

(2011) 05 BOM CK 0023
In the Bombay High Court
Case No : Writ Petition No. 323 of 2010

Mr. Mohan Vithal Dabhale

APPELLANT

Vs

Mr. Santosh Vasant Morajkar and Others

RESPONDENT

Date of Decision : 03-05-2011

Acts Referred:

Companies Act, 1956 — Section 630

Constitution of India, 1950 — Article 226

Goa Village Panchayat Raj Act, 1994 — Section 10, 12, 12(1), 15, 15(1)

Citation : (2011) 4 ALLMR 559 : (2011) 3 BomCR 484 : (2011) 113 BOMLR 1979 : (2011) 5 MhLj 461

Hon'ble Judges : S.C. Dharmadhikari, J;F.M. Reism, J

Bench : Division Bench

Advocate : N. Sardessai, for the Appellant; D. Pangam, for Respondent No. 1, J.A. Lobo, for Respondent Nos. 2 and 7 and A.D. Salkar, Government Advocate for Respondent Nos. 3, 4 and 6, for the Respondent

Judgement

S.C. Dharmadhikari, J.—By this petition under Article 226 of the Constitution of India, the Petitioner seeks a declaration that Respondent No. 1 is disqualified as member of Village Panchayat Verla Canca, Bardez Taluka and that seat has therefore become vacant.

2. As a consequence of the above relief, it is prayed that Respondent Nos. 3 to 6 should hold election to fill up the vacant seat from ward No. 5 of the said Panchayat.

3. The case of the Petitioner is that he is residing in the said village and he is voter at the Panchayat election of the Village Panchayat, which is imp leaded as Respondent No. 2. Respondent No. 1 also resides in the village Verla-Canca and he is a member of Village Panchayat. The other Respondents are the Authorities in charge of implementation of the provisions of Goa Panchayat Raj Act, 1994. It is stated that Respondent No. 1 was elected from ward No. 5 in the election of the Panchayat in May, 2007. The Petitioner also contested the election.

Respondent No. 1 is elected as Panchayat member for a period of 5 years.

4. It is the case of the Petitioner that the first Respondent stands disqualified on account of his conduct in supporting his wife in obtaining a No Objection Certificate from the Village Panchayat. His wife Smt. Sweta Morajkar does not have any independent source of income. Respondent No. 1 and his wife are residing in house No. 289, Sonarvada, Verla Canca, Bardez Goa. Respondent No. 1 has pecuniary interest in her transaction in as much as he does not deal in his own name but in the name of his wife. On 27.12.2007 Smt. Sweta Morajkar made an application to the Panchayat and requested the Sarpanch/Secretary to issue No Objection Certificate(NOC) to start a business of hotel/restaurant in the name and style of "Sai Satwa" on plot bearing survey No. 12/22 situated at Verla Canca Bardez, Goa. It is further alleged that Smt. Sweta Morajkar is not the owner of this plot and has not submitted the requisite documents. It is alleged that on 28.12.2007 the second fortnightly meeting of the Village Panchayat of the Verla was held in the office of Village Panchayat. The agenda dated 20.12.2007 was taken up for discussion. As per the minutes of the meeting, which started at 10.30a.m, Shri Laxmikant Bicholkar was in the chair in the absence of Sarpanch. In this meeting agenda item No. 5(3) was taken up for discussion in which Respondent No. 1 participated. This subject was taken up with the permission of the chair. The subject was grant of NOC to the wife of Respondent No. 1 in pursuance of her application. The Panchayat decided to issue NOC to her. Relying upon the minutes, it is contended that the proceeding records that Shri Santosh Vasant Morajkar (Respondent No. 1) was present at the said meeting and he signed the proceeding sheet. It is alleged that though the proceedings wrongly record the name of secondary as Santsoh Bhaidkar, later on Secretary of the Panchayat has stated before the Director of Panchayat that it was a mistake and name of Santosh Bhaidkar is written instead of Santosh Morajkar (Respondent No. 1). It was certified that the Panchayat had no objection to Respondent No. 1's wife starting the business of Hotel/Restaurant in the name and style "Sai Satwa" in the premises. In such circumstances Respondent No. 1 being husband of Smt. Sweta Santosh Morajkar had pecuniary interest in the question concerning resolution No. 5(3). In paras 14 and 15 of the petition, this is what is alleged:

Para 14:

This is a conflict between interest of husband and duty of member of Village Panchayat in so far as subject matter of aforesaid resolution No. 5(3) is concerned. Since Respondent No. 1 has beneficial interest in business of his wife and since him being married to her under the system of communion of assets he is automatic shareholder in her properties. Therefore he is disqualified to act as member of Panchayat as he has unduly influenced the decision of Village Panchayat to issue NOC to his wife. Therefore in terms of Section 55(4) of the Goa Panchayat Raj Act, 1994 Respondent No. 1 should not have voted or taken part in the discussion thereupon in the said meeting.

Para 15:

By his conduct of remaining present and/or discussing and/or voting on the said resolution in the said meeting Respondent No. 1 has acted in contravention of Section 55(4) of the Goa Panchayat Raj Act, 1994.

5. On such allegation and relying on the judgments of this Court in Writ Petition No. 109/2009, Agnelo Lobo v. Sanajay Pednekar and Writ Petition No. 497/2009, The Akhada St. Estevam Village Development and Protection Samittee and Ors. v. Smt. Seema Rohidas Narvekar and Ors., it is submitted by the Petitioner that Respondent No. 1 stands disqualified and his seat from Village Panchayat is vacant. It is categorically alleged that the proceedings sheet shows that first Respondent has not abstained from the discussions and that he participated in them. In these circumstances, aforesaid declaration has been claimed. It is held by the Directorate of Panchayat that issue of disqualification of the member of Panchayat cannot be decided by him and that is how Petitioner has invoked writ jurisdiction of this Court. In para 23 of the petition it is alleged as follows:

Para 23:

The Petitioner submits that the Respondent No. 1 in the reply to the said petition has contended that the said petition is not maintainable and he had gone out of the meeting hall during that time item No. 5(3) was taken up and this fact is not been recorded by the Secretary and the said permission has been revoked on 15.7.2008. The Respondent No. 1 has further alleged that by resolution dated 15.7.2008 the NOC dated 22.2.2008 is revoked upon application of Mrs. Sweta Morajkar wife of Respondent No. 1 by resolution No. 8(2) and subsequently by resolution dated 17.10.2008 the resolution No. 5(3) dated 28.12.2007 is corrected. It is seen that these two resolutions that they are also in relation to the subject matter of wife of Respondent No. 1 and in these two resolutions also the Respondent No. 1 has participated. The contention of Respondent No. 1 that the NOC stands revoked and the resolution dated 28.12.2007 is corrected by subsequent resolutions does not in any manner help the Respondent No. 1 but it further shows that Respondent No. 1 has further participated in such resolution. In any case the revocation of NOC does not affect the first resolution and further the correction of the resolution does not affect the Petitioners case and such resolution could not have been taken since the Goa Panchayat Raj Act prescribed procedure for modification of the resolution which has not been followed. Therefore the Respondent No. 1 cannot take benefit of these subsequent resolutions and in any case these resolutions further strengthen the Petitioners case.

6. On being served with the copy of the writ petition the first Respondent filed an affidavit and stated that writ petition is not maintainable as he has not incurred any disqualification. It is alleged that Petitioner has personal enmity with Respondent No. 1. Earlier also Petitioner made an attempt to disqualify him through one Mr. Ashok Ladu Arlekar by filing petition before the Director of

Panchayat being Panchayat Petition No. DP/P/6/2008 but the same failed and this is a second attempt through the said Ashok Ladu Arlekar to disqualify him. In paras 8 and 9 of the affidavit in reply the Respondent No. 1 alleged as under:

Para 8:

With reference to paragraph 11 of the petition, I deny that I participated in any discussion, in the meeting held on 28.12.2007, when the application filed by my wife, Mrs. Sneha Morajkar was taken up for discussion.

I say that I was neither party, nor privy to the decision of the Panchayat to issue NOC to my wife. I say that I did not directly or indirectly influence the decision of the Panchayat, to grant NOC to my wife. I say that I abstained from participating in the discussion, and remained outside the premises, when the matter relating to the grant of application filed by my wife was taken up for consideration by Village Panchayat.

I say that though it is true, that I was present on the day i.e 28.12.2007, when the aforementioned fortnightly meeting of the Panchayat was held, I deny that copy of the proceeding sheet of the above referred meeting dated 28.12.2007 in any manner states or indicates, that participated in the discussion when the application made by my wife was taken up for consideration in the above fortnightly meeting held on 28.12.2007, though it is true, that the proceeding sheet wrongly records that Santosh Bhaidkar had seconded the proposal.

It is not true, that the name of Santosh Bhaidkar was written, instead of my name, as the Secondary in the respect of the said resolution.

I say that I did not participate in the discussion relating to the application made by wife. I did not endorse the same, either as Propose or Secondary.

Para 9:

I say that the then, Secretary of the Village Panchayat Mr. Kishor Pagi, has not properly recorded the minutes of the meeting held on 28.12.2007, in as much as, it has not been specifically recorded in the minutes that I had abstained myself from the discussion relating to the application filed by my wife for NOC, and had not participated in the decision of the Panchayat taken thereon.

Annexed here to and marked as Exhibit R-1/A coolly are the minutes of the concerned meeting, as written by Shri Kishor Pagi. I say that it is apparent from the said minutes that Shri Kishor Pagi has not written the minutes properly, but has written then haphazardly, and casually.

7. Thus, making allegations against the Secretary of Village Panchayat Mr. Kishor Pagi, Respondent No. 1 contended that petition should not be entertained and be dismissed. Bearing in mind the affidavit placed on record on behalf of the contesting parties and Respondent No. 7, this Court passed an order appointing an Advocate Shri R. G. Ramani as a Commissioner for recording evidence. The Commissioner has recorded the evidence and submitted his report to the Court.

Thereafter, the petition has been placed before us. In the light of the rival contentions we proceed to issue Rule. The contesting Respondents waive service. By consent of the parties we have taken up the petition for hearing and final disposal forthwith.

8. Mr. Sardesai learned Advocate appearing on behalf of the Petitioner has invited our attention to the NOC and even the certificate dated 7.1.2008 issued by Sarpanch of Village Panchayat of Verla Canca and submitted that the Petitioner's case stands proved. Inviting our attention to the minutes of the meeting, it is contended by Shri Sardesai that the mistake has been corrected at pages Nos. 35 and 36 of the petition/paper book which shows that allegations made against the Secretary of Panchayat are not substantiated by the Petitioner at all. Thus the Respondent No. 1 cannot take advantage of so called mistake. Our attention is also invited to the record which was forwarded by the Commissioner and it is submitted that Respondent No. 1 is falsely contending that he was absent at the meeting or that when the item was taken up for discussion he left the venue of the meeting. Our attention is invited to the deposition of the Petitioner and it is contended by Shri Sardesai that there is no cross examination on vital points. It is submitted that in the examination in chief of Secretary of Panchayat factual aspect has been clarified and it is proved that resolution No. 5(3) is recorded in the minutes. It is categorically stated by the Secretary that Respondent No. 1 was present at the meeting held on 28.12.2007 throughout and he participated in the proceedings. He has stated in the examination in chief that the application of Smt. Sweta Morajkar was taken up for discussion and resolution No. 5(3) was passed. Shri Sardesai, submitted that there is no cross examination on this aspect. In such circumstances and when in the evidence of Respondent No. 1 there is no statement that resolution incorrectly records the events and there is no attempt to seek any clarification, or correction, ingredients of Section 12(1) (d) read with Section 55(4) of the Goa Panchayat Raj Act stand satisfied. Further, Respondent No. 1 has not examined a vital witness, according to him, namely, Shri Laxmikant Bicholikar the presumption must be drawn from this non examination and that is if the said Bicholkar had been examined he would not have corroborated and supported the version of Respondent No. 1. In these circumstances, this Court should issue the necessary declaration. Mr. Sardesai has placed reliance on the decisions of this Court in Writ Petition No. 497/2009, The Akhada St. Estevam Village Development and Protection Samittee and Ors. v. Smt. Seema Rohidas Narvekar and Ors., Writ Petition No. 295/2010. Shri Jagdish Bhobe v. State of Goa and Ors. and Writ Petition No. 464/2008, Shri Lenocio Raicar v. Shri Martinho Rocha and Ors..

9. On the other hand Mr. D. Pangam, learned Advocate appearing for Respondent No. 1 submits that the provisions that are relied upon to seek disqualification of the Respondent No. 1 are penal in nature. They pertain to his disqualification and therefore must be strictly construed. Shri Pangam, submits that the averments in the petition are not that the Respondent No. 1 participated in the discussion but

the averment is regarding presence of Respondent No. 1 in the meeting held by the Panchayat on 28.12.2007 and at which several subjects were discussed. Respondent No. 1 took part in the meeting but that is different and distinct than taking part in the discussion on the item or question of grant of NOC to his wife. Mr. Pangam, invited our attention to para 9 of the examination in chief of the Petitioner and deposition of PW2. He submits that there is no proof of the Petitioner participating in the discussion on this question or item. In these circumstances no reliance can be placed on the minutes of the meeting and particularly when the witness namely the Secretary of the Village Panchayat has admitted that there are mistakes and errors in the same. That apart, the resolution does not state that Respondent No. 1 has taken part in the discussion. There is no positive evidence in this behalf. Hence, no inference can be drawn that the Respondent No. 1 participated in the discussion. In such circumstances when there is no clear case that the Respondent No. 1 was present at the meeting and in any event there is no clinching evidence that he took part in the discussion on the subject item/question and when no direct pecuniary interest of Respondent No. 1 is proved, then, it must be held that the Petitioner has not substantiated his allegations. The petition therefore be dismissed. More so, when the burden is on the Petitioner to prove all the allegations. First Respondent is handicapped because copy of the application of the wife for grant of NOC was not provided to him nor copy of the resolution was provided and his request to provide him with the same was ignored by Block Development Officer. Since the mistake in the minutes and proceedings has been admitted and that is clear from the deposition of PW2, then, all the more the petition be dismissed. Mr. Pangam, submitted that the decisions that are relied upon by Shri Sardesai are in no way applicable to the facts of the present case. Assuming that they lay down the principle that participation in the proceedings means participation in the discussion, then, to that extent they so hold that they should not be followed. For all these reasons, he submit that the petition be dismissed.

10. For properly appreciating the rival contentions a reference will have to be made to Section 12(1) and Section 55(4) of the Act. To the extent they are relevant, they are reproduced herein below:

Section 12(1) (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.

Section 55(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.

11. A perusal thereof would indicate that if a member votes or takes part in the discussion in contravention of provisions of Sub-Section 4 of Section 55 his seat shall be deemed to be or have become vacant.

12. The above provisions are made in the Goa Panchayat Raj Act. The Act is enacted to fulfill the constitutional objective relating to Panchayat Raj for greater participation of the people and more effective implementation of Rural development programmed. The definitions are u/s 2. Chapter II deals with Gramsabha and Constitution of Panchayat. Section 6 which in this chapter sets out the function of Gramsabha whereas Section 7 and Section 8 deal with Constitution of Panchayats and their incorporation. The qualification for membership is provided in Section 9 and disqualification is u/s 10. The decision on question as to disqualification is to be referred to the State Election Commission and thereafter Section 12 provide for vacation of seat by members. There, BDO has been given limited powers and that is to deal with a question covered by Clause (b) and (c) of Section 12(1). Learned Counsel appearing for the Petitioner is right in urging that there is no provision in the Act by which the question of vacation of seat by the member u/s 12(1) (d) can be dealt with and decided. This is not a ground on which election can be set aside by filing an election petition. Therefore, the matter must be decided by this Court. The provisions such as Section 12(1)(d) read with Section 55(4) are inserted with a view to avoid any conflict between public duty and private interest. In a decision reported in N. Satyanathan Vs. K. Subramanyan and Others, , the Hon''ble Supreme Court has held that Section 7 is intended to ensure that there is no occasion for conflict between public duty and private interest. The elected member has clear and free choice before him. If he is anxious to serve the community as a member he has to give up all his private gains.

13. In another decision reported in Gulam Yasin Khan Vs. Sahebrao Yeshwantrao Walaskar and Others, , the Hon''ble Supreme Court has observed thus:

Para 7:

The question which we have to consider is whether by virtue of his relationship with Khalildad Khan, the Appellant can be said to have any indirect share or interest in the employment of Khalildad Khan with the Municipal Committee. We are assuming for the purpose of dealing with this point that the contract to which clause (1) refers, includes employment, though unlike other similar statutes, the word "employment" is not specifically mentioned in the said clause. In order to incur disqualification, what the clause requires is "interest or share in any contract"; it may either be a share or an interest; and if it is an interest, the interest may be direct or indirect. But it is plain that the interest to which the clause refers, cannot mean mere sentimental or friendly interests; it must mean interest which is pecuniary, or material or of a similar nature. If the interest is of this latter category, it would suffice to incur disqualification even if it is indirect. But it is noticeable that the clause also requires that the person who incurs disqualification by such interest must "own such share or interest". It is not easy

to determine the scope of the limitation introduced by this last sub-clause. Mr Gauba for Respondent 1 urged that the clause "owning such share or interest" is tautologies when it refers to direct interest or share, and is meaningless when it refers to indirect share or interest. Prima facie, there is some force in this contention; but whatever may be the exact denotation of this clause, it does serve the purpose of limiting the character of the share or interest which incurs disqualification prescribed by the clause, and it would not be easy to ignore the existence of the last portion of the clause all together.

Para 8:

It is quite true that the purpose and the object of prescribing the several disqualifications enumerated in clauses (a) to (1) of Section 15 of the Act is to ensure the purity of the administration of municipal Committees, and in that sense, it may be permissible to hold that the different clauses enumerated in Section 15 should not receive an unduly narrow or restricted construction. But even if we were to adopt a liberal construction of Section 15(1), we cannot escape the conclusion that the interest or share has to be in the contract itself. When we are enquiring as to whether the Appellant is interested directly or indirectly in the employment of his son we cannot overlook the fact that the enquiry is not as to whether the Appellant is interested in the son, but the enquiry is whether the Appellant is interested in the employment of the son. The distinction between the two enquiries may appear to be subtle, but, nevertheless, for the purpose of construing the clause, it is very relevant. Considered from this point of view, on the facts proved in this case, we find it difficult to hold that by mere relationship with his son, the Appellant can be said to be either directly or indirectly interested in his employment.

14. Therefore, we must decide this matter by applying the aforesaid principles and bearing in mind the purpose of the provisions.

15. In the Writ Petition, the Petitioner has made allegations which we have reproduced above. After this Court passed an order appointing the commissioner to record the evidence, the Petitioner filed his affidavit in evidence and stated that in the meeting held on 28.12.2007 the application of the wife of Respondent No. 1 was taken up at item No. 5(3) for discussion in which Respondent No. 1 participated and it was decided to issue NOC to her. He relies upon the copy of the proceeding sheet and the signature of Respondent No. 1 to show that he was present in the meeting. His signature is also appearing in the proceedings sheet, he therefore submitted that there is pecuniary interest in the question concerning resolution No. 5(3) of husband and wife for mutual earning of each other and particularly proposed hotel/ restaurant business. There is conflict between interest of husband and duty of a member of village Panchayat. The first Respondent has beneficial interest in the business of his wife and since he being married to her under the system of communion of assets, he is automatic shareholder in her property. His conduct of remaining present and discussing and voting on the resolution is in contravention of Section 55(4). In paras 17 and 18

of his affidavit he states thus:

Para 17:

I state that the minutes of the resolution No. 5(3) dated 28.12.2007 does not disclose that the applicant Mrs. Sweta Morajkar is wife of Respondent No. 1 and that he had abstained from the meeting and that he had disclosed that he had pecuniary interest in the Resolution which was being passed. I say that the Respondent No. 1 has also participated in the resolution dated 15.1.2008 wherein earlier resolution was confirmed. Similarly the Respondent No. 1 has participated in the resolution dated 17.10.2008 wherein it is alleged that the said NOC was decided to be revoked. state that the copy of said resolution is already on record of the writ petition which I rely upon and copy is annexed.

Para 18:

I submit that the acts of participating in discussion in the meeting dated 28.12.2007 in the Resolution bearing No. 5(3) and subsequent resolutions and voting in favor of such resolution has rendered the Respondent No. 1 disqualified u/s 12(1) (d) of the Goa Panchayat Raj Act, 1994.

16. In the cross examination of the Petitioner certain general questions were asked and thereafter he states about the procedure of recording the proceedings, writing minutes and confirmation. He also states that he had read the application made by the wife of Respondent No. 1 for NOC for running a hotel and then he states that he has only seen the NOC. The Petitioner did not attend the meeting of the Panchayat and therefore such and other suggestions to him are really not relevant. Having perused this examination in chief and his cross examination we are of the opinion that his statements as reproduced above have not been shaken or falsified in any manner.

17. Then we have the deposition of Shri Vasudev Laxman Korgaonkar who is member of the said Panchayat (PW2). He stated that he was present in the meeting of Village Panchayat held on 28.12.2007. He stated that the Respondent No. 1 participated in the meeting and participated in resolution No. 5(3) which was in respect of subject of grant of NOC in the name of wife of Respondent No. 1 to start a business. He stated that resolution was passed by the Panchayat to grant NOC. This witness was cross examined at length about the general procedure of the Panchayat meeting so also certain suggestions were given to him but nowhere from his deposition it is shown that the meeting of the Panchayat was not held or that in the said meeting Respondent No. 1 was not present or that when the question was taken up for discussion and decision he left the meeting hall or that there was no participation of Respondent No. 1.

18. Third witness who was examined is Digambar Uttam Kalangutkar who is also member of the said Panchayat and who confirms the meeting and the discussions therein. He has also confirmed that the said subject was discussed at the meeting and that he stated that it is not true to suggest that Respondent No. 1

left the meeting when subject resolution No. 5(3) was taken up for discussion. He states that entry about absence of the member is made against his name at the end of the meeting. Certain questions were posed to him about correctness of minutes but he confirms the material aspects and contents of the same. He confirms the statements of the Petitioner. Our attention was invited to the deposition of Kishor Pagi who is Secretary of Village Panchayat. In his examination in chief he states that Respondent No. 1 was present during the entire meeting held on 28.12.2007 and he participated in the proceeding. He confirms that the application of wife of Respondent No. 1 was taken up for discussion in this very meeting and resolution No. 5(3) was passed. There were certain suggestions given to him about the mistake committed in the recording of minutes and further that he has some enmity but in the cross examination also he confirms that all the members had participated in the discussion. He also states that Respondent No. 1 did not leave the meeting hall when the subject of application of the wife of Respondent No. 1 for grant of NOC came up for discussion. He admits that there are certain mistakes pertaining to some entries and there are typographical errors. However despite certain suggestions to him regarding his integrity he stood by his statements in the examination in chief. All documents including the resolution are admitted in evidence and exhibited accordingly.

19. As against this version of the Petitioner, the first Respondent entered the witness box, made a categorical statement in his examination in chief that he did not participate when the application of his wife was taken up for discussion. He disputed the minutes to the extent as to who initiated the discussion on subject resolution No. 5(3) and who was the propose and the secondary. He also stated that before the discussion could begin he left the meeting. Presiding Officer Laxmikant Bicholkar recorded the said fact on the application of his wife. It is his specific case that in his absence discussion took place and decision to grant NOC to his wife was taken. Thereafter he makes several allegations against the Secretary of Village Panchayat. In his cross examination the Respondent No. 1 admits the resolution passed in the meeting of 28.12.2007. He states that the resolution No. 5(3) was passed and it was resolved to issue NOC to his wife to start the business of hotel. He states that resolution No. 5(3) was passed in the very meeting held on 28.12.2007 and this decision/resolution was confirmed in the next meeting held on 15.1.2008. He denies other suggestions but admits that he and his wife are residing in the same house and that she applied to the Panchayat for grant of NOC. He states that Presiding Officer Bicholkar recorded on the application of his wife that the discussion and decision was taken up in his absence but when his attention was invited to the affidavit to the reply to the Writ Petition and about the omission to state any such thing he admits that this stand was taken by him in his affidavit in reply dated 28.7.2010 filed in this Writ Petition but he states that it is by oversight that it does not appear therein. His attention was invited to his affidavit in lieu of examination in chief and the contents of the affidavit sworn by Laxmikant Bicholkar. However, the said

Bicholkar is not examined by him as a witness. The rest of the statements are not very much relevant.

20. In the light of the admissions in the cross examination and bearing in mind the contents of the admitted documents it is more than clear that the basic facts are not in dispute. Firstly, that the application was made by the wife of the Respondent No. 1. Secondly, Respondent No. 1 and his wife are residing together in the same house. Thirdly, application was made for grant of NOC to start a hotel business. Fourthly, that application was taken up for discussion and decision at a meeting of a Panchayat held on 28.12.2007. Fifthly, Respondent No. 1 was present at that meeting. The only question that was disputed was whether the ingredients of Section 55(4) are satisfied in the light of the statements made in the Writ Petition and the evidence on record.

21. Mr. Pangam, learned Counsel appearing for the Respondent No. 1 submitted that the provisions contemplate taking part in the discussion of any question coming up for consideration of a meeting of a Panchayat and the evidence that is led is of participation in the meeting. In other words, first argument is participating in the proceeding will not amount to taking part in discussion of the specific question in which Respondent No. 1 allegedly had pecuniary interest, therefore, he is not disqualified and the petition be dismissed.

22. It is not possible to accept this contention of shri Pangam and for obvious reasons. Evidence on record unmistakably shows that the Respondent No. 1 took part in the discussion, on the question in respect of which resolution No. 5(3) was passed. We have noted the factual undisputed position. It is clear that the first Respondent was present during the entire meeting and he participated in the proceedings. It was first Respondent case that he left the meeting hall when the question of grant of NOC to his wife was being discussed. Thus, his stand is that he did not take any part in the discussion. Once this is the stand taken by him, then, Mr. Pangam, cannot argue to the contrary. Accepting such an argument would be ignoring the overwhelming evidence on record and allowing Respondent No. 1 to change his stand frequently. The cross examination of the Secretary of the Village Panchayat by Respondent No. 1 reveals that in answer to a specific question on this point, the Secretary replied that all the members present participated in the said discussion. Thus, it is too late in the day to argue now that the Respondent No. 1 does not incur any disqualification.

23. On the suggestion of first Respondent, the Secretary of the Village Panchayat replied that it is not true to suggest that during the meeting of 28.12.2007 when the subject of the application of wife of Respondent No. 1 came up for discussion, Respondent No. 1 left the meeting.

24. In this behalf, the version of the first Respondent in his affidavit in evidence is that he had not participated in the discussion in the meeting held on 28.12.2007. Para 9 of his affidavit in evidence very clearly states that his stand is as aforesaid. However, in his cross examination the first Respondent could not

explain a crucial omission. In the cross examination, the first Respondent was asked about the omission in the affidavit in reply filed in writ petition and the statement made in para 6 of his affidavit in evidence. He could not explain as to why there is a dichotomy and contradiction in his version. This is sufficient to hold that the first Respondent had taken part in the discussion on the subject/question of grant of NOC to his wife and therefore the ingredients of Section 55(4) are satisfied. It is not Mr. Pangam's argument that the first Respondent had no pecuniary interest in the question pertaining to grant of NOC to his wife to start business of a hotel/restaurant. Therefore, in this question, Respondent No. 1 had a direct pecuniary interest. Thus, he stands disqualified. A faint attempt is then made by Mr. Pangam, to suggest that the Division Bench orders and Judgments relied upon by the Petitioner do not take note of the distinction between "taking part in the proceedings" and "taking part in the discussion". Therefore, to the extent that they hold that taking part in the proceeding means taking part in the discussion, they do not lay down the correct law.

25. It is not possible to accept this argument for obvious reason. Mr. Pangam argues that this is a provision for disqualification and it should be strictly construed as it is penal in nature, but the Hon"ble Supreme Court hold that even such a provision can be interpreted consistent with the object and purpose for which the same is enacted. In this context, reference can be made to the judgment of the Hon"ble Supreme Court in the case of P. Prabhakaran Vs. P. Jayarajan, . In this context, this is what the Hon"ble Supreme Court has held:

Para55:

Shri K.K. Venugopal, learned Senior Counsel appearing for the Respondent in one of the appeals, submitted that Section 8 of RPA is a penal provision and, therefore, should be construed strictly. We find it difficult to countenance the submission. Contesting an election is a statutory right and qualifications and disqualifications for holding the office can be statutorily prescribed. A provision for disqualification cannot be termed a penal provision and certainly cannot be equated with a penal provision contained in a criminal law. If any authority is needed for the proposition the same is to be found in Lalita Jalan and Another Vs. Bombay Gas Co. Ltd. and Others, , which has held Section 630 of the Companies Act, 1956 not to be a penal provision. The Court has gone on to say "the principle that a statute enacting an offence or imposing a penalty is to be strictly construed is not of universal application which must necessarily be observed in every case.

Para 59:

In Shibu Soren Vs. Dayanand Sahay and Others, , a three-Judge Bench of this Court was seized of the question of examining a disqualification on account of the person at that time holding an office of profit. The Court held that such a provision is required to be interpreted in a realistic manner having regard to the facts and circumstances of each case and the relevant statutory provisions. While

"a strict and narrow construction" may not be adopted which may have the effect of "shutting off many prominent and other eligible persons to contest the elections" but at the same time "in dealing with a statutory provision which imposes a disqualification on a citizen it would be unreasonable to take merely a broad and general view and ignore the essential points". A balance has to be struck between strict construction and What is at stake is the right to contest an election and hold office. "A practical view, not pedantic basket of tests" must, therefore, guide courts to arrive at an appropriate conclusion. The disqualification provision must have a substantial and reasonable nexus with the object sought to be achieved and the provision should be interpreted with the flavor of reality bearing in mind the object for enactment.

26. Therefore, undue emphasis on the distinction as made by Shri Pangam, may frustrate and defeat the object sought to be achieved.

27. In our view the judgment rendered by the Division Benches of this Court in Writ Petition No. 497/2009 and Writ Petition No. 295/2010(supra) would apply to the facts of the present case.

28. In Writ Petition No. 497/2009 the sitting member had pecuniary interest in the subject matter and when the complaint was discussed the member had participated in the discussion and proposed to reject the same. Some what identical arguments were canvassed, but Division Bench noted that participation in the discussion would amount to discussing the issue and therefore member stood disqualified there. The Division Bench held that there is no scope for unduly narrow and restricted construction because the provisions ensure purity of administration of local bodies. Similarly in the case of Jagdish Bhobe, in Writ Petition No. 295/2010, the minutes of the meeting showed that fourth Respondent to the petition participated in the meeting and voted on the issue. Therefore, relying on the earlier view in Akhada St. Estevam Village case, the Division Bench held that the said member stood disqualified.

29. We do not find that the view taken by the Division Benches is in any way erroneous and does not take note of the distinction pointed out by Shri Pangam. Once there is evidence to indicate that there is participation in the discussion when the question was taken up, then, to what extent and what degree the participation is, cannot be of much relevance. If all the conditions stipulated by the subject Sub-section are satisfied, namely, about pecuniary interest of the member, then, he must incur the disqualification.

30. The last attempt by Shri Pangam, was to urge that similar view was taken in Writ Petition No. 464/2008 by a Division Bench of this Court in its judgment delivered on 13.4.2010 and an Appeal against the same is pending before the Hon"ble Supreme Court in which some interim order has been passed. That also need not detain us. Merely because an appeal is pending does not mean that the judgment is quashed and set aside. Therefore, the view that we have taken, finds support even in this Judgment.

31. As a result of above discussion, the Writ Petition succeeds. Rule is made absolute in terms of prayer Clause 33(i) and (iii). In the circumstances, there will be no order as to costs.

At this stage, Mr. Pangam appearing for Respondent No. 1 requests for stay of this order. The request is opposed by Mr. Kamat appearing on behalf of the Petitioner. In the light of the fact that the Petitioner has been elected as a Member of the Panchayat in the elections held in the year 2007 and has continued till date, the interest of justice would be served if the operation of this order is stayed for a period of four weeks from today.