(2010) 04 BOM CK 0023

In the Bombay High Court

Case No : Writ Petition No. 464 of 2008

Lenocio, John Raicar APPELLANT

Vs

Martinho, Francisco Rocha and Others RESPONDENT

Date of Decision : 13-04-2010

Acts Referred:
Goa Village Panchayat Raj Act, 1994 — Section 12, 12(1), 55, 55(4)

Citation : (2010) 5 BomCR 303

Hon'ble Judges : Vazifdar S.J., J;Salvi U.D., J

Bench : Division Bench

Advocate : D. Pangam and B. Bandekar, for the Appellant; G. Teles and M. Salkar, Additional Government Advocate for Respondent Nos. 2 and 4, for the Respondent

Final Decision : Allowed

Judgement

Vazifdar S.J., J.—Respondents No. 2, 3 and 4 are the State of Goa, the Village Panchayat of Davorlim-Dicarpale and the Director of Panchayats, respectively.

2. The petitioner has sought a declaration that Respondent No. 1 is deemed to be disqualified u/s 12(1)(d) of the Goa Panchayat Raj Act, 1994 ("the said Act" for short), and the seat has, therefore, become vacant. The petitioner has also sought a writ of mandamus, directing Respondent No. 1 to Forbear from functioning or acting as a Member/Panch and Sarpanch of Respondent No. 3-Village Panchayat of Davorlim-Dicarpale.

3. Sections 12(1)(d) and 55(4) of the said Act read as under:

12. Vacation of a seat by members - (1) If a member of a Panchayat:

(a) ....

(b) ....

(c) ....

(d) 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.

55. Quorum and Procedure - (1) ....

(4) No member of a Panchayat shall vote on, or take part in the discussion of, any question coming up for consideration at a meeting of a Panchayat, if the question is one in which, apart from its general application to the public, he has any pecuniary interest, and if the person presiding has such an interest, he shall not preside over the meeting when such question comes up for consideration.

4. The facts are not disputed.

Respondent No. 1 is the owner of a plot of land, having acquired the same by a Deed of Sale dated 16.12.1996. Respondent No. 1 entered into a Leave and Licence Agreement dated 18.8.2007 with Idea Cellular Ltd., by which Respondent No. 1 granted a licence to Idea Cellular Ltd., in respect of the land, for the purpose of erecting tower and installing equipments in connection with cellular mobile telephone network and services. The agreement is for a period of 15 years. Clauses 1 and 3 of the agreement read as under:

1. LICENSE:

The Licensor hereby grants a license to the Licensee in respect of the licensed Land and the Licensee hereby accepts the same for the purpose to erect, install, operate and maintain the Equipments described in Schedule III written hereunder and such other equipments not mentioned in the said schedule, but which will be required from time to time by the Licensee to effectively carry on their operations on the said Licensed Land, alongwith absolute easement rights and all appurtenances attached thereto, along with right of ingress and egress through and/or from the said property upto the license land, on all days and at any time during the term of this Agreement. The Licensor further grants right of way/permission to the Licensee to lay power/optical fiber duct/cable through/on the said property up to the Licensed Land. The schedules referred herein under will constitute internal part of this Agreement.

3. COMPENSATION:

3.1 In consideration of the license fees hereby reserved and of the terms and conditions, covenants herein contained and on the part of the licensee to be observed and performed by the licensee, the licensor do hereby grant unfretted license unto all that peace and parcel of the said premises/land/rooftop, license premises more particularly described in the II Schedule written hereunder, and to hold, to use & to occupy the Licensed premises for the term of Fifteen years commencing from date of agreement, subject to earlier determination/ termination of this license granted and as herein under provided and paying thereof the monthly license fees of Rs. 7000/- (Rupees Seven Thousand only) with an escalation of 15% every five years.

3.2 The first of such monthly License fees is to be paid by the Licensee to the licensor from the date of commencement of the construction work of licensee only. The subsequent license fees to be paid on or before 10th day of every succeeding month. It is specifically agreed by the Licensor that period from the date of the agreement till the date of commencement of the CONSTRUCTION of Licensor will be free of cost without any license fees or compensation. The date of construction ratified and confirmed by the construction Department of the Licensee will be held binding on the licensor and licensee. The license fees will be payable from the said start date of construction only. During the said free license free period the licensor shall have to comply their obligations as set forth in this agreement.

3.3 The License Fee payable under this agreement will be payable to the Licensor by Licensee subject to deduction of applicable tax at source as per Government rules and regulations and without challenging the same in Court of law as not being standard license fee and/or compensation payable in respect of the licensed Land.

5. It is an admitted fact that Respondent No. 1 was a Member of the Village Panchayat. What transpired at the meeting of Village Panchayat-respondent No. 3 is the basis of the petition, seeking the first respondent''s disqualification.

At the meeting of Respondent No. 3 held on 28.12.2007, the following resolution was passed:

Res. No. 3/B dated 28.12.2007

Sub : Construction file for M/s. Idea Cellular Ltd.(Tower) at Survey No. 3/5(Part). Davorlim village.

Name of the Proposer & Seconder: Mr. Martinho Rocha & Mr. Francisco Dias.

Approved construction file for construction of Public Utility Services (Tower) Pre tab Shelter and Security room in Survey No. 3/5(Part) of Davorlim Village, approved vide No. TPM/Const/Davor/3/5107/4397 dt. 11.12.2007 was placed before the members discussed and unanimously approved.

(emphasis supplied)

6. The petitioner had filed a petition u/s 12(d) of the said Act before the Election Commission of the State of Goa. By judgment and Order dated 6th July, 2008, the Commissioner dismissed the petition on the ground that he had no jurisdiction to entertain the same. It is in these circumstances that the present writ petition was filed.

7. The minutes of the meeting and the text of the resolution establish and it is not denied, that Respondent No. 1 proposed the resolution, took part in the discussion pertaining to the subject-matter thereof and voted thereon. The question that falls for consideration is whether by virtue thereof his seat should be deemed to be or to have become vacant? This, in turn, raises the question as

to whether in view of the agreement dated 18.8.07 between Respondent No. 1 and Idea Cellular Ltd., Respondent No. 1 had any pecuniary interest in the question that formed the subject-matter of the said resolution?

8. Mr. Teles, the learned Counsel appearing on behalf of Respondent No. 1 submitted that the pecuniary interest u/s 55(4) should arise directly and not indirectly out of the question for consideration in the meeting. He submitted that neither the question that fell for consideration at the meeting viz. whether the construction of the tower by Idea Cellular Ltd. ought to be approved or not, nor the resolution allowing the same conferred any pecuniary interest in favour of Respondent No. 1.

9. The submission is not well founded. The agreement dated 18.8.07 between Respondent No. 1 and Idea Cellular Ltd. itself certainly created a pecuniary interest in favour of Respondent No. 1. The receipt of this pecuniary interest i.e. the consideration under the agreement was to commence upon the commencement of the construction work as stipulated in Clause 3.2 thereof. To construct the tower, permission was required from Respondent No. 3, the Village Panchayat. Respondent No. 1 was, therefore, materially and substantially interested in the permission being granted in order to implement the said agreement dated 18.8.07 and to derive the benefit thereunder. This interest was clearly pecuniary. The permission was necessary to advance and assist the implementation of the agreement and was accordingly in aid of the first respondent''s pecuniary interest which is manifest therein. It was submitted that the pecuniary interest must be direct and not indirect. Even assuming the submission to be well founded, in the present case, the first respondent had a direct pecuniary interest in the resolution being passed in the meeting.

10. Mr. Teles relied upon Clause 3.2 of the agreement dated 18.8.07 to contend that it is the commencement of the construction and not the resolution that entitles Respondent No. 1 to the pecuniary interest. He also submitted that the agreement was not the subject-matter of the discussion or the resolution.

11. To attract the provisions of Sections 12 and 55, it is not necessary that the pecuniary interest is discussed by the Village Panchayat or disbursed by the very resolution. Nor is it necessary for these provisions to apply that the question discussed pertains to or involves the disbursement or accrual of the pecuniary interest. It is sufficient if the subject-matter of the question discussed or the resolution passed leads to or results or assists in the accrual of or has the effect of leading to, resulting in or assisting or has the potential to result or assist in enabling the member realizing the pecuniary interest.

The connection between the question discussed or the resolution passed on the one hand and the pecuniary interest on the other, must be proximate and real, not fanciful or too remote. It would depend upon the facts of each case. One test would be to examine whether the member would be able to or capable of realizing the pecuniary interest if an adverse decision on the question is rendered by the Village Panchayat.

12. The agreement dated 18.8.07 could be implemented only in the event of Respondent No. 3 granting the said permission. In other words, had the permission been rejected, the petitioner would have lost the benefit under the said agreement, including and especially the pecuniary benefit thereunder. This is clear, inter alia, from Clauses 9.1 and 11 of the agreement dated 18.8.07 which read as under:

9. TERMINATION:

9.1 Notwithstanding what is stated hereinabove, Licensee shall have the right to terminate this agreement without assigning any reasons, whatsoever, at any point of time by giving one month notice in writing to the Licensor on the address mentioned hereto.

11. FORCE MAJEURE:

Neither Party shall be liable to the other Party for failure to perform its obligations hereunder due to the occurrence of any event beyond the control of such Party and affecting its performance including, without limitation, governmental regulations, orders, administrative requests, rulings or orders, acts of God, war, war-like hostilities, civil commotion, riots, epidemics, fire, strikes, lockouts or any other similar cause or causes.

The termination of the agreement by Idea Cellular Ltd., in the event of the permission being refused was a certainty. It was, therefore, in the interest of Respondent No. 1 to have the resolution passed.

13. Mr. Teles submitted that the sections do not apply in the present case as the pecuniary interest would accrue only upon the commencement of the construction and not by virtue of the resolution alone.

14. The accrual or furtherance of a pecuniary interest may be dependent on several factors. That would make no difference to the applicability of Sections 12 and 55. The applicability of these provisions is not so restricted by the Legislature. These sections would also operate even if the pecuniary benefit accrues or is dependent on account of other factors, so long as the discussion upon the subject-matter of such a question or a resolution thereon falls within their ambit.

15. Mr. Teles submitted that no pecuniary interest would accrue between the date of the resolution and the commencement of the construction.

16. Merely because between the date of the resolution and the commencement of the construction, the licence fee was not payable is irrelevant to the question as to whether Respondent No. 1 had a pecuniary interest in the subject-matter of the resolution. The resolution was required for the liability of Idea Cellular Ltd. to make the payment of the licence fee. The fact that a pecuniary benefit would arise subsequent to the passing of a resolution does not exclude it from the

ambit of the expression "pecuniary interest" appearing in Section 55(4) of the said Act.

17. The purpose of Sections 12(d) and 55(4) of the said Act is to ensure the purity and fairness in the proceedings, working and dealings of the Village Panchayat, inter alia, by ensuring that there is no misuse of the fiduciary capacity occupied by its members. The provisions are based on public policy. It would make no difference even if the agreement was subsequently not implemented for any reason. That is irrelevant for the purpose of Sections 12 and 55 of the said Act. That is relevant only between the parties to the contract.

18. In the circumstances, it is not necessary for us to consider Mr. Teles''s submission that the judgments of this Court in the case of The Akhada St. Estevam Village Development and Protection Samittee Vs. Smt. Seema Rohidas Narvekar and Others, and in the case of Agnello Caridade Lobo Vs. Mr. Sanjay A. Pednekar and Others, are not binding on us, as the submissions advanced by him, before us, were not considered.

19. In the circumstances, the writ petition is allowed. The rule is made absolute in terms of prayers (A) and (B). There shall be no order as to costs. The operation of this order is stayed upto 14th May, 2010, in so far as it declares the first respondent''s seat to have become vacant. However, Respondent No. 1 shall not, during the operation of this stay, participate in the affairs or business of Respondent No. 3, the Village Panchayat, in any manner whatsoever.

