
(2018) 07 BOM CK 0184
In the Bombay High Court
Case No : Writ Petition No.179 Of 2014

Mr. Pascoal Trindade

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 30-07-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 9

Citation : (2018) 07 BOM CK 0184

Hon'ble Judges : C. V. Bhadang, J

Bench : Single Bench

Advocate : Raunaq Rao, Susan Linhares, Pranay A. Kamat

Final Decision : Disposed Off

Judgement

1. By this petition, the petitioner is challenging the orders dated 08/10/2013 and 15/10/2013, passed by the Administrative Tribunal (Tribunal, for short),

granting permission to the fourth respondent Comunidade of Bambolim (Comunidade) to file a suit against the petitioner and others in respect of

Survey Nos.93/2, 93/3 and 93/4 of village Bambolim along with some other reliefs.

2. The brief facts necessary for the disposal of the petition may be states thus :

That the respondent no.4 Comunidade had filed two applications i.e. dated 19/09/2013 and 17/07/2013. According to the Comunidade, it is claimed,

it is the owner of several 'adicaos' of land and the Attorney of the Comunidade was advised to file a suit for following reliefs :

- (i) Three sale deeds executed by Dionisio Dias e Mergulhoneed to be challenged;
- (ii) Comunidade has to get itself transposed as plaintiff in Civil Suit No.66/2009;
- (iii) Various authorities have passed orders for conversion, approval of plan, etc.

and the same need to be challenged.

3. In such circumstances the Comunidade had prayed for grant of permission to file suits and other proceedings in the competent Court. That

application was forwarded by the Administrator of Comunidade to the Tribunal vide letter dated 23/07/2013.

4. It was contended on behalf of the Comunidade before the Tribunal that the the Comunidade had sought for declaratory decree in respect of certain

plots and Survey No.93/3 and 93/4 of village Bambolim and for a declaration that the three sale deeds were illegal and had sought cancellation of the

same. The Comunidade was also seeking to file a suit for declaration that the compromise decrees in Civil Suit No.6/2007/C and Special Civil Suit

No.15/2001 before the Senior Civil Judge, were illegal and void-ab-initio.Â The Comunidade was also intending to file a suit seeking possession of the

said lands.

5. In the present petition, we are only concerned with Land Survey Nos.93/2, 93/3, 93/4 of village Bambolim, which are claimed by the petitioner.

6. The Administrative Tribunal, by an order dated 08/10/2013, granted following permission to the Comunidade :

(i) To file a suit against the Pascoal Trindade (petitioner) and others in respect of land Survey No.93/3 and 93/4 of village Bambolim;

(ii) To file a suit against Mr.Raghurai Tamba, Mrs DionisiaDias e Mergulho and others in respect of the property Surveyed under No.89/3 of village

Bambolim;

(iii) To file an application for transposition of Comunidadeas plaintiff in Civil Suit No.766/2009.

7. It appears that the Attorney of Comunidade filed an application dated 11/10/2013 for rectification of the order.Â The Administrative Tribunal, by

an order dated 15/10/2013, has inter alia, granted permission to file a suit against the petitioner and others in respect of Survey No.93/2, 93/3, 93/4 of

village Bambolim.Â Feeling aggrieved, the petitioner is before this Court.

8. I have heard Shri Raunaq Rao, the learned Counsel for the petitioner and Ms. Linhares, the learned Additional Government Advocate for the

respondent nos.1 and 2.Â I have also heard Shri P. A. Kamat, the learned Counsel for the respondent no.4.Â With the assistance of the learned

Counsel for the parties, I have gone through the record and the impugned orders

passed.

9. Shri Rao, the learned Counsel for the petitioner has submitted that the impugned orders are passed by the Tribunal without application of mind and

in breach of the principles of natural justice, in as much as the petitioner was not heard before passing of the impugned order.Â It is next contended

that the impugned orders are passed in breach of the provisions of Article 349 of the Code of Comunidade (the Code, for short), which requires the

Administrative Tribunal to obtain an opinion of the 'Advocate General' before granting permission, which has not been done. Lastly, it is contended

that there is apparent discrepancy in the text of Articles 349 to 353 in the June 2012 Edition and October 2009 Edition of the Code.Â It is submitted

that the Division Bench of this Court had disposed of the W.P.No.154 of 1999 (Advocate Joaquim Godinho Vs. State of Goa and others), by a

judgment and order dated 19/04/2000, on the basis of an affidavit filed by the Director of Printing and Stationary setting out a time schedule within

which, the various legislative acts, rules, etc. referred to in the affidavit shall be made available along with upto date amendments.Â It is submitted

that in spite of the said order, the Government has failed to rectify the mistake and to bring out an authenticated version of the Codee, as a result of

which, the Tribunal could not have been able to act on the basis of genuine provisions of Article 349.Â The submission is that the impugned order is

vitiated on this ground. The learned Counsel has referred to the decision of the Division Bench of this Court in a batch petition beingÂ W.P. No.506

of 2009 and others, decided on 29/03/2012, in order to contend that this Court has found it to be difficult to believe that the properties bearing Survey

Nos.89/3, 93/2, 93/3 and 93/4, ever belonged to the fourth respondent Comunidade. He submits that the Tribunal has granted permission without

considering the relevant aspects and the said permission is, thus, rendered bad in law.

10. Ms. Linhares, the learned Additional Government Advocate for the respondent nos.1 and 2 and Shri Kamat, the learned Counsel for the

respondent no.4, on the contrary, have supported the impugned orders.

11. On behalf of the respondents, reliance is placed on the decision of this Court in Comunidade of Cacoda Vs. Vishnu Bhikaro Sawant (decided on

22/11/2007), in order to submit that the permission granted under Article 9 read

with Article 349 of the Code, is neither a bar on the jurisdiction of the Civil Court to exercise its jurisdiction, nor for that matter, a bar on the Comunidade from filing a suit, even if it not be of a preservatory nature. It is submitted that the Administrative Tribunal only acts in an administrative manner in granting permission. It is pointed out that the object of grant of such permission is to ensure that the Comunidades on their own do not indulge into any adventurous or speculative litigation and expend public money over it. It is submitted that the suit filed after grant of permission by the Tribunal is pending since 2013. It is pointed out that this Court in the case of Comunidade of Cacoda (supra) has gone to the extent of holding that in a given case, such permission from the Tribunal can also be obtained ex-post-facto, if the suit is filed without such permission.

12. Shri Rao, the learned Counsel for the petitioner submits that the decision in the case of Comunidade of Cacoda (supra) will have to be treated as being rendered sub silentio as the requirement of obtaining the report from the Advocate General under Article 349 of the Code has not been noticed by this Court.

13. I have carefully considered the circumstances and the submissions made and I do not find that any case for interference is made out.

14. Two Articles from the Code need to be noticed, which govern the grant of permission to the Comunidade for filing suits, etc. The relevant

Articles are Articles 9 and 349, which read thus :

(June, 2012 Edition)

Art. 9- The Comunidades are not entitled to file any civil suits without permission of the Administrative Tribunal, save in cases where civil suit is merely of preventive relief or of executive nature or the delay in its filing may result in extinction of the right of any guarantee, in which case the sanction of the administrator be enough.

Art.349- When the comunidade decides to file any suit, in terms of article 9, the attorney shall explain, with indication of the probable expenditure to be incurred with the suit, with para wise pleadings in fact and law supported by documents and addressed to the Administrative Tribunal, through the respective administrator, who shall put his remarks on it.

The Administrative Tribunal shall decide, independently of the approval without

circulation to other members, with exception that of the Ministerio

Publico, and if the permission is granted to file the suit, it shall sanction the expenditure to be incurred for the purpose.

Articles 9 and 349 from October 2009 Edition read thus :

Art. 9- Comunidades should not file any civil suit without the consent of the Administrative Tribunal, except when the suit filed is of preservative

or executive nature or when the delay in filing it may bring as a result the extinction of the right or any guaranty. In such cases the approval of the

Administrator shall suffice.

Art-349- When the Comunidade decides to file any suit in the court as per Art.9, the procurador should apply to the Administrative Court

stating the probable expenses of the suit the rights of the case in a proper form with document through the respective Administrator who will inform

the matter. The Administrative Court will summarily decide after hearing the Attorney General and if it sanctions that the suit be filed it will

authorise the expenditure that it thinks will be necessary.

15. The contention on behalf of the petitioner is that the Administrative Tribunal had not obtained the report/ opinion of the Advocate General. In

the first place, Article 349 (2009 Edition) speaks of the Administrative Court, summarily deciding the application to file the suit, after hearing the

Attorney General. It was not disputed during the course of the arguments at bar that after Goa assumed Statehood, there is no post of

Attorney General in Goa. Be that as it may, it is contended that the permission will have to be granted after hearing the Advocate General.

Article 349 (2012 Edition), which is the subsequent edition, speaks of the 'Administrative Tribunal', deciding the application independently without

circulation to other members, with the exception that of 'Ministerio Publico', which the learned Counsel for the parties stated, is the office of the

Public Prosecutor. It was, however, not disputed that neither the Advocate General was heard nor the report or opinion of the Public Prosecutor

was obtained in this case. The question is what is the effect. Incidentally, the question is also about the locus of the petitioner (the defendant in the

proposed suit) to challenge the said permission.

16. In the case of Comunidade of Cacoda (supra), the issue before this Court was whether Article 9 of the Code expressly or impliedly bars the

jurisdiction of the Civil Court to entertain a suit filed on behalf of the Comunidade without obtaining sanction from the Administrative Tribunal.Â This

Court in para 7 of the judgment, inter alia, held that the permission as is referred to in Article 9 read with Article 349 of the Code is neither a bar on

the jurisdiction of the Civil Court to exercise its jurisdiction nor for that matter bars any Comunidade from filing a suit, even if it is not seeking any

relief of preservatory/ preventive in nature.Â This Court has held that, at the highest, if the Comunidade files a suit and expends money towards it, the

Comunidade would not be reimbursed the amount expended towards filing and prosecution of the suit from its account and this in no manner excludes

the jurisdiction of the Civil Court.Â This is what is held in para 7 of the judgment:

7. The other aspect of the matter is what is the scope of Article 9 of the Code of Comunidades. If the language of Article 9 is considered, it is not a

bar on the civil Court exercising jurisdiction, but a prohibition on the Comunidade from filing a suit without the consent of the Administrative Tribunal,

except for matters as set out therein. Therefore, Article 9 cannot be said to be a bar on the Civil Court exercising its jurisdiction.Â We may look at

the object of the Article from another aspect. Careful reference may be made to Article 349 of the Code of Comunidades, which reads as under :

â?? When the Comunidade decides to file any suit in the court as per Article 9, the â??procuradorâ? should apply to the Administrative Court stating

the probable expenses of the suit the rights of the case in a proper form with document through the respective Administrator who will inform the

matter. The Administrative Court will summarily decide after hearing the Attorney General and if it sanctions that the suit be filed it will authorize the

expenditure that it thinks will be necessary.â? Article 349 provides for sanctioning of expenses for prosecution of suits where permission is required.

For such suits, therefore described under Article 9, the Comunidade cannot spend money from its funds without the sanction taken in terms of

Article 349. Article 9 and Article 349, therefore, read together would lead to the conclusion that it is a bar on the Comunidades from incurring

expenses from its funds in the event sanction is not taken from the Administrative Tribunal. In my opinion, this is the only reasonable construction that

will have to be given to Article 9, read with 349 of the Code of Comunidades. If

it is so read, it is neither a bar on the jurisdiction of the Civil Court to exercise its jurisdiction, nor for that matter a bar on the Comunidades from filing a suit even if it not be of preservatory in nature. At the highest, if the Comunidade files a suit and expends money towards it, the Comunidade would not be reimbursed the amount expended towards filing and prosecution of the suit from its account. This in no manner excludes the jurisdiction of the civil Court. Therefore, as Article 349 was not considered when the Court of Judicial Commissioner disposed off the second appeal No.15/74, nor were the provisions of Section 9 of C.P.C. considered in the matter of ouster of jurisdiction, that judgment cannot be said to be a judgment of a co-ordinate Bench of this Court and on the principle of judicial discipline to be followed by another Co-ordinate Bench. The language of articles and the rule of construction which we have applied, would show that the jurisdiction of the civil Court is neither expressly or impliedly barred and that is always open to the Comunidades, whether it be a suit of preservatory character or for that matter what may be said to be nonconservatory in nature to file a suit. Speaking for myself, I would say that there is no distinction between the suit for perpetual injunction and the suit for mandatory injunction, as both are with the object of preserving the property. However, in my opinion, that is totally immaterial considering the object of Article 9, read with Article 349 of the Code of Comunidades. The conclusion which emerges from our discussion is that a civil Court would have jurisdiction to entertain a suit for a mandatory injunction, whether described as preservatory and or non-conservatory, irrespective of whether the sanction is taken from the Administrative Tribunal or not. The sanction is only for the purpose of expending monies.â??

17. It can, thus, be seen that the Civil Court shall have jurisdiction to entertain a suit for mandatory injunction, whether described as preservatory and/or non-conservatory nature, irrespective of whether the sanction is taken from the Administrative Tribunal or not.Â Sanction is mainly for the purposes of sanctioning the expenditure incurred.

18. This Court further went on to hold in para 8 of the judgment as under :

â??8. The other consequential aspect of the matter is the scope of Article 349 of the Code of Comunidades. Article 349 does not create any

substantive right. It is merely procedural. In other words, even if a suit is filed by the Comunidade in respect of its property without permission of the Tribunal, it will always be open to the Comunidade if they have earlier not taken permission to apply post facto for permission, if permission is required under Article 349. Under Article 9, all civil suits which are to protect property or recover the property of the Comunidade can be said to be 'preservatory'.â??

19. It can, thus clearly, be seen that the object and purpose behind the Comunidade obtaining the permission from Administrative Tribunal, as has been rightly submitted on behalf of the respondent, is to ensure that the Comunidades on their own do not indulge into any speculative or adventurous litigation and expend money thereon.Â All that the Tribunal is required to see is as to whether a case for filing civil suit is made out or not and if it is made out, to sanction the expenditure for the same.Â

20. Looked from this angle, it is difficult to envisage as to how the proposed defendant in the suit can be said to be aggrieved by any such permission so as to enable him to challenge it.Â The defence, if any, (as has been tried to be raised, based on the judgment of this Court in W.P. No.506/2011 and others) has necessarily to be raised in the suit and not while challenging the permission.Â That apart, the learned Counsel for the respondents have pointed out another order dated 18/02/2009 passed by this Court in W.P. No.102/2009, (Marvin Gonsalves Vs. State of Goa), by which this Court had given certain directions to the Administrator and Collector to act in accordance with law, while directing the respondents to demolish the illegal construction and/ or to preventÂ them from carrying out any further construction.

On the basis of the directions issued by this Court, the Administrator of Comunidade, by an order dated 03/07/2009, had directed the fourth respondent Comunidade to initiate appropriate proceedings in law.Â It is necessary to emphasize the merits of the claim in the suit and the defence of the petitioner, have necessarily to be gone into at the trial of the suit and it is neither necessary nor appropriate to go into the same in the present writ petition.

21. Now coming to the discrepancy in respect of the text of Article 9 and Article 349 between the 2009 and 2012 editions. I find that it would not be

decisive of the matter in this case for the simple reason that the Administrative Tribunal has admittedly not heard the Advocate General or obtained the report or the opinion of the Public Prosecutor. The question is what is the effect thereof. Speaking for myself and without expressing any binding opinion, I find that the requirement of hearing Advocate General or obtaining the opinion of the Public Prosecutor may not be mandatory. It is an enabling provision for the Administrative Tribunal to obtain the opinion of the Public Prosecutor before grant of any such permission. In a given case, if such permission is refused, the Comunidade would be in a position to challenge the same on the ground that the permission is refused, even without obtaining the opinion of the Public Prosecutor. However, the proposed defendant in the suit, in my humble view, cannot challenge such permission on any such ground, particularly in view of the fact that the object of grant of such permission is essentially to ensure that the Commundades do not engage in any adventurous and speculative litigation and incur expenditure on the same and further as held by this Court, the same does not affect the jurisdiction of the Civil Court to entertain the suit.Â I am in respectful agreement with the view as expressed by this Court in the case of Comunidade of Cacoda (supra).Â I am unable to accept that the said decision can be said to be sub silentio in so far as the provisions of Article 349 of the Code are concerned.Â The fact that this Court has not noticed the requirement of Advocate General being heard or the opinion of the Public Prosecutor being obtained, has no bearing on the ratio as laid down in the said decision, about the nature and character of the permission granted and the effect of the absence of the permission on the jurisdiction of the Civil Court to entertain the suit.Â In the present case, the suit is filed on the basis of the permission way back in the year 2013 and considering the overall circumstances, I do not find that this is a fit case, where this Court should interfere with the permission in the exercise of the extra-ordinary and supervisory jurisdiction under Article 226 and/or 227 of the Constitution of India.Â I would hasten to add that this Court has not expressed any opinion on the merits of the defence as is raised or may be raised by the petitioner in the suit.Â Subject to this, the petition is hereby dismissed. Rule is discharged, with no order as to costs.

22. At this stage, the learned Counsel for the petitioner submits that the Trial of Special Civil Suit No.52/13/A be expedited, for which the learned

Counsel for the respondents have no objection.

23. The learned Trial Court shall decide Special Civil Suit No. 52/2013/A, as expeditiously as possible and in any event, within a period of one year

from the receipt hereof.Â The parties to co-operate for the time bound disposal of the matter.