

(2007) 03 BOM CK 0041
In the Bombay High Court
Case No : Writ Petition No. 539 of 2006

Shri Mario Cotta Pereira

APPELLANT

Vs

Gorakshawadi Shantinagar Gram Vikas Samittee and The
Administrative Tribunal of Goa

RESPONDENT

Date of Decision : 08-03-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2007) 5 ALLMR 623 : (2008) 3 BomCR 885

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : S.D. Lotlikar and Ryan Menezes, for the Appellant; L. Dharwadkar, Additional Government Advocate, for the Respondent

Judgement

S.A. Bobde, J.—By this petition under Articles 226 and 227 of the Constitution of India, the petitioner has challenged the Judgment of the Administrative Tribunal, Goa dated 29.9.2006 holding that the Judgment of the Deputy Collector and S.D.O. South Goa, Margao one Shri Dipak S. Desai, is liable to be set aside on the ground of bias.

2. The matter arises this way. In a writ petition in the nature of a public interest litigation, there was a challenge by the Gorakshawadi Shantinagar Gram Vikas Samittee, the respondent No. 1 to the order of conversion of agricultural land bearing Survey Nos. 42/1 to 42/63, admeasuring 30,000 sq. metres, situated at Aquem Baixo Village of Salcete Taluka owned by the petitioner herein i.e. Mario Cotta Pereira. According to the petitioners, this conversion was part of a large scale collusion being practised in such conversions where the tenants collusively accept the position that they are not tenants and thus allow the lands to be converted to non-agricultural purposes. Since the order of conversion dated 28th June, 2002 impugned in that petition bearing Writ Petition No. 71/2000 without hearing the respondent No. 1 herein who had filed that petition, this Court passed an order by consent of the parties. The order was that the order of the

Deputy Collector dated 28.6.02 in respect of Survey Nos. 42/1 to 42/63 was set aside and the Deputy Collector was directed to decide whether there was any tenant on the said land on the date on which the Goa Land Use (Regulation) Act, 1991 came into force. The Deputy Collector was directed to decide the aforesaid issue, after affording opportunity to the petitioners No. 2 and 3 therein, who were presumably the members of the respondent. It may be noted that in that Writ Petition No. 71/2000, Shri Dipak S. Desai, Deputy Collector, in question, had filed an affidavit in support of the decision of his predecessor dated 28.6.02. The decision or order that was set aside in Writ Petition No. 71/2000 was passed by Shri Sanjit Rodrigues, Dy. Collector and S.D.O. Margao, Goa.

3. After remand, the question of conversion was heard by the Deputy Collector Shri Dipak S. Desai. The respondent No. 1 was heard. The members of the respondent one Vinayak Naik and Shrikant Audi gave evidence which was eventually disbelieved. The Deputy Collector came to the conclusion that the land, in question, was not cultivated by any tenant at any time and, therefore, was not under any tenancy when the Goa Land Use (Regulation) Act, 1991 came into force. He, thus, permitted the conversion by the order dated 27th June, 2004.

4. It must be noted that through out the hearing or any time before that, the respondent who had consented to the matter being decided by the Deputy Collector, did not take any objection to the hearing of the matter by Shri Dipak S. Desai. In fact, they consented to the order before this Court that the matter be decided by the Dy. Collector knowing that Dipak S. Desai was holding that office. He had filed an affidavit before this Court.

5. Not satisfied by the decision, the respondent through its members, described as conveners, preferred an appeal against the Judgment and Order dated 27.8.2004 passed by the Dy. Collector and S.D.O. Margao Shri Dipak S. Desai, before the Administrative Tribunal Goa, at Panaji. In the appeal, the respondent, inter alia, questioned the Judgment of the Deputy Collector on the ground that he was predisposed to decide the matter against the respondent on the ground that he was party respondent to Writ Petition No. 71/2000 and he had filed an affidavit supporting the impugned decision of the then Deputy Collector.

6. The Tribunal heard the matter and agreed with the respondent that Shri Dipak S. Desai, Deputy Collector who had rendered the decision dated 27.8.04 after remand of the matter, was biased primarily because the Office of Deputy Collector, which he held, was a party to Writ Petition No. 71/2000 and that he had filed an affidavit supporting the decision dated 28th June, 2002 in respect of Survey Nos. 42/1 to 42/63 and that he had inspected the suit property. The Tribunal, therefore, did not go into the merits of the decision at all. However, the Tribunal made some passing observations regarding the manner in which Shri Dipak Desai had decided the matter in support of its view that he was biased. It is that decision of the Tribunal which is impugned in this writ petition.

7. Mr. Lotlikar, learned Counsel for the petitioner submitted that the Judgment of the Tribunal is not sustainable in law. According to the learned Counsel, in the present case, the respondent must be taken to have waived its objection to the hearing of the matter by Shri Dipak S. Desai, Dy. Collector and S.D.O., Margao since they knew well before hand all the facts which have eventually resulted in the conclusion that he was biased. They did not, at any stage, before or after the remand, raised any objection to the matter being heard by said Shri Dipak S. Desai. It must, therefore, be inferred that they took a chance and it is only after they found that the said Shri Dipak Desai had decided the matter against them, that they challenged the decision on the ground of bias.

8. Having considered the matter, it seems that there is merit in the petition. First of all, the respondents were a party to Writ Petition No. 71/2000. In that petition, the impugned order was the order dated 28.6.02, by which the Deputy Collector had permitted conversion of the petitioner's land for nonagricultural purposes. The Deputy Collector who had permitted the conversion was one Shri Sanjit Rodrigues and not Shri Dipak Desai. When the writ petition was filed, it seems Shri Dipak Desai was posted as Deputy Collector and was, therefore, obliged to file an affidavit supporting the order of Shri Sanjit Rodrigues. Indeed, any officer who holds the post when actions pertaining to his office are challenged, is bound to do so. At the hearing of the case, the respondent specifically consented to a remand and that the matter be heard again by the Deputy Collector. They were clearly aware by whom the matter would be heard since the affidavit was filed by said Shri Dipak Desai.

9. When the matter went before the Deputy Collector i.e. Shri Dipak S. Desai for hearing, the respondent did not raise any objection. The entire period of evidence and hearing went on without raising any such objection. This objection was raised for the first time after they failed to prevent the conversion of the agricultural land.

10. These are the circumstances which clearly attract the principal laid down by the Supreme Court in *Manak Lal Vs. Dr. Prem Chand*, wherein the Supreme Court has observed thus:

(8) The next question which falls to be considered is whether it was open to the appellant to take this objection for the first time before the High Court. In other words, has he or has he not waived his objection to the presence of Shri Chhangani in the tribunal? Shri Daphtary does not seriously contest the position that the objection could have been effectively waived. The alleged bias in a member of the tribunal does not render the proceedings invalid if it is shown that the objection against the presence of the member in question had not been taken by the party even though the party knew about the circumstances giving rise to the allegations about the alleged bias and was aware of his right to challenge the presence of the member in the tribunal. It is true that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the

party knew about the relevant facts and was aware of his right to take the objection in question. As Sir John Romilly, M.R., has observed in *Vyuyan v. Vyuyan* (1861) 30 Beav 65 : 54 E.R. 813 waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and, that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim. If, in the present case, it appears that the appellant knew all the facts about the alleged disability of Shri Chhangani and was also aware that he could effectively request the learned Chief Justice to nominate some other member instead of Shri Chhangani and yet did not adopt that course, it may well be that he deliberately took a chance to obtain a report in his favour from the tribunal and when he came to know that the report had gone against him he thought better of his rights and raised this point before the High Court for the first time. In other words, though the point of law raised by Shri Daphtary against the competence of the tribunal be sound, it is still necessary for us to consider whether the appellant was precluded from raising this point before the High Court by waiver or acquiescence.

(9) From the record it is clear that the appellant never raised this point before the tribunal and the manner in which this point was raised by him even before the High Court is somewhat significant. The first ground of objection filed by the appellant against the tribunal's report was that Shri Chhangani had pecuniary and personal interest in the complainant Dr. Premchand. The learned Judges of the High Court have found that the allegation about the pecuniary interest of Shri Chhangani in the present proceedings are wholly unfounded and this finding has not been challenged before us by Shri Daphtary. The learned Judges of the High Court have also found that the objection was raised by the appellant before them only to obtain an order for fresh inquiry and thus gain time. It may be conceded in favour of Shri Daphtary that the Judgment of the High Court does not in terms find against the appellant on the ground of waiver though that no doubt appears to be the substance of the conclusion. We have however heard Shri Daphtary's case on the question of favour and we have no hesitation in reaching the conclusion that the appellant waived his objection deliberately and cannot now be allowed to raise it. Shri Daphtary does not contend that at the material time the appellant did not remember the fact that Shri Chhangani had appeared for Dr. Premchand in the criminal proceedings. Indeed such a plea cannot be raised by the appellant in view of the affidavit which the appellant sought to be placed before us in the present appeal. Under this affidavit, the appellant's case appears to be that, until he met his Advocate Shri Murli Manohar for filing objections to the report of the tribunal, the appellant did not know that Shri Chhangani was legally disqualified from acting as a member of the tribunal. It is obvious that this ground necessary implies that the appellant knew about the facts giving rise to the alleged disqualification of Shri Chhangani to act as a member of Tribunal. In substance, the contention is that though the appellant knew that Shri Chhangani had appeared for Dr. Premchand in the criminal proceedings in question, he was not aware about that, in consequences, Shri

Chhangani was disqualified to act as a member of the tribunal. It is this limited aspect of the matter and which is pressed before us by Shri Daphtary. Shri Daphtary contends and no doubt rightly that if he had satisfied that the appellant did not know about the two legal position in this matter and his rights arising therefrom, his failure to challenge the appointment of Shri Chhangani on the tribunal would not raise any effective plea of waiver. However, in our opinion, it is very difficult to accept Shri Daphtary's argument that his client did not know the true legal position or his rights until he met Shri Murli Manohar. No doubt, the appellant is a junior at the Bar, but even so he can claim 10 years' standing at the bar. Besides, he had the assistance of a lawyer in defending him in the present proceedings and it appears extremely difficult to assume that neither the appellant nor his lawyer knew that the presence of Shri Chhangani in the tribunal could be effectively challenged by them. We are disposed to think that even a layman not familiar with legal technicalities and equitable principles on which this doctrine of disability has been based would have immediately apprehended that the lawyer who had appeared for Dr. Premchand was authorised to sit in judgment over the conduct of appellant and that might cause embarrassment to the appellant and might lead to prejudice against him. From a purely common sense point of view of a layman, the position was patently awkward and so, the argument that the appellant was not conscious of his legal rights in this matter appears to us to be an afterthought. Since the appellant was driven to adopt this untenable position before the High Court in seeking to raise this point for the first time at that stage, we are not surprised that the High Court took the view that the plea had been taken late in order to gain time and secure a fresh inquiry in the matter. Since we have no doubt that the appellant knew the material facts and must be deemed to have been conscious of his legal rights in that matter, his failure to take the present plea at the earliest stage of the proceedings creates an effective bar of waiver against him. It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.

11. In any case, I find that there cannot be said to be a reasonable likelihood of bias, merely because the executive officer who also performs quasi-judicial function, is called upon to file an affidavit to support the decision of his predecessor in a Court of law. It is the duty of an officer holding a post to fairly support the decision given by his predecessor. It would be unfair to infer bias in such an officer, merely because he had filed such an affidavit in support. It would be more unfair when the remand was made to him by consent of the parties and without any objection being taken by any of the parties. In this case, the Tribunal has, vide paragraph 16, principally held said Shri Dipak S. Desai as biased only on the basis of the fact that he had filed an affidavit before the High Court supporting the case of the respondent in the writ petition. The Tribunal has not adverted to the fact that the order which he supported by his affidavit was not his own order. From that, the Tribunal has inferred that involvement and interest

in the matter is established. I find that this is tenuous, capable of creating great harm to the morale of the officers who are called upon to discharge their functions according to law. The matter would have been entirely different if there was any other evidence to show a genuine bias which the officer may have harboured against the respondent or for a petitioner. In my view, therefore, the petition is liable to succeed.

11. Having regard to the fact that the Tribunal has not gone into the merits of the matter, in view of its own observations in the last paragraph and there has been no decision of the Tribunal on merits of the matter, it would be appropriate in the interest of justice to remand the matter to the Administrative Tribunal Goa, Panaji, respondent No. 2 for a fresh decision on the respondents' appeal, in accordance with law. However, having regard to the circumstances of the case, the Tribunal is directed to decide the matter not later than three months from the date of receipt of writ of this Court. The matter may be heard on merits. However, it would be open for the petitioner to contend that the respondents have no locus standi to file the appeal. Rule is made absolute in the above terms.