by its order dated 10.02.2021, had already rejected Raunak and Nishad's objections to the retention of the names of the non-Goan Mahazans in the catalogue of Mahazans and the list of capable Mahazans. The General Body upheld the Managing Committee's order on 14.03.2021. In the challenge to these orders before the Tribunal, the Managing Committee filed a strong reply defending its actions. The Managing Committee also filed a response that the inclusion of the names of the non-Goan Mahazans was after following all due procedures and asserted that there was no infirmity in such inclusion. Yet, despite all this, the same Managing Committee, without any variation in facts, arrived at a diametrically opposite decision. Such a decision-making process can hardly be described as a process consistent with principles of natural justice and fair play.

[78] As noted earlier, Mr. Bhobe repeatedly maintained that the catalogue of Mahazans prepared under Article 23 of the Devasthan Regulations, 1933 was intact. The names of the non-Goan Mahazans continue in it. He submitted that in the list published in the newspaper on 14.01.2022 and displayed in the Committee office on

15.01.2022, it is the Clerk/Secretary who, under Article 25 of Devasthan Regulations, had deleted the names of 2352 Mahazans from the list of capable Mahazans.

[79] Article 23 of the Devasthan Regulations provides that the bodies of members (mazanias) shall have a catalogue of their components written down in their book concerned, prepared according to model no.24, annexed to the Regulation. This shall be revised every year by the Managing Committee till December 31, by making therein enrolments in harmony with the bye-laws, the necessary eliminations, and the endorsements to the enrolments of those "which may become incapable."

[80] Article 24 of the Devasthan Regulations expressly permits the enrolment of members (mazanes) residing abroad, provided they satisfy the legal requirements. There is no dispute that the expression "abroad" means beyond the territories held by the Portuguese before Goa's Liberation on 19.12.1961.

[81] Article 25 of the Devasthan Regulations reads as follows:

"Art.25 - In view of the catalogue, the Clerk of the committee shall draw up, till the January 15, a list, in duplicate, of the capable members (mazanes) or associates, it being displayed one copy for the inspection of interested persons, at the respective temple, with a prior notice published in the periodicals of the taluka (concelho), there being any, or in Government Gazette and the other forwarded to the Office of Taluka (Concelho) Administrator till the 20 th of the said month."

[82] Since Mr. Bhobe has made it clear that the catalogue of Mahazans prepared under Article 23 of the Devasthan Regulations was never amended, and the non-Goan Mahazans continued in the catalogue, we fail to appreciate how the Clerk/Secretary of the Managing Committee could have on 31.12.2021 prepared a list of capable Mahazans by excluding 2352 Mahazans from the catalogue of Mahazans under Article 23 of the Devasthan Regulations. Despite our queries, we received no satisfactory response on this issue from any of the learned Counsel for the respondents.

[83] Article 25 begins with the expression open "in view of the catalogue." Further, Article 25 leaves it to the Clerk of the Committee to draw up the list of capable Mahazans and then display the same as prescribed. Thus, it is quite clear that the Clerk of the Committee could not have ignored the catalogue of Mahazans that included the names of 3084 Mahazans, including the so-called non-Goan Mahazans.

[84] The above circumstances expose yet another flaw in the decision-making process leading to the deletion of 2352 Mahazans from the list of capable Mahazans.

[85] The Secretary/Clerk of the Managing Committee attempted to mislead the Mahazans by publishing a notice that created an impression that the Administrative Tribunal, by its order dated 15.09.2021, had declared that the Mahazans not having a permanent residence in Goa were not entitled to vote. Even the order dated 15.09.2021 was obtained without giving the Tribunal a whole idea that the same was to be used to delete 2352 Mahazans or to resile from the pleadings before the Tribunal. The order dated 15.09.2021 was obtained without making any of the non-Goan Mahazans as

parties to the proceedings in Devasthan Appeal No.3/2021, whether in a representative capacity or otherwise.

[86] All the above circumstances, if individually or cumulatively considered, establish that the decision-making process leading to the deletion or the attempted deletion of 2352 Mahazans was flawed. The process violated the principles of natural justice and fair play and was aimed at overreaching the judicial process. The process ignored the relevant legal provisions in Articles 23 and 25 of the Devasthan Regulations. The Secretary/Clerk acted ultra vires.

[87] The process also ignored the binding decision of the General Body that the Managing Committee and its Clerk quite unceremoniously ignored. Finally, the process also ignored the provisions of Article 32 of the Devasthan Regulations and the circumstance that none of the four predicates prescribed therein were even remotely attracted to the 2352 Mahazans, who were declared incapable Mahazans based on a misinterpretation of the bye-laws. On all these grounds alone, the petitioners are entitled to succeed.

[88] However, the learned Counsel for the parties time and again requested this Court to decide the matter on merits by interpreting the import and scope of the bye-laws, 1900. They submitted that the material they placed on record is sufficient to determine the issue on merits. They do not press the objection based on alternate remedies or disputed facts.

[89] Even otherwise, we think that such objections lack merit. The parties were very much before the Tribunal in the Devasthan Appeal 3/2021. But unfortunately, the Managing Committee, instead of awaiting the appeal's disposal, short-circuited the process. This was possibly because it might have been difficult for the managing Committee to resile from its reply before the Tribunal. This was possibly to avoid an adverse verdict from the Tribunal. In such circumstances, there was hardly any merit in the objections raised and given up. In any case, deferring to this request, we examine the merits of the impugned decision to delete the names of 2352 from the 3084 Mahazans from the list of capable Mahazans.

[90] The law concerning the administration of temples in Goa is the “Regulamento das Mazanias” (Devasthan Regulation), enacted by the Portuguese Legislature in 1933. This law continues in force even after liberation, given the provisions of the Goa, Daman, and Diu Administration Act 1962. Furthermore, this Act was amended by the UT/State legislature several times, about which there is no serious dispute. Therefore, all the parties rely upon this law to support their respective contentions in this petition.

[91] Dr. Rui Gomes Pereira, in his work “Hindu Temples and Deities” (1978), writes about the evolution of the law to govern the administration of Hindu temples. He notes that 'Mazanias' are associations of a religious nature consisting of the founders of Hindu temples or their descendants. The expression 'Mahazan,' a title the

members use, means 'elder' (Maha: great and Zan: person). Every male descendant, by masculine lineage, has the customary right to become its member on attaining the prescribed age.

[92] Dr. Rui Gomes Pereira writes that up to the XIX century, there were several difficulties in the administration of temples and temple properties because Mazanias did not have a juridical personality and, consequently, could not directly be parties in acts and contracts. According to the old custom, all the donations in their favor were made in the name of their Mahazans or priests. However, when commerce progressed, donations poured in on festive occasions in fulfillment of vows and thanksgiving for divine graces received. As a result, temples became very rich, but all this income and the properties so donated stood in the name of certain Mahazans or priests who invested this in profitable transactions in their own names.

[93] Dr. Rui Gomes Pereira writes that in the absence of proper regulatory measures, funds were diverted for personal benefit. Sometimes the descendants of those who possessed these properties alienated them and pocketed their price. At other times the properties were attached and sold in public auction on account of the debts of their supposed owners. As a result, the posts in the administrative Committee of those temples became much desired and disputed. Complaints were submitted to the Government against the diversion of funds, usurpation, alienation of immovable property, non-submission of accounts, and other irregularities; thus came the call for urgent measures to put a stop to such practices.

[94] Dr. Rui Gomes Pereira writes that this caused the Portuguese Government to establish an official tutorship in those institutions. The Edict of November 14, 1828, made some provisions, but they were insufficient to set right the irregularities in administrating the temples. This led to the appointment of the inquiry commission, whereby the Mahazans were forced to declare the properties of the temples they held in their name. This was only possible when they were taken before the deity and were forced to swear according to the customary system, as is testified in the record of proceedings held on November 26, 1881, by the Government Commissioner for listing the properties of the temple of Shantadurga of Queula and other temples in the same village. Similar inquiries were made regarding various other temples and inventories of their movable and immovable properties. Properties were restored to many temples through the Courts. There was an urgent need for stricter legislation.

[95] Therefore, a study committee was appointed, and based on its report, approval was granted by 'Portaria' No.584 on October 30, 1886, to the Regulamento das Mazanias (Rules governing Mazanias), which continued to be in force till the publication of the second 'Regulamento' - Legislative Diploma No.645 of 1933 - slightly amended subsequently by the Legislative Diplomas No.1311 of October 29, 1949, and 1388 of July 19, 1951.

[96] Dr. Rui Gomes Pereira writes that the loopholes in the law were plugged, the vulnerable points were defended, and the outflow of their funds was stopped. The Mazanias were invested with a juridical personality so they might henceforth directly enjoy rights, discharge obligations, and establish how this should be represented. Orders were issued to organize a catalogue of the Mahazans, thus putting an end, once and for all to the disputes on who should be held as a member or not, along with the necessary provisions of law to guarantee to the presumed Mahazans the right of proving such a qualification through the 'Tribunais Contenciosos Administrativos' (Administrative Tribunals).

[97] Dr. Rui Gomes Pereira writes that 'Regulamento' is a general law applicable to all the Mazanias. The 'Compromisso' is the private statute of each of them. The object of which is mainly to define who has the right of being held as its member; the honors, prominence, rights, and duties of members, the festivals and the daily and periodical rites, the listing of its servants and their rights and duties and the foreseen income and the expenses inherent to the cult. The Compromissos are subject to the approval of the Government, which has the right to decide all the issues that may be raised on the points or aspects foreseen in the same, either as regards the Constitution of the Mazanias and their patrimony or as regards other aspects connected with the rights of Mahazans or others, established by custom.

[98] Article 17 of the Devasthan Regulation provides for the bodies of members (mazanias) to have a legal constitution. It shall be required to have bye-laws approved by the Government, mentioning, inter alia, the designation of the Devasthans and their dependent temples of the groups or family groups of which the bodies of members (mazanias) are composed, tribe, “gotra” (progeny comprising various families), when the associates are Brahmins, class, and surnames (mazanias) rights and obligations, honors and responsibilities of which family group, and of families within the family groups, cult, obligatory religious acts and festivities, fun receipts and expenditure, servants and their obligations and pay, rates of cultural and festive acts, and any other provisions that may not be in opposition to this Regulation and the general law.

[99] The bye-laws of the temple of Shree Damodar and its affiliates in Sanguem Taluka were approved and published in Government Gazette No.27 dated 06.04.1900. The parties have placed on record the Portuguese version as well as the English translation. There is no dispute that these bye-laws were prepared and approved under the Devasthan Regulation of 1886, then in force.

[100] Article 437 of the Devasthan Regulation 1933, among other things, repeals the Devasthan Regulation issued vide Government order No.584 dated 30.10.1886. Accordingly, the status of bye-laws prepared and approved under the Devasthan Regulation 1886 after the Devasthan Regulation 1933 entered force and came up for consideration in Shri Vinayak Kamat Tarcar (supra) before a coordinate Division Bench of this Court.

[101] A Co-ordinate division bench in paragraph 11 held as follows:

> "11. The Devasthan Regulation relating to Hindu temples, was enacted by Act of Legislature No. 645 dated March 30, 1933 by the Portuguese. It was felt that earlier Regulation, governing Hindu temples in force, approved by the Government Order No. 584 dated October 30, 1886, was required to be updated in the public interest. Accordingly the previous Devasthan Regulation under Government Order No. 584 dated October 30, 1886, was repealed and the Devasthan Regulation by Act of Legislature No. 645 dated March 30, 1933, was introduced. Article 437 of the Devasthan Regulation, in force repealed not only the Devasthan Regulation approved by Government Order No. 584 dated 30-10-1886, but also the rules to the contrary, general as welt as special. It appears that the bye-laws under Government Order No. 108 were framed for the purpose of administration of temple of Shree Bhagwati Chimulkarrin Devasthan of Marcela, Goa and the associate temples thereunder in terms of the said Government Order No. 584 dated 3-10-1886. If it is so, then bye-laws under Government Order No. 108 would stand automatically repealed in view of Article 437 of the Devasthan Regulation in force. Even, otherwise, Article 437 of the Devasthan Regulation clearly postulates that the rules to the contrary, general and special, stand repealed. There is no provision in the Devasthan Regulation for election of Committee of 'Dazans' for the purpose of administration and Management of the Devasthan....."

[102] Thus, in the opinion of a coordinate Division Bench, Article 437 of Devasthan Regulation 1933 repealed not only the Devasthan Regulation approved by Government order No.584 dated 30.10.1986 but also the bye-laws framed by the temple concerned on 27.10.1910. The Division Bench, in fact, held that the bye-laws would stand automatically repealed because of Article 437 of Devasthan Regulation, 1933.

[103] The learned Counsel for the respondents, including Mr. Pangam, submitted that the issue of repeal of bye-laws was not necessary for the decision in Shri Vinayak Kamat Tarcar (supra). Therefore, the line about bye-laws being automatically repealed due to Article 437 of the Devasthan Regulations, 1933, may not be taken as the ratio.

[104] In the facts of the present case, we do not think we must base our decision on the ruling of the coordinate Division Bench in Shri Vinayak Kamat Tarcar (supra). Therefore, the issue of the precise ratio of the said decision or the impact of Article 437 of the Devasthan Regulations and the bye-laws of 1900 that were admittedly framed under the 1886 law is kept open for consideration in an appropriate case.

[105] However, even if we proceed on the basis that the bye-laws of 1900 continue in force, in our opinion, nothing in the said bye-laws debars the non-Goan Mahazans from voting at elections to constitute the Managing Committee of the said

temple. At least in the last three decades, such non-Goan Mahazans have voted at the polls, and in the absence of explicit bye-law provisions, we do not think they can be deprived of this right based on the contentions of the learned Counsel for the respondents. Even if any explicit provisions were to be made in the bye-laws, the issue of their enforceability, should they conflict with the Devasthan Regulations, would survive.

[106] The Managing Committee raised no serious arguments regarding non-compliance with the qualifications prescribed in Articles 1, 3, 4, and 5 of the bye-laws of 1900 regarding non-Goan Mahazans. Article 4 states that all Mahazans have equal rights and prerogatives except for the preference observed since remote times and mentioned in Article 3 of the bye-laws.

[107] However, Mr. Bhobe, Mr. Kantak, and even Mr. Pangam submitted that the expression 'acts of management' in Article 6 of the bye-laws includes the right to vote or contest elections to the Managing Committee. Therefore, they submit that by voting at elections to constitute the Managing Committee, the non-Goan Mahazans would at least indirectly perform the 'acts of management' that Article 6 of the bye-laws forbids them from performing.

[108] There is at least no dispute that the expression 'foreigners' referred to in Article 6 of the bye-laws means Mahazans who do not have any permanent residence in Goa or, in other words, the non-Goan Mahazans. The expression 'foreigners' has to be construed in the historical context when Goa was considered a part of Portugal up to 19.12.1961. Therefore, even the descendants of the founder Mahazans residing just beyond the borders of Goa were treated as 'foreigners' for all legal purposes.

[109] Neither Article 6 of the bye-laws nor any other articles of the bye-laws make any specific reference to the right of the Mahazans to vote at the elections for constituting the Managing Committee. However, Article 31 of the Devasthan Regulation, which is a legislative instrument and therefore superior to the bye-laws of 1900, provides that it shall be incumbent on the members into (Mazanias) or Associates to vote and be voted for the offices of the members of the Managing Committee and their substitutes.

[110] The relevant extract of Article 31 is transcribed below for the convenience of reference:

> "**Article 31-**It shall be incumbent on the members (mazanes) or associates:
>
> 1) To discuss and vote in all their meetings;
>
> 2) To examine the statements of receipts and expenditure, the estimates for auction and its conditions, the statements of accounts and ordinary and extraordinary budgets, in the periods and in the manner laid down under this Regulation;
>
> (3) To vote and be voted for the office of members of the Managing Committee and their substitutes;

4) ...

5) ...

6) ...

7) ...

8) ...

9) ...

10) ...

11) To serve the administrative posts to which they may be appointed and to discharge any service commissions with which they may be charged; they shall not be bound to serve for more than three years the posts of Managing Committee, and others for more than a two-year period."

[111] There was a dispute about using the word "incumbent" in Article 31 of the Devasthan Regulations. Learned Counsel for the respondents submitted that the translation might not be appropriate. However, this word is used in the official government translation. Be that as it may, even if we hold that Article 31 refers to the competence of the members (Mazanis) or Associates as suggested by Mr. Pangam, it is pretty clear that this Article declares that the Mahazans shall be competent to vote at elections to constitute the Managing Committee.

[112] Therefore, based on the expression' acts of Management,' as it appears in Article 6 of the bye-laws, we do not think that such competence of the Mahazans can be diluted or watered down by declaring that the so-called non-Goan Mahazans are incompetent to vote at the elections to the Managing Committee of the temple. The Legislature must be deemed to be aware of the bye-laws approved by the Government before the Devasthan Regulations were enacted and entered force. Yet, the mahazans were declared competent to vote at elections to constitute managing committees. There are separate provisions to determine the incapability of the mahazans in the Devasthan Regulations.

[113] In the present case, there is no dispute that the descendants of the foreigner Mahazans, wherever they may reside, are Mahazans of the temple and shall enjoy preeminence and prerogative of Mahazans with local nationality (meaning thereby Mahazans having permanent residence in Goa). Once this position is accepted, in terms of Article 31 of the Devasthan Regulation, such Mahazans, wherever they reside, will have the right, at least, to vote for the offices of the members of the Managing Committee. In this matter, we are not concerned with the right to be voted for the offices of the Managing Committee; therefore, we refrain from making any observations on that issue.

[114] However, the provisions of Article 31 of the Devasthan Regulation are pretty clear in that it shall be incumbent on the Mahazans, or at least the Mahazans will be competent to vote for the offices of the members of the Managing Committee and

their substitutes. This right provided by the Devasthan Regulation, a legislative instrument, cannot be watered down or diluted by the bye-laws of 1900. This is more so because Article 6 of the bye-laws does not even refer to the right of the foreigner Mahazans to vote. The interpretation suggested by Mr. Kantak, Mr. Bhobe, and Mr. Pangam might render Article 6 of the bye-laws ultra vires the Devasthan Regulation. Thus, an interpretation that saves this bye-law from being declared ultra vires will have to be preferred.

[115] In Bokajan Cement Corporation Employees' Union (supra), the Hon'ble Supreme Court was considering whether an employee would lose his right as a trade union member due to the cessation of employment. The Single Judge of the Guwahati High Court held that no such inference could be drawn. However, the Division Bench reversed the Single Judge. It held that no sooner an employee ceases to be employed, he loses his right to continue as a trade union member. The trade union, therefore, appealed to the Hon'ble Supreme Court.

[116] The Hon'ble Supreme Court analyzed the provisions of Section 6(e) of the Trade Union Act, 1926, and clause 5 of the trade union's Constitution. It held that there was no specific provision either in the Act or in the Constitution of the union to provide for the automatic cessation of the trade union membership upon an employee's cessation of his employment. The Court held that the Constitution of a trade union is not required to be construed as a statute. It deserves to be construed broadly and liberally. Unless clearly stipulated otherwise, the Act and the Constitution of the trade union should be interpreted to advance the interest of the trade union and its members. Membership of a trade union is a valuable right that can be taken away only within clear parameters of the Act and the Constitution of the trade union. The Court finally held that given the provisions of the Constitution of the trade union and in the absence of any provisions under the trade unions Act to the contrary, on cessation of employment, it cannot be held that the employee would cease to be a member of the trade union.

[117] Thus, without an explicit prohibition on voting rights, the same cannot be read into Article 6 of the bye-laws. Article 31 of the Devasthan Regulations is quite clear, and the explicit wordings of Article 31 cannot be set at naught by reading into Article 6 of the bye-laws some words which do not even find a place in the said Article. Even the context does not call for reading such words in the bye-laws.

[118] The rulings in Life Insurance Corporation of India (supra), 63 Moons Technologies Limited (supra) & Raghu Hari Dalmia & Ors. (supra) do not support the respondents' contention that the non-Goan Mahazans, by voting for elections to constitute the Managing Committee, are themselves taking part in the Management of the Committee. The status of Mahazans is not akin to the status of equity shareholders in a company. The statements in the said decisions must be read in the context and not de hors. The bye-laws impose no specific bar, and such bar cannot be read or deduced

from the expression 'acts of Management,' also because such a construction might conflict with the statutory provisions.

[119] Mr. D. Pangam submitted that the non-Goan Mahazans could be conceded rights to vote on several subjects referred to in Article 31 of the Devasthan Regulations except the right to vote and to be voted for the offices of the members of the Managing Committee and their substitutes. However, he was unable to make good his submission except for contending that otherwise, there was no good reason for the Portuguese Legislature to deal with the subject of the right to vote and to be voted for the offices of the members of the Managing Committee and their substitutes separately in Article 31(3) when in fact Article 31(1) had already granted the Mahazans the right to discuss and vote in all their meetings.

[120] In our opinion, the above reasoning is too slender a basis to jump to a conclusion of such proportions. The Legislature wished to leave no ambiguity regarding the rights of the Mahazans to vote for the offices of the members of the Managing Committee and their substitutes. Therefore the subject may have been treated separately. Suppose Mr. Pangam's submissions were to be accepted. In that case, apart from Article 31(1), there may have been no necessity to have any further sub-clauses in Article 31 because Article 31(1) was wide enough to include practically everything. The very structure of Article 31 does not support the contention advanced. Therefore, based on such reasoning, we do not think that the non-Goan Mahazans can be deprived of their right to vote guaranteed by Article 31(3) of the Devasthan Regulations.

[121] The question of whether bye-laws under the Devasthan Regulations can impose additional qualifications and disqualifications for a Mahazan exercising his right to vote does not seriously arise in this matter because Articles 6 & 9 of the bye-laws, in our opinion, impose no disqualification on a non-Goan Mahazans from voting at elections to constitute the Managing Committee. If such disqualifications were to be explicitly imposed, only then would the occasion arise to determine whether the imposition of such disqualification was permissible, given that no such disqualification was contemplated under the Devasthan Regulations. Therefore, the three decisions that Mr. Pangam relied on are of no assistance in resolving the issue raised in this petition.

[122] The Managing Committee cannot simply resile from its earlier position by claiming that there can be no estoppel against the law. The Managing Committee, at least, in its reply before the Tribunal, had pleaded facts, including the fact that the names of the non-Goan Mahazans had been included in the catalogue and the list of capable Mahazans after following due process and verification. There is virtually no dispute that for the last 25 to 30 years, the non-Goan Mahazans were not only included in the catalogue of Mahazans but also in the list of capable Mahazans thereby entitling them to vote for elections to the Managing Committee of the said temple.

[123] None of the parties have placed any record about non-Goan Mahazan being prevented from voting at such elections to constitute the Managing Committee of the said temple at any time before the liberation of Goa or even after that. Thus, the position that prevailed for all these years could not have been reversed by the Managing Committee or its Clerk based on such a belated interpretation of Article 6 or Article 9 of the bye-laws of 1900. This is not just a case of some inadvertence as claimed by the Managing Committee in its returns. Instead, this appears to be an unfortunate attempt by the Managing Committee and its Clerk to reverse a settled position for no legitimate reason.

[124] The Managing Committee, after all these years, has virtually declared the non-Goan Mahazans as "incapable Mahazans." Articles 23 and 26 of the Devasthan Regulations may empower a Managing Committee to determine whether Mahazan enrolled in a catalogue of Mahazans has become incapable. The wordings of Article 23 of the Devasthan Regulations speak about the elimination of 'those who may become incapable.' However, no case is made out to even remotely suggest that any non-Goan Mahazans had become incapable since their enrolment in the catalogue of Mahazans.

[125] Be that as it may, the issue as to whether any of the Mahazans have become incapable has to be determined by reference to Article 32 of the Devasthan Regulations, 1933.

[126] Article 32 of the Devasthan Regulations, 1933 reads as follows:

> **"Article 32 -** The following persons shall be forbidden to take part in the deliberations of the body of members (mazania) as they are incapable:
>
> 1) The minors not emancipated;
>
> 2) The interdicted, debtors of the body of members (mazania) or/of associations, after being judged as such by an administrative or judicial verdict;
>
> 3) Those who may have lawsuits or disputes with the body in the matter relating to the same lawsuits;
>
> 4) Those who may be judge a verdict made definitive, as usurpers of the fields or lands of the temples;"

[127] In our opinion, none of the predicates in clauses (1), (2), (3) & (4) of Article 32 of the Devasthan Regulations, 1933 are even remotely attracted to the non-Goan Mahazans. However, Mr. Kantak, the learned Counsel for Raunak and Nishad, submitted that the non-Goan Mahazans had been interdicted by Article 6 of the by-laws of 1900 and, therefore, have become incapable Mahazans in terms of Article 32(2) of the Devasthan Regulations, 1933.

[128] In our opinion, Mr. Kantak's above contention is too tenuous to deserve acceptance. Fortunately, even Mr. Bhobe and Mr. Pangam did not go this far. Though the Devasthan Regulations do not define the expression "interdict," there is a particular

meaning assigned to this term in the dictionaries and the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012. This 2012 Act is relevant because it consolidates and amends the law of intestate and testamentary succession, notarial law, and the laws relating to partition of an inheritance and matters connected therewith. All these matters were earlier governed by the corresponding Portuguese laws, which also referred to the concept of "interdict".

[129] Section 2 (j) of the 2012 Act defines "interdict" means a person who is declared to be incompetent to manage his assets by an order of the Court. Even the dictionary meanings on the same lines do not even remotely assist the interpretation suggested by Mr. Kantak. Besides, the bye-laws do not interdict the non-Goan mahazans from voting as urged.

[130] Thus, it is clear that none of the non-Goan Mahazans could have been declared "incapable Mahazans" simply because they may not have had a permanent residence in Goa. Further, what is most important is that the Managing Committee's orders declaring some of the non-Goan Mahazans as incapable came only on 09.022022. If they were legal, such orders would, at the highest, apply only to the 277 mahazans who filed objections and not all the 2352 mahazans. But the Clerk of the Committee purporting to exercise powers under Article 25 of the Devasthan Regulations on 31.12.20.21 itself proceeded to delete 2352 non-Goan Mahazans from the list of capable Mahazans. This, the Clerk did by ignoring the catalogue under Article 23 of the Devasthan Regulations, which Mr. Bhobe admitted, was intact, as of 31.12.2021 or even to date, and includes all these so-called non-Goan mahazans.

[131] For all the above reasons, we are satisfied that the impugned decision, even or merits, is unsustainable and warrants interference.

[132] Mr. Mulgaonkar and Mr. Bhobe urged this Court to keep in mind the historical perspective when interpreting the provisions of the Devasthan Regulations 1933 and the bye-laws of 1900.

[133] The Managing Committee, in its affidavit, in paragraph 26, admitted that the ascendants of the petitioners shifted outside Goa because of the inquisition of the Portuguese in the region of Mathgramkars (now Margao) in the year 1565. However, after all these years, the Managing Committee has produced nothing on record to establish that the ascendants of the petitioners, who shifted outside Goa because of the inquisition by the Portuguese in 1565, had no role to play in the establishment of the said temple. This point was not even urged by Mr. Bhobe or, for that matter, any other Counsel. The pleadings, however, acknowledge the exodus of Gaud Saraswat Hindu Brahmins from Goa to the neighboring areas due to inquisition and religious persecution.

[134] Alan Machado (Prabhu), in his book "Goa's Inquisition - facts-fiction-factoids," has a chapter (Chapter 33) entitled "Emigration and the Inquisition". He writes that in the 1560s, several influential Brahmans who chose to resist coercive

conversion laws were expelled from Goa. They were given short notice to dispose of their property and leave. The 1801 census reveals that lesser privileged Konkani speakers accompanied the exiles.

[135] The Eminent journalist-writer Chandrakant Keni in his book entitled "The Saraswats," has a chapter (Chapter 7) entitled "Exodus from Goa." He writes that around the 1560s, the Portuguese gave Saraswat Brahmins in Goa two alternatives either convert to Christianity and stay in Goa or leave within a month. Most may have chosen the second alternative during this period and migrated to South Kanara.

[136] Another eminent historian, A. K. Priolkar, in his book "The Goan Inquisition - The Terrible Tribunal for the East" writes about the banishment of the Hindus. Some extracts from this chapter are quoted below:-

> "On April 2, 1560, the viceroy D. Constantino de Branganca ordered that a large number of Brahmins, whose names were included in the rolls appended to the order should be thrown out of the island of Goa and the lands and fortresses of the Portuguese king. Only those who were natives of Salsete and Bardez were permitted to return to their villages. Others were banished under pain of their being made prisoners on the galleys without remission and losing all their property, one half to the accuser and the other to whatever purpose the viceroy may consider appropriate. They were given one month within which to dispose of their property. On June 8 of the same year was issued similar order banishing persons of the Goldsmith caste who had their families and properties outside the Portuguese territories unless they brought back their families and property within a period of 10 days."
>
> "The result of such orders was that the Hindus migrated to the neighbouring lands en masse, business establishments were closed down, and there was an acute dearth of agricultural labour, artisans and mechanics."

[137] Thus, if the matter is considered from the historical perspective, it does appear that the Mahazans, who are now referred to as the 'foreigner Mahazans' or the 'non-Goan Mahazans,' have their roots and deities in Goa. However, due to inquisition and religious persecution, they may have immigrated to the neighboring areas that did not form a part of the Portuguese territories in India (Esta Do India). After 60 years since the liberation and in the absence of explicit provisions in the Devasthan Regulations of 1900, it will not be proper to say that the descendants of such Mahazan will not have a right to even vote for elections to the Managing Committee.

[138] The Managing Committee's plea of "inadvertence," for the last 3 to 4 decades in including the names of non-Goan Mahazans in the category of Mahazans and the list of capable Mahazans also cannot be accepted. The Managing Committee cannot attribute any inadvertence to the several Managing Committees that preceded it. Even this Managing Committee, by its order dated 10.02.2021, expressly rejected Raunak/Nishad's interpretation of the bye-laws and the Devasthan Regulation and

dismissed their application seeking deletion of the names of the non-Goan Mahazans. The General Body endorsed Managing Committee's decision. This very Managing Committee filed a detailed reply before the Tribunal on defending the inclusion of the names of the so-called non-Goan mahazans in the catalouge of mahazans and the list of capable mahazans. After all this, the Managing Committee cannot plead "inadvertence", in answer to the petitioners' plea of estoppel.

[139] The circumstance that the names of non-Goan Mahazans were included in the catalogue of Mahazans and the list of capable Mahazans for over 3 to 4 decades is a circumstance that assumes relevance considering the doctrine of contemporanea expositio. The usage or practice developed under a statute is indicative of the meaning ascribed to its words by contemporary opinion. In the case of an ancient statute, it is an admissible external aid to its construction. (Contemporanea expositio est optima et fortissima in lege).

[140] Besides, the petitioners have placed on record bye-laws enacted by neighboring temples like Shree Mahalasa Devasthan, Shree Lakshmi Narasimha Devasthan, and Shree Kamakshi Devasthan made between 1900 and 1933, which also contain explicit provisions that permit the so-called "foreigner Mahazans" from voting at elections to Managing Committees but restricts their right to contest elections to Managing Committees.

[141] Mr. Kantak's contention based upon particular surnames also deserves no acceptance. Over the years, surnames have changed mainly due to the vocations or the titles bestowed. Even the respondents Mr. Kantak represents do not trace their names to the bye-laws of 1900. No such contention was correctly raised on behalf of the Managing Committee. The Regulations and the bye-laws refer to the four gotras and their vangods. Even Mr. Kantak did not urge that the so-called non-Goan mahazans do not fulfill the gotra criterion as prescribed. Incidentally, no objection based on the surname was ever raised by Raunak and Nishad in their complaint to the Managing Committee.

[142] For all the above reasons, we allow this petition and make the rule absolute in terms of prayer clauses (a), (b), (d) & (e) of the petition. The relief in terms of prayer clauses (c) & (f) is already worked out because elections have been held though the ballot boxes have been sealed.

[143] The Prayer clauses (a), (b), (d) & (e) read as follows:

> "(a) That this Hon'ble Court be pleased to after perusing the legality, validity, correctness and propriety of the List of Capable Mahajans dated 15.01.2022 of Shree Ramnath Damodar Saunsthan prepared by the Respondent no.2 in pursuance to its notice dated 14.01.2022 quash and set aside the same as regards the deletion/non addition of the names of the Petitioners and other similarly situated persons.

(b) That this Hon'ble Court be pleased to issue a Writ of Mandamus, or a Writ in the nature of Mandamus or any other Writ, order or direction, directing the Respondent No.1 to act on the representation dated 18.01.2022 made by the Petitioners, and reject the List of Capable Mahajans dated 15.01.2022 of Shree Ramnath Damodar Saunsthan prepared by the Respondent No.2 in pursuance to its notice dated 14.01.2022.

(d) That this Hon'ble Court be pleased to pass an order or direction, precluding the Respondent No.1, Respondent No.2 or Respondent No.3 from finalising the List of Capable Mahajans of Shree Ramnath Damodar Saunsthan in pursuance to the List of Capable Mahajans dated 15.01.2022 of Shree Ramnath Damodar Saunsthan prepared by the Respondent No.2 in pursuance to its notice dated 14.01.2022.

(e) That this Hon'ble Court be pleased to pass a Writ of Mandamus or a Writ in the nature of Mandamus or any other Writ, order or direct, restraining the Respondent No.1 from publishing in the official Gazette the List of Capable Mahajans dated 15.01.2022 of Shree Ramnath Damodar Saunsthan prepared by the Respondent No.2 in pursuance to its notice dated 14.01.2022 and/or from acting in furtherance to the List of capable Mahajans dated 15.01.2022 of Shree Ramnath Damodar Saunsthan prepared by the Respondent No.2 in pursuance to its notice dated 14.01.2022."

[144] Further, we direct the Mamlatdar/Administrator, who has custody of the sealed and segregated ballot boxes, to open the seals, count the votes and declare the results in the presence of the Petitioners or their representatives, the members of the Managing Committee, and Raunak/Nishad, if they choose to remain present. Notice to the learned Counsel for these parties will be sufficient notice. The Mamlatdar/ Administrator must maintain a record of the segregated votes.

[145] The above exercise must be completed within seven days from today. Further, within a maximum of five days from the declaration of results, the members of the present Managing Committee should hand over charge to the newly elected Managing Committee members.

[146] The rule is made absolute in the above terms. There shall be no order for costs. All concerned to act on the authenticated copy of this order

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2023(1)GoaCC67

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak; Bharat P Deshpande]

Writ Petition No 2423 of 2022 **dated 30/11/2022**

Sameer Bhiku Naik

Versus

State of Goa; Goa Public Service Commission; Directorate of Agriculture

RELAXATION OF STANDARD OF SUITABILITY

Rights of Persons With Disabilities Act, 2016 Sec. 2, Sec. 3 - Selection process - Post of 'Assistant Agricultural Officer' - Reserved post for disabled person - Relaxation of standard of suitability - Petitioner is certified to suffer from 43% disability arising out of a united fracture lateral condyle left femur - Moreover, the post for which he was being considered is reserved for persons with disabilities - Therefore, upon cumulative consideration of all these peculiar factors - GPSC is justified in exercising power of relaxation vested in it.

[Paras 13, 15]

Law Point - GPSC and the State Government have sufficient powers to relax the suitability standard where a sufficient number of benchmark disability candidates are not available based on general standards to fill all vacancies reserved for them.

Acts Referred:

Rights of Persons with Disabilities Act, 2016 Sec. 2, Sec. 3

Counsel:

A D Bhobe, A Fernandes, Deep Shirodkar, Dattaprasad Lawande, Pradosh Dangui

JUDGEMENT

M.S. Sonak, J.

[1] Heard Mr A.D. Bhobe for the Petitioner, Mr Deep Shirodkar for respondents no.1 & 3 and Mr Dattaprasad Lawande for respondent no.2 (GPSC).

[2] Rule. The rule is made returnable immediately at the request of the learned Counsel for the parties.

[3] The Petitioner complains about his non-selection to the post of 'Assistant Agricultural Officer', a position reserved for persons with disabilities. There is no dispute that a petitioner is a person with a permanent disability to the extent of 43%. Moreover, this position has been duly certified by Goa Medical College, the prescribed Authority.

[4] On 24.06.2022, the GPSC issued an advertisement inviting applications for the posts of 'Assistant Agriculture Officer', which included two positions reserved for persons with disabilities. Regarding the selection process, the Petitioner was required to appear for a Computer Based Recruitment Test (CBRT)/screening test held on 01.10.2022.

[5] The Petitioner secured 54.6% marks at the CBRT. The GPSC selection guidelines prescribe that a reserved category candidate to be considered for further selection process must secure at least 55% marks at the CBRT.

[6] Relying upon the above guidelines, the GPSC did not invite the Petitioner to attend an interview or participate in the further selection process. Mr Lawande pointed

out that one more candidate had applied to the reserved post and secured only 30% marks at the CBRT.

[7] Mr Lawande admitted that the reserved post for 'Assistant Agricultural Officer' was advertised on no less than five occasions. Unfortunately, no suitable candidates were available and could be selected. He points out that this is the fifth occasion on which an advertisement was issued.

[8] The records show that the post was advertised four times in the past and the GPSC could not secure a suitable candidate to fill the reserved posts. The records also show that the Petitioner secured 54.6% at the CBRT.

[9] The Ministry of Personnel, Public Grievances and Pensions Department of Personnel & Training, Government of India, has issued an Office Memorandum dated 15.01.2018 on the issue of Reservation of Persons with Benchmark Disabilities. This Office Memorandum has been adopted by the Directorate of Social Welfare, Government of Goa. This is clear from the Office Memorandum dated 08.08.2018.

[10] Clause 11 of the above Officer Memorandum reads as follows:

"11. RELAXATION OF STANDARD OF SUITABILITY:

11.1 If sufficient number of candidates with benchmark disabilities candidates are not available on the basis of the general standard to fill all the vacancies reserved for them, candidates belonging to this category may be selected on relaxed standard to fill up the remaining vacancies reserved for them provided they are not found unfit for such post or posts. However, this provision shall not be used to allow any relaxation in the eligibility criteria laid down for the issuance of certificate of disability.

11.2 Same relaxed standard should be applied for all the candidates with Benchmark Disabilities whether they belong to Unreserved/SC/ST/OBC. No further relaxation of standards will be considered or admissible in favour of any candidate from any category whatsoever."

[11] Thus, the GPSC and the State Government have sufficient powers to relax the suitability standard where a sufficient number of benchmark disability candidates are not available based on the general standards to fill all the vacancies reserved for them.

[12] In the peculiar facts of this case, where the GPSC advertised the reserved post on not less than five occasions and the fact that the Petitioner has secured 54.6% marks at the CBRT, Mr Lawande, based on instructions, states that the GPSC will exercise the powers of relaxation and permit the Petitioner to take part in the further selection process, that is an interview for selection to the reserved post. This means that the GPSC will consider the Petitioner as successful in the CBRT by exercising powers of relaxation in the peculiar circumstances of this case.

[13] The above approach of the GPSC would be consistent with the provisions of Section 3 of the Rights of Persons with Disabilities Act, 2016, quoted below, which concerns equality and non-discrimination.

Sub-section (1) of Section 3 provides that the appropriate Government shall ensure that the persons with disabilities enjoy the right ot equality, life with dignity and respect for his or her integrity equally with others.

Sub-section (2) of Section 3 provides that the appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.

Sub-section (3) of Section 3 provides that no person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned Act or omission is a proportionate means of achieving a legitimate aim.

Sub-section (5) of Section 3 provides that the appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities.

[14] The expression "reasonable accommodation" is defined in Section 2(y) and reads as follows:

> "reasonable accommodation" means necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others.

[15] The Petitioner is certified to suffer from 43% disability arising out of a united fracture lateral condyle left femur. Moreover, the post for which he was being considered is reserved for persons with disabilities. Therefore, upon cumulative consideration of all these peculiar factors, we think the GPSC is justified in exercising the power of relaxation vested in it.

[16] Accordingly, we are inclined to grant some relief to the Petitioner, though not in the entire terms he claimed. Instead, by moulding the relief, we direct the GPSC, consistent with the relaxation granted by it, to consider the Petitioner as passed in the CBRT and interview him for selection to the post of 'Assistant Agricultural Officer' (reserved post). This process should be completed within a month from today.

[17] The rule is made absolute in the above terms. There shall be no order for costs.

[18] All concerned are to act on an authenticated copy of this order

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2023(1)GoaCC70

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak; Bharat P Deshpande]

Criminal Writ Petition No 723 of 2022 **dated 29/11/2022**

Sandeep Harischandras Mainkar

Versus

State; Mayem Co-operative Credit Society Ltd

APPEAL AGAINST CONVICTION

Negotiable Instruments Act, 1881 Sec. 138 - Appeal against conviction - Compensation - On Specious plea that it had become functus officio - Order requiring petitioner to undergo further in default imprisonment is unsustainable , set aside - There is no question of invoking functus officio doctrine - Set aside impugned order to extent it declines to order release of petitioner - Order accordingly

[Paras 8, 9]

Acts Referred:

Negotiable Instruments Act, 1881 Sec. 138

Counsel:

C Collasso, S G Bhobe

JUDGEMENT

M.S. Sonak, J.

[1] Heard Ms. Collasso, learned Counsel for the petitioner and Mr. S.G. Bhobe, learned Public Prosecutor for the Respondent - State.

[2] Rule. With the consent of the parties, the Rule is made returnable forthwith.

[3] The petitioner was convicted by judgment and Order dated 31st October 2019 for an offence under Section 138 of the Negotiable Instrument Act (N.I. Act, for short) and sentenced to undergo imprisonment till the rising of the Court and to pay a fine of Rs. 65,000/- (Rupees Sixty Five Thousand Only) and in default to undergo simple imprisonment of 120 days.

[4] The petitioner's appeal was dismissed by the Judgment dated 12th May 2022. Since the petitioner did not deposit the compensation amount, he was taken into custody on 11th November 2022 to suffer the in default imprisonment.

[5] On 15th November, 2022, the petitioner applied to the JMFC for a leave to deposit the compensation amount of Rs. 65,000/- and to undergo sentence up to the rising of the Court.

[6] The learned JMFC, by the impugned order, partly allowed the above application. She permitted the deposit but declined the release of the petitioner, on the specious plea that it had become functus officio. The learned JMFC directed the petitioner to undergo the remaining default sentence.

[7] We have heard the learned Counsel for the petitioner and the learned Public Prosecutor. We have duly considered the submissions made across the bar and perused the record.

[8] There is no dispute that the petitioner has now deposited the compensation amount of Rs. 65,000/- on 17th November 2022. In our opinion, therefore, the order requiring the petitioner to undergo further in default imprisonment is unsustainable and

is required to be set aside. In such circumstances, there is no question of invoking the functus officio doctrine.

[9] Accordingly, we set aside the impugned order to the extent it declines to order the release of the petitioner. The petitioner is directed to be released forthwith unless his custody is required in any other matter.

[10] The registry to ensure that this order is forthwith communicated to the Jailor, Central Jail, Colvale so that the petitioner can be released immediately.

[11] Rule is made absolute in the above terms

2023(1)GoaCC72

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak; Bharat P Deshpande]

Writ Petition No. 482 of 2022 **dated 16/11/2022**

Shah Technical Consultants Pvt Ltd; Prasana Shah

Versus

Public Works Department; State of Goa

ALTERNATE REMEDY

Indian Penal Code, 1860 Sec. 120B-Land Acquisition Act, 1894 Sec. 48-Prevention of Corruption Act, 1988 Sec. 13, Sec. 9, Sec. 7, Sec. 8-mandamus to State-consultancy fees under a contract for project management consulting services - period was extended- petitioners - not established circumstances necessary for invoking extraordinary jurisdiction- - relief - for recovery of specific amounts under a non-statutory contract- no case of public law character or failure to discharge public duties was even attempted to be made out by petitioners- scope of judicial review-limited- Court can direct aggrieved party to resort to alternate remedy-in determining whether jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly, eschew disputed questions of fact which would depend on evidentiary determination - Petition Dismissed

[Para 28.34, 32, 35]

Acts Referred:

Indian Penal Code, 1860 Sec. 120B

Land Acquisition Act, 1894 Sec. 48

Prevention of Corruption Act, 1988 Sec. 13, Sec. 9, Sec. 7, Sec. 8

Counsel:

V Tulzapurkar, Vishal Sawant, D Pangam, Maria Correia

JUDGEMENT

M. S. Sonak, J.

[1] Heard Mr V. Tulzapurkar, learned Senior Advocate, along with Mr Vishal Sawant for the Petitioners and Mr D. Pangam, learned Advocate General along with Ms Maria Correia, learned Additional Government Advocate for the Respondents.

[2] The petitioners seek to enforce directions issued by the erstwhile Chief Minister, State of Goa, in a noting dated 05.02.2018 (Exh. O) to make payment of Rs. 21,30,72,298/- (Rupees Twenty One Crore, Thirty Lakhs, Seventy-Two Thousand, Two Hundred and Ninety-Eight Only) to petitioner no.1 and an amount of Rs. Rs. 1,68,95,800/- (Rupees One Crore, Sixty Eight Lakhs Ninety-Five Thousand Eight Hundred Only) to Nihon Suido Consultants Co. Ltd. along with interest @ 18% p.a. From 30.08.2019 till payment.

[3] In short, the petitioners seek a mandamus to the State to pay them an amount of Rs. 21,30,72,298/- towards consultancy fees under a contract for project management consulting services dated 26.05.2009. The State incidentally entered into this contract with a consortium comprising Nihon Suido Consultants Co. Ltd., NJS Consultants Co. Ltd., The Louis Berger Group Inc. and the petitioner no.1.

[4] The petitioners have pleaded that the original period of the contract was until 30.06.2014, but the same was extended up to 31.12.2015 vide an addendum dated 30.06.2014, explicitly stating that the services of petitioner no.1 will continue in accord with the terms and conditions of the contract. The petitioners contended that this period was extended to 30.06.2016 though the respondents raised a serious dispute on this aspect.

[5] The petitioners have pleaded that though they raised invoices towards consultancy fees, an amount of Rs. 21,30,72,298/- remains to be paid to the petitioners, and an amount of Rs. 1,68,95,800/- remains to be paid to another consortium partner Nihon Suido Consultants Co. Ltd. The petitioners have not adequately explained the authority under which they claim the amount allegedly due to Nihon Suido Consultants Co. Ltd. or whether 'Nihon' had authorized the petitioners to institute this petition to recover the alleged dues of Rs. 1,68,95,800/-.

[6] Mr Tulzapurkar's argument was based on the note in File No.3406/2016-PEC-PWD dated 05.02.2018, read with some subsequent notings. The primary noting dated 05.02.2018 made by the then Chief Minister, State of Goa, which is the fulcrum of the petitioners' case, reads as follows:-

> **" File No. 3406/2016-PEC/PWD**
>
> **Office of Chief Minister**
>
> I have gone through entire file. It appears that M/s. Shah Technical Consultants Pvt. Ltd. And M/s. Nihon Suido Consultants Co. Ltd. are not part of the criminal case that is being proceeded and it is only against M/s. Louis Berger Group Inc.

(Refer Pg. 61/C). Further based on the information that is gathered charge sheet have been filed in the case. PWD may take confirmation from the crime branch that the above two companies are not charge sheeted as accused. Extension had been granted by Government of Goa up to 31.12.2015 to above two which is valid. Therefore subject to final confirmation of above two aspects (letter from crime branch and extension of validity up to 31.12.2015) we ma pay the consultants there dues, for all work up to 31.12.2015.

As regards services provided after 31.12.2015, separate file may be submitted for advice of Law Department and Ld. Advocate General. Approval/ concurrence of Finance Department is required as the payment is done by Government of Goa, not as per original plan of things. Cabinet approval however may not be essential. However F.D. may decide on the aspects considering the peculiar situation. May accordingly move for F.D. approval.

(Manohar Parrikar)

Chief Minister

05.02.2018

Pr. C.E. (PWD)"

[7] Based on the above noting, the Superintendent of Police (Crime Branch) was requested to confirm whether M/s. NSC and M/s. STC are part of the Criminal Case and whether they are charge-sheeted as accused persons in the said case.

[8] By a noting dated 10.05.2018, the Project Director noted that a reply was received from the Superintendent of Police (Crime Branch) vide his letter dated 03.04.2018 stating that Shah Technical Consultants Pvt. Ltd. (Petitioner No.1) and Nihon Suido Consultants Co. Ltd. are not accused in Criminal Case - Crime Branch P.S., Crime No.93/2015 under Section 120-B of the Indian Penal Code and Sections 7, 8, 9 and 13 of the Prevention of Corruption Act, 1986 (JICA Case).

[9] Mr Tulzapurkar submits that the noting dated 05.02.2018 was nothing but an express direction from the erstwhile Chief Minister to pay the consultant's dues for all work up to 31.12.2015 subject to the final confirmation about petitioner no.1 and Nihon Suido Consultants Co. Ltd. not being charge-sheeted as accused persons in the case against the Louis Berger Group Inc. and the extension being granted by the Government of Goa up to 31.12.2015. He submits that since there was no dispute or rather since there was confirmation that petitioner no.1 and Nihon Suido Consultants Co. Ltd. were not accused in the criminal case and further, there was an extension granted up to 31.12.2015, the State, had no defence whatsoever to resist the payment of consultancy fees as claimed by the petitioners.

[10] Mr Tulzapurkar relied upon **ABL International Ltd. & Anr. vs. Export Credit Guarantee Corporation of India Ltd. & Ors.**, 2004 3 SCC 553 and **Unitech Limited & Ors. vs. Telangana State Industrial Infrastructure Corporation**

(TSIIC) & Ors.,2021 SCCOnLine(SC) 99 to submit that there is no bar to the entertainment of a petition under Article 226 of the Constitution of India, even in a contractual matter or even where the contract has an arbitration clause for resolution of disputes. He submits that no disputed questions of fact are involved, and the State cannot renege upon the express directions of its erstwhile Chief Minister, as reflected in the note dated 05.02.2018. He submits that the non-payment of the consultancy fees as claimed amounts to arbitrariness and unreasonableness, which is antithetical to Article 14 of the Constitution of India. Mr Tulzapurkar submits that this petition must be entertained and a writ of mandamus issued to the respondents for payment of the consultancy fees under the contract for project management consultancy services dated 26.05.2009.

[11] Learned Advocate General submitted that no petition could be based on mere noting in the file given the law in **Shanti Sports Club & Anr. vs. Union of India & Ors.**, 2009 15 SCC 705 . He submitted that the noting in the file never culminated into any Government decision in terms of Article 166 of the Constitution of India. Further, there was no communication of such a decision to the petitioners. He further submitted that this was a case of a non-statutory contract that admittedly contained an arbitration clause for the resolution of contractual disputes. Therefore, he presents that a petition for recovery of monies simpliciter should not be entertained in such circumstances.

[12] The learned Advocate General further submitted that there is a serious dispute about the contract extension up to 30.06.2016. He points out that most of the claims raised by the petitioners proceeded on this premise which the respondents seriously dispute. He submits that the petitioners have placed on record no order in support of this claim of extension. Further, the learned Advocate General submitted that the issue of whether the respondents have breached any of its contractual obligations would depend upon the evidence, and it is a well-established principle of law that where the dispute revolves around the questions of fact, normally, no petition under Article 226 of the Constitution of India should be entertained.

[13] Learned Advocate General also submitted that though the petitioners claim for consultancy fees for the period from June 2014 to June 2016, this petition was instituted only on 04.08.2022. Therefore, he submitted that there is a gross delay which is unexplained by the petitioners.

[14] Learned Advocate General also submitted that there was no arbitrariness or unreasonableness involved, and the petitioners have not even alleged any breach of their fundamental rights. Accordingly, he offered that the petitioners have no locus standi to seek any relief on behalf of Nihon Suido Consultants Co. Ltd. He denied that the report dated 30.08.2019 admits any payments due to the petitioners. Learned Advocate General relied on **Goldwin Healthcare Pvt. Ltd. & Anr. vs. State of Goa** (Writ Petition No.7/2022 (F) decided on 23.02.2022) and the decisions referred to in the said Order.

[15] Mr Tulzapurkar rejoined to submit that there was correspondence to show that the petitioners' consultancy services were accepted post-December, 2015. Therefore, the respondents were not justified in contending that there was no extension up to June 2016. He submitted that most of the learned Advocate General's contentions had been answered in ABL International Ltd. (supra) and Unitech Limited (supra).

[16] The rival contentions now fall for our determination.

[17] The petitioners' entire case is based on the noting dated 05.02.2018 referred to above and its interpretation of the same. However, even if we were to proceed based upon the petitioners' interpretation of the noting, we cannot be oblivious of the legal status of notings/opinions recorded in official files by the Government Officers/ Ministers as explained by the Hon'ble Supreme Court in Shanti Sports Club (supra) and other decisions on the subject.

[18] In Shanti Sports Club (Supra), the petitioners had contended that the note dated 08.06.1999 recorded by the then Minister for Urban Development must be treated as a decision of the Government to withdraw from the acquisition of land in question in terms of Section 48(1) of the Land Acquisition Act, 1894, even in the absence of any formal notification to that effect. However, this contention was turned down by the Hon'ble Supreme Court, relying inter alia on the provisions of Articles 77 and 166 of the Constitution of India.

[19] The Hon'ble Supreme Court explained that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be under Articles 77(1) and 166(1) of the Constitution. This means that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government.

[20] Further, the Hon'ble Supreme Court explained that a noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents an expression of opinion by a particular individual. By no stretch of the imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting the right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/ reversed/overruled or overturned, and the Court cannot take cognizance of the earlier noting or decision to exercise the power of judicial review.

[21] The Hon'ble Supreme Court also referred to its earlier decisions in **State of Punjab vs. Sodhi Sukhdev Singh**, 1961 AIR(SC) 493 , **Bachhittar Singh vs. State of Punjab**, 1963 AIR(SC) 395 , **State of Bihar vs. Kripalu Shankar**, 1987 3 SCC 34 , **Rajasthan Housing Board vs. Shri Kishan**, 1993 2 SCC 84 , **Sethi Auto Service Station vs. DDA**, 2009 1 SCC 180 , amongst others. All these decisions hold that no cause of action could be based merely on notings in a file that have not culminated into a Government decision as contemplated by Article 77 or 166 of the Constitution of India and communicated to the party concerned. These decisions hold that merely writing something in the file does not amount to an order. Before something amounts to an order of the State Government, two things are necessary. First, the Order has to be expressed in the name of the Governor as required by Article 166(1), and then it has to be communicated. Until this is done, the State cannot be held to be bound by the so-called notings. The Court noted that the business of the State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. The Constitution, therefore, requires a particular mode or manner in which such decisions can be taken and given effect to. Thus, in all these cases, relief based upon notings in a Government file was declined.

[22] Therefore, in the present case, the petitioners' claim for consultancy fees, which is entirely based only upon the notings in the file, cannot be entertained, even if we were to proceed on the basis that the petitioners' interpretation of such notings is correct.

[23] There is no dispute that the payments claimed by the petitioners are under a non-statutory contract dated 26.05.2009 between the State and a consortium of companies, of which petitioner no.1 is one of the companies engaged in imparting consultancy services. There is also no dispute that this contract dated 26.05.2009 contains any arbitration clause for resolving disputes that may arise between the parties.

[24] In ABL International Ltd. (supra), the respondent - Export Credit Guarantee Corporation, relied on the **State of Uttar Pradesh vs. Bridge & Roof Co. (I) Ltd.**, 1996 6 SCC 22 where it was held that when the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy, provided in the contract itself, is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Article 226.

[25] The Hon'ble Supreme Court distinguished Bridge & Roof Co. (I) Ltd.(supra) at para 14 by observing thus:-

> **"14.** This judgment again, in our opinion, does not help the first respondent in the argument advanced on its behalf that in contractual matters remedy under Article 226 of the Constitution does not lie. It is seen from the above extract

that in that case because of an arbitration clause in the contract, the Court refused to invoke the remedy under Article 226 of the Constitution. **We have specifically inquired from the parties to the present appeal before us and we have been told that there is no such arbitration clause in the contract in question. It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution.** Since that is not the case in the instant appeal, the observations of this Court in the said case of Bridge & Roof Co. are of no assistance to the first respondent in its contention that in contractual matters, writ petition is not maintainable."

[26] Since, in the present case, there is no dispute about the existence of an arbitration clause in the contract, the law in Bridge & Roof Co. (I) Ltd. (supra) will apply even going by the observations in para 14 of ABL International Ltd. (supra). The basis for distinguishing the cited decision is absent, and there is no good reason not to follow the binding precedent in Bridge & Roof Co. (I) Ltd. (Supra).

[27] In ABL International Ltd. (supra), several decisions were cited to the effect that writ jurisdiction under Article 226 would not be exercised in case of purely non-statutory contracts involving no public element or discharge of a public duty or a public function. The Hon'ble Supreme Court accepted this proposition but, on facts, found that the respondent - Export Credit Guarantee Corporation of India, was not only a wholly Government-owned company but it discharged a public duty and its functions were public functions. Therefore, a writ petition could always be entertained if there was any unreasonableness or arbitrariness in discharge of public duties or public functions. However, in the present case, no attempt was made to demonstrate the existence of any public duty or the discharge of any public function. This is yet another reason to distinguish ABL International Ltd. (supra).

[28] No doubt, Unitech Ltd. (supra) holds that jurisdiction under Article 226 can be invoked in contractual matters even where a contract contains an arbitration clause subject to well-settled parameters. In this case, the Court found that the respondent-Telangana State Industrial Infrastructure Corporation, had accepted crores of rupees on the promise of allotment of land. But no such land could be allotted for reasons attributable to the Corporation. In these circumstances, the Hon'ble Supreme Court directed the refund of the amounts paid. However, even in this decision, the Hon'ble Supreme Court held that in determining whether jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly, eschew disputed questions of fact which would depend on evidentiary determination requiring a trial. The Hon'ble Supreme Court approved the exercise of jurisdiction by the Single Judge and the Division Bench of the Andhra Pradesh High Court because the foundational representation of the contract had failed. TSIIC, a state instrumentality, had not just

reneged on its contractual obligation but hoarded the refund of the principal and interest on the consideration that Unitech paid over a decade ago. The TSIIC did not even dispute the entitlement of Unitech to refund its principal. Such facts are not present in the case at hand. Therefore, based upon Unitech Ltd. (supra), this petition cannot be entertained.

[29] The respondent-State has raised a serious dispute about the contract extension beyond 31.12.2015. The noting, which is the mainstay of the petitioners' case, if construed holistically, might refer to the processing of the petitioners' claims provided there was an extension to the contract and the petitioners were not prosecuted as accused persons in the criminal prosecution under the Prevention of Corruption Act. The noting speaks about the payment of consultant's dues without any quantification of such dues. In such circumstances, on behalf of the Respondents, the affiant rightly contends that the adjudication of petitioners' claims would involve adjudication into the disputed questions of fact.

[30] At this stage, it is not for us to decide one way or the other on the merits of rival contentions. The only reason why we have adverted to the rival contentions is to point out that the respondents' contentions, at least prima facie, cannot be said to fall in the realm of arbitrariness or unfairness, thereby compelling the petitioners to invoke public law remedy or obliging us to exercise such public law remedy at their behest.

[31] In **Joshi Technologies International Inc. vs. Union of India & Ors.**, 2015 7 SCC 728 , the Hon'ble Supreme Court, after examining a series of precedents on this issue, including the precedent in ABL International Ltd. (supra), has held that principles in the said precedents have to be understood in the context of the discussion that preceded the same. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition, even in contractual matters, where there are disputed questions of fact or even when a monetary claim is raised. But, at the same time, discretion lies with the High Court, which it can refuse to exercise under certain circumstances. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

> 69.1. The Court may not examine the issue unless the action has some public law character attached to it;
>
> 69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said made of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration;
>
> 69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination;
>
> 69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

70.4. Writ jurisdiction of High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no

element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

[32] In the present case, as pointed out by us earlier, no case of public law character or failure to discharge public duties was even attempted to be made out by the petitioners. Even the allegations of arbitrariness or unfairness were faint-hearted. The entire case was based on the noting dated 05.02.2018 in the Government file. The legal status of such noting is discussed earlier. Further, as noted earlier, it is not as if any clear case of arbitrariness or unfairness is made out. Admittedly, there is an arbitration clause in the contract upon which the petitioners seek recovery of consultancy fees. However, disputed questions of fact are involved that cannot be effectively adjudicated only by adverting to the affidavits or interpreting the clauses of the agreement as they stand.

[33] Therefore, applying the principles in Joshi Technologies International Inc. (supra), we do not think this is a fit case to exercise our discretion and entertain the present petition under Article 226 of the Constitution of India.

[34] In similar circumstances and after considering the decisions in ABL International Ltd. (supra), Unitech Ltd. (supra), Bridge & Roof Co. (I) Ltd.(supra) and Joshi Technologies International Inc. (supra), we had declined to entertain Writ Petition No.7/2022 (F) where the relief was for recovery of specific amounts under a non-statutory contract. Accordingly, even the Special Leave to Appeal (C) No.4370 of 2022 against this decision was dismissed as withdrawn by Order dated 28.03.2022.

[35] For all the reasons mentioned above, we decline to entertain the present petition, not because the same is not maintainable but because the petitioners have not established the circumstances necessary for invoking our extraordinary jurisdiction. Instead, this is a case where the State has demonstrated that exercising our extraordinary jurisdiction at the behest of the present petitioners would not be appropriate considering the above-quoted parameters from Joshi Technologies (Supra). Therefore, we dismiss this petition without any order for costs.

[36] Though we have dismissed this petition, we clarify that we have not adjudicated on the rival disputes, and the observations, if any, are for the limited purpose of deciding whether we should exercise our jurisdiction and entertain this petition. Therefore, if the parties ultimately resort to ordinary remedies available, such disputes will have to be resolved without being influenced by the observations in this Order

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2023(1)GoaCC82

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak]

First Appeal No 26 of 2020 **dated 18/08/2022**

State of Goa

Versus

Michael Joaquim F D Souza; Ana Leopoldina Marta Menezes (Widow); Mathew Stephen Dsouza (Son); Nicolas Andrew Dsouza (Son); Raghoba Krishna Naik; National Insurance Company

AMOUNTS RECEIVED UNDER INSURANCE POLICY

Motor Vehicles Act, 1988 Sec. 165 - Quantum of compensation - Determination of - Claimants received amount amounts received policy - Whether from out of the compensation amount of Rs.2,39,529/-, an amount of Rs.1,96,540/-, which the claimants received under a mediclaim insurance policy, was required to be deducted - Held, no deductions are warranted towards the amounts received by a

claimant under a contract for insurance for which the claimant had paid premium - Appeal is dismissed

[Paras 35 to 40]

Law Point: No deductions are warranted towards the amounts received by a claimant under a contract for insurance for which the claimant had paid premium.

Acts Referred:

Motor Vehicles Act, 1988 Sec. 165

Counsel:

Susan Linhares, Byron Rodrigues, James Lopes

JUDGEMENT

M S Sonak, J.

[1] Heard Ms. Susan Linhares, learned Additional Government Advocate for the Appellant-State, and Mr. Byron Rodrigues for the respondents-claimants.

[2] At the outset, since an issue arose whether from out of the compensation amount of Rs.2,39,529/-, an amount of Rs.1,96,540/-, which the claimants received under a mediclaim insurance policy, was required to be deducted, this Court requested Mr. James Lopes to assist this Court as an Amicus Curiae. Mr. James Lopes accordingly appeared in this matter and rendered able assistance.

[3] The Appellant-State challenges the judgment and award dated 16.02.2018 made by the Motor Accident Claims Tribunal (Tribunal) in Claim Petition No.226/2012/II, awarding the original claimant, Mr. Michael D'Souza compensation of Rs.2,80,000/- along with interest @ 9% p.a. for the injuries sustained by him in a vehicular accident on 13.08.2011.

[4] During the pendency of this appeal, Mr. D'Souza expired. Accordingly, his legal representatives, i.e., respondent no.1(a) - widow and respondents no.1(b) and 1(c) - sons, were brought on record. Respondents 1(a), 1(b), and 1(c) are collectively referred to as claimants for the sake of convenience.

[5] At the outset, Ms. Linhares, the learned Additional Government Advocate, submitted that there was no credible evidence to sustain the finding of rashness and negligence. Therefore, in the absence of rashness and negligence, the State could not be made to pay any compensation. Secondly, and without prejudice, she submitted that the compensation awarded was not backed by any legal evidence and did not represent just compensation. In particular, she pointed out that there was no evidence to justify the award of Rs.7,000/- towards the attendant charges. Finally, she submitted that even the award of Rs.2,39,529/- towards medical expenses is excessive and not supported by the evidence on record.

[6] Ms. Linhares, by referring to paragraph 37 of the impugned award, pointed out that the claimant had already received an amount of Rs.1,96,540/- from the insurance company under a mediclaim policy for medical expenses. She submitted that this amount was required to be deducted from the compensation amount of Rs.2,39,529/- as excessively determined by the Tribunal. She presented that otherwise, the claimant would get double benefits or a bonanza from out of the same accident. In support of this proposition, Ms. Linhares relied on **United India Insurance Co. Ltd. vs. Patricia Jean Mahajan & Ors.**, 2002 6 SCC 281, **Cholamandalam MS General Insurance Co. Ltd. vs. A. Saravanan & Anr.,2012 SCCOnLineMad 1082** and **The Manager, Tata A.I.G. General Insurance Co. Ltd. vs. Kathamuthu & Anr. - C.M.A. (M.D.) No.729/2017 decided on 13.04.2022.**

[7] Mr. Rodrigues, learned counsel for the claimants, defended the impugned award based on the reasoning therein. He submitted that the evidence on record supports the Tribunal's findings. Finally, he proposed that no deductions of the amount received by the claimant under a mediclaim policy could be made given the law in the following decisions:-

(i) **Royal Sundaram Alliance Insurance Co. Ltd., Kolkata vs. Ajit Chandrakant Rakvi & Anr.,2019 SCCOnLineBOM 496.**

(ii) **Vrajesh Navnitlal Desai vs. Bagyam & Anr.,2005 SCCOnLineBOM 156**.

(iii) **New India Assurance Company Ltd. vs. Bimal Kumar Shah & Ors.**, 2019 ACJ 1532.

(iv) **National Insurance Co. Ltd. vs. Sohna Singh & Ors.,2019 SCCOnLineCAL 8283**.

(v) **National Insurance Co. Ltd. vs. Sohna Singh & Ors. - S.L.P. (C) No.005103-005104/2020 decided on March 23, 2022**.

(vi) **Madhya Pradesh State Road Trans. Corpn. & Anr. vs. Priyank,1999 SCCOnLineMP 18**.

(vii) **Kashiram Mathur vs. Rajendra Singh**, 1983 ACJ 152 (M.P.).

(viii) **National Insurance Co. Ltd. vs. Aman Kapur & Ors.**, 2014 ACJ 1342.

(ix) **Oriental Insurance Co. Ltd. vs. Kokilaben & Ors.,2015 CDJGHC 705.**

(x) **Kamlesh Bhalla vs. G. T. Roadways & Ors.,2019 CDJPHC 48**.

(xi) **Mrs. Rajeshwari G. Bhuyar & Ors. vs. Sindhu Travels & Anr.,2015 SCCOnLineKAR 8622**.

(xii) **Reliance General Insurance Company Limited vs. Shashi Sharma & Ors.,2016 SCCOnLineSC 986**.

[8] Mr. James Lopes learned Amicus Curiae submitted that the amounts received by a claimant under a mediclaim policy for which the claimant had regularly paid his premium could not be deducted from the compensation determined by the Tribunal. He submitted that the decisions of the Bombay High Court in Ajit Chandrakant Rakvi (supra) and Vrajesh Desai (supra) support this view. He offered that a detailed discussion in support of this view is found in Bimal Kumar Shah (supra) and Sohna Singh (supra) - two decisions of the Division Bench of the Calcutta High Court. He submits that in Bimal Kumar Shah (supra), the Division Bench of the Calcutta High Court has analytically discussed and distinguished the decision in Patricia Jean Mahajan (supra). He distinguished the decisions relied upon by Ms. Linhares.

[9] Mr. James Lopes submitted that there is a distinction between a contractual benefit and a statutory benefit, which must be borne in mind. He presents that where a claimant or a deceased insures himself by paying a premium, the same's benefit is purely contractual. Therefore, no advantage can be taken of such benefit by a tortfeasor or a joint tortfeasor. He relies on the decision of the Full bench of the Madhya Pradesh High Court in Kashiram Mathur (supra).

[10] Mr. Lopes also points out that mediclaim policies are usually annual. He pointed out that where the insurable event occurs during the policy term, this affects the further premium for the subsequent years. He submits that the claimant is invariably required to forego the benefit of the bonus usually extended to such policies. Finally, he presents that considering all these aspects, there is no warrant to insist upon the deduction of the contractual benefits that a party or his dependents may secure in proceedings instituted to recover statutory benefits.

[11] The rival contentions now fall for my determination.

[12] Upon considering the rival contentions, the following points arise for determination in this appeal:

a) Whether the finding on rashness and negligence recorded by the Tribunal is supported by evidence on record?

b) Whether the compensation amount of Rs.2,39,529/- determined by the Tribunal represents just compensation based on the evidence on record?

c) Whether the Tribunal was required to deduct an amount of Rs.1,96,540/- from out of the amount of Rs.2,39,529/- awarded by the Tribunal towards medical expenses because there is unimpeachable evidence that the original claimant had already recovered this amount of Rs.1,96,540/- from the insurance company under a mediclaim policy taken out by him?

[13] So far as the first point is concerned, there is evidence that the claimant was proceeding from his residence at Dabolim to Vasco on his Activa scooter bearing registration No.GA-08-B-6815. At that time, Raghoba Krishna Naik (original respondent no.2 in the claim petition) was driving a Police recovery vehicle, without either looking into the rearview mirror or without giving any signal, took a sudden 'U-

turn in a rash and negligent manner due to which, the rear wheel cover of the Government vehicle hit the claimant's Activa scooter. As a result, the claimant lost balance and fell along with his son Nicolas who was riding pillion. In addition, the claimant's left foot came under the vehicle's right rear tire, due to which the claimant sustained significant injuries.

[14] The claimant examined himself and his son Nicolas D'Souza who was riding pillion along with him. The Tribunal, relying on **Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & Anr.**, 2013 10 SCC 646 correctly held that the issue of rashness and negligence has to be decided on the touchstone of preponderance of probabilities.

[15] The Tribunal has correctly analyzed evidence of the claimant and his son Nicolas who was riding pillion. Both the witnesses have deposed how they halted at the red signal and, after the signal turned green, were moving slowly. Both the witnesses have deposed to the rashness and negligence of the Government vehicle's driver. They have also deposed about how the driver took a 'U-turn without adequate signaling resulting in the accident.

[16] Ms. Linhares, however, focused on the evidence of RW1 - Head Constable Vikram Khanolkar and RW2 - P.S.I. John Fernandes who suggested that the accident occurred due to the fault and rashness of the claimant himself. The Tribunal noted that both these witnesses had deposed that they were at the traffic outpost near the airport at the time of the accident, and it was only after they heard the sound of the accident that they went to see the spot. Based on such testimonies, the Tribunal correctly concluded that both these witnesses had not actually witnessed the accident.

[17] The Tribunal has also considered the evidence of Raghoba Krishna Naik (RW3), the driver of the Government vehicle, i.e., the Goa Police Recovery Van. The Tribunal noted that RW3, in his cross-examination, deposed that he had seen in the rear-view mirror for vehicles on his rear side before taking the 'U-turn but that he had not seen the Activa scooter. From this, the Tribunal correctly inferred that the driver's version of the claimant driving the Activa scooter at a fast speed was quite doubtful. The Tribunal also took cognizance of the panchanama and the sketch, including the fact that there was neither any brake mark nor skid mark of the scooter. The Tribunal also took cognizance of Raghoba's changing versions on the issue of skid marks or brake marks.

[18] The Tribunal has quite correctly assessed and analyzed the evidence on record, and the finding of rashness and negligence is supported with cogent evidence. Raghoba was admittedly a driver of a police recovery van. RW1 and RW2 are police officials who do not appear to have seen the accident but deposed in favor of their departmental colleagues. The Tribunal, having considered the oral and documentary evidence on record, has correctly answered the issue of rashness and negligence. No case has been made to interfere with this finding.

[19] The approach of the Tribunal, in this case, is quite consistent with the law laid down in **Mangala Ram vs. Oriental Insurance Co. Ltd.**, 2018 5 SCC 656, **Sunita And Others vs. Rajasthan State Road Transport Corporation And Others**, 2020 13 SCC 486, **Anita Sharma and others v. New India Assurance Company Limited and another**, 2021 1 SCC 171 and **Vimla Devi & Ors. vs. National Insurance Company Ltd.**, 2019 2 SCC 186. Accordingly, the Tribunal has quite correctly relied on Dulcina Fernandes (supra).

[20] The first point is determined against the appellant for all the above reasons.

[21] Regarding the second point, the Tribunal has awarded the sum of Rs.2,39,529/- towards the pecuniary damages, i.e., the expenses relating to the treatment, hospitalization, medicines, etc. In fact, this award is mainly towards the medical costs incurred by the claimant.

[22] The Tribunal has also awarded Rs.7,000/- towards the attendant charges by computing these charges at a nominal rate of Rs.200/- per day. Finally, the Tribunal has awarded Rs.10,000/- towards the transportation charges against the claim of Rs.35,000/-.

[23] The award is on a relatively conservative basis. There is evidence of the injuries sustained by the claimant and the four operations he had to undergo to treat such injuries. The claim is backed by oral as well as documentary evidence. The award towards attendant charges and transportation is also justified and supported by the reasonability evidence, though some guesswork is inevitable in such matters. The Tribunal has given cogent reasons in support of such determination.

[24] Accordingly, even the second point for determination will have to be answered against the appellant.

[25] In so far as the third point for determination is concerned, there is evidence that out of the determined amount of Rs.2,39,529/-, the claimant received an amount of Rs.1,96,540/- from the insurance company with whom he had obtained a mediclaim policy. Therefore, the question is whether this amount of Rs.1,96,540/- must be deducted from the compensation amount of Rs.2,39,529/- determined by the Tribunal towards medical expenses.

[26] Admittedly, in this case, the Government vehicle was not insured by any insurance company. However, there is also no dispute that the claimant has taken out a mediclaim policy with the National Insurance Company, which was impleaded as respondent no.3 in the claim petition. For this, it is the claimant who had paid the premium. Thus, the mediclaim policy was an independent contract between the claimant and the said insurance company with which the appellant-State had neither any concern nor made any contribution towards the premium. Though Ms. Linhares did not dispute this position, she submitted that the claimant could not get double benefits from the same accident. Therefore, she proposed that the loss, if any, was

recouped, and the Tribunal erred in not deducting the amount received by the claimant under the mediclaim policy.

[27] Ms. Linhares's contention indeed finds support in A. Saravanan (supra) and Manager, Tata A.I.G. General Insurance Co. Ltd. vs. Kathamuthu (supra), both the decisions rendered by learned Single Judges of the Madras High Court. In both these decisions, relying on **Helen Rebello vs. Maharashtra State Road Transport Corporation**, 1999 ACJ 10 and Patricia Jean Mahajan (supra), it was held that the amounts received under the insurance policy taken out by the claimant are required to be deducted.

[28] Ms. Linhares also relied on the observations in paragraphs 24 and 26 of Patricia Jean Mahajan (supra) to submit that such observations support the proposition advanced by her.

[29] The Division Bench of the Calcutta High Court in Bimal Kumar Shah (supra), in paragraph 10, has explained the import of the decisions in Helen Rebello (supra) and Patricia Jean Mahajan (supra) in the following terms:

> "**10.** So far as the judgments which Mr. Singh cited in his favour are concerned, pertaining to the judgments rendered by the Hon'ble High Courts which allow such deduction, as briefly referred to in paragraph 7 of this judgment I must point out the following. These cases started and ended on a possible interpretation of the judgment in Rebello (supra) as noticed synoptically by Their Lordships in Patricia Jean Mahajan's case (supra). The interpretation depends upon parts of paragraphs 37 and 36 reported in A.C.J. in the former case. Very briefly, these cases interpret the entire ratio of the judgment in Rebello (supra) without considering paragraph 38 of the report as if the Hon'ble Supreme Court held that only in cases of life insurance would deduction not be permissible. which ignores the rest of the ratio that makes it clear that even in case of accidental injury or death, the same principle applies and as if the test is whether the two sums paid are no for the same occurrence, that is to say, death, since in one case it is paid under a contract of life insurance and in the other case, even by efflux of time without death. The said other judgments have tried, therefore, to construe the said judgment in Rebello (supra) and Patricia Jean Mahajan (supra) as if the ratio is that "when we seek the principle of loss or gain, it has to be on the same plane having nexus inter se between them and not to which, there is no semblance of any correlation." Taken out of context, it is possible that this would be an interpretation which would appeal to any Court of Law. However, in the instant case, I cannot lose sight of the principles which control the entire ratio--first, that the liability of an insurer of the offending vehicle to pay a third party compensation for injury or death caused in an accident by the offending vehicle is statutory whereas the liability to pay a sum to the insured

victim for such accidental death or injury, or for any other kind of death, is contractual, and second that the sum paid by the insurer of the victim (rather than the offending vehicle) in both cases is due to the premium paid by the victim from his own earnings. Once these important differences and similarities as I have extracted above are appreciated, it will appear, with the greatest of respect to the learned Coordinate Benches of the other Hon'ble Courts or the learned Single Benches of those Hon'ble Courts, that none of the judgments referred to in paragraph 7 and sub-paragraphs a, b, c, d, or e, lay down the law, in the teeth of the ratio laid down by the Hon'ble Supreme Court in the case of Rebello (supra) as noticed by me above."

[30] In Bimal Kumar Shah (supra), the Division Bench of the Calcutta High Court, upon due consideration of several decisions on the subject, concluded that there is no warrant for deduction of the amounts that a claimant might have received under the contracts of insurance like mediclaim. In the leading judgment by Protik Prakash Banerjee, J., discussion on this issue is to be found in paragraph 14, which reads as follows:

"**14.** Thus, the seduction which first swayed me off my judicial feet, due to the persuasive skills of Mr. Singh could not survive the cold light of forensic analysis of the judgments he had relied upon and like most infatuations, this too ended. Once the matter is considered, apart from the rhetoric of the argument, it will be found that the analogy depends upon the payment being made as a charity and relates to death of a person. The precedents cited in favour of this position, on the other hand, go against the express ratio of Rebello (supra) interpreted both by the Hon'ble Supreme Court as by me, as above. The case of Shashi Sharma (supra), is on a different point and on different facts and can be distinguished. In none of the precedents of the Hon'ble High Courts relied upon by Mr. Singh, was the question of a contractual right created by payment of premium by the victim for an accident suffered by him against his insurer, as distinguished from a statutory duty imposed on the insurer of an offending vehicle due to third party risk imposed by statute, and whereunder payment was liable under statute to be made to someone other than with whom it had a contractual relationship, considered. Those cannot, therefore, with the greatest respect, be authorities for deciding the present case. A decision is only an authority for what it decides, and not what can be logically deduced from it, and this is well settled, among others, in the case of **Quinn v. Leathern**, 1901 AC 495, which has been followed in India in several cases including **Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. and Others**, 2003 AIR(SC) 511, MANU/SC/1092/2002: VII (2002) SLT 322: . and before that in **Mafatlal Industries Ltd. and Others v. Union of India and Others**, 1997 5 SCC 536, MANU/SC/1203/1997: 1996 (S.L.T. Soft) 384:. Therefore,

the arguments advanced do not pertain to a right of getting just compensation, created by a statute, in favour of an innocent by-stander, who has been tragically robbed of the use of his right leg from just above the knee, by amputation, because of the accident, where the fault is squarely of the offending vehicle. That statutory right was created as a liability of the owner of any vehicle, towards a third party since the owner of the offending vehicle chose to ply a vehicle on the public thoroughfare, where his duty to take care towards everyone else on the street is not in question. The duty from which the liability arises under stanate, can be shown to have been duly discharged if contributory negligence could have been proved. Then that liability could have been mitigated or rebutted. When it has not been proved, this becomes an absolute statutory liability, whose risk the Insurance Company has assumed and on which it has been imposed, under the Motor Vehicles Act, 1988. It cannot wriggle out of its statutory liability by pleading a contractual benefit which the victim has, under a contract between the victim and its separate insurer, for which benefit it has been paying a premium. The liability of an insurer providing insurance through Mediclaim to the victim for the medical expenses incurred by him for an accident or hospitalization, subject to a limit and based on the premiums paid by the victim by bilateral contract between the victim and his insurer, is distinct, separate and wholly different form, and independent of the liability imposed on the appellant as the insurer of the offending vehicle and its owner from third party risks in case of accident, and is provided for, created and imposed by the Motor Vehicles Act, 1988. It is not contractual as far as the victim, a third party, is concerned."

[31] Dipankar Dutta, J. (as His Lordship then was), in his concurring judgment, made the following significant observations in support of the conclusion in paragraph 27, which reads as follows:

"**27.** The argument of Mr. Singh was that compensation that is determined under Section 168 of the Act of 1988 should not be a bonanza for the victim and care must be exercised to ensure that the victim does not receive 'double benefit'. True it is, the Tribunals/High Courts should guard against determination of just compensation which would amount to a bonanza for an accident victim or his family. But, at the same time, is it not the duty of the Tribunals/High Courts to determine just compensation in a manner that an Insurance Company, which is under a statutory liability to pay, does not escape the rigours of paying compensation and thus evade its obligation under the contract of insurance that exists between it and the owner of the offending vehicle? Should such an Insurance Company despite receiving premiums from the insured to indemnify him be allowed to achieve gains merely because the victim of the accident has received some money out of faithful discharge of contractual liability by another Insurance Company? The

> answers to the aforesaid questions cannot be in favour of the Insurance Company which is under a statutory liability to pay. One should not forget that what the victim gets from his Mediclaim policy is the return for making payment of premiums. It is the hard earned money that he puts in, in insurance business as premium, that is returned to him upon happening of an accident. The money received, thus, does not come free. In most cases, the accident and its aftermath are not only heart breaking for the victim but may also result in severe physical disability to him. To lead a paralysed life, is sometimes more painful than death itself. Such an accident victim may ask "why me"? The return that he receives from his insurer on the claim arising out of Mediclaim policy is consolation money, in the circumstances. To consider such return as a benefit received from other sources while determining compensation, to my mind, would be an approach of a narrow-mind, not intended in the best interests of the victim who might be left high and dry, battling for the rest of his life to survive only on the compensation money. I hold that any money received by an accident victim as return for money invested by him ought not to be comprehended as a benefit received and, therefore, question of the victim in this case being doubly benefited does not and cannot arise."

[32] In Sohna Singh (supra), the same Division Bench of the Calcutta High Court reiterated the above position by relying on Bimal Kumar Shah (supra). Accordingly, special Leave Petition Nos.005103-005104 of 2020 challenging the decision in Sohna Singh (supra) was dismissed by the Hon'ble Supreme Court of India on 23.03.2022.

[33] In Vrajesh Desai (supra), the learned Single Judge of our High Court has held that the amount recovered by a claimant under the insurance contract for which he had paid the premium could not be deducted from the compensation payable under the MV Act. For this, the learned Single Judge relied on the judgment of the Madhya Pradesh High Court in Madhya Pradesh State Road Trans. Corpn. & Anr. vs. Priyank (supra).

[34] In Ajit Chandrakant Rakvi (supra), another learned Single Judge of our High Court, noted the cleavage of judicial opinion on the point as to whether the amount of reimbursement received under a mediclaim policy should be deducted from the compensation payable under the MV Act, in the judgments of various High Courts. However, after analyzing several such decisions, the learned Single Judge chose to follow the Division Bench of Calcutta High Court in Bimal Kumar Shah (supra).

[35] The reasoning of the learned Single Judge, as reflected in paragraphs 28, 29, and 30, commends reproduction:-

> "**28.** In the light of aforesaid enunciation as regards the statutory liability of the insurer, the nature of general contract of medical insurance needs to be noted. The medical insurance covers a variety of ailments and medical expenses therefor, which are not otherwise specifically excluded. Often there

is a upper limit. The duration is also stipulated by the terms of the contract. In this backdrop, the matter can be looked at from another angle. If the claimant exhausts the upper limit or substantial part of the insured amount, for meeting the expenses of treatment, for the injury which is suffered in an accident, the claimant would not be entitled to the benefit of the medical insurance, if the occasion again arises on account of certain other ailments unconnected with the accident. If the policy is in the nature of Family Floater Plan and the limit is exhausted for meeting the expenses in connection with an injury suffered in an accident, by one member, the other members of the family cannot have the benefit of the medical insurance.

29. In the backdrop of these variables, the nature of the proceedings under the Act, becomes significant. A claim petition for compensation in regard to a motor accident filed by the injured before Tribunal constituted under Section 165 of the Act, is neither a suit nor an adversarial lis in the traditional sense. Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation. (United India Insurance Co. Ltd. Vs. Shila Datta & Ors. 7). This being the nature of the proceedings before the Tribunal, even in respect of the parties before it, in my view, the benefits emanating from an independent and unconnected contract of insurance cannot be considered by the Tribunal, as it besets with variables rooted in contract.

30. From this stand point, in the context of the distinction between the contractual ability under the contract of insurance (medical) and the statutory liability under the Act, the aforesaid proposition, not to deduct the amount of reimbursement received, under a mediclaim policy, appears to be in consonance with the principle of beneficial interpretation and advances the object of the Act. Hence, I am not persuaded to agree with the submission on behalf of the appellant that the said amount of Rs.1,20,000/- ought to have been deducted."

[36] The Full Bench of the Madhya Pradesh High Court, while answering the issue as to whether the amounts received by a claimant or his dependents under a life insurance policy, provident fund, family pension, gratuity, and ex gratia payment must be deducted from out of the compensation amount determined by the Tribunal under the MV Act, at paragraph 22 made the following significant observations after referring to Lord Reid's remarks in **Perry vs. Cleaver**, 1969 ACJ 363 (House of Lords):-

"**22.** Damages for personal injuries are payable under the common law of England. Principles evolved under Common Law for personal injury cases so far as they can be applicable to cases of Fatal Accidents Act can provide the necessary guidelines for deciding the question posed before us. The leading

case is Perry v. Cleaver decided by the House of Lords. The claimant in the cited case had sustained injuries in a motor accident as a result of which he was discharged from service. He was awarded disablement pension and the question arose whether the pension received by him should be deducted while assessing the liabilities. For the claimant it was urged that pension, like life insurance was the product of the employee's past services or thrift and it was neither equitable nor just that the tortfeasor should take over the benefit of the same. On behalf of the opposite party the contention was that plaintiff was entitled only to the actual loss suffered by him and the pension received by him should be deducted. The Law Lords discussed the principle in great detail and covered all the English authorities up to date. It will be appropriate to reproduce certain relevant observations of Lord Reid setting out the principles in such cases (at para 7):

"As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor. Here again I think that the explanation that this is too remote is artificial and unreal. Why should the plaintiff be left worse off than if he had never insured? In that case he would have got the benefit of the premium money; if he had not spent it he would have had it in his possession at the time of the accident grossed up at compound interest. I need not quote from the well known case of Bradburn v. Great Western Rly. Co. but I may refer to an old Scottish case, Forgie v. Henderson where the pursuer was assaulted by the defender. During part of his resulting illness he received an allowance from a friendly society, and Lord Chief Commissioner Adam in charging the jury:

'I do not think you can deduct the allowance from the Society, as that is of the nature of an insurance, and is a return of money paid'."

Though the above case dealt with compensation for personal injury, the principle of compensation has been decided on the touchstone of equity and reasonableness which are the postulates under the Motor Vehicles Act and the Fatal Accidents Act also. Therefore, the principle enunciated in Perry's case can be applied mutantis mutandis to cases of fatal accidents as well. The principle is clear. If the deceased was entitled to the amount of insurance under a contract and for which he had paid premiums (as in the present case) the receipt of such an amount by the legal representatives is not deductible from the damages payable to them. The deceased had not insured himself and paid premiums all the years during his life time for the benefit of the tortfeasor. This sum represented his thrift for his own benefit and for the

benefit of his family. It was, therefore, not for the tortfeasor to seek any advantage out of this receipt."

[37] The Division Bench of the Madhya Pradesh High Court in Priyank (supra), relying on the Full Bench in Kashiram Mathur (supra), has held that no deductions are warranted towards the amounts received by a claimant under a contract for insurance for which the claimant had paid premium.

[38] The Karnataka High Court in Rajeshwari (supra), the Punjab and Haryana High Court in Kamlesh Bhalla (supra), the Gujarat High Court in Oriental Insurance Co. Ltd. vs. Kokilaben & Ors. (supra) and the Delhi High Court in National Insurance Co. Ltd. vs. Aman Kapur & Ors. (supra) have all held that no deductions are warranted on account of the amounts received by a claimant or his dependents under the insurance policies for which the claimant had paid the insurance premium.

[39] Thus, except for the two decisions of the Madras High Court relied upon by Ms. Linhares, the judicial opinion overwhelmingly supports the position that no deductions are warranted towards the amounts received by a claimant or his dependents under a contract of insurance for which the claimant paid the premium from out of the compensation amount payable under the MV Act.

[40] As noted earlier, at least two decisions of our High Court in Vrajesh Desai (supra) and Ajit Rakvi (supra) have endorsed the above view. Accordingly, following these decisions, even the third point for determination will have to be answered against the appellant.

[41] For all the above reasons, this appeal is liable to be dismissed and is hereby dismissed. Accordingly, there shall be no order for costs.

[42] The Court records appreciation and gratitude to Mr. James Lopes, who rendered valuable assistance in this matter.

[43] Now that this appeal is dismissed, the claimants will be entitled to withdraw the compensation amount deposited by the appellant in this Court and the interest that shall have accrued thereon. The claimants will have to furnish identification documents and bank details so that the Registry can directly transfer the amounts into their respective bank accounts.

[44] The miscellaneous applications, if any, do not survive the appeal's disposal and are disposed of accordingly

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2023(1)GoaCC95

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak]

Second Appeal No 156 of 2012 **dated 28/11/2022**

Subash Fotu Bhandari; Sudir Bhandari; Shubada (Shraddha) Bhandari; Sudesh Bhandari; Shubhada Bhandari; Sachin Bhandari; Shreya Bhandari; Sushila Subhash Bhandari; Pandurang Fotu Bhandari; Mridula P Bh

Versus

Vassant Data Quenim Robolo; Mohinibai Keni; Khushalchand V Keni; Rekha K Keni; Vinayanand V Keni; Shaila V Keni; Premchand V Keni; Suhas Alias Radha Premchand V Keni; Chirag Keni; Roshini Keni; Roshan

APPRECIATION OF EVIDENCE

A) Code of Civil Procedure, 1908 Or. 22R. 9 - Gift deed - Execution of - Appreciation of evidence - Merely because another view was possible, second appellate Court would not interfere with finding of fact based upon which Law came to be applied - Generally, first appellate Court is final Court on factual issues unless some case of perversity is made out - If finding of fact is left undisturbed, then there may be no error in Law applied by first appellate Court - Evidence on record and Law applicable does not warrant disturbing a position prevailing from 1922 concerning suit properties which Plaintiffs have not even bothered to identify - Any finding on this substantial question of Law will make no difference because there is no legal evidence about execution or drawal of Gift Deed, which is a factor which goes to root - Appeal dismissed

[Para 69, 70]

B) Portuguese Civil Code, 1867 Art. 1457, Art. 1459, Art. 2426, Art. 2493, Art. 2495, Art. 1759 - Gifts - External form of gifts of immobile assets - Gifts' Mortis Causa' - Applicability of - Upon conjoint construction of Articles 1457 and 1759 of Portuguese Civil Code, it is apparent that Article 1457 will apply only to Gifts which are to produce their effect upon donor's death where such Gifts are in nature of disposition of last wishes of donor - Therefore, at least title of Article 1457 refers to "Gifts' Mortis Causa" - Further, even plaintiffs understood Deed to give Fottu right to possess suit properties only after demise - If donor makes Gifts in contemplation of death or as expressing his last wishes in contemplation of death, then such Gifts will have to be construed in context of rules applicable to testamentary disposition, that is, Wills - Have to be construed in light of provisions of Article 1759 and or provisions of Code concerning testamentary dispositions - Article 1759 indeed provides that testamentary disposition shall lapse and have no effect in relation to heirs or legatees if such heir or legatees die before testator.

[Paras 63, 64, 65]

Law Point - The provision of this Article does not include gifts for marriage even though they have to produce their effects after death of donor

Acts Referred:

Code of Civil Procedure, 1908 Or. 22R. 9

Portuguese Civil Code, 1867 Art. 1457, Art. 1459, Art. 2426, Art. 2493, Art. 2495, Art. 1759

Counsel:

M B Da Costa, K Betquecar, Priyanka Kamat, S Pinto

JUDGEMENT

M S Sonak, J.

[1] Heard learned Counsel for the parties.

[2] The appellants are the original plaintiffs, and the respondents are the original defendants in Special Civil Suit No.55/1984/B in the Court of Civil Judge Senior Division at Panaji (trial Court). Therefore, in this Appeal, the parties will be referred to as plaintiffs and defendants for convenience.

[3] The plaintiffs relying upon a Gift Deed dated 23.02.1922, instituted the above suit for recovery of possession of the property, which they claimed, was the subject matter of the said Gift Deed from the defendants. The defendants resisted the claim, inter alia, by raising a counterclaim that the Gift Deed dated 23.02.1922 was never executed by their predecessor in title. In any case, the same was null and void.

[4] The trial Court dismissed the suit by judgment and Decree dated 04.07.2000 but decreed the counterclaim. Aggrieved, the plaintiffs instituted Regular Civil Appeal No.201/2010 before the Adhoc District Judge-2, North Goa at Panaji (first appellate Court). By judgment and Decree dated 02.05.2012, the first appellate Court dismissed the Appeal. Hence, the present Second Appeal.

[5] This Second Appeal was admitted on 10.10.2012 on the following substantial questions of Law:

(i) Whether Gift (23.02.1922) made in favour of the donee with reservation of usufruct do not lapses when donee expires before one of the donors, but the donee expires leaving behind heirs ?

(ii) Whether the Gift Deed (23.02.1922) drawn by the Notary under the Notarial Code, which records that a third party has signed at the request of the donor in accordance with the provision of the Civil Code in the presence of witnesses is valid and there is no need of any Power of Attorney in favour of said third party ?

(iii) Whether a deed drawn by the Notary under the Notarial Code is valid operative and effective and certified copy thereof is proof of Gift without their being legal requirement to call for the book of the Notary ?

[6] At the very outset, Mr M.B. Da Costa, learned Senior Advocate for the plaintiffs, clarified that he was not pressing any ground based on Order 22 Rule 9 of CPC and, therefore, no substantial question of Law was even framed on this issue. He, however, submitted that the two Courts concurrently erred in holding that the Gift Deed dated 23.02.1922 was never executed by Raiu or Radha alias Caxibai or that the same was otherwise null and void or not binding on the legal representatives of Raiu and Radha alias Caxibai.

[7] Mr Costa submitted that the two Courts applied or rather purported to apply the provisions of the Indian Registration Act, the Indian Stamp Act, or the Transfer of Property Act for determining the validity of the Gift Deed, which was executed on 23.02.1922. He submits that the execution of this Gift Deed should have been examined on the touchstone of the Law then prevalent. He presents that the Portuguese Civil Code and the Notarial Law then prevalent permitted the drawing out of a Gift Deed by a notary public. He submits that where donors were illiterate or otherwise unable to sign, their authorized representative, even without a formal power of Attorney, could always sign on their behalf. He submits that since the two Courts did not consider all these aspects, this Appeal must be allowed.

[8] Mr Costa submits that the two Courts failed to appreciate that the certified copy from the notarial records constitutes sufficient proof of the documents and the contents of such documents. He referred to some provisions of the Portuguese Civil Code and the Notarial Laws concerning this proposition. Finally, he submits that since all this was not considered, the Appeal deserves to be allowed.

[9] Mr Costa submitted that the two Courts have unnecessarily raised doubts about the Gift Deed of 23.02.1922. He pointed out that this Gift Deed was referred to and relied upon in the inventory proceedings of 1923, and even allotments were made based upon this Gift Deed. He pointed out that even in the Gift Deed of 1943, executed by Radha in favour of her daughter Mohanbai, there is a clear reference to this 1922 Gift Deed. He submitted that at least the 1943 Gift Deed was executed by Radha in her daughter Mohanbai's house. Moreover, the Deed records that Vasant, her son-in-law, assisted her. Therefore, there was no question of coercion or any undue influence. Mr Costa submits that even this aspect was not considered adequately by the two Courts.

[10] Mr Costa submits that the first appellate Court committed an error apparent on the face of the record in confusing the Gift Deed for a Will and holding that the disposition in the Gift Deed lapses because the donee Fottu died before one of the donors, Radha alias Caxibai. Mr Costa submits that Article 1457 of the Portuguese Civil Code did not apply to the 1922 Gift Deed simply because one of the donors died within eight days of its drawing out. Mr Costa pointed out that the Gift Deed itself provided that the transfer would become void should the donors beget a male child. From this, he submitted that none of the donors made the Gift Deed in contemplation of their imminent demise in the near future. He proposes that the finding of the appellate Court to the contrary is vitiated by perversity.

[11] Mr Costa submitted that there could be various explanations for why Radha alias Caxibai, who was only 18 years old then, did not sign the Gift Deed. He offered that she possibly did not know to read and write at that time but must have learnt to read and write subsequently. He submitted that since Raiu, who was suffering from tuberculosis, was not signing the Deed, Radha, out of respect for her husband or not to embarrass him, may have chosen not to sign the Gift Deed.

[12] Mr Costa submitted that a Deed drawn by a Notary under the Notarial Code is valid, operative and effective, and the certified copy thereof is the proof of the Deed without insisting or calling for the book from the Notary. He submits that the document was adequately proven. He presents that the two Courts addressed irrelevant issues based upon the provisions of the Indian Evidence Act or the application of the Rule of Evidence relating to 30 years old documents. Based on this, Mr Costa submitted that even the third substantial question of Law must be answered in favour of the plaintiffs.

[13] For all the above reasons, Mr Costa submitted that the substantial questions of Law must be answered in favour of the plaintiffs, and this Appeal must be allowed.

[14] Ms Priyanka Kamat countered the submissions of Mr Costa and submitted that this Appeal must be dismissed because no case is made out to interfere with the concurrent findings of fact recorded by the two Courts. She proposes that both Courts have applied correct legal principles and there is no error in their reasoning.

[15] Ms Kamat pointed to the contemporaneous evidence about the donor Raiu signing promissory notes in a firm hand hardly three days before the alleged drawing of the Gift Deed dated 23.02.1922. She pointed out a power of Attorney relied upon by the appellant (though disputed by the respondent) allegedly executed by Radha alias Caxibai in 1923, within hardly a year from the alleged drawing out of the Gift Deed dated 23.02.1922. She pointed to other writings and signatures of Raiu and Radha alias Caxibai to submit that they could write or sign. She offered that in such circumstances, there was no question of Crisna, in the absence of any power of Attorney, signing on behalf of Raiu and Radha alias Caxibai.

[16] Ms Kamat referred to the Notarial Laws to point out that a mere inability to write shall not be a ground for someone to sign on the donor's behalf. She pointed out that the Notarial Laws contemplated affixing of thumb impression in front of witnesses. She submitted that the 1922 Gift Deed had no legal efficacy since all this was never done.

[17] Ms Kamat submitted that the evidence on record shows that Fottu Bhandari, the elder brother of Raiu, took undue advantage and exercised undue influence. Knowing that Raiu was sick and dying, the properties were sought to be taken on Gift on the promise of providing usufruct. However, perhaps realizing that Raiu and Radha alias Caxibai would never agree to such a transaction, hardly a week before Raiu died, some document was notarised, which did not even bear signatures or thumb

impressions of Raiu and Radha alias Caxibai. Based on such a document, legal representatives of Raiu and Radha alias Caxibai cannot be deprived of their parents' properties. Therefore, she submitted that there are concurrent findings of fact that warrant no interference.

[18] Ms Kamat submitted that since the donee expired before the surviving donor, the Gift Deed, which was admittedly a conditional Gift Deed, reserving the usufruct to the donors, lapsed. The legal representatives of the donee who predeceased the donor could never maintain a suit to enforce such a Gift Deed. She submitted that even otherwise, the Gift Deed was conditional, as admitted by the plaintiffs' witness. She offered that the condition subject to which the Gift Deed was done was never fulfilled; therefore, there was no question of the recovery of properties based upon such a Gift Deed.

[19] Ms Kamat submitted that the 1922 Gift Deed was never proved in accord with Law. Only a document certified by the notary public was produced. Even the so-called alleged original certified copy was never produced. She submitted that in 1988, no notaries could pose as Notary Ex-officio and purport to issue certified copies. Without valid proof, the Courts could never have relied upon the 1922 Gift Deed.

[20] Ms Kamat submitted that the suit was for recovering two specific properties. However, in the evidence, the plaintiffs' witnesses referred to some properties having no correlation with the properties pleaded in the plaint. Therefore, there was no identification of the suit properties and based on this, two Courts correctly dismissed the suit.

[21] For all the above reasons, Ms Kamat submitted that this Appeal may be dismissed.

[22] The rival contentions now fall for determination.

[23] The plaintiffs are the legal representatives of Fottu Bhandari, and the defendants are the legal representatives of Raiu Bhandari and his wife, Radha alias Caxibai. Raiu Bhandari was the younger brother of Fottu Bhandari. There is evidence that he was suffering from tuberculosis, and his wife Radha was hardly 18 years old when Raiu died on 01.03.1922, within barely eight days from the alleged drawal of the Gift Deed dated 23.02.1922, which is the fulcrum of the plaintiffs' case.

[24] The plaintiffs contend that by Gift Deed dated 23.02.1922 drawn up before the notary public, Raiu and Radha gifted their entire properties (disposable quota) to their elder brother/brother-in-law, Fottu Bhandari. However, the alleged donors reserved unto themselves the right of usufruct. The plaintiffs admitted that this Deed was conditional upon Raiu and Radha not begetting a male child even though they already had a two-year-old daughter Mohanbai. The plaintiffs also admitted that the Gift Deed required Fottu to treat Raiu, Radha and their daughter with affection and care as one of the conditions of the Gift Deed.

[25] The plaintiffs accept, and even otherwise, the evidence establishes that the Gift Deed dated 23.02.1922 was never signed or executed by Raiu and Radha. Instead, without being constituted as Attorney, one Crisna Sinai Neurencar signed on their behalf. Furthermore, the Gift Deed of 23.02.1922, assuming that the plaintiffs proved the same before the Trial Court, records that Raiu was unable to sign since his hand was trembling in view of his sickness and Radha alias Caxibai did not know to write.

[26] The plaintiffs contend that in terms of the Portuguese Law prevalent in 1922, there was no invariable requirement about donors signing the Gift Deed. Furthermore, they claim that there was also no invariable requirement for execution of a formal power of Attorney authorizing some other person to sign a Gift Deed. The plaintiffs, therefore, contend that where the donors could not sign for want of literacy or were unable to sign due to sickness, infirmity, etc., some other person authorized by them could always sign in front of a notary and two witnesses. Based on this, Mr Costa contended that there was no infirmity in the Gift Deed dated 23.02.1922.

[27] The two Courts below have concurrently disagreed with the plaintiff's contentions on the validity of the Gift Deed that was never signed or executed by the donors. Mr Costa submitted that the two Courts did not adequately consider the provisions of the Portuguese Civil Code and the Notarial Law prevalent in 1922 but based their conclusions on the Law applicable after the Liberation of Goa in 1961. Therefore, he submits that the conclusions reached by the two Courts are erroneous for want of reference to the appropriate laws and legal provisions.

[28] Mr Costa referred to Article 1459 of the Portuguese Civil Code, 1867, which reads as follows:

> **"Article 1459 - External form of gifts of immobile assets -** The Gift of immobile assets, if their value doe not exceed 1,000$ (one thousand escudos) may be made by private writing with the signature of the donor or of another at his request, if he does not know to write, and two more witnesses who write their name in full; if it exceeds that amount, it can only be done by a public deed. Sole paragraph - These gifts produce effect in relation to third parties only if they are registered."

[29] Mr Costa also referred to Articles 1, 38, 39, 63 and 79 of Decree no.8373 (Notarial Laws). He submitted that this Decree repealed the earlier Notarial Law of 1900, 1919 and 1921. However, he offered that there was not much difference between the legal provisions in the repealed laws and Decree no.8373. He submitted that the drawal of the Gift Deed dated 23.02.1922 was consistent with the Notarial Laws that permitted some other person to sign on behalf of the donors where the donors could not sign for want of literacy or sickness.

[30] Neither of the Counsel could produce the Notarial Laws of 1900, 1919 and 1921, which might have been the laws prevalent at the time of the alleged draw of the Gift Deed dated 23.02.1922. Decree no. 8373 (Notarial Laws) entered force only on

20.10.1927, almost five years after the suspected draw of the Gift Deed 23.02.1922. However, even if we proceed based on the submission that there was not much difference between the legal provisions of 1900, 1919 and 1921 laws and Decree no.8373, which entered force on 20.10.1927, the question is whether there was any compliance with the Decree no.8373 or the similar provisions in the earlier laws.

[31] Article 1459 of the Portuguese Civil Code relied upon by Mr Costa, inter alia, provides that the Gift of immobile assets (immovable properties) not exceeding 1000 escudos could be made by private writing with the signature of the donor or of another at his request, if he does not know to write, in the presence of two or more witnesses. However, this Article provides that if the value of immobile assets to be gifted exceeds 1000 escudos, then such a gift can be made only by a public Deed.

[32] Mr Costa explained that one rupee corresponded to approximately six escudos. The Gift Deed dated 23.02.1922 relied upon by the plaintiffs valued the immobile properties at Rs. 2500/- and Rs. 625/-. Thus, the value of the immobile properties purported to have been gifted exceeds 1000 escudos, about which there was no dispute whatsoever. Therefore, such a gift could only be effected by a public deed.

[33] Though Article 1459 may have permitted the Gift of immobile properties not exceeding 1000 escudos by a private Deed or with the signatures of some person authorized by the donor, where the donor does not know to write, there is no such explicit sanction for gifts of properties valued about 1000 escudos. Furthermore, Mr Costa could not show any provision to either the Portuguese Civil Code or the Notarial Laws that permitted even the execution of a public Deed of Gift of immobile properties valued about 1000 escudos without the signature of the donor or with the signature of some other person (not a power of Attorney), where the donor did not know or was unable to write.

[34] The standard rule is that the Gift Deeds must be signed by the donors or their duly constituted power of attorneys. Such power of attorney must be in writing and cannot be simple oral authorization. Since the plaintiffs sought to rely on some alleged exception in Article 1459 of the Portuguese Civil Code, it was for the plaintiffs to not only prove the existence of such exception but also prove that their case fell strictly within the exceptions. Therefore, the plaintiffs were duty-bound to plead and prove compliances, subject to which exceptions were made or exemptions granted.

[35] The two Courts may be, without specific reference to Article 1459 or the Notarial Laws, have recorded concurrent findings of fact that the plaintiffs failed to either plead or prove these crucial aspects. There is no perversity in the record of such a finding of fact; possibly that is why not even any substantial question of Law based on perversity was proposed or formulated at the admission stage of this Second Appeal.

[36] Since Mr Costa relied on Decree no.8373 (Notarial Code), reference to Article 77 of this Code cannot be avoided. Accordingly, article 77 is transcribed below for the convenience of reference:

> **"Article 77 -** In the case of public wills and proceedings of approval of the closed wills, the intervention of three witnesses is indispensable; in the case of other authentic and extra official documents, excluding protests or promissory notes, two are sufficient.
>
> 1. Where the parties, testators not exempted, are not able to or do not know to write, it shall not be necessary, on this ground alone, for some one to sign on their behalf. In case of illiterate parties who are holders of Identity Cards issued by the Archive of Identification, the thumb impression shall substitute the signature, provided that its affixation is made in the presence of the Notary and the latter declares in the documents that it compares with the one recorded in the book of specimen signature.
>
> 2. The witnesses shall sign according to the mode of signatures that they used and can at the same time act as warrantors of identity of the parties, as much in the wills and proceedings of approval, as in the deeds and more instruments. The parties who know to write and can write shall also sign according to the mode of signatures that they used.
>
> 3. The parties who are illiterate or not and even those who are not holders of Identity Cards, shall affix on the documents the thumb impression, should the notaries so require, mentioning this fact expressly in the same documents.
>
> 4. The following persons shall not be witnesses nor warrantors:
>
> 1. The foreign nationals.
>
> 2. Those who are not in sound mind.
>
> 3. The minors who are not emancipated.
>
> 4. The deaf, the thumb and the blind and those who have no knowledge of the Portuguese language.
>
> 5. The ascendants, descendants and espouses as also the assistants, copying clerks and typists of the notaries who have intervened in the documents and the notaries to whom the assistants were serving.
>
> 6. Those who are directly interested in the act.
>
> 7. The ascendants in the acts of the descendants and vice-versa.
>
> 8. The father-in-law or mother-in-law in the acts of the son-in-law or daughter-in-law and vice-versa.
>
> 9. The husband in the acts of the wife and vice-versa.
>
> 10. The husband and the wife jointly."

5. The competence of the witnesses shall be verified by any means by the notaries and mention of this shall be made in the authentic and extra official documents.

[37] Article 77(1) provides that merely because the parties may not be able to or do not know to write, some other person cannot be permitted to sign on their behalf. In such a case, the thumb impression shall substitute the signature, provided that its affixation is made in the presence of the Notary and the latter declares in the documents that it compares with the one recorded in the book of specimen signatures. Thus, the procedure for affixation of thumb impression was not something alien to the Notarial Code upon which Mr Costa relies. Admittedly the Gift Deed dated 23.02.1922 does not bear either the signatures of Raiu and Radha or even their thumb impressions.

[38] The Gift Deed dated 23.02.1922, assuming that the plaintiffs proved the same in accord with Law, only records that Raiu was unable to sign because his hands were trembling due to sickness and Radha alias Caxibai did not know to write. As noted earlier, Article 77(1) of the Notarial Code provides that only this could not have been the reason enough to require Crisna Sinai Neurencar, who was not even the power of attorney holder of Raiu and Radha, to sign on their behalf. In such a situation, at least the thumb impressions of Raiu and Radha should have been affixed. These impressions are conspicuous by their absence, even assuming that the document is regarded as proven.

[39] The defendants have relied upon two promissory notes executed by Raiu on 20.02.1922. These documents are duly proved and marked as Exhibit DW1/A and DW1/B. Both these documents show the signature of Raiu in a firm hand. Moreover, these documents, executed hardly 2 to 3 days before the suspected draw of the Gift Deed dated 23.02.1922, negate the statement in the Deed about Raiu being unable to sign due to his sickness and Radha not knowing to sign. Therefore, Mr Costa's contention about Raiu's state of health on the particular day, i.e. 23.02.1922, cannot be readily accepted without any evidence to back the same.

[40] Similarly, the plaintiffs have relied upon inventory proceedings allegedly instituted by Radha alias Caxibai in 1923 upon the death of her husband Raiu on 01.03.1922. It is the plaintiffs' case that Radha alias Caxibai constituted Fottu Bhandari as her power of Attorney. This document is also produced on record by the plaintiffs and marked in evidence. The defendants dispute this document as a forgery. They claim that Fottu, Raiu's elder brother, took advantage of the situation and got the properties allotted in his favour by relying upon the fraudulent Gift Deed dated 23.02.1922 through this inventory proceedings.

[41] However, since the plaintiffs rely upon this power of Attorney dated 31.05.1922 as bearing the signature of Radha alias Caxibai, the two Courts were justified in concluding that even Radha alias Caxibai knew to sign and was not

illiterate, as stated in the Gift Deed dated 23.02.1922. Therefore, this finding recorded by the two Courts is certainly not perverse.

[42] There are documents from 1943 and 1975 referring to the writings of Radha alias Caxibai. However, Mr Costa is correct in suggesting that these documents may not greatly assist the defendants' case because it is possible that after 30 to 40 years, Radha alias Caxibai may have learnt to write. At the same time, Mr Costa's contention that Radha alias Caxibai may not have signed the Gift Deed on 23.02.1922 so as to respect or not to embarrass her husband Raiu, who was unable to sign due to sickness or that she was only 18 years old and therefore had not learnt to sign, cannot be accepted in the absence of any pleadings or evidence whatsoever to this effect. Moreover, no suggestions were made to the defendant's witnesses on these lines. Besides, the defendants' witnesses deposed to Radha alias Caxibai having studied up to the fourth standard, and this deposition was not seriously challenged.

[43] Thus, for all the above reasons, the finding concurrently recorded by the two Courts on the issue of non-execution of the Gift Deed dated 23.02.1922 and even the legal effects arising out of such non-execution by the donors warrant no interference. These are concurrent findings of fact that suffer from no perversity whatsoever. Moreover, these findings are backed by the evidence on record and even applicable laws.

[44] The circumstance that the Gift Deed was referred to in the inventory proceedings of 1923, of which a certified copy was issued in 1936, can be of no great assistance to the plaintiffs. The inventory proceedings were initiated mainly by Fottu based on an alleged power of Attorney by Radha alias Caxibai. The plaintiffs, on the one hand, contend that Radha could not read or write and, on the other hand, rely upon a power of Attorney allegedly executed by her hardly within three months from the Gift Deed dated 23.02.1922.

[45] Thus, the plaintiffs claim that Radha could not read, write, or sign when it suits the plaintiff's interests. But when it does not, they contend that Radha could read, write and sign. This is approbation and reprobation in the same breath. Besides, these inventory proceedings are based entirely on the so-called Gift Deed dated 23.02.1922, which the two Courts have concurrently found was never executed by the donors Raiu and Radha alias Caxibai. Therefore, any purported allotment in such inventory proceedings can produce no legal effects as concurrently held by the two Courts below.

[46] Based only upon the reference to this Gift Deed in the 1943 Gift Deed by which Radha gifted her properties to her daughter Mohanbai, the concurrent findings of fact recorded by the two Courts cannot be interfered with. To a certain extent, such reference supports Mr Costa's contentions. However, the evidence on record has to be assessed and evaluated in its entirety. The circumstances in which Radha alias Caxibai was placed after the demise of her husband Raiu when she was hardly 18 years old

cannot be lost sight of. Evidence shows that Raiu was suffering from T.B. and was in the process of winding up. The circumstance that Radha alias Caxibai and the couple's two-year-old daughter were entirely at the mercy of her husband Raiu's elder brother Fottu also cannot be lost sight of.

[47] Therefore, based upon the statement or the reference in the 1943 Gift Deed, the considerable evidence to the contrary cannot be ignored. In any case, no substantial question of Law was also formulated on this aspect precisely because this would be a matter of appreciation or reappreciation of the evidence on record that is generally beyond the limited scope of a second Appeal.

[48] The two Courts have held that the Gift Deed dated 23.02.1922 was not even proved by the plaintiffs in accordance with Law. Mr Costa, however, relies upon provisions of the Portuguese Civil Code and the Notarial Code to contend that even a certified copy of an extract from the Notarial record amounts to proof of the documents and their contents.

[49] Though no explicit provisions were shown in support of the above statement, even if the above statement is accepted as correct, there is no clarity whether, indeed certified copy of the extract from the notarial records was produced in this matter. On record, marked as 'X' for identification (page 226 of the original records), is a xerox copy of a document notarized by the Notary Atmarama X.P. Palondicar on 26.07.1988. This Notary has put an endorsement that 'this copy is certified to be a true xerox copy of the original document, which I have initialled and returned'. If this Notary Atmaram Palondicar was shown some original document, which he has initialled and returned, there is no explanation why this original document was not produced on record. Further, even the Notary Atmaram Palondicar was not examined by the plaintiffs.

[50] Mr Costa, however, referred to the notarized xerox copy and pointed out that this has been certified by the Notary ex-Officio (O Notario ex-Officio), who has put a note in Portuguese language and certified that this is the copy (xerox true copy) of the writings in the Notarial books. Now, this writing in Portuguese is dated 28.05.1988. Mr Costa also submitted that the Notario ex-Officio made this certification on 26.05.1988 after verifying the Notarial books.

[51] Almost 27 years after liberation, it is doubtful whether any notary public can claim the status of Notary ex-officio and purport to hold custody of old Notarial books and issue certificates based thereon. Mr Costa explained that this is possible and permissible. He also explained that this Notary ex-Officio, who signed on 26.05.1988, is a successor to the Notary before whom the 1922 Gift Deed was drawn out. However, there is no evidence on this crucial aspect, assuming this was legally possible. Moreover, Mr Costa referred to no legal provisions under which this was possible or permissible, nor did the plaintiffs produce any material on record to show that this Notary ex-Officio was indeed the successor to the Notary before whom the

Gift Deed dated 23.02.1922 was allegedly drawn out and lawfully had the custody of Notarial books.

[52] In the above state of evidence, the two Courts were not unjustified in holding that there was no proof about the document dated 23.02.1922 or that such document, which was the fulcrum of the plaintiff's case, was never proved in accord with the Law whether prevalent before 1961 or even after.

[53] However, in the paper book on pages 251 and 252 is a document in the Portuguese language issued by Civil Registrar cum Sub-registrar (leave reserved) O Notario ex-Officio, a typed copy of Gift Deed dated 23.02.1922. The learned Counsel did not point out this document, but I found the same while reviewing the records. To rely on this, Ms Asha Suresh Kamat should have been examined. Only she could have thrown some light on the source and custody of the original document if any. Admittedly, Asha Kamat was never examined in this matter. There is no translation of this document placed on record. This is a typed document, and there is no evidence about the source from which Asha Kamat prepared and issued this document, if at all.

[54] Ms Kamat referred to the Notarial Code that was relied upon by Mr Costa to point out that judicial examinations of Notarial books were contemplated. She submitted that the plaintiffs made no efforts to summon those with the official custody of the Notarial books in the context of the doubtful Gift Deed dated 23.02.1922. Further, she raised certain submissions in the context of Articles 63, 70, 74, 75, 89 and 93 of Decree no.8373 (Notarial Laws). Finally, she pointed out some discrepancies and procedural non-compliances. However, even without going into these issues, the plaintiff's case fails on the substantive issues discussed earlier.

[55] Ms Kamat, however, referred to Article 77 of Decree no.8373, which was crucial and was already discussed earlier. Similarly, Ms Kamat also pointed out that Article 2426, relied upon by Mr Costa in support of the probative value of authentic extra-official documents, must be considered along with Articles 2493 and 2495 of the Portuguese Civil Code and other Articles in Section V, which deals with defects which may undo the probative value of the documents. In particular, she referred to Article 2495, dealing with the nullity of extra official documents. She emphasized that the absence of signatures of the parties would render such documents null and void. She submitted that, in such case, such documents would lose their probative value. Article 2495 of the Portuguese Civil Code indeed provides that extra official documents are rendered null and void on account of the absence of signatures of the parties or of the persons who are signing at the request of the parties when they do not know to sign or are unable to sign.

[56] As noted earlier, the evidence on record does not establish that Raiu and Radha alias Caxibai were unable to sign or did not know to sign. Admittedly, Crisna Neurencar, alleged to have signed on their behalf, was not their power of Attorney. Moreover, there is no explanation why Raiu's and Radha's thumb impression was not

affixed, even though the Notarial Code contemplates such affixation in certain circumstances. Therefore, in the absence of signatures of Raiu and Radha alias Caxibai on a crucial document that purports to gift away their entire properties (disposable quota), the two Courts were justified in the view that they have adopted. Such a view is neither contrary to the evidence on record nor the laws then applicable.

[57] Ms Kamat is also justified in defending the findings of the Trial Court and the appellate Court on the issue of identification of the suit properties. In the plaint, the plaintiffs referred to and sought for recovery of possession of two specific immobile properties known as "Queinem of Azossim" described (i) and (ii) in paragraph 5(b) of the plaint. This is evident from pages 104 to 108 of the paper book. However, the plaintiffs' only witness Subhash Bhandari (PW1), in his deposition, spoke about the property Manchechem Bhat at Pernem and some other properties like Kerim, Bakar, Manchechem Band, Gharbhat and residential houses at Cumbarjua. He stated that all these properties are "suit properties".

[58] Thus, the plaintiffs' witness deposed about one set of properties when the plaint referred to and sought possession of another set of properties. There is complete variation between the pleadings and proof. Considering that the plaintiffs had applied for the recovery of specific properties, they should have been clear about the properties they sought possession, should any decree be made in their favour. This is an additional ground not quite unjustifiably taken into account by the two Courts for denying any relief to the plaintiffs.

[59] Based on the above discussion, the substantial questions at (ii) and (iii) set out in paragraph 5 of judgement and order are liable to be answered against the appellants. This is sufficient to dismiss this Second Appeal without answering the substantial question (i) in paragraph 5 of this judgement and order. Even if the question (i) is answered in favour of the appellant, the conclusion will not change, and the Appeal could not be allowed.

[60] Further, since the two Courts have held that since there was no valid execution of the Gift Deed dated 23.02.1922, there is no question of deciding whether the Gift lapsed because at least one of the donors who were to enjoy the usufruct of the gifted properties survived the donee. In other words, because the donee expired before one of the donors, who was to enjoy the usufruct of the gifted properties, the gift lapsed.

[61] The appellate Court apparently relied on Article 1457 of the Portuguese Civil Code to hold without prejudice that the Gift lapsed. Article 1457 of the Portuguese Civil Code reads as follows:

> **"Article 1457 - Gifts' Mortis Causa' -** The gifts, which are to produce their effects upon the death of the donor, have the nature of disposition of the last wishes, and shall be subject to the rules laid down under the title on Wills.

Sole paragraph - The provision of this Article does not include the gifts for marriage even though they have to produce their effects after the death of the donor."

[62] Ms Kamat pointed out that Article 1457 has to be read in conjunction with Article 1759, which provides for lapsing of testamentary provisions. She pointed out that in Article 1759, the testamentary dispositions lapse, and have no effect, in relation to the heirs or the legatees, if they die before the testator.

[63] Upon conjoint construction of Articles 1457 and 1759 of the Portuguese Civil Code, it is apparent that Article 1457 will apply only to Gifts which are to produce their effect upon the donor's death where such Gifts are in the nature of the disposition of the last wishes of the donor. Therefore, at least the title of Article 1457 refers to **"Gifts' Mortis Causa".** Further, even the plaintiffs understood the Deed to give Fottu the right to possess the suit properties only after the demise of Raiu and Radha.

[64] Thus, at least prima facie, if the donor makes Gifts in contemplation of death or as expressing his last wishes in contemplation of death, then such Gifts will have to be construed in the context of the rules applicable to testamentary disposition, that is, Wills. Such Gifts will have to be construed in the light of the provisions of Article 1759 and other provisions of the Code concerning testamentary dispositions.

[65] Article 1759 indeed provides that testamentary disposition shall lapse and have no effect in relation to the heirs or legatees if such heir or legatees die before the testator. In this case, one of the donors, Raiu, died on 01.03.1922, within hardly eight days from the alleged draw of the Gift Deed dated 23.02.1922. On the other hand, the donee Fottu Bhandari died on 07.12.1974 and was survived by Radha alias Caxibai, wife of Raiu and the second donor in the Deed allegedly drawn on 23.02.1922. Thus, it can be said that the donee died before one of the donors, Radha alias Caxibai.

[66] The Gift Deed did contemplate that the donors would enjoy the usufruct of the gifted properties during their lifetime. Based on this understanding, neither Fottu Bhandari nor the plaintiffs, his legal representatives, sought possession of any of the allegedly gifted properties during the lifetime of Raiu or Radha. The suit was instituted only on 11.04.1984, after the demise of Radha alias Caxibai on 09.09.1980.

[67] However, the first appellate Court did not advert whether the alleged Gift Deed was executed in contemplation of the donors' imminent death. The alleged Gift Deed contains a clause that would become void if the donors beget a male child. To a certain extent, this statement might militate against any contemplation of imminent death. But it is not easy to hypothesize on such matters because only the couple would be acquainted with such intimacies. At the same time, there is evidence that Raiu was sick and suffering from tuberculosis. Moreover, he appeared to be winding up his affairs. There is also no dispute that Raiu died on 01.03.1922, hardly within eight days from the Gift Deed's alleged draw dated 23.02.1922.

[68] Therefore, this was a matter of appreciating the evidence on all these aspects. Merely because another view was possible, the second appellate Court would not interfere with the finding of fact based upon which the Law came to be applied. Generally, the first appellate Court is the final Court on factual issues unless some case of perversity is made out. If the finding of fact is left undisturbed, then there may be no error in the Law applied by the first appellate Court. The evidence on record and the Law applicable does not warrant disturbing a position prevailing from 1922 concerning the suit properties which the Plaintiffs have not even bothered to identify.

[69] In any case, as noted earlier, any finding on this substantial question of Law will make no difference because there is no legal evidence about the execution or drawal of the Gift Deed dated 23.02.1922, which is a factor which goes to the root. Therefore, even the question number (i) referred to in paragraph 5 of this judgement and order is disposed of accordingly

[70] For all the above reasons, the substantial questions of Law are answered in the above terms. Based on the answers, this Appeal fails and is liable to be dismissed. Accordingly, this Appeal is hereby dismissed. However, there shall be no order for costs

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2023(1)GoaCC109

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Criminal Appeal No. 21 of 2017 **dated 15/11/2022**

Umadevi Menon

Versus

Anthony Susai; State of Goa

PREPONDERANCE OF PROBABILITY

Code of Criminal Procedure, 1973 Sec. 178, Sec. 313-Negotiable Instruments Act, 1881 Sec. 138, Sec. 139-presumption under Section 139-complaint under Section 138 -no loan transaction defence -but accused clearly admitted to obtaining loan-defence must meet the standard of "preponderance of probability"-cannot be considered as probable defence- appeal challenging acquittal- appeal allowed - Section 178 of Cr.P.C- evidence in the matter needs to be reviewed/re-appreciated and reconsidered-in favour of complainant- found guilty-to pay compensation to the tune of double amount of cheque - Appeal allowed

[Para 6, 7, 14 , 25]

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 178, Sec. 313

Negotiable Instruments Act, 1881 Sec. 138, Sec. 139

Counsel:

Pavithran A V, Galileo Teles, Mahesh Amonkar

JUDGEMENT

Bharat P Deshpande, J.

[1] The present appeal is filed by the original complainant thereby challenging dismissal of her complaint and acquittal of the respondent by the learned Magistrate at Mapusa for the offence punishable under Section 138 of Negotiable Instruments Act.

[2] Heard Mr. Pavithran A.V., learned counsel for the appellant, Mr. Galileo Teles, learned counsel for the respondent no.1 and Mr. Mahesh Amonkar, learned Additional Public Prosecutor for the respondent no.2.

[3] With the assistance of the learned counsel appearing for the parties, I perused the record and proceedings of the trial Court, the impugned judgment and more specifically the evidence.

[4] The point for determination is as under together with my evidence against it.

Whether the learned Magistrate committed patent error in accepting the so-called evidence of the respondent as rebuttal evidence, to rebut presumption under Section 139 of the Negotiable Instruments Act?

[5] In a nutshell, the facts leading to the present proceedings are as under.

[6] The appellant claimed that her deceased husband advanced friendly loan to the respondent to the tune of Rs. 7,00,000/- by issuing a demand draft, in presence of PW2. In discharge of such loan, respondent no.1 issued cheque bearing No.669919 drawn on South Indian Bank, Porvorim branch amounting to Rs. 7,00,000/- in favour of the appellant. On presentation of the said cheque, it was returned unpaid for funds insufficient. Legal notice was issued by the appellant demanding amount of cheque, which was received by respondent no.1. A complaint under Section 138 of Negotiable Instruments Act was filed before the learned Magistrate at Mapusa. On issuance of process, respondent no.1 appeared and contested the matter. On completion of trial, learned Magistrate though accepted that cheque bears signature of respondent no.1, observed that respondent no.1 succeeded in proving that there was no loan transaction between him and deceased husband of the complainant, which resulted in dismissal of the complaint and acquitting respondent no.1.

[7] Learned counsel Shri Pavithran appearing for the appellant submitted that once it is established that cheque bears signature of respondent no.1 and on presentation, it was returned unpaid, presumption under Section 139 of Negotiable Instruments Act is required to be drawn. He submitted that legal notice was issued to respondent no.1 which he received but failed to reply and, therefore, at first instance he failed to show any plausible reason or defence in his favour so as to rebut presumption. He then submitted that on receipt of summons from the Magistrate, the respondent no.1 appeared and on explaining substance of accusation, he only denied the said substance but failed to take any specific defence. He then submitted that during cross-

examination of complainant and her witness, there are no denials to the averments made in the affidavits and in fact such cross-examination further strengthened the presumption under Section 139 of Negotiable Instruments Act. He further submitted that respondent no.1 failed to examine himself though he desired to do so while answering statement recorded under Section 313 of Cr.P.C. Thus, there is practically no material/cogent evidence so as to rebut presumption under Section 139 of Negotiable Instruments Act.

[8] Learned counsel Shri Pavithran then submitted that at one stage during cross-examination of the complainant, a suggestion was given to her as to whether she knows that accused repaid amount of Rs. 7,00,000/- to her deceased husband during his lifetime in cash, to which she showed ignorance. According to learned counsel Shri Pavithran, it is not just a suggestion but a specific defence and two things emerge from it. Firstly, by asking such question to complainant, accused admit that first of all he obtained loan of Rs. 7,00,000/- from the deceased husband of the complainant and that he paid it in cash. Therefore, learned counsel Shri Pavithran submitted that once accused admit to taking loan from the husband of the complainant, it further confirms the case of the complainant that cheque was issued towards legally enforceable debt. Secondly, he claimed that so-called evidence of the accused that he repaid said loan in cash, ought to have been proved by him in his defence by leading evidence as burden shifts on him to prove it. In absence of any such proof or evidence, the debt remained unpaid and, therefore, cheque issued by respondent no.1 in favour of the complainant has to be presumed as towards discharge of legal enforceable debt, which learned Magistrate failed to consider and thereby coming to erroneous findings. He finally submitted that observations of the learned trial Court are clearly perverse and against settled proposition of law and, therefore, this Court, in appeal, is required to interfere by setting aside the impugned order/judgment and thereby convicting respondent no.1 for the said offence.

[9] Learned counsel Shri Pavithran relied upon the following decisions of the apex Court:-

(i) **Rangapa v/s. Sri Mohan**, 2010 11 SCC 441

(ii) **Bir Singh v/s. Mukesh Kumar**, 2019 4 SCC 197

[10] Learned counsel Shri Galileo Teles appearing for respondent no.1 submitted that the scope of this Court in an appeal challenging acquittal is very limited and only on the parameters that the findings of the trail Court suffer from the vice of irrationality or considered to be perverse thereby ignoring or excluding relevant material or by taking into consideration irrelevant and inadmissible material. Learned counsel Shri Teles appearing for respondent no.1 then submitted that it is not necessary for the accused to examine himself in defence to rebut presumption under Section 139 of Negotiable Instruments Act as onus on him is by showing preponderance of probability which he can show or demonstrate from the evidence of

the complainant and their witnesses. If the accused succeeds in showing inconsistencies or improbabilities in the cased of the complainant from the evidence and cross-examination of the complainant and their witnesses, the Court has to consider such presumption as rebutted.

[11] Learned counsel Shri Teles then submitted that crossexamination of PW1 and PW2 alongwith the documents clearly show that such presumption stands rebutted and thelearned trial Court has rightly accepted it in favour of respondent no.1.

[12] Learned counsel Shri Teles placed reliance on the following decisions:

(i) **Geeta Devi v/s. State of U.P and Others,2022 SCCOnLineSC 57**.

(ii) **Kumar Exports v/s. Sharma Carpets**, 2009 2 SCC 513 .

[13] Admittedly, present matter is an appeal challenging acquittal and therefore parameters laid down by the apex Court for deciding appeal challenging acquittal must be taken into account.

[14] In the case of **Geeta Devi** (supra), the Supreme Court while considering the powers of this Court in reversing the findings of acquittal into conviction, considered most of the earlier decisions of the apex Court from paragraph 7 onwards.

[15] In the case of **Chandrappa & Ors v/s. State of Karnataka**, 2007 4 SCC 415 , the legal position with regard to appeal under Section 178 of Cr.P.C is found enumerated in paragraph 42 as under:-

> "42. ... (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
>
> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

[16] Keeping in mind the above settled legal position in connection with appeal under Section 178 of Cr.P.C., evidence in the matter needs to be reviewed/re-appreciated and reconsidered.

[17] In the case of **Kalamani Tex And Anr. V/s. V.P. Balasubramanian**, 2021 5 SCC 283 , the Supreme Court observed in paragraph 11 that the High Court is justified in invoking powers under Section 378 of Cr.P.C. If the trial Court, had inter alia, committed a patent error of law or grave miscarriage of justice or had arrived at perverse findings of fact.

[18] Section 138 of Negotiable Instruments Act introduced in Chapter XVII by Act 66 of 1998 w.e.f. 01.04.1989 is basically to give more strength to the bank transaction by using Negotiable Instruments. Object and purpose of introducing said Chapter has been discussed by the Supreme Court in many decisions and it is well settled now that the object is to streamline and to give more sanctity to the transaction through the negotiable instruments. The purpose of Section 138 of Negotiable Instruments Act is twofold. Firstly, it shows that even if on any count the negotiable instrument is not honoured by the bank, notice is mandatory to be given to the drawer of the cheque by the payee or the holder about reasons of dishonouring of the cheque and alongwith it, calling upon such drawer by way of demand for payment of the amount of money mentioned in the cheque.

[19] The purpose of issuing such notice in writing demanding the amount mentioned in the cheque serves dual purpose. Firstly, it gives opportunity to the drawer of the cheque to make arrangement of the money in his account so as to pay the said amounts to the payee or the holder of cheque and intimate the payee or the holder of cheque to re-present the said cheque. Alternatively, it also gives an opportunity to the drawer of the cheque to pay the said amount mentioned in the cheque by any other mode, if he is liable to make such payments. However, the second effect of such notice is, giving an opportunity to the drawer of the cheque to explain, in case he is not liable to pay the amount mentioned in the cheque to the payee. It needs to be noted that till the period mentioned in Section 138 (1) (b) is not over, there is no criminal liability fastened upon the drawer of the cheque. Only if he fails to make the payment mentioned in the cheque within the stipulated period, provision in clause (c) of Section 138 gets attracted. In case, drawer of such cheque fails to make payment of the amount mentioned in the cheque to the payee as the case may be, within 15 days from the date of receipt of the notice, the payee/holder of cheque is entitled to lodge complaint under Section 138(1) of Negotiable Instruments Act where it provides a criminal liability. Till expiry of such period, it is only a civil liability. Thus, the very purpose of issuing notice is to give opportunity to the drawer of the cheque either to arrange the payment within a period of 15 days from the date of receipt of notice and to intimate the payee

or the holder of the cheque in due course or to raise his probable defence that he is not liable to pay such amount.

[20] Keeping in mind above provisions and the purpose of issuance of notice, failure on the part of drawer to comply with the said notice on either way must be considered strictly as such failure is going to affect the drawer in the matter filed under Section 138 of Negotiable Instruments Act. It is so because, Section 138 of Negotiable Instruments Act draws a presumption in favour of the payee or the holder in due course that such cheque was issued for the discharge in whole or in part of any debt or other liability, unless contrary is proved. Such presumption is necessarily to be drawn once it is found that the cheque is issued by the drawer. The words "unless contrary is proved" comes into play only during trial and not at the stage of pre-trial proceedings. The reference to the word "proved" has to be read with the definition of such word as found in the Evidence Act as follows:

> **'Proved.-**A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.'

Therefore, when a complaint is lodged under Section 138 of Negotiable Instruments Act and complainant/holder of the cheque produces the material before the Court that such cheque was drawn/signed by the accused, presented within its validity and dishonoured for the reasons stated in the memo issued by the bank and that in spite of issuing notice to the accused, he failed to pay the amount mentioned in the cheque, the Court is bound to draw presumption under Section 139 of Negotiable Instruments Act in favour of the complainant. Only then the accused is required to prove contrary in order to rebut such presumption.

[21] In the present matter, admittedly, complainant issued legal notice which is produced at Exhibit 29 dated 02.02.2013 alongwith the AD card from the Department of Posts at Exhibit 30-Colly. This notice was addressed to the registered address of the accused and it was delivered by the postal department on that address. The postal acknowledgment bears signature who received the notice at the registered address of the accused. It is not necessary that the accused himself has to sign the postal acknowledgment. It is sufficient that any member of his family signs the acknowledgment.

[22] Once such notice is addressed and received by the accused, he was having two options as discussed earlier. The accused failed to opt both the options. Thus, he even failed to raise his probable defence against the contentions raised in the legal notice and, more specifically, the amount mentioned in the cheque. Therefore, it is very clear at the time of filing of the complaint and even during trial that the accused was not having any specific defence. This is evident from the cross-examination of the complainant and her witness.

[23] In the case of **Kumar Exports** (supra), the Supreme Court observed in paragraphs 20 and 21 as under:-

'20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.'

'21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.'

[24] In the case of **Bir Singh** (supra), all the earlier decisions were considered and it is observed in paragraphs 20, 21 and 22 as under:-

> '20. Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law and presumptions of fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact as held in Hiten P. Dalal [**Hiten P. Dalal v. Bratindranath Banerjee**, 2001 6 SCC 16: 2001 SCC (Cri) 960]'.
>
> '21. Presumption of innocence is undoubtedly a human right as contended on behalf of the respondent-accused, relying on the judgments of this Court in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra [**Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra**, 2005 5 SCC 294 and Rajesh Ranjan Yadav v. CBI [**Rajesh Ranjan Yadav v. CBI**, 2007 1 SCC 70. However the guilt may be established by recourse to presumptions in law and presumptions in facts, as observed above.'
>
> '22. In Laxmi Dyechem v. State of Gujarat [**Laxmi Dyechem v. State of Gujarat**, 2012 13 SCC 375, this Court reiterated that in view of Section 139, it has to be presumed that a cheque was issued in discharge of a debt or other liability but the presumption could be rebutted by adducing evidence. The burden of proof was however on the person who wanted to rebut the presumption. This Court held "however, this presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of a post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act".'

[25] In **Kalamani Tex** (supra), the Supreme Court (3 Judges Bench) observed in paragraph 15 as under:-

> '15. No doubt, and as correctly argued by the Senior Counsel for the appellants, the presumptions raised under Section 118 and Section 139 are rebuttable in nature. As held in M.S. Narayana Menon v. State of Kerala [**M.S. Narayana Menon v. State of Kerala**, 2006 6 SCC 39, para 32, which was relied upon in Basalingappa [**Basalingappa v. Mudibasappa**, 2019 5 SCC 418, a probable defence needs to be raised, which must meet the standard of "preponderance of probability", and not mere possibility. These principles were also affirmed in Kumar Exports [**Kumar Exports v. Sharma**

Carpets, 2009 2 SCC 513, wherein it was further held that a bare denial of passing of consideration would not aid the case of the accused.

[26] In the case of **Rangappa** (supra) (3 Judge Bench) the Supreme Court observed in paragraphs 26, 27, 28 and 29 as under:-

'26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in **Krishna Janardhan Bhat**, 2008 4 SCC 54 may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.'

'27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof.'

'28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.'

'29. Coming back to the facts in the present case, we are in agreement with the High Court's view that the accused did not raise a probable defence. As noted earlier, the defence of the loss of a blank cheque was taken up belatedly

and the accused had mentioned a different date in the "stop payment" instructions to his Bank. Furthermore, the instructions to "stop payment" had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability.'

[27] The observations of the Supreme Court as quoted above and more particularly in the case of **Rangappa** (supra) wherein it has been observed in paragraph 29 that, the very fact that accused failed to reply to the stipulated notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version, comes to the aid of the complainant in the present matter since no reply was sent by the accused to the said legal notice probabilising his defence. It further leads to the inference that the accused had no probable defence to be taken in the matter.

[28] Coming back to the averments in the complaint, it shows that the complainant clearly mentioned that accused approached her late husband for financial assistance as a hand-loan in order to pay his debt. Accordingly, her late husband handed over an amount of Rs. 7,00,000/- as hand-loan by a demand draft. Accused issued cheque dated 22.01.2013 for an amount of Rs. 7,00,000/- in discharge of the said cheque liability.

[29] All these averments are found in the affidavit-in-verification and also affidavit-in-evidence of the complainant. The cross-examination is cryptic and it even does not deny of obtaining loan from the husband of the complainant as well as receiving such amount by way of demand draft.

[30] As rightly pointed out by the learned counsel Shri Pavithran that the accused clearly admitted to obtaining loan when he asked the question in the cross-examination to PW1. The answer to it is as under:-

'I do not know whether the accused had already paid the amount of Rs. 7,00,000/- in cash to my late husband.'

[31] This answer of the complainant in the cross-examination is not in the form of suggestion put to her. It pre-supposes that she was specifically asked as to whether she knows that the accused repaid the said loan of Rs. 7,00,000/- during the lifetime of her late husband, who expired somewhere in the year 2012. Thus, by asking the witness as to whether she knew about repayment, clear inference needs to be drawn that first of all the accused admits of obtaining loan of Rs. 7,00,000/- from her husband and that he claims to have paid such amount in cash. The latter part that accused paid the said amount of Rs. 7,00,000/- in cash is required to be established by the accused himself.

It needs to be noted that no such defence was ever raised when accused received legal notice. It is for the first time that such aspect was brought on record during the course of examination of the complainant. Therefore, the presumption under Section 139 of Negotiable Instruments Act in favour of complainant gets more strength and the accused was required to rebut with plausible material and not by mere probability.

[32] The reasoning of the learned trial Court are totally tangent to the presumptive value of section 139 of Negotiable Instruments Act. There is no observation in the entire judgment that the complainant is entitled to draw such presumption though a decision in the case of **Rangappa** (supra) is cited. Instead of putting the onus on accused to discharge the burden, the learned trial Court directly assessed the defence and jumped to the conclusion that the complainant failed to prove that her late husband advanced loan of Rs. 7,00,000/- to the accused. By doing so, the learned trial Court completely ignored settled proposition of law as laid down in the decisions referred above. The so-called defence raised by the accused during cross-examination of the complainant and her witness, specifically in absence of any reply to the legal notice, cannot be considered as probable defence and certainly not a defence showing preponderance of probability in favour of the accused so as to rebut statutory presumption. Therefore, such findings of the trial Court which clearly come within the category of committing patent error of law and causing grave miscarriage of justice as also arriving at perverse finding of fact, as held in the case of **Kalamani Tex** (supra) in paragraph 11. Thus, such findings cannot be sustained in the eyes of law and need to be interfered with under the provisions of Section 378 of Cr.P.C.

[33] In the light of above findings, the appeal must succeed and, hence, allowed. The appeal stands allowed. The impugned judgment dated 30.11.2016 in Other Act Criminal Case No.67/NIA/2013/C is hereby quashed and set aside.

[34] The accused/respondent herein is found guilty for the offence punishable under Section 138 of the Negotiable Instruments Act.

[35] The matter is placed for hearing the accused on the point of sentence.

JUDGMENT CONTINUED ON 16.11.2022

[36] Heard learned counsel for the respondent No.1. The amount mentioned in the cheque is Rs. 7,00,000/-. The matter is of the year 2013. Therefore, considering the above facts, the respondent No.1/accused needs to be awarded punishment appropriate to the offence committed.

[37] Respondent No.1/accused who is found guilty for offence punishable under Section 138 of the Negotiable Instruments Act is hereby sentenced to undergo simple imprisonment for a period of one month and to pay compensation to the tune of double the amount of cheque, i.e. Rs. 14,00,000/-, within a period of one month, failing which, accused shall undergo simple imprisonment for a period of 15 days.

[38] Respondent No.1/accused shall surrender before the learned Magistrate within 2 weeks from today to undergo the sentence. In case of failure of the accused to

surrender, learned Magistrate shall issue warrant in order to comply with the orders of this Court regarding sentence

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2023(1)GoaCC120

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak]

Second Appeal No 68 of 2011 **dated 28/11/2022**

Ussein Gazi Son of Z A Gazi

Versus

Razia Shaikh

PERMANENT INJUNCTION

Transfer of Property Act, 1882 Sec. 53A, Sec. 54-Appeal is directed against judgments and decrees made by the first appellate Court and the Trial Court, respectively, declining the relief of permanent injunction - The doctrine of part performance in Section 53-A of the Transfer of Property Act is an equitable doctrine - Once the two Courts rightly dismissed the suit for specific performance, the Appellant's so-called possession became unauthorised and illegal, no question of protecting such illegal and unauthorised possession - Appeal is dismissed with costs.

[Paras 2, 16, 26]

Law Point:- Once a suit for specific performance is dismissed, there is no question of extending the benefit of Section 53-A of the Transfer of Property Act to the prospective purchaser.

Acts Referred:

Transfer of Property Act, 1882 Sec. 53A, Sec. 54

Counsel:

Dharmanand Vernekar, Gina Almeida

JUDGEMENT

M S Sonak, J.

[1] Heard Mr D. Vernekar for the Appellant and Ms Gina Maria Almeida for the Respondent (under the Legal Aid Scheme).

[2] This Appeal is directed against judgments and decrees dated 29.03.2011 and 01.09.2010 made by the first appellate Court and the Trial Court, respectively, declining the relief of permanent injunction to the Appellant-plaintiff in respect of the suit shop.

[3] The Appellant is the original plaintiff, and the Respondent is the original defendant in Regular Civil Suit No.145/07/E, in which the Appellant applied for a permanent injunction to restrain the Respondent from interfering with his possession and occupation of shop no.2 in Estefania Building, Margao, and for a mandatory injunction requiring the Respondent to execute a Sale Deed along with the owners of the building in favour of the Appellant, in terms of the agreement reached between the parties.

[4] The Respondent denied the Appellant's case and urged the suit's dismissal. The Respondent also raised a counterclaim seeking eviction of the Appellant from the suit shop and for payment of a licence fee at the rate of Rs. 25,000/- per month from November 2006 till the possession of the suit shop is handed over to the Respondent.

[5] The Trial Court, by judgment and decree dated 01.09.2010, dismissed the suit and the counterclaim. The Appellant's Regular Civil Appeal No.552/2010 was dismissed by the first appellate Court by judgment and decree dated 29.03.2011. Hence, the present Second Appeal.

[6] This Second Appeal was admitted on 23.08.2011 on the following substantial questions of law:

Whether the Court below could have refused relief of permanent injunction in favour of the Appellant after recording the finding that the Respondent has failed to prove that it was a leave and licence agreement and that the Appellant was put in possession pursuant to the agreement dated 04.11.2006 and after dismissing the counterclaim of the Respondent to recover possession?

[7] Mr Vernekar, the learned Counsel for the Appellant, submits that the trial Court disbelieved the Respondent's case about the Appellant being a mere licensee. Consequently, after the trial Court dismissed the Respondent's claim for recovery of possession, the trial Court and the first appellate Court could never have refused the relief of permanent injunction to protect the Appellant's possession in respect of the suit shop. He submits that the two Courts should have granted such relief as a matter of course.

[8] Mr Vernekar submitted that the Respondent, vide letter dated 04.11.2006, offered to sell the suit shop to the Appellant for a total consideration of Rs. 14,00,000/- . This offer was duly accepted by the Appellant, resulting in an Agreement for the Sale/Purchase of the suit shop for total consideration of Rs. 14,00,000/-. He submitted that an amount of Rs. 1,50,000/- was paid at that time, pursuant to which the Respondent placed the Appellant in possession of the suit shop. He submitted that by written notice, the Appellant offered to pay the balance amount to the Respondent against the execution of the Sale Deed involving inter alia the owner of the building. However, the Respondent neither accepted the balance amount nor executed any Sale Deed favouring the Appellant. Instead, the Respondent began interfering with the

Appellant's possession. Mr Vernekar submits that in such circumstances permanent injunction should have been granted as a matter of course.

[9] To the Court's query whether the Appellant would be willing to deposit the balance consideration amount together with interest, Mr Vernekar, on instructions, stated that the Appellant is now not in a financial position to pay the amount.

[10] Ms Gina Almeida, the learned Counsel for the Respondent (appointed under the Legal Aid Scheme), submitted that the substantial question of law as framed does not arise and, in any case, should be answered against the Appellant. She pointed out that the Appellant, by paying Rs. 1,50,000/- and refusing to pay the balance amount for frivolous reasons, continues to enjoy the suit shop without having any right to do so. She submits that once the two Courts declined the decree of specific performance, the Appellant has no right or title to retain possession of the suit shop. Therefore, the two Courts were entirely justified in declining relief of permanent injunction to the Appellant.

[11] The rival contentions now fall for determination.

[12] By instituting the suit, the Appellant had applied for a mandatory injunction for the execution of the Sale Deed in pursuance of the agreement reached with the Respondent. Though the relief was styled as one for mandatory injunction, the same was a relief for the specific performance of the alleged agreement. In addition, the Appellant also applied for a permanent injunction to protect his possession of the suit shop.

[13] The trial Court and the first appellate Court have, for good and valid reasons, rejected the relief of mandatory injunction or specific performance. Yet, the Appellant has not even chosen to question the rejection of the relief of specific performance or mandatory injunction. This is because the Appellant enjoys the suit shop free and does not wish to pay the balance consideration. No substantial question of law was framed in this regard, nor were any contentions advanced supporting this relief.

[14] Instead, to the query of the Court whether the Appellant was even now in a position to pay the balance consideration amount, Mr Vernekar, on instructions from the Appellant, who was present in the Court, flatly stated that the Appellant would not pay the balance amount. Accordingly, it is pretty clear that the two Courts, upon evaluation of the evidence on record, have rejected the relief of specific performance (mandatory injunction). Accordingly, there is neither any challenge nor infirmity in the concurrent findings on this score.

[15] Mr Vernekar, however, submitted that in terms of Section 53-A of the Transfer of Property Act, the Appellant was entitled to protect his possession and, therefore, the decree of the permanent injunction must be granted. However, this contention is entirely misconceived for reasons discussed after this.

[16] The doctrine of part performance in Section 53-A of the Transfer of Property Act is an equitable doctrine. Therefore, in a situation where the Appellant's suit for

specific performance (mandatory injunction) came to be rightly dismissed by the two Courts, there is no question of such Appellant's possession being protected by a decree of a permanent injunction. Once the two Courts rightly dismissed the suit for specific performance, the Appellant's so-called possession became unauthorised and illegal. There was no question of protecting such illegal and unauthorised possession.

[17] The grant of decree of permanent injunction to the Appellant, even though the two Courts have correctly dismissed his suit for specific performance (mandatory injunction), would amount to permitting the Appellant to continue enjoying the possession of the suit shop, even though the Appellant has failed to pay the balance consideration of Rs. 12,50,000/-, which, according to the Appellant himself was due and payable to the Respondent way back in the year 2006-07. Admittedly, after paying an amount of Rs. 1,50,000/- the Appellant has not bothered to make any further payments to the Respondent. Therefore, equitable relief of permanent injunction cannot protect the inequitable situation created by the Appellant.

[18] Section 54 of the Transfer of Property Act clearly provides that a contract for the sale of immovable property by itself does not create any interest in or charge on such property. Therefore, based on the so-called agreement, the Appellant could have only sought a decree of specific performance. The Appellant did seek such a decree but the two Courts below rightly denied the same to the Appellant. Moreover, the Appellant has not even made any grievance about the same in this Second Appeal. In such a situation, the Appellant cannot hold on to the suit shop illegally and unauthorisedly and further claim a decree of permanent injunction to protect his illegal and unauthorised occupation.

[19] In **Mr. Prakash Pote & anr. V/s. Mr. John Cruzinho Gonsalves & Ors.** (SA No.1109/2021(F) decided on 28.07.2021) , it is held that once a suit for specific performance is dismissed, there is no question of extending the benefit of Section 53-A of the Transfer of Property Act to the prospective purchaser.

[20] The above judgment and order dated 28.07.2021 was challenged before the Hon'ble Supreme Court by instituting a petition for Special Leave to Appeal (C) No.3912/2022. However, this SLP was dismissed by the Hon'ble Supreme Court on 07.03.2022, observing thus:

"ORDER

Once the petitioner(s) is/are lost in the suit for specific performance thereafter, the petitioners have no right to continue with the possession. All the Courts have rightly passed an order of eviction.

The Special Leave Petition stands dismissed.

Pending application stands disposed of."

[21] In **Revanasiddayya V/s. Gangamma alias Shashikala & Anr.**, 2018 1 SCC 610 , the Hon'ble Supreme Court has held that once a suit for specific performance filed by a prospective buyer is dismissed, his possession becomes unauthorised and

illegal. Protection under Section 53-A of the Transfer of Property Act is after that no longer available. The seller is entitled to claim possession from the prospective buyer on the ground of ownership.

[22] The Appellant, who was the plaintiff in the suit, cannot rely upon any alleged weakness in the Respondent's case. Therefore, merely because the Respondent's case about the Appellant being a licensee may not have been accepted by the trial Court while dismissing the Respondent's counterclaim, the Appellant was not entitled to relief of permanent injunction, as a matter of course, as contended by Mr Vernekar. The Appellant, as a plaintiff, had to stand or fall on his own feet and could not rely upon any alleged weakness in the respondent-defendant's case.

[23] After this Appeal was admitted on 23.08.2011, the Appellant did not cooperate in the matter of procedural compliances and service of notice. Ultimately, the Appeal was dismissed for non-prosecution in the year 2019. The Appellant did apply for restoration but did not bother to circulate such an application for almost three years. The Appellant delayed the proceedings only to hold on to the possession of the suit shop without making any reasonable payments for such a user. By paying Rs. 1,50,000/- in the year 2006-07 and not paying the balance consideration amount of Rs. 12,50,000/- for all these years, the Appellant has continued in possession of the suit shop without any right or authority to do the same. In terms of the Hon'ble Supreme Court ruling in Revanasiddayya (supra), the possession of the Appellant would be illegal and unauthorised. A decree of permanent injunction cannot protect such possession.

[24] For all the above reasons, the substantial question of law as framed is decided against the Appellant. This Appeal is dismissed. The Appellant shall pay costs of Rs. 25,000/- to the Respondent. Such costs should be deposited by the Appellant in this Court within two weeks, with due intimation to Ms Gina Almeida.

[25] The Goa State Legal Services Authority will pay Ms Gina Almeida the fees as per the rules. However, the Goa State Legal Services Authority must also ensure that the costs of Rs. 25,000/- are duly paid to the Respondent once the Appellant deposits the same.

[26] The Appeal is dismissed with costs. Misc. Applications, if pending are also disposed of

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2023(1)GoaCC124

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak; Bharat P Deshpande]

Writ Petition No 419 of 2022 **dated 29/11/2022**

Vidhya Y Naik; Roopa Diwakar; Devidas C Naik; Sharad D Kannekar

Versus

State of Goa; Office of Director, Institute of Psychiatry & Human Behaviour Department; Director of Accounts

PENSIONARY BENEFITS

Constitution of India ,Art.226 - Writ petition - Pensionary benefits - Entitlement of - Claim reliefs - To direct fixation of Salary and Pensionary benefits of petitioners in Pay scale along with future benefits based on revised pay scales - Direct Respondents to grant Petitioners benefits - Petition allowed

[Para 7]

Counsel:

Vivek Rodrigues, Siddharth R Malik, Manish Salkar

JUDGEMENT

M.S. Sonak, J.

[1] Heard Mr. Rodrigues for the Petitioners and Mr. Salkar, learned Government Advocate for the Respondents.

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

[3] The Petitioners claim that their case is covered by the decision in Writ Petition No. 668/2014. Based upon the same, they claim the reliefs in terms of prayers clauses (a) and (b), which read as follows:

> "(a) Issue an appropriate writ, order or direction quashing and setting aside the impugned Circular dated 02/12/2010 issued by the Respondent No.3 and the recoveries effected from the petitioners in pursuance thereof vis a vis these petitioners;
>
> (b) To direct fixation of the Salary and Pensionary benefits of the petitioners in the Pay scale of Rs. 9300- 34000+Rs.4600 (G.P.) along with future benefits based on the revised pay scales."

[4] Mr. Salkar tenders an affidavit of Prof. Dr. S.M. Bandekar, Director/Dean, Institute of Psychiatry & Human Behaviours and paragraph 7 of this affidavit, reads as follows:

> "7. I say that, in respect to above Circular all the petitioners are not entitled for the benefits, however it is to submit that as per the judgement dated 26/04/2017 in WP-668/2014 it appears that the petitioners are entitled for all the benefits."

[5] This affidavit admits that the case of the Petitioners is covered by our Judgment and Order dated 26/04/2017 in Writ Petition No.668/2014. This position is also fairly endorsed by Mr. Salkar, learned Government Advocate for the Respondents.

[6] Mr. Rodrigues points out that this Court, following the decision in Writ Petition No.668/2014, has granted reliefs to some other Petitioners in Writ Petitions

No.719/2017 and 982/2017. The orders made in Writ Petition No.668/2014 and these connected matters, have also been placed on record.

[7] Considering the above, we allow this Petition and direct the Respondents to grant the Petitioners the benefits in terms of our Judgment and Order dated 26/04/2017 in Writ Petition No.668/2014 and in the connected matters, referred to above.

[8] The benefits should be granted to the Petitioners as expeditiously as possible and not later than six months from today.

[9] Rule is made absolute in the above terms. There shall be no orders for costs.

[10] All concerned to act on an authenticated copy of this order

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2023(1)GoaCC126

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak]

First Appeal No 76 of 2019 **dated 24/11/2022**

Waman K Nayak; Ramesh N Nayak; Sangeeta W Nayak

Versus

Shivpujan Jaiswal; Umadsingh Chaudhary; New India Assurance Co Ltd

QUANTUM OF COMPENSATION

Appeal - Quantum of compensation - Held - Tribunal has deducted amount from out of the bills produced the Appellants' toward repair of the vehicles - There is no justification for such deduction - Since the repairs/reconstruction were already carried out, the Appellants should have produced bills or other evidences in support of the actual expenditure incurred by them for repairs/reconstruction - The appellants are also entitled to some compensation for the expenses incurred by them to obtain valuation of reports/ estimates - Compensation enhanced - Appeal partly allowed.

[Paras 8, 11 and 15]

Counsel:

Premanand A Kholkar, Amey Kakodkar

JUDGEMENT

M S Sonak, J.

[1] Heard Mr. Kholkar for the Appellants and Mr. Kakodkar for Respondent No.3.

[2] Respondent Nos. 1 and 2, though served, had not appeared before the Motor Accident Claims Tribunal (Tribunal). They were marked ex parte. Since the Appeal is only on the quantum of compensation awarded, the same can proceed without insisting upon service on Respondents No.1 and 2.

[3] Admit. With the consent of and at the request of the learned Counsel for the parties, heard finally.

[4] The challenge in this Appeal is to the Judgment and Award dated 30 October 2018, by which the Tribunal has awarded compensation of Rs. 2,72,100/- to the Appellants for the damages caused to their house and two scooters in a vehicular accident involving a JCB crane bearing registration No. GA-03-7673.

[5] Mr. Kholkar submits that the Tribunal has inadequately considered the evidence of the Architect and the Valuer Shri S.A. Dhuri (AW.2). He submits that AW.2 had deposed that the expenditure of almost Rs. 6,50,000/- was incurred by the Appellants for repairs/reconstruction of the damaged portion of their house. Mr. Kholkar also submitted that a further expenditure of Rs. 8,625/- incurred by the Appellants for obtaining Architect/Valuer's report was also not awarded to the Appellants. He submits that unnecessary deductions were made from the bills produced towards repairs to the damaged vehicles. Based on all this, Mr. Kholkar submitted that an additional compensation of Rs. 6,50,000/- ought to have been awarded to the Appellants.

[6] Mr. Kakodkar submits that Mr. M.R. Shenvi (AW.4) examined by the Appellants had deposed about the damages to the house, being Rs. 2,04,600/-. He submits that even this report which is exaggerated, was earliest in point of time unlike the report of AW.2-Mr. Dhuri who inspected the site almost 2 and half years after the incident. He submits that the Appellants have not produced any bills towards repairs or reconstruction of the house though, some bills were produced about the repairs of the vehicles. Mr. Kakodkar, therefore, submits that the impugned award, which is likely on the higher side, ought not to be interfered with.

[7] Rival contentions now fall for my determination.

[8] The Tribunal, in this case, has deducted about 2,000- 3,000/- rupees from out of the bills produced by the Appellants towards repairs of the two vehicles. There is no justification for such deductions. Therefore, to that extent, the compensation awarded is required to be enhanced by an approximate amount of Rs. 3,000 - 4,000/-.

[9] So far as damages to the house are concerned, the evidence of AW.4-Mr. Shenvi is relevant. This valuer visited the site soon after the accident and witnessed the actual damage caused to the house. He gave an estimate of Rs. 2,04,600/- for restoring the house to its original condition. This witness deposed that the house was about 80 years old and at a T-junction. The Appellant (AW.1) has also deposed about the previous accident due to the peculiar location of the house.

[10] Mr. Shenvi (AW.4), in his deposition before the Tribunal, tried to explain that his report was based upon depreciated position at the site. He also tried to depose that he did not make any estimate about reconstruction.

[11] Mr. Kholkar relies on the report of AW.2-Mr Dhuri. This witness inspected the site after about 2 and half years when the repairs/reconstruction were complete. His

report is prepared based upon certain photographs shown to him of the house soon after it met with the accident. Such a report is not much reliable. Since the repairs/reconstruction were already carried out, the Appellants should have produced bills or other evidences in support of the actual expenditure incurred by them for repairs/reconstruction.

[12] Mr. Kakodkar also pointed out that AW.2-Mr. Dhuri's report suggests that the Appellants constructed two shops with shutters and the additional expenditure claimed concerned these structures. He submitted that in any case, bills or other evidences of actual expenditure, should have been produced by the Appellants.

[13] AW.2-Mr. Dhuri also admits that the house was about 80- 100 years old. Even the evidence of AW.1-Appellant refers to the dilapidated conditions of the house.

[14] Both, Mr. Shenvi as well as Mr. Dhuri, have stated that the house was a load bearing structure. Mr. Dhuri has, however, deposed that some RCC work had been carried out because, the load bearing structure would not suffice to a great extent. This explanation has gone unchallenged. Now that the house was damaged on account of the accident, it is quite natural that the Appellants resorted to a better technology now available, so that the repairs/restoration are not merely cosmetic in nature. To that extent, some additional compensation is due to the Appellants. Besides, the Appellants are also entitled to some compensation for the expenses incurred by them to obtain valuation reports/estimates.

[15] Thus, for all the above reasons, the amount of compensation is enhanced by Rs. 30,000/-. The award of compensation of Rs. 2,72,100/- is now substituted by an award of Rs. 3,02,100/-. The interest awarded is also maintained in the peculiar facts and circumstances of the present case.

[16] The Appeal is partly allowed in the above terms. The Respondent No.3 is now directed to deposit the enhanced component, together with interest, within eight weeks from today, after giving due intimation to the learned Counsel for the Appellants. Upon deposit, the Appellants are permitted to withdraw the enhanced amount, together with interest, by furnishing identification and bank details. The Registry to ensure that the amounts are credited directly into the bank accounts. It will be open to the Appellants to nominate any one or two of them to receive the amount on behalf of them.

[17] The Appeal is disposed of in the above terms, without any orders for costs

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