

SUPREME COURT OF INDIA

Goa Foundation

Vs.

Fomento Resorts and Hotels Ltd.

C.A.No.6074 of 2000

(B.N.Agarwal and G.S.Singhvi JJ.)

20.01.2009

JUDGMENT

G.S. SINGHVI, J.

1. This is an appeal for setting aside order dated 25.4.2000 passed by Goa Bench of the High Court of Bombay in Writ Petition Nos. 284 of 1991 and 37 of 1992 whereby the appellants' prayer for issue of a direction to the respondents for restoration of public access to the Vainguinim beach and the car parking area through survey No. 787 (new No. 246/1) and for demolition of the construction made in the open area of the property bearing survey No. 789 (new No. 246/4) was rejected, but directions were given for ensuring that the alternative access to the beach is kept open for public and the same is extended up to the beach along the retaining wall so that it may directly lead to the beach and not to the rocks or some other place.

BACKGROUND FACTS;

(i) Dr. Alvaro Remiojo Binto owned several parcels of land in Village Taleigao, District Tiswadi, Goa. He sold plots bearing survey Nos. 803 and 804 (new Nos. 246/2 and 245/2) to Gustavo Renato da Cruz Pinto and plots bearing survey Nos. 787 and 805 (new Nos. 246/1 and 245/1) to M/s. Sociedade e Fomento Industries Pvt. Ltd. (respondent No. 2 herein).

(ii) After purchasing the land, respondent No. 2 leased out the same to respondent No. 1. The latter submitted an application to Gram Panchayat Taleigao (for short 'the Gram Panchayat') for grant of permission to construct hotel complex near Vainguinim beach. On a reference made by the Gram Panchayat, Chief Town Planner, Government of Goa, Daman and Diu vide his letter dated 1.8.1978 informed that the plans submitted by respondent No. 1 are in conformity with the regulations in force in the area but observed that right of the public to access the beach must be maintained by providing necessary footpath. Paragraph 2 of that letter reads as under:

The road leading to the hotel complex is at present used by general public to approach the Vainguinim Beach which is popular picnic spot for the people of Panaji as well as other parts of Goa. It will need to be ensured that the right of access to the beach is maintained by the applicant by providing the necessary footpath to the beach at an appropriate place. The parking facilities provided will also have to take care of the parking of vehicles of such members of the public in an appropriate manner. This will ensure that the beach remains open to public as it is at present and that

the public is not deprived of this beautiful and frequently used beach.

[emphasis added]

(iii) Thereafter, the Gram Panchayat issued letter dated 22.8.1978, whereby respondent No. 1 was permitted to lay access road linking Dona-Paola-Bambolim Road to the construction site and construct the hotel subject to the conditions specified in the letter including the one relating to public access to the beach. This was reiterated by the Sarpanch of the Gram Panchayat in his letter dated 1.12.1978, which reads as under:

VILLAGE PANCHAYAT OF TALEIGAO

Your ref. No.

Our Ref. No. VT/TLG/329/78 Dated: 1.12.1978

To

M/s. Gomantak land Development Pvt. Ltd.,

Velho Building,

Panaji - Goa.

Dear Sir,

I have inspected the site for the proposed hotel building and I am satisfied that the licence holder bearing licence No. 195/78 dated 22.9.1978 has complied with the condition imposed by the letter dated 1st August, 1978 from the department of Town Planning to the Panchayat by constructing a road as required. The said road runs up to the parking area on the spot No. 787, from west to east. The parking area is situated on the north east corner of survey No. 787 adjacent to Survey No. 803. The public footpath runs on survey No. 787 and forms the boundary to survey No. 803.

The interest of the public as per the condition in the letter of the Department of Town Planning of 1.8.1978 are satisfied. The road parking area and the public footpath will be open to public use and will not be altered without our permission.

Thanking you,

Yours faithfully,

-sd-

(Spmnath D. Zraukar)

Sarpanch

Village Panchayat of Taleigao

Tiswadi - Goa.

Copy: Department of Town Planning.

Sd/- Sd/- (A.A. Noronha) (Somnath D. Zuarker) Secretary Sarpanch

(iv) In furtherance of the permission granted by the Gram Panchayat, respondent No. 1 commenced construction of the hotel, which is now known as Hotel Cidade de Goa on the land forming part of survey No. 787 (new No. 246/1) and completed the same by May, 1983.

(v) During construction of the hotel building, respondent No. 1 made an application dated 29.9.1979 to the Sarpanch of the Gram Panchayat, for permission to change the location of the footpath and parking area by stating that in view of installation of 10,000 kg gas tank (poisonous gas at high pressure), high pressure water tank and high voltage electric transformer near the hotel building, it will not be in public interest to locate the footpath and parking area at the sanctioned site.

(vi) The Sarpanch of the Gram Panchayat neither forwarded the application of respondent No. 1 to the Town and Planning Department nor placed the same before the Gram Panchayat. Instead, he wrote letter dated 29.9.1979 to respondent No. 1 giving an impression that the Gram Panchayat does not have any objection to the change of location of the footpath and parking area. Thereafter, respondent No. 1 shifted access to the beach to the new site.

(vii) In the meanwhile, Shri Gustavo Renato Da Cruz Pinto, Smt. Surana Pefira Pinto and Miss Befta Sara Da Costa Pinto filed Special Civil Suit No. 313/1978/A in the Court of Civil Judge, Senior Division, at Panaji against respondent No. 2, Dr. Alvaro Remiojo Binto and four others for a decree of possession by pre-emption in respect of the land comprised in survey Nos. 787 and 805 and also to restrain the defendants, their agents, servants, etc. from changing, alienating or raising any construction on the suit land by alleging that they were owners of property bearing survey Nos. 803, 804, 806, 807, 788 and 789 situated at Taleigao and since time immemorial they and their predecessors were using footpath passing through survey Nos. 787, 805 and 769 for going to Panaji-Dona Paula-Bambolim road, which was sought to be obstructed. Defendant No. 1 in the suit (appellant No. 2 herein) filed written statement to contest the suit. After some time, the parties compromised the matter in terms of which the plaintiffs gave up their claim for pre-emption in respect of plot bearing survey Nos. 787 and 805 and defendant No. 1 agreed to exchange the plot bearing survey No. 790 with plots bearing survey Nos. 788 and 789 belonging to the plaintiffs and also that it will have no right of access through any of the properties of the plaintiffs. As a sequel to this, the plaintiffs applied for withdrawal of the suit. By an order dated 20.12.1978, the Civil Judge permitted them to do so.

(viii) Soon after withdrawal of the pre-emption suit, Respondent No. 1 represented to Shri Shankar Laad, Minister of Revenue, Government of Goa for acquisition of land comprised in survey Nos. 788, 789, 803, 804, 806 and 807 of village Taleigao, Dona-Paola for construction of Beach Resort-Hotel complex. The State Government partially accepted the request of respondent No. 1 and issued notification dated 29.10.1980 under Section 4(1) of Land Acquisition Act, 1894 for acquiring

survey Nos. 803 and 804. After holding an enquiry under Section 5A of the Act, the State Government issued declaration under Section 6, which was published in Gazette dated 27.10.1983.

(ix) Gustavo Renato da Cruz Pinto and some others filed Writ Petition No. 8/1984 for quashing the aforementioned notifications on various grounds including the one that before acquiring the land, government did not make enquiry as per the requirement of Rule 4 of the Land Acquisition (Companies) Rules, 1963 (for short 'the Rules'). The writ petitioners also highlighted discrepancies in different notifications issued by the State Government. Respondent No. 2 in the writ petition (respondent No. 1 herein) filed reply affidavit stating therein that Rule 4 of the Rules is not mandatory and non compliance thereof did not affect legality of the acquisition. In paragraphs 67 and 76 of the reply affidavit, it was averred that part of the project, i.e., hotel is complete and has started functioning. In paragraph 79, it was averred that besides the hotel project; cottages were proposed to be constructed on plot bearing survey No. 805 and the acquired land in survey Nos. 803 and 804 will be used for putting up health club, yoga centre, water sports and other recreational facilities, which are integral part of the project.

(x) By an order dated 26.06.1984, Goa Bench of the High Court of Bombay allowed the writ petition and quashed the impugned notifications only on the ground of non compliance of Rule 4 of the Rules. That order was reversed by this Court in **Fomento Resorts and Hotels Ltd. v. Gustavo Renato Da Cruz Pinto and Ors.** : [1985]2SCR937 and the case was remitted to the High Court for deciding other grounds of challenge. It, however, appears that after the judgment of this Court, the parties compromised the matter and the writ petition was withdrawn on 26.3.1985.

(xi) In the meanwhile, respondent No. 1 entered into an agreement with the Government as per the requirement of Section 41 of the 1894 Act.

(xii) After taking possession of the acquired land, Respondent No. 1 extended the hotel building on survey Nos. 787, 788, 789 and 803 in the garb of permission granted by the Development Authority under the Goa, Daman and Diu Town and Country Planning Act, 1974. Respondent No. 1 also closed public access to the beach available through survey No. 803 (new No. 246/2). The same was challenged in Writ Petition No. 330 of 1991 Shri Minguel Martins v. Sociedadee Fomento Industries Pvt. Ltd. and Ors.: 2000(4)BomCR448 Writ Petition No. 36 of 1992 Goa Foundation and Anr. v. Fomento Hotels and Resorts Limited and Ors. and Writ Petition No. 141 of 1992 Shri Gustavo Renato da Cruz Pinto v. State of Goa and Ors. By an order dated 25.4 2000 the Division Bench of the High Court allowed the writ petitions and issued directions for demolition of the construction made in survey No. 803 (new No. 246/2) after complying with Clause 6 of agreement dated 26.10.1983. The High Court further directed that access to the beach shown in plan Exhibit-A filed along with Writ Petition No. 141/1992 shall be kept open without obstruction of any kind.

(xiii) Shri Victor Albuquerque and the appellants herein filed another ser of Writ Petition Nos. 284 of 1991 and 37 of 1992 for issue of a direction to the respondents (including respondent Nos. 1 and 2 herein) for restoration of public access to Vanguinim beach and the car parking area through survey No. 787 (new No. 246/1) and for demolition of the construction made in the open area of survey No. 789 (new No. 246/4).

(xiv) In their writ petition, the appellants claimed that while approving the plan for construction of hotel project in survey No. 787 (new No. 246/1), the Chief Town Planner had directed respondent Nos. 1 and 2 to maintain access to the beach through that survey number by providing necessary

footpath and also provide facility for parking of the vehicles and this was reiterated by the Gram Panchayat, but respondent Nos. 1 and 2 have shifted access to the beach to another location on the basis of permission allegedly granted by the Sarpanch who had no authority to do so. According to the appellants, respondent Nos. 1 and 2 were and are not entitled to shift the public access to some other location and, as a matter of fact, instead of ending at the beach, new road leads to the rocks through which public cannot go to the beach. It was also the appellants' case that the location of new road is extremely dangerous because it is adjacent to 10,000 Kg. poisonous gas tank.

(xv) In their counter-affidavit, respondent Nos. 1 and 2 pleaded that the sanction accorded by the Chief Town Planner was subject to the condition that public access to the beach should be maintained by providing necessary footpath at appropriate place and facilities should be provided for parking of the vehicles but no particular location was identified for that purpose. It was further their case that in the first instance, car parking was identified at North-East corner of property bearing survey No. 787 and the footpath alongside its Eastern boundary, but during execution of the project, it was found that existence of road near 10,000 Kg. poisonous gas tank, high pressure water tank, electric transformer will be dangerous to the public and, therefore, application was made to the Sarpanch of the Gram Panchayat for shifting the location of public road, car parking and footpath and construction thereof at the new site was undertaken after seeking permission from the Sarpanch. Respondent Nos. 1 and 2 also pleaded that since 1979 members of the public are using access to the beach through alternative road and footpath.

(xvi) The High Court referred to letter dated 1.8.1978 of the Chief Town Planner, letter dated 1.12.1978 of the Sarpanch, two letters dated 29th September, 1979, one of which was written by respondent No. 1 to the Sarpanch, and the other by the Sarpanch and held that even though access provided by respondent Nos. 1 and 2 is not at the site initially approved by the Gram Panchayat, the same is being maintained at the new location since 1979. The High Court noted that while approving the plan prepared by respondent No. 1 for construction of hotel complex, the Chief Town Planner did not identify the particular location at which public road, car parking and footpath were to be constructed and even when inspection was carried out on 16th October, no objection was raised to the change of alignment of the public road etc. and, therefore, it cannot be said that respondents have violated the conditions of sanction. The High Court also took cognizance of the photographs produced by the writ petitioners and observed that the access to the beach is not maintained in proper manner and that the same leads to rocks and is inaccessible during high tide. Accordingly, directions were issued to the respondents to maintain tarred road of three meters width throughout, proper area for parking of cars and ensure that the access goes up to beach. However, the prayer of the writ petitioners for demolition of the construction made in survey No. 789 (new No. 246/4) was rejected by observing that the so-called construction is in the form of road and there is no legal prohibition against such construction. The relevant extracts of paragraphs 12 and 13 of the impugned order which also contain the directions given by the High Court read as under:

All said and done, once, it is not in dispute that the members of the public are entitled to have their access through the property bearing survey No. 787, it cannot be disputed the Respondents are duty bound to maintain a proper access for the public to the said beach and sufficient area for parking of cars. Both these things are to be maintained through and in the property bearing survey No. 787. It is the contention of the Respondents that they have already provided such access and that the same is being used by the public. However, the photographs of such access which are placed on record by the Petitioners and not disputed by the Respondents clearly disclose that such access is not maintained in proper manner and/or as is otherwise required to be maintained in terms of the

directions given by the Chief Town Planner. It is the contention of the Petitioners that the said access leads not to the beach but to the rocks and the beach is absolutely unaccessible during the high tide by the said access. The fact that members of the public cannot have access to the beach during the high tide is also admitted by the respondents in the Affidavit-in-replies filed in both the Petitions. In Writ Petition No 37/92, it has been clearly stated in Affidavit-in-reply in para 20 "and that the Respondents state that in compliance with the said condition from the point of steps, where also there is a jetty the Respondents built retaining wall with access over it to the extent of 60 metres giving access over it to the public through the beach even during the high tide". Similarly, in Writ Petition No. 284/91 in the Affidavit-in-reply it is stated in para 13(d) that "the Respondents state that in compliance with the said condition from the point of steps where also there was a jetty, the Respondents have built a retaining wall with access over it giving access to the public through the beach even during the high tide." The Affidavit-in-reply in Writ Petition No. 284/91 was filed in September, 1991 whereas the Affidavit-in-reply in Writ Petition No. 37/92 was filed in January, 1992. This clearly shows that the Respondents are fully aware that the access which has been stated to have been maintained by the Respondents as it stands today is not at all convenient for free access to the public to the said beach. Once, it is not disputed that the public have right to free access to the beach through the said property and the project of construction of hotel was approved with the condition that such access is to be maintained, it is the duty of the Respondents to maintain a proper access through the property to the beach. It has been stated across the bar and delineated in a sketch produced by the Petitioners and not disputed by the Respondents that alternative access as exists at present provided by the Respondents for the public is through the western half of the property bearing old survey No. 787. It leads to the steps constructed near the retaining wall by the side of the jetty leading to the sea situated on the said Vainguinim Beach. Once, it is clear that the said access does not lead to the beach directly but to the steps and further to the rocks, it is necessary to give appropriate directions to the Respondents to extend the said access upto the beach along the retaining wall referred to in para 20 of the Affidavit-in-reply in Writ Petition No. 37/92 to such an extent that the said access directly leads to the said beach and not to the rocks or some other place. It is also necessary that such road should be maintained of 3 metres in width all throughout, and also that the said road to be tarred and maintained in proper condition. The Respondents shall also maintain proper area for parking of the cars and the area should be maintained in a usable condition for the members of the public and the responsibility in that regard shall also be of the Respondent Nos. 1 and 2. There shall not be any obstruction caused on the said access or car park area either by construction of any fencing or any gate or otherwise and the same should be kept open all 24 hours of day and night.

13. Considering the fact that neither of the parties have bothered to place on record a proper plan with dimension and to scale, a further direction in that regard is necessary to the Respondent Nos. 1 and 2 who shall file a proper plan drawn by a recognized surveyor showing the location of the access and car park maintained in accordance with directions of this Court and such plan should be filed along with the Affidavit regarding the compliance of maintenance of such access within a period of four weeks from today. The said access shall be at the location corresponding to the one disclosed in the sketch produced by the Respondents and placed on record and marked at 'X' for identification. However, an alteration in the location of the access shall be made as regards the space near the gas tank shown in the said sketch and sufficient space should be maintained from the location of the gas tank so as to avoid hardship or injury to the members of the public using the said access and the distance between the gas tank and the access shall not be less than 20 metres under any circumstances. It shall also be the responsibility of the Respondent No. 5 in Writ Petition No. 37/92 as well as other authorities to have periodical checks and to ensure the maintenance of the

said access and the car park area in the said property.

[underlining is ours]

2. Ms. Indira Jaising, learned senior counsel appearing for the appellants argued that even though the letter dated 1.8.1978 of the Chief Town Planner did not identify the location where footpath and parking facilities were required to be provided by respondent Nos. 1 and 2 for access to the beach, but if the same is read in conjunction with permission granted by the Gram Panchayat vide letter dated 22.8.1978 and letter dated 1.12.1978 of the Sarpanch, it becomes clear that respondent Nos. 1 and 2 were required to provide parking area, on the north-east corner of survey No. 787 adjacent to survey No. 803 and public footpath was to be provided in a manner that it would run on survey No. 787 and form the boundary of survey No. 803 but they manipulated the so-called permission from the Sarpanch of the Gram Panchayat and changed the location of public road and car parking. She vehemently argued that access provided at the new site ends on the rocks and it is impossible for the public to go to the beach even during the normal period what to say of high tide period and the High Court committed grave error by declining the appellants' prayer for issue of mandamus to respondent Nos. 1 and 2 to provide access to the beach through survey No. 787 in terms of the approval accorded by the Chief Town Planner vide his letter dated 1.8.1978 read with the permission granted by the Gram Panchayat on 22.8.1978. Shri Anil B Divan, learned senior counsel appearing for the respondents, submitted that the directions given by the High Court are just and proper and do not call for interference, because public road, car parking and access to the beach had been constructed in 1979 after obtaining permission from the Sarpanch of the Gram Panchayat and public has been using the same for last almost 20 years. Learned senior counsel produced some photographs to show that tarred road has been constructed and access provided through footpath goes, right up to the beach.

3. We have considered the respective submissions. Since it is not in dispute that respondent Nos. 1 and 2 have provided access to the beach at the alternate site in 1979 and the same is in existence for just almost 20 years and is being used by the public, it is not possible to agree with Ms. Indira (sic) that the High Court committed an error by not taking cognizance of the approval accorded by the Chief Town Planner and the permission granted by the Gram Panchayat on 22.8.1973. It is true that Sarpanch did not place before the Gram Panchayat letter dated 29.9.1979 written by respondent No. 1 for permission to change the location of the footpath and, parking area from the site originally Sanctioned and the Gram Panchayat did not pass any resolution sanctioning such change, but the fact remains that pursuant to letter dated 29.9.1979 written by the Sarpanch of the Gram Panchayat, respondent No. 1 laid access to the beach at alternative site and made it operational sometime in 1979 and the same is being used by the public since then. The photographs produced during the hearing of the appeal also prima facie show that access to the beach is available at the alternative site. It is not the appellants' pleaded case that they were unaware of the change of location of public access to the beach and construction of road, parking area, etc. at the alternative site in 1979. Therefore, the writ petition filed by them in 2000 was highly belated, and the High Court may have been justified in non-suiting them only on the ground of delay. However, as the High Court has dealt with the matter on merits, we do not consider it necessary to deal with this issue in detail, more so because we are convinced that the directions given by the High Court to respondent Nos. 1 and 2 for ensuring that public road is shifted from the site near 10,000 Kg. poisonous gas tank and access to the beach ends on the beach and not on the rocks are just and proper and are in consonance with public interest.

4. In the result appeal is dismissed. Needless to say that if respondent Nos. 1 and 2 have not carried out the directions given by the High Court in toto and access to the beach still ends at the rock or there is any other deficiency in the implementation of the order impugned in this appeal, then the appellants or any other interested person shall be free to bring this to the notice of the High Court for appropriate order and action.