
(2015) 06 BOM CK 0325
In the Bombay High Court
Case No : Writ Petition No. 414 of 2015

Felix Agnel Rodrigues and Others	Vs	APPELLANT
State of Goa and Others		RESPONDENT

Date of Decision : 11-06-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2015) 6 BomCR 144

Hon'ble Judges : F.M. Reis and K.L. Wadane, JJ.

Bench : Division Bench

Advocate : J. Abreu Lobo, for the Appellant; Amogh Prabhudessai, A.G.A., for the Respondent

Judgement

F.M. Reis, J.—Heard Mr. J. Lobo, learned Counsel appearing for the petitioners, Mr. Amogh Prabhudessai, learned Additional Government Advocate appearing for respondents Nos. 1 & 4, Mr. Anthony D'Silva, learned Counsel appearing for respondent No. 2, Mr. Ashwin D. Bhobe, learned Counsel appearing for respondent No. 3, Mr. N. Pai, learned Additional Government Advocate appearing for respondent No. 6 and Mr. S.S. Kantak, learned Senior Counsel appearing for the petitioners in Writ Petition No. 288/2015. Rule. Heard forthwith with the consent of the learned Counsel appearing for the parties. The learned Counsel for the respondents waive notice.

2. The petition was heard at length. Mr. J. Lobo, learned Counsel appearing for the petitioners has raised three main contentions. The learned Counsel has pointed out that on the garb of an order passed by this Court whilst disposing of Writ Petition No. 288/2015, the respondents have colluded themselves to drain the water from the building constructed by the respondent No. 2 to the storm water drain which is admittedly located towards the eastern side of the property belonging to the petitioners. The learned Counsel has elaborated the said contentions, and pointed out that the petitioners have obtained the permission from the Corporation to construct a drain in order to enable the water from the

building of the petitioners to lead to the storm water drain which is located on the eastern side of the property. The learned Counsel has thereafter taken us to the permission granted in the year 2000 to point out that the water from the building constructed by the respondent No. 2 would lead into such drain and proceed to the storm water drain located on the eastern side. The learned Counsel further points out that the order obtained by the respondents was in collusion between the respondents and the petitioners in the said Writ Petition and, as such, the question of invading into the property of the petitioners without any right is not at all justified. The learned Counsel further points out that the learned Vacation Judge of this Court whilst passing an ad interim order has clearly recorded that there is no justification to allow the water from the building constructed by respondent No. 2 to enter into the private drain belonging to the petitioners. The learned Counsel further points out that, as such, the respondents are not entitled to carry out the work of allowing the water from the building of the respondent No. 2 into the storm water drain through the property of the petitioners. The learned Counsel has thereafter taken us through the photographs to point out that the drain is a private drain located in the property of the petitioners and further that adjoining to such drain there is a chamber which according to the petitioners is also located in the property of the petitioners. The learned Counsel further submits that the Commissioner has to follow the procedure provided under the City Corporation Act to allow such activity and without examining such aspect the Commissioner has disclosed to this Court that such permission could be granted. The learned Counsel further submits that the water drain which has been constructed by the petitioners is only sufficient to accommodate the water generated from the building of the petitioners and according to him the water from the building constructed by the respondent No. 2 would involute the land belonging to the petitioners thereby causing irretrievable damage to the petitioners and other than occupants of the said premises. The learned Counsel further submits that respondent No. 3 has not even applied his mind to examine the feasibility of the exercise being carried out by the respondent No. 2 to allow the water to drain into the chamber and, thereafter, to the storm water drain located towards the eastern side. The learned Counsel further submits that there are alternative sites which can allow the water to be drained out from the building of the respondent No. 2 into the storm water drain. The learned Counsel further points out that the earlier attempts on the part of respondent No. 2 to carry out such exercise did not yield any fruits as according to him there are objections raised by the people from the locality with that regard. The learned Counsel has also taken exception to the building put up by the respondent No. 2 in the property which according to him has violated the statutory requirements of the Building Regulations. The learned Counsel further submits that the petitioners in the earlier petition have filed the petition in collusion with the respondents herein and fraudulently obtained an order from this Court to allow the work at the site to drain out the water from the building of the respondent No. 2 to the detriment of the proprietary right and interest of the petitioners herein. The learned Counsel has further pointed out

that unless and until there is a report submitted to show that no water from the building of the respondent No. 2 would enter the private drain constructed by the petitioners, the question of allowing any work to be completed by the respondents based on the said order of this Court would not at all be justified.

3. When the matter was earlier called out for hearing, Mr. S.S. Kantak, learned Senior Counsel who was appearing for the petitioners who are the occupants of the building put up by the respondent No. 2 in the earlier Writ Petition No. 288/2015 pointed out that the present petition is an abuse of the process of the Court and deserves to be rejected as according to him the said occupants who are necessary parties to the related dispute raised in the present petition have been deliberately left out and not made party in the above petition. The learned Senior Counsel further submits that on this ground alone, the petition deserves to be rejected. The learned Senior Counsel further points out that the petitioners be directed to implead the said occupants in the earlier petition namely Mr. Benjamin Charles, Mrs. Usha Sivan, Mrs. Aswini Sail, Mr. Rohit Pai & Mr. Mehrunnisa Nooruddin Rehman, in order that the Court may effectually examine the issues and contentions raised by the petitioners herein.

To avoid any further delay in the matter and considering the contentions raised by the parties that the activity which is being done to connect the pipeline from the building of the respondent No. 2 to the storm water drain is to be completed before the ensuing monsoon season, we find it appropriate to allow the learned Senior Counsel Mr. S.S. Kantak to address the Court. Accordingly, Mr. S.S. Kantak, learned Senior Counsel has pointed out that the contention of the petitioners that the petition filed by the occupants of the building of the respondent No. 2 is in collusion with the respondents is totally misplaced. The learned Senior Counsel has submitted that the petitioners have made averments in their petition to disclose that for the last three years there were attempts made by the occupants to call upon the respondent No. 2 to take necessary steps to connect the water generated from the project of the respondent No. 2 to lead to the storm water drain which did not yield any results. The learned Senior Counsel further points out that there were even averments in the earlier petition to show that in the last two years, during the monsoon season, the whole area around the building constructed by respondent No. 2 and the basement of said building was flooded with water. The learned Senior Counsel further pointed out that there are also averments to suggest that during such period the lift of the building also became non-functional. The learned Senior Counsel further pointed out that the correspondence between the occupants and the Corporation with that regard was also produced in the said petition. The learned Senior Counsel further submits that only on account of the intervention of this Court in the earlier petition filed by the occupants the respondent No. 2, which was otherwise not taking any steps to ensure that the water from the building constructed by respondent No. 2 be connected to the storm water drain, that the respondent No. 2 agreed to do this exercise on his own costs and risk. The learned Senior Counsel further points out that the petition itself is misconceived as according to

him the water is being connected to the chamber which is located at the site which according to the learned Senior Counsel is located in the road widening area. The learned Senior Counsel further submits that the said chamber leads to another chamber located towards the eastern side designated by letter B in the plan produced by respondent No. 3 today which is marked "Z" for identification. The learned Senior Counsel further points out that in any event the petitioners cannot raise any objection to carry out the work at the site as according to him such right can be curled out in terms of the provisions of section 176 of the Corporation Act. The learned Senior Counsel has further taken us to the said provisions to point out that the Commissioner is always entitled to allow the water from the adjoining project to be drained into the private drain belonging to a private owner, as such, drain leads to the storm water drain. The learned Senior Counsel further points out that at the most in case there is any objection by such private owner the law recognises in terms of section 178 of the Corporation Act that the Commissioner may direct payment of compensation and/or direct that such parties would be considered as joint owners thereof. The learned Senior Counsel has thereafter taken us to the said provisions and pointed out that in fact the occupants were calling upon the respondent No. 3 to exercise his powers in terms of sections 176 and 178 of the said Act in the earlier petition. The learned Senior Counsel has thereafter pointed out that the ad interim order obtained by the petitioners from the learned Vacation Judge is by misrepresenting the true facts and without disclosing the provisions of sections 176 and 178 of the Corporation Act. The learned Senior Counsel further submits that the work as permitted in terms of the order passed by this Court whilst disposing of the earlier Writ Petition has been substantially completed and according to him any further delay in completing the work would result in an irreparable damage to the occupants of the building and not to any of the respondents or to the petitioners herein. The learned Senior Counsel, as such, submits that the petition deserves to be rejected and the ad interim order be vacated forthwith.

4. Shri A.D. Bhohe, learned Counsel appearing for respondent No. 3, on the other hand, pointed out that the Commissioner has in fact permitted the work in terms of the order passed by this Court whilst disposing of the earlier Writ Petition after examining the situation at loco. The learned Counsel further points out that the contention of the learned Counsel appearing for the petitioners that there are alternative routes to allow the water to drain off to the storm water drain are not at all feasible or available at the site. The learned Counsel has further pointed out that the respondent No. 3 has filed an affidavit to categorically state that the chamber at the site shown by letter "A" in the plan marked "Z" for identification is located in the road widening area, and even in the plan approved by the petitioners in the year 2001 to construct the private drain does not show such chamber as according to him this by itself would establish that the chamber was belonging to respondent No. 3. The learned Counsel further points out that the contention of the petitioners that the water

would enter into the private drain as shown by hatch lines in the plan marked "Z" for identification is totally far-fetched as according to him the respondent No. 3 has carried out an inspection which shows that the width of the pipe which leads from the private drain to the chamber shown in the said plan marked "Z" for identification and the pipe which leads to the storm water drain has a diameter of 1.2 meters as per the instruction of the respondent No. 3. The learned Counsel further points out that in the area statement which has been produced on record by the petitioners themselves it clearly shows that the petitioners have consumed FAR which was available to them in terms of the provisions of law of the road widening area. The learned Counsel further points out that this itself would suggest that the petitioners' claim that the chamber belongs to the petitioners is totally erroneous. The learned Counsel further points out that the question of any water from the chamber entering the private drain of the petitioners as shown by hatch lines in the plan marked "Z" for identification is totally incorrect as according to him the water would lead to chamber B shown in plan and, thereafter, into the storm water drain located on the eastern side. The learned Counsel further submits that the petitioners are not entitled for any relief and that the contention of the petitioners that the building of respondent No. 2 is in violation of any of the statutory provisions has not ever been raised by petitioners before the respondent No. 3 as according to him the building is in existence from the year 2011. The learned Counsel further points out that the contention that the respondent No. 3 has collided with the authorities is totally incorrect as according to him the respondent No. 3 has performed the duties in accordance with law. The learned Counsel, as such, submits that the petition be rejected and interim order be accordingly vacated.

5. Mr. Anthony D'Silva, the learned Counsel appearing for respondent No. 2 has pointed out that before the learned Vacation Judge it was pointed out that a valve would be installed in the property of the respondent No. 2 to ensure that there would be no water login in said chamber A. The learned Counsel further submits that respondent No. 2 will abide with any conditions or directions to ensure that no nuisance or water login or any prejudice is caused to the petitioners on account of such work. The learned Counsel, as such, submits that the petition be rejected.

6. We have given our thoughtful consideration to the rival contentions of the parties. With the assistance of the learned Counsel we have also gone through the records and the photographs.

7. At the outset, we find, that though the petitioners are contending that there was collusion between the petitioners in Writ Petition No. 288/2015 and the respondents herein, the conduct of the petitioners in not impleading the said petitioners who are occupants of the building in the above petition deserves to be deprecated. Once it is alleged that there is collusion between the parties to obtain an order to their benefit, the petitioners who were very well aware that said order dated 8/5/2015 was passed for the benefit of the said occupants, it

was expected of the petitioners to make the said occupants as party respondents to the present petition. Despite of the intervention of Mr. S.S. Kantak, learned Senior Counsel appearing for the petitioners to make them parties to the above petition, Mr. J.A. Lobo, learned Counsel appearing for the petitioners chose not to take any steps to that effect and on the contrary failed to even serve the copy of the petition on the learned Senior Advocate. It is pertinent to note that this Court has already permitted Mr. S.S. Kantak, learned Senior Counsel appearing for the said occupants to address the Court as it was submitted that there is urgency in the matter on the last date. This conduct of the petitioners itself would otherwise disentitle the petitioners from any extraordinary relief in the present petition under Article 227 of the Constitution of India.

8. Be that as it may, we shall proceed to examine the rival contentions raised by the Counsel appearing for the respective parties.

The first contention of Mr. Lobo, learned Counsel appearing for the petitioners is that the pipeline being installed by the respondent No. 2 with the permission of the respondent No. 3 in terms of the order passed by this Court whilst disposing of the said Writ Petition No. 288/2015 would lead into the private drain of the petitioners herein. In this regard it is the contention of Mr. Bhobe, learned Counsel appearing for the respondent No. 3 that the pipeline would lead into the chamber as shown by letter A in the plan marked "Z" for identification. The said chamber prima facie appears to be in the road widening area. Though Mr. Lobo, learned Counsel appearing for the petitioners has disputed such contention this disputed question of fact about the title of the petitioners over such land is a matter which cannot be decided in a petition under Article 226 of the Constitution of India. The petitioners if so advised are always at liberty to initiate appropriate proceedings to get their right adjudicated as far as their claim of title over the said disputed area.

9. With regard to the next contention of Mr. Lobo, learned Counsel appearing for the petitioners that respondent No. 3 cannot permit the respondent No. 2 to drain off the water from their building into the said chamber "A", we, prima facie, find that the private drain constructed by the petitioners in their own property as shown by hatch lines in the plan marked T for identification is at a distance of about 0.7 meters from the said chamber "A". On perusing the photographs attached to the said plan, we find that the pipe which leads to the said chamber from the private drain located in the property belonging to the petitioners besides being at a distance of 0.7 meters is also almost at the level of the existing road. Prima facie, we find on the basis of the photographs produced on record that the water leads into chamber B which is located in the plan marked "Z" for identification through an outlet pipe which is at a lower level of about 2 meters as pointed out by Mr. Bhobe, learned Counsel appearing for respondent No. 3, upon instructions. Though Mr. Lobo, learned Counsel appearing for the petitioners has disputed the correctness of said measurements, nevertheless, Mr. Bhobe, learned Counsel appearing for respondent No. 3 pointed

out that the plan, photographs and sketch are produced upon specific instructions of the respondent No. 3 herein. In such circumstances, we find no reason to prima facie not accept the said contention of Mr. Bhobe as nothing has been produced by the petitioners to take a contrary view. In fact, the petitioners who claim to be the owners of such chamber were expected to disclose these facts and bring to the notice of this Court that this chamber had 2 outlets one leading to the storm water drain at a lower level than the pipe which drains the water from the said building belonging to the petitioners.

10. The only aspect which remains to be examined is with regard to the contention of Mr. Lobo, learned Counsel appearing for the petitioners that this exercise could not have been allowed without the respondent No. 3 hearing the petitioners as per the provisions of law.

Section 176 of the City Corporation Act reads thus:

176. Obligation of owner of drain to allow use of or joint ownership therein to others-Every owner of a drain connected with a municipal drain or other place set apart by the Commissioner for drainage shall be bound to allow the use of it to other persons, or to admit other persons as joint owners thereof, on such terms as may be prescribed under section 178.

Section 178 of the said Act reads thus:

178. Commissioner may authorise person other than the owner of a drain to use the same or declare him to be a joint owner thereof- (1) Where the Commissioner is of opinion, whether on receipt of an application or otherwise, that the most convenient means by which the owner or occupier of any premises can drain such premises is through a drain belonging to some person other than the said owner or occupier, the Commissioner shall give the owner of the drain a reasonable opportunity of stating his objection thereto, and, if no objection is raised or if any objection which is raised appears to him invalid or insufficient, may, by an order in writing, authorise the said owner or occupier to use the drain or declare the said owner to be a joint owner thereof, on such terms and conditions and on such payment of fees or compensation which may be required to be paid to such owner of the drain as may appear to him equitable with regard to the payment of rent or compensation and to connecting the drain of the said premises with the communicating drain and to the respective responsibilities of the parties for maintaining, repairing, flushing and cleaning the joint drain.

11. On going through the provisions of section 176 of the said Act, it clearly provides that every owner of a drain connected with a municipal drain shall be bound to allow the use of it to other persons as joint owners" on such terms and conditions as may be prescribed under section 178. Section 178, inter alia, provides that the Commissioner shall give the owner of the drain reasonable opportunity of stating his objections and if any such objections appear to him invalid or insufficient, may by an order in writing authorise the said owner or occupant to use the drain or declare the said owner to be a joint owner thereof,

on such terms and conditions and on such payment of fees or compensation which may be required to be paid to such owner of the drain as may appear to him equitable with regard to the payment of such compensation and to connecting the drain of the said premises with the communicating drain and to the respective responsibilities of the parties for maintaining, repairing, crushing and cleaning the joint drain.

12. In the present case, a permission came to be issued by the respondent No. 3 dated 4/5/2015, inter alia, permitting the storm water drain from the property of the respondent No. 2 to the municipal drain across the road at Caranzalem, subject to condition specified therein. The conditions, inter alia, prescribe that measure would be taken to avoid nuisance to general public and provision should be kept for maintenance and cleanliness of the drain and that the work should be executed within 8 days from the date of issuance of the permission.

13. As pointed out herein above the petitioners who are claiming to be the owners of the private drain are bound to allow the use of such drain to other persons which would include the occupiers of the building constructed by the respondent No. 2.

14. In the affidavit filed by the respondent No. 3, he has stated that the storm water drain in the petitioners property is connected to an outlet chamber which is within the road widening area i.e. within 9 meters from the centre of the road (Dona Paula to Panaji road). He has further stated at para 4 that the water from the said outlet chamber thereafter flows through the municipal drain towards the direction of the sea. At para 6 the respondent No. 3 has stated that the plans produced by the petitioners indicate that the area statement as depicted in the site approved plan produced by the petitioners indicate the area reserved for road widening and further disclose that the FAR to that effect is consumed by the developers. He has also stated at para 7 that the outlet chamber which falls in the road widening area is the property of the Corporation of City of Panaji in view of the provisions of City of Corporation Act of 2002 and the provisions of section 176 thereof. In the affidavit in rejoinder filed by the petitioners to the said affidavit, the fact that FAR was consumed as well as that the outlet chamber falls within the road widening area, has been disputed by the petitioners. But, however, as already referred to herein above, this dispute would have to be adjudicated in appropriate forum. But, however, in the present case, even assuming the contention of the petitioners that the outlet chamber which the petitioners described as an "inspection chamber is located in the property of the petitioners is accepted, in view of the clear provisions of section 176 of the said Act, the petitioners are bound to allow the occupants of the building of the respondent No. 2 to use the said drain so as to allow the flow of water from the storm water drain. No doubt, the provisions of section 176 are subject to the provisions of section 178 of the said Act. The Commissioner after hearing the petitioners can proceed to determine the compensation payable to the petitioners or declare that the said owner to be a joint owner thereof and provide measures

for the purpose of repairing, flushing and clearing such drains, in case the objections raised by the petitioners are found to be invalid.

15. In the present case, as it was pointed out by Shri Kantak, learned Senior Counsel in the petition filed by the occupants of the building constructed by respondent No. 2, in the earlier years there was flooding of their building which resulted in total annihilation of the basement which affected the lift, we find that in the interest of justice, it would not be appropriate to further delay in carrying out the work as contemplated in the order passed by this Court whilst disposing of the said Writ Petition No. 288/2015. But, however, respondent No. 3/the Commissioner shall proceed to hear the petitioners in terms of the provisions of section 178 of the said Act and pass appropriate directions in accordance with the said provisions after considering the objections of the petitioners. In case the Commissioner accepts such objections the respondent No. 2 shall not claim any equities for carrying out the work in terms of the order dated 8/5/2015 in Writ Petition No. 288/2015. In fact, on perusal of the photographs produced by the respondent No. 3 of the disputed chamber designated by letter "A" in the said plan, we find that the outlet pipe is at a height of about 2 meters from the pipe introducing the water from the private drain shown in hatch lines as stated above. No doubt, the respondent No. 3 ought to have examined this aspect in terms of section 178 of the Corporation Act before granting the permission but, however, there is a serious dispute raised by the respondents with regard to the location of the outlet chamber which would have to be examined on its own merits. This dispute would have to be considered by the respondent No. 3 while hearing the petitioners in terms of the provisions of section 178 of the said Act. Hence, we hold that any work carried out by the respondent No. 2 in terms of the said order dated 8/5/2015 passed in the earlier writ petition would be subject to the final outcome of the proceedings under section 178 of the City Corporation Act.

16. Apart from that, respondent No. 2 has also filed an affidavit in this Court to inter alia put on record that they would take measures in the nature of erecting sewage gate in the said property to ensure that the water from the storm water drain is regulated whilst proceeding to the said chamber identified by letter "A" in the plan. This exercise would ensure that there is no flooding or any nuisance to the property of the petitioners. Apart from that, it is pointed out by respondents Nos. 2 & 3 that water from the storm water drain from the building of the respondent No. 2 shall not enter the private drain constructed by the petitioners shown in hatch lines in the plan marked "Z" for identification. In such circumstances, the respondent No. 2 shall ensure that no flooding or nuisance is created on account of the acts permitted in terms of the order passed by this Court dated 8/5/2015. The respondent No. 3 shall take necessary action in case of any violation of any of the terms referred to in the permission or in case any nuisance or flooding occurs at the site on account of such activity, in case any complaint is lodged to that effect in accordance with law.

17. Mr. J. Lobo, learned Counsel appearing for the petitioners has also pointed out that the learned Vacation Judge had called upon the respondent No. 3 to produce the plan to identify the municipal drain. Considering that on the basis of the photographs now produced by the respondent No. 3 along with the plan and the affidavit filed by the respondent No. 3 to inter alia contend that the chamber is located in the road widening area, and in view of the provisions of the City Corporation Act referred to herein above, the exercise of verifying these facts need not be carried out in the present Writ Petition under Articles 226 and 227 of the Constitution of India. Said dispute as already stated herein above can be examined by the Commissioner in terms of the provisions referred to herein above.

18. In view of the above, we pass the following order:

(i) The respondent No. 3 shall initiate proceedings in terms of section 178 of the City of Corporation Act, and pass appropriate orders in the light of observations made herein above, after hearing the petitioners and the concerned parties within three months from today.

(ii) The works carried out by the respondent No. 2 in terms of the said order dated 8/5/2015 passed in Writ Petition No. 288/2015 shall be subject to the final result of such proceedings before the respondent No. 3.

(iii) The interim order shall accordingly stand vacated subject to the observations made herein above.

(iv) Rules stands accordingly disposed of in the above terms.

At this stage, Mr. J. Lobo, learned Counsel appearing for the petitioners seeks stay of two weeks of the order passed today. Considering the nature of the dispute and as substantial work has already been completed and the work to drain the water from the storm water drain has to be completed before the ensuing monsoon and as any such work is made subject to the conditions stated herein above, we find that no case is made out for any stay which would cause grave prejudice to the occupants of the building constructed by the respondent No. 2. As such, the said prayer stands rejected.