

(2009) 09 BOM CK 0100
In the Bombay High Court
Case No : Writ Petition No. 306 of 2008

Shri Anthony John Menino Rodrigues	APPELLANT
Vs	
Shri Gregory Bruno Fernandes and The Administrative Tribunal of Goa	RESPONDENT

Date of Decision : 07-09-2009

Acts Referred:

Goa Village Panchayat Raj Act, 1994 — Section 10, 16, 20(1)

Citation : (2010) 4 BomCR 426 : (2010) 1 MhLj 959

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : S.D. Lotlikar, for the Appellant; V.P. Thali, for the Respondent

Judgement

A.H. Joshi, J.—The calendar of election was as follows:

- i) Last date and time for On 11.4.2007, from 11.00 hrs receiving the nomination to 14.00 hrs. papers.
- ii) Date and time for scrutiny On 12.4.2007, from 11.00 hrs of the nomination papers. till 18.00 hrs and on 13.4.2007, from 11.00 hrs till scrutiny is over.
- iii) Date and time of withdrawal On 14.4.2007 from 10.00 of nomination papers. Hrs to 14.00 hrs.
- iv) Date and time of Poll On 5.5.2007, from 08.00 hrs till 17.00 hrs.
- v) Date and time of counting On 6.5.2007.

2. The Petitioner, the respondent No. 1, Smt. Belvy Auxilo Noronha, Shri Filastro Teodorio Cardozo and Shri Teodomiro Paul Mendonca were the candidates in the fray for the seat of member of Panchayat of Village Varca for ward No. III.

3. Nomination of the respondent No. 1 was orally objected by the petitioner.

The objection can be described as follows:

Candidate namely Gregory Bruno Fernandes is in arrears of dues payable to the Panchayat towards contract of collection of market fees etc. since year 2000 and is therefore a defaulter. Due to this default he is disqualified u/s 20(1)(c) of the Goa Panchayat Raj Act, 1994 as on the date of nomination.

4. The Returning Officer gave hearing to the parties. The respondent No. 1 defended against the objection urging as follows:

(a) He had requested the Administrator by letter dated 4.4.2007 to receive from him a sum of Rs. 35,900/- which had remained unpaid due to failure in recovery.

(b) The Block Development Officer was authority to decide the dispute as regards the payment if any liable to be made under agreement entered between Panchayat and respondent No. 1 herein.

(c) The Block Development Officer, Salcete, Margao Goa, issued a memorandum dated 10.4.2007 directing that amount of Rs. 45,390/- as dues be collected from the contractor, and Panchayat should adopt a resolution in this behalf.

(d) That on 12.4.2007 respondent No. 1 herein tendered a letter and Demand Draft for Rs. 45,500/- drawn from a Nationalized Bank.

(e) This letter and Demand Draft were inwarded and acknowledged in the office of Village Panchayat.

(f) Therefore, on the date of scrutiny there was no amount due and recoverable by the Panchayat from the candidate ? contractor ? respondent No. 1.

5. The Returning Officer after hearing the parties, accepted the objection, and rejected the nomination paper of the respondent No. 6.

6. The finding recorded by Returning Officer is based on submissions which are accepted by the Returning Officer which is seen recorded in his order are as follows:

At the time of scrutiny of nomination papers one Shri Anthony Rodrigues through his Counsel Shri Vinoj Daniel raised an objection in terms of Section 10(d) of the Goa Panchayat Raj Act 1994. The objectors submitted that the candidate is a defaulter and is due to pay arrears to the Village Panchayat of Varca since the year 1999-2000.

The objector also adduced a certificate issued by the Administrator bearing No. VP/VAR/2007-08/43 dated 13.4.2007 which states that the candidate has to pay dues to the Panchayat for the market fees collection/sopo for the year 1999-2000 which has not been paid till date.

The objectioner also placed on record a letter bearing No. VP/VAR/2007-08/42 dated 13.4.2007 which letter has been addressed to the objectioner by the V.P. Secretary under the Right to Information Act, 2005.

The said letter under Right to Information Act, 2005 highlights the fact that the

candidate has not paid the dues as on 13.4.2007 as the meeting to deliberate on this aspects is fixed on 15.4.2007.

Quoted from judgment dated 13.04.2007 at page 43 of paper book, sub paragraphs are made for convenience)

7. Returning Officer recorded reasons as follows:

Assuming without admitting that before the date of scrutiny that is on 13.4.2007, than how come the V.P. Of Varca still does not acknowledge the fact that the candidate has cleared all the dues. Speculation therefore arise that what the candidate has paid vide Demand Draft on 12.4.2007 ay not be the end and there may exist arrears more than that....

After these acts and facts which have been brought to the notice of this office clearly indicate that as on the date of filing of the nomination the candidate was in arrears and hence he squarely attracts Section 10(d) of the Goa Panchayat Raj Act, 1994.

(Quoted from judgment dated 13.04.2007 at pages 49 and 51 of paper book)

8. In the result, the respondent No. 1 herein was excluded from the process of election.

9. In the election petitioner herein was returned, the respondent No. 1 then filed election dispute u/s 16 read with Section 20(1)(c) of the Goa Panchayat Raj Act, 1994 on the ground of wrongful rejection of his nomination.

10. The Tribunal heard the case on summoning the parties and by calling for the records.

11. The Tribunal has passed judgment and order dated 16.5.2008 upholding the challenge and setting aside declaration in favour of the returned candidate upholding that dispute ? present respondent No. 1's nomination was wrongfully rejected.

12. The present petitioner is challenging the order passed by Administrative Tribunal.

13. This Court heard Advocates appearing and perused the records annexed to the petition.

14. The grounds which are urged before this Court can be summarized as follows:

(a) Last installment of money payable by the respondent was payable to the panchayat by 5th December, 1999. The Respondent No. 1 was already in arrears for more than 3 months before the date of the scrutiny of the nomination i.e. on 13.4.2007 and hence he was disqualified u/s 10(d) of the Act had to operate in continuity.

(b) The certificate of non payment dated 13.4.2007 Annexure ? A at page 21 was

on record before the Tribunal which is not properly considered by the Tribunal.

(c) The respondent No. 1 has not produced a no dues certificate, and therefore, he has not proved that there were no arrears due and payable by the candidate to the Panchayat.

(d) Production of such certificate became necessary in the background that admittedly he was in arrears in immediate past.

(e) The Trial Court failed to consider that the Panchayat alone was empowered to decide about the question of fact as to arrears and the respondent No. 1 could be absolved from liabilities only upon the issue of the "No Dues Certificate" by the Panchayat.

(f) The Tribunal has failed to consider that as per the information obtained from the secretary of the Village Panchayat of Varca dated 13.4.2007, a special meeting was to be conveyed on 15.4.2007 to decide on the question of the recovery of the dues of the Respondent No. 1. Therefore, there was no obligation on the panchayat to accept the amount tendered by the Respondent No. 1 in full satisfaction.

(g) The impugned order is contrary to the ratio laid down by this Hon'ble Court in the matter of Mafaldo Fernandes v. Kushali Kalekar reported in 1996 (2) GLT 46 and Smt. Wilma Pacheco v. the President reported in 2000 (1) GLT 450 in as much as the Respondent No. 1 was in arrears for a period more than 3 months on the date of scrutiny and hence disqualified u/s 10(d) of the Goa Panchayat Raj Act, 1994.

15. The question or dispute as to disqualification on account of failure to pay the arrears is essentially a question of fact, and the only jurisdictional fact. This Court has therefore adverted to the facts in order to properly appreciate the question involved. These facts are summarized as below:

(a) The respondent No. 1 herein was awarded a contract upon executing an agreement towards collection of fees etc. recoverable by Village Panchayat of Varca.

(b) The terms of contract between Panchayat and respondent No. 1 are summarized as follows:

(i) The respondent No. 1 was entitled to collect the fees as per the schedule in the year 1999-2000 ending by 31st March, 2000.

(ii) The amount of Rs. 35,900/- was the contract amount and which was liable to be paid in four equal installments of Rs. 8975/- payable on 5th July to 5th December.

(c) The respondent No. 1 had failed to make the payment.

(d) On the eve of election, as the respondent No. 1 wanted to be a candidate, he had offered to pay the arrears of Rs. 35,000/-, by writing the letter dated

4.4.2007

(e) It has not been brought on record by the petitioner that either before 04.04.2007 or any time during the pendency of the election dispute before the Administrative Tribunal, the Panchayat had issued any notice of demand or for recovery of amount and arrears.

(f) The petitioner did not make any efforts to seek production of any documents by summons or by taking recourse to Right to Information to bring such notices etc. on record.

(g) It is a common ground that the Block Development Officer has passed order specifying the amount to be recovered.

(h) The propriety of the order passed by the Block Development Officer is doubted or disputed, however his authority and jurisdiction which is not challenged nor such challenge is demonstrated to be valid by indicating any provisions of law.

(i) Tender and delivery of letter and the amount of Rs. 45,500/- by Demand Draft dated 12.4.2007 drawn on Corporation Bank, a Nationalized Bank is not disputed.

(j) It has not been brought on record if Village Panchayat disagrees or has disagreed with the figure of amount of Rs. 45,500/- tendered by respondent to be correct and proper.

(k) The certificate of arrears dated 13.4.2007 does not disclose advertence to tendering of money by demand draft in the Panchayat on 12.4.2007.

16. In the aforesaid factual premises, the challenge raised in the writ petition is sought to be based solely on facts namely:

(a) The decision as to whether and what amount was recoverable from the respondent was not decided by the Panchayat till the date of nominations, since the issue was due to come before the Panchayat in its meeting on 15.04.2007;

(b) In view of the reported judgments of this Court namely:

(i) Shri Mafaldo Fernandes v. Shri Kushali S. Kalekar and Ors. and

(ii) Smt. Wilma Pacheco v. The President and Anr. (supra); once it is admitted that the amount was not paid within three months, the respondent herein is disqualified, notwithstanding his payment or tender on the date of scrutiny too.

17. According to the petitioner, admittedly such defaulter was incurred, irrespective as to whether and whatever payment was made did not fully satisfy the arrears and therefore the respondent No. 1 herein was disqualified.

18. This Court has perused the citations relied upon.

19. The case of Mafaldo Fernandes (supra) was admittedly of incurring a disqualification during the tenure of the member in the office. The candidate

concerned had accepted liability and admitted that the intimation demanding the arrears was served on him, yet the amount due was not paid, and this Court held that in the light of admitted liability, and default in payment did constitute a default.

20. In a second judgment relied upon by petitioner, namely Smt. Wilma Pacheco, this Court has relied upon earlier judgment in case of Mafaldo Fernandes. On facts of the case the returned candidate was in arrears, though he had raised dispute relating to the dues. This Court found on facts in Wilma's case that on 26.12.1996 i.e. on the date of scrutiny of nomination said petitioner was in arrears of Rs. 2,41,125/-.

21. This Court is of the view that in the present case, the amount payable under the agreement was undoubtedly overdue. It was also due on the date of filing of the nomination. In view of adjudication by BDO, and payment of amount adjudicated by BDO, was made by the respondent on 12.4.2007, and there were no due on the date of scrutiny.

22. On fact it has to be noted that the objection raised by the petitioner was oral. It is not petitioner's case that the respondent No. 1 was served notice, intimation etc. by the Village Panchayat, and that the arrears were to a particular tune, so specified in the demand notice, and that those are not paid or what is tendered is less than what was demanded.

23. The documentary evidence was brought by the respondent No. 1 before the Returning Officer shows that the amount due was adjudicated by the BDO and that he had delivered the Demand Draft drawn on a Nationalized Bank towards total dues, one day before the date fixed for the scrutiny of nominations. Had a tendered being by cheque or alleged to have been offered by cash, such tender would have certainly come unbelievable which is not a case on facts.

24. It would be useful to once advert to the language used in Section 10 of Goa Village Panchayats Act, which is quoted as follows:

10. Disqualification for membership ? A person shall be disqualified for being chosen as, and for being, a member of the Panchayat if,

(a) he is so disqualified by or under any law for the time being in force for the purposes of the elections to the State Legislature:

Provided that no person shall be disqualified on the ground that he is less than twenty five years, if he has attained the age of twenty-one years;

(b) he has been dismissed from service of the Government or any local authority;

(c) he holds any office of profit under any local or other authorities subject to the control of the Central Government, the State Government or the Government of any other States, other than such offices as are declared by rules made under this Act not to disqualify the holder;

(d) he is in arrears for such period as may be prescribed of any tax, fee or other sum due to the Panchayat.

25. It is clear from Section 10 quoted above, that a person shall be disqualified "for being chosen" thereby mean that candidature cannot be set up if he suffers the disqualification listed in Section 10. Clause (d) suggest that the candidate "is in arrears", it operates in present tense and not in past.

26. Relying on case of Malfaldo Fernandes (supra), the disqualification sought to be inferred i.e. failure to pay the arrears and remain in default for three months cannot be read as a disqualification in perpetuity or whether the candidate is in arrears on the date of scrutiny will have to be seen.

27. In these premises, the petitioner's contention that the disqualification subsisted on the date of scrutiny it is a submission without factual basis. In absence of any record being summoned or otherwise brought before the Tribunal from the Panchayat, to suggest that some other arrears were unpaid is argumentative than a proved fact. The contention that arrears still exist is a submission in void, and is rightly rejected by the Tribunal.

28. On the very face, it sounds unethical to allow such a rank defaulter, who has failed to pay for long 8 years, and has paid only on the eve of election. As it is well known, the law relating to elections is highly technical. Provisions relating to disqualification have to be read strictly and rule of liberal construction has no application. When law disqualifies a person to be chosen to be a candidate saying "is in arrears", said present tense cannot be construed to include past tense.

29. If Legislature wants a particular mischief to be remedied, it has to come from legislature as a piece of legislation, and cannot be enforced by judicial legislation or interpretation. However, unethical it is seen, this cannot be enforced unless incorporated in the law.

30. In the result, petition does not merit any interference. Rule is discharged.

31. At this stage, learned Advocate for the petitioner has prayed for continuation of the interim relief by way of stay of order of Tribunal, in view that during pendency of petition, the petitioner was holding the office.

32. Heard learned Advocates on this point. In view of the fact that the petitioner has been unseated on account of wrongful rejection of nominations of other candidates and not due to any ground of such as corrupt practice, it would not matter if the order unseating the petitioner is stayed for some duration, even otherwise by election would not be very quickly held. During this period, the petitioner would not be entitled to draw sitting fee.

33. In this background, the order of the Tribunal shall be stayed for further period of three months from today with conditions as indicated in foregoing para.

34. In the circumstances, parties are directed to bear own costs.