
(2009) 07 BOM CK 0102
In the Bombay High Court
Case No : Writ Petition No. 104 of 2009

Agnello Caridade Lobo

APPELLANT

Vs

Mr. Sanjay A. Pednekar and Others

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 243(O), 243K, 329
Goa Village Panchayat Raj Act, 1994 — Section 10, 11, 12, 12(1), 12(2)
Goa, Daman and Diu Town and Country Planning Act, 1974 — Section 134

Citation : (2009) 5 BomCR 62 : (2009) 111 BOMLR 3318

Hon'ble Judges : U.D. Salvi, J; B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : V.B. Nadkarni and P.A. Kamat, for the Appellant; S.G. Dessai V. Parsekar, for Respondent No. 1, Shivan Dessai, for Respondent No. 2, A. Kamat, Additional Government Advocate and V.P. Thali, for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J.—The writ petition to be disposed of finally at the stage of admission as per orders of this Court dated 30.4.2009. Accordingly, we admit the writ petition by making Rule, returnable forthwith. Respective Advocates waive notice for the respondents. The matter is heard finally by consent.

2. Challenge in this writ petition filed under Articles 226 and 227 of the Constitution of India raises a question of disqualification of respondent No. 1 as a Member of respondent No. 2 Village Panchayat. Declaration sought for by the petitioner is for that disqualification and for a relief that the seat has become vacant. The facts are not much in dispute. The present respondent No. 1 is elected as a Member of Village Panchayat Socorro on 7.5.2007 and as its Deputy Sarpanch on 19.5.2007. One Shri Pinto has got a plot having No. 6 in area of said Village. He has entered into an agreement dated 7/12/07 for construction of residential building on said plot with respondent No. 1, who has been described therein as Contractor. Total cost of said construction payable by said Shri Pinto to

respondent No. 1 is stated to be Rs. 32,94,000/-and it is admitted by respondent No. 1 before this Court that he constructed the said building and by December, 2008 he received an amount of Rs. 32,70,000/-. Respondent No. 1 has disclosed that an amount of Rs. 24,000/-has been retained by owner Shri Pinto as retention amount and respondent No. 1 is entitled to demand it after monsoon of 2009.

3. In this background, Senior Advocate Shri V.B. Nadkarni with Shri P.A. Kamat for the petitioner has argued that respondent No. 1 participated in the Panchayat meeting held on 15.3.2008 and incurred disqualification as contemplated by Section 12(1)(d) of Goa Panchayat Raj Act, 1994 read with Section 55(4) thereof. He points out that in that meeting construction licence was directed to be issued to owner Shri Pinto and accordingly, construction licence has been issued on 26.3.2008. Advocate Nadkarni points out that even these facts are admitted by respondent No. 1. He states that therefore by following the Judgment of the learned Single Judge of this Court in Ashabai Gawande Vs. Additional Commissioner, Amravati Dvn. and Others, it is apparent that respondent No. 1 has incurred disqualification and his seat has become vacant. To explain the scope of deeming section as appearing in Section 55(4) of the Goa Panchayat Raj Act, 1994 (1994 Act for short) he has relied upon The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others, . He also points out that perusal of Sections 10, 11 and Section 12 read with its Sub-section (2), clearly shows that the petitioner has no other remedy in the matter, but to knock the doors of this Court. He states that by way of abundant precaution, the petitioner approached the Goa State Election Commission, but then vide its communication dated 26.12.2006, the Commission informed him that it is not the authority to decide the issue of disqualification u/s 12(1)(d) of 1994 Act. He, therefore, states that declaration as prayed for may be granted and the petition should be allowed by issuing writ of quo warranto.

4. Senior Advocate Shri S. G. Dessai appearing for respondent No. 1 has contended that the construction licence issued to Shri Pinto is much before the election of present respondent No. 1. He invites attention to communication dated 5.10.2006 issued by respondent No. 2 to said Shri Pinto and points out that Shri Pinto had submitted his plans for approval on 18.7.2006 and the same were considered on 30.9.2006. What has been granted on 15.3.2008 is only a revised licence and, therefore, respondent No. 1 cannot be treated as disqualified. With reference to agreement dated 7.12.2007 with Shri Pinto and other documents on record, learned Advocate contends that it has not been shown that respondent No. 1 had any interest in the resolution passed in the meeting of 15.3.2008. He contends that the agreement was fully performed before the date of meeting and payment of respondent No. 1 did not depend upon what happened in the said meeting. He states that the revised plan was approved by the Village Panchayat on 15.3.08 with majority of 6 : 4 and worst comes to worst, if respondent No. 1 had not participated in that meeting, said revised plan would have been cleared by majority of 5 : 4. He, therefore,

contends that result of the meeting had not been prejudicially affected and as no pecuniary interest of respondent No. 1 is demonstrated, the writ petition needs to be dismissed. He further points out that the plots were already sub-divided and sub-division was approved before 13.6.2004, and by Town and Country Planning Department on 20.5.2004. According to him, in view of Section 134 of Goa Town & Country Planning Act, 1974, major role is to be placed by the planning and development authority and as that role was already over, the allegation of pecuniary interest being made against respondent No. 1 is without any merit. He invites our attention to the fact that P.W.D. has to independently give no objection before occupancy certificate is issued. Similarly, Directorate of Health Services is also required to issue similar certificate.

5. He has invited attention to provisions of Article 243O(b) of the Constitution of India to urge that dispute of such nature is not cognizable by the Court and even in writ jurisdiction interference therewith is prohibited. Article 329(b), is also pointed out for same purpose. It is, therefore, contended that provisions of 1994 Act being complete code in itself, the remedy for the petitioner has to be found in the said Act only. He invites attention to provisions of Section 50(4) and (5) to urge that it deals with removal of Deputy Sarpanch, as also Member. Similarly, attention is also invited to Section 10 to show that it provides disqualification for being chosen as and for being a Member of Panchayat. He, therefore, states that words under Clause (b) or Clause (c) of Sub-section (1) appearing in Section 12, Sub-section (2) need to be read as under Clause (b) to Clause (d) of Sub-section (1). Thus, according to him, the Block Development Officer has to be read as an Officer competent to decide the question of disqualification u/s 12(1)(d). He invites attention to Section 210-A to show that it also enables the Director to remove the Member of Panchayat. Thus, an alternate remedy is available to the petitioner and present petition, therefore, needs to be dismissed.

6. The provisions of Section 55(4) of 1994 Act show that it prohibits a Member of Panchayat from voting on or taking part in discussion of any question in the meeting of Panchayat if he has any pecuniary interest in such question. Section 12(1)(d) states that if a Member of Panchayat votes or takes part in discussion in contravention of the provisions of Sub-section (4) of Section 55, his seat shall be deemed to be or to have become, as the case may be, vacant. The participation in the meeting of Panchayat by respondent No. 1 on 15.3.2008 is not in dispute. The business transacted in the meeting is also not in dispute. The revised plans of building of Shri Pinto already approved by P.W.D., and Town and Country Planning Department, were considered in that meeting and revised construction licence was issued. The construction licence, thereafter, has been issued on 26.3.2008 and it mentions that the same is as per plans in triplicate/duplicate attached to his/her application under inward No. 2052 dated 7.12.2007. The agreement between the said owner Shri Pinto and respondent No. 1 is also dated 7.12.2007. It is apparent that when revised plans were being processed by P.W.D., Town and Country Planning Department or by the Village Panchayat, respondent No. 1 proceeded further with the construction work of house of said

Shri Pinto and completed the structure and further received payment for it before December, 2008. Respondent No. 1 has not stated that he had received his entire payment before 15.3.2008. The records also show that on 27.9.2008, Secretary of respondent No. 2 Village Panchayat forwarded communications to the Health Officer and Assistant Engineer stating that completion certificate in relation to house structure of Shri Pinto was being forwarded for inspection and issuance of occupancy letter to Shri Pinto. Thus total structure was completed as per revised plans and was ready for occupation in September, 2008. All these facts clearly show that construction, therefore, was either in progress or was over on 15.3.2008 when meeting of respondent No. 2 Village Panchayat took place and respondent No. 2 continued to receive his dues till December, 2008.

7. The documents show an important part to be played by the Village Panchayat in the matter. The said part is also apparent from the provisions of various enactments to which the learned Counsel for the respondent No. 1 has made reference. Respondent No. 1, therefore, obviously had interest in seeing that occupancy certificate is issued to Shri Pinto in respect of the structure constructed by him for said Shri Pinto. It depended upon sanction to the revised plans by the Village Panchayat and that sanction has been given on 15.3.2008. Respondent No. 1 has constructed the building obviously as per the revised sanctioned plans either before or after 15.3.2008 in view of the agreement dated 7.12.2007 and admitted payment by him. His pecuniary interest in the matter is also clear. Though in his absence and according to him, revised sanctioned plans could have been passed by majority of 5 : 4, the situation is hypothetical and one does not know as to what would have happened because 4 Members of Village Panchayat have opposed sanction to the revised plans. The said owner approached respondent No. 1 and engaged him as contractor only for the purpose of seeing that his revised plan is cleared by the Village Panchayat. Respondent No. 1 has not stated that he had received all his payments before 15.3.2008 and, hence, further completion of structure and release of payments in his favour depended upon the resolution of Village Panchayat dated 15.3.2008. The pecuniary interest of respondent No. 1 in the matter is, therefore, well established on record. Respondent No. 1 has not stated that his contract with Shri Pinto was one in regular course of his business.

8. The The State of Haryana Vs. The Haryana Cooperative Transport Ltd. and Others, relied upon by Advocate Nadkarni states that when a person is found holding a post though he is not eligible or qualified, his appointment has to be declared as invalid and writ of quo-warranto or any other appropriate writ or direction can be issued for that purpose. To strike down usurpation of office is the function and duty of High Court in the exercise of its power under Articles 226 and 227. In Gulam Yasin Khan Vs. Sahebrao Yeshwantrao Walaskar and Others, , Hon"ble Apex Court has held that the interest of respondent No. 1 cannot mean mere sentimental or friendly interest and it must be an interest of pecuniary or material or of a similar nature. It is also observed that to ensure the purity of administration of local bodies, the provisions relating to disqualification

should not receive an unduly narrow or restricted construction. The observations of the Hon'ble Apex Court apply with full force in the present matter and the pecuniary interest of respondent No. 1 is sufficient to disqualify him.

9. The provisions of Article 243O of the Constitution of India now need to be looked into. Article 243O is in Part IX, which deals with Panchayats and it states that the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies made under Article 243K shall not be called in question in any Court. Its Clause (b) provides that no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any Law made by the Legislature of a State. Article 329(b) deals with elections of Parliament and of Legislature of every State as also to the Office of President and Vice President of India. It provides for bar to interference by courts in electoral matters and its language is identical with Article 243O mentioned above. Both these Articles, therefore, deal with election or matters pertaining to election and does not deal with disqualification incurred by elected member after his tenure as such begins. Section 10 of 1994 Act provides for disqualification for membership and its reading shows that disqualification prescribed in it has to be at the time of election of such person as Member of Panchayat. Said Section 10, read with Section 11 clearly supports the legislative design that when such questions arises as a part of election process, the same has to be referred to State Election Commission for decision. The decision of Election Commission in the matter has been made final. The disqualifications prescribed in Section 10 which are required to be in existence at the time of election and, therefore, affect the election process, have been independently added in Section 12 vide its Sub-section (1)(a). It is, thus, apparent that if those disqualifications are incurred after the tenure of elected person as Member begins, Section 12 comes into play. Thus, there is no overlapping in Section 10 and Section 12. The jurisdiction available to State Election Commission u/s 11 is restricted to disqualifications affecting the initial election of such person as Member. Section 12 deals with an elected person who does not have any such disqualification at the time of his election, but incurs it subsequently. By Section 12(2), the Block Development Officer has been given authority and powers to find out whether disqualification under Clause (b) or Clause (c) of Sub-section (1) is incurred by such Member. Sub-section (2) does not deal with disqualification under Sub-section (1)(d) with which we are concerned in the present petition. It also does not deal with Clause (a) which incorporates disqualification mentioned in Section 10 and in Section 12. It is to be noted that Section 55(4) contemplates an act of voting in a meeting by an elected member i.e. after his term as elected member has begun and, therefore, it cannot operate to disqualify the person so voting at the time of its election i.e. at the stage when he has not become a Member of Village Panchayat. Looking to the scheme of Section 12(1) and express language of Sub-section (2), we are not in a position to read the words under Clause (b) to Clause (d) of Sub-section (1) as argued by Advocate Dessai in Section 12(2). There is

no any lacuna or omission in the language of Section 12, Sub-section (2) which is, otherwise, clear and unambiguous. It, therefore, needs to be given effect to as it is. By reading the provisions of Constitution of India in relation to elections or then because of Section 10 of 1994 Act with it, no case for supplying any words or adding any words to Sub-section (2) of Section 12 is made out and can be made out.

10. Section 50(4) deals with removal of Sarpanch or Dy. Sarpanch and removal is for being persistently remiss in the discharge of his duties, or for misconducting himself or for misusing or abusing the powers etc. The removal contemplated is thus not for incurring disqualification u/s 12 and under Sub-section (5) of Section 50, the Dy. Sarpanch so removed can also be removed by the Director from Membership of Panchayat for such period not exceeding five years. This removal u/s 50(4) can further disqualify a removed Dy. Sarpanch for a period of 5 years. Section 12 contemplates disqualification of a member and it does not provide for any further disqualification after his elected tenure is over. Section 210-A contemplates removal of member for persistent remiss in the discharge of his duties or for acts detrimental to the interest of the Panchayat or for misusing or abusing the powers etc. It also provides that the member so removed is not eligible for re-election for a period not exceeding five years. Thus, again this provision operates in altogether different sphere. It is not a removal of a member for disqualification. We, therefore, do not find any alternate remedy available to the petitioner in the matter.

11. In the circumstances, the writ petition is allowed. Respondent No. 1 is found disqualified u/s 12(1)(d), read with Section 55(4) of the Goa Panchayat Raj Act, 1994 to continue as a Member of respondent No. 2 Village Panchayat. With the result, in terms of Section 12(1)(d) his seat is deemed to have become vacant. He is restrained from assuming the Office of Member of respondent No. 2 Village Panchayat and working in that capacity. Writ Petition is, accordingly, allowed. The costs of petition are quantified at Rs. 5,000/ and respondent No. 1 shall pay the same to the petitioner.

Learned Senior Advocate Mr. S. G. Dessai requests for stay of operation of today's judgment for a period of four weeks to enable respondent No. 1 to approach the Hon'ble Apex Court. Advocate Mr. Kamat for the petitioner is strongly opposing the same. However, in the interest of justice, we grant stay, as prayed for, subject to the condition that respondent No. 1 shall not participate and vote in any meeting of the Village Panchayat till appropriate orders are passed by the Hon'ble Apex Court. Subject to this, operation of this judgment is stayed till