(2014) 02 BOM CK 0262

In the Bombay High Court

Case No : Writ Petition No. 569 of 2013

Vishal Shambu Volvoikar APPELLANT

Vs

State of Goa RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Citation : (2014) 6 BomCR 455 : (2014) 5 MhLj 529

Hon'ble Judges : R.S. Dalvi, J;F.M. Reis, J

Bench : Division Bench

Advocate : V.A. Lawande and N. Mayekar, Advocate for the Appellant; M.D. Salkar, Government Advocate, Sahish Mahambrey and G. Teles, Advocate for the Respondent

Judgement

R.S. Dalvi, J.—Rule. Made returnable forthwith. The petitioner is the Sarpanch of Respondent No. 2 Village Panchayat. Respondent No. 3 is an elected member thereof. The petitioner has contended that respondent No. 3 has incurred a disqualification to be a member of Village Panchayat by virtue of having pecuniary interest in the subject-matter of two resolutions passed in the Village Panchayat meetings held on 3rd July, 2012 and 18th January, 2013.

2. Respondent No. 3 has claimed no pecuniary interest in the subject-matter of those resolutions. He, therefore, claims that he had not incurred any disqualification. The Court would require to see whether respondent No. 3 had pecuniary interest in either of subject-matters of the resolutions.

3. One resolution relates to the grant of permission to the licencee of respondent No. 3 for opening an Ice-cream Parlour in shop No. 137/2 admittedly owned by respondent No. 3. The other is the resolution with regard to the NOC of the Village Panchayat required for opening a shop/branch of HDFC Bank Ltd., in the premises of respondent No. 3.

4. Respondent No. 3 has produced documents with regard to these aspects.

5. Respondent No. 3 has executed a leave and licence agreement on 1st June, 2012 with his licencee one Shobhnath showing himself as the owner of shop No. 137. The licence of premises admeasuring 18 sq. Mts is granted for carrying on the business of Baskin Robbins Ice-cream Parlour. The licencee is to pay respondent No. 3 a sum of Rs. 25000/- p.m. He has to pay electricity charges etc also. The licencee is entitled to terminate the licence by giving 30 days notice to respondent No. 3.

6. The licencee applied to the Village Panchayat for opening an Ice-cream Parlour in shop No. 137/2 and also for electricity connection. In the meeting held on 2nd July, 2012 in which respondent No. 3 was admittedly present, a resolution was passed by the Village Panchayat being Resolution No. 3(28). It runs thus:

"No. 3(28):-- Application received from Shobhnath Enterprise, Near SBI ATM, Old Goa regarding opening of Ice Cream Parlour in shop No. 137/2 Tourist Inn Hotel Near SBI ATM, Old Goa and it is decided to issue the same and also NOC for 3 phase electricity connection and decided to issue the same."

(emphasis supplied)

7. The resolution shows what has been decided by the Village Panchayat. The opening of the Ice Cream Parlour is permitted.

8. It is contended on behalf of the petitioner that respondent No. 3 has a pecuniary interest in the transaction. It is contended by respondent No. 3 that he does not. Respondent No. 3 is the owner of the premises. The applicant is only his licencee. The licence is given for carrying on the business of Ice Cream Parlour. It is contended on behalf of the petitioner that if the licence is not granted by the Village Panchayat the licencee would terminate the licence; this would cause loss to respondent No. 3. Hence the respondent No. 3 would have an interest in obtaining the licence. That interest is pecuniary. The licence does not show that it is conditional upon carrying on only the business of Ice Cream. It also does not show that the contract would be cancelled if the permission is not granted. The licence, like any other such licence, is terminable upon 30 days'' notice. The licence only shows the intention of the licencee to carry on the kind of business, but which is alterable at the instance of the licencee or by agreement between the parties. If the licencee cannot carry on the business of Ice Cream Parlour he may carry on any other business. If he does not desire to carry on any other business he would have to vacate and handover the premises to respondent No. 3 as the owner thereof. Respondent No. 3 would be entitled to licence it to any other person. He would also be entitled to use and enjoy his premises himself or otherwise transfer it to any other person. His proprietary interest would be altered, but not impaired. He may incur inconvenience, but not loss or damage. In fact he would get back his own premises for future use or transfer. A licence creates no interest in any premises. Hence his legal interest is secured. The grant of the permission to run the Ice Cream Parlour to his licencee may continue his contract with the licencee; the refusal of the permission may

frustrate the contract, but not damage the property of respondent No. 3. The contention on behalf of respondent No. 3 that therefore, respondent No. 3 would have no pecuniary interest in the grant or refusal of the permission by the Village Panchayat does not appear to be entirely misconceived.

9. A consideration of the various judgments of the Supreme Court and this Court with regard to the concept of pecuniary interest is, therefore, called for.

10. In the case of Agnello Caridade Lobo Vs. Mr. Sanjay A. Pednekar and Others, a member of Village Panchayat was a contractor who entered into an agreement with the owner of a particular land for construction of the residential building on the plot of such owner. The building was constructed by that member. A large part of the price was paid. A very small fraction of the price was retained by the owner. The question of issue of a revised construction licence of the owner came up before the Village Panchayat. The contractor, as the member of the Village Panchayat, participated in the discussion relating to the resolution sought to be passed. Pecuniary interest of the member was seen by this Court to be clear relying upon the case of Gulam Yasin Khan Vs. Sahebrao Yeshwantrao Walaskar and Others, in which the Supreme Court laid down the parameters of the interpretation of the term pecuniary interest. It held that it cannot mean sentimental or friendly interest and that it must be an interest of pecuniary or material or of a similar nature. The Supreme Court exalted the Courts to interpret the term "pecuniary interest" upon the objective of the legislation of Village Panchayat which is to ensure the purity of administration of local bodies so that it should not receive an unduly narrow or restricted construction.

11. In the case of The Akhada St. Estevam Village Development and Protection Samittee Vs. Smt. Seema Rohidas Narvekar and Others, this Court further accepted the pecuniary interest of a member of the Village Panchayat relating to the illegal construction of the husband of the member of the Village Panchayat.

12. The aspect relating to the pecuniary interest of a spouse in marital relationship came to be considered in the case of Zelia M. Xavier Fernandes E. Gonsalves Vs. Joana Rodrigues and Others, by the Supreme Court. Upon considering the case of Gulam Yasinkhan (supra) and the exaltation of the Supreme Court in interpreting the statute of the Village Panchayat broadly to ensure purity of justice and despite the fact that in the case of Gulam Yasinkhan (supra) a father was held not to have any interest in the employment of the son, the Court held that a wife would have pecuniary interest in the property of her husband, in view of the concept of the principle of communion of acquired properties between spouses under Articles 1098 and 1108 of the Portuguese Civil Code, 1860.

13. The case of licensor and licencee is certainly on a wholly different footing.

14. In the case of Lenocio, John Raicar Vs. Martinho, Francisco Rocha and Others, this Court considered the pecuniary interest between a licensor and licencee. In that case the owner of the plot entered into a Leave and Licence

Agreement with Idea Cellular Ltd. in respect of his land for the purpose of erecting a tower and installing equipments in connection with cellular mobile telephone network and services. The agreement was for 15 years. The licence fee was payable by the licencee from the date of the commencement of the construction work only. The Court held that the licensor who was the member of the Village Panchayat had pecuniary interest in the licenced premises because the construction under the agreement was to commence only upon the commencement of the construction work stipulated therein. The permission of the Village Panchayat was required to construct the tower. Hence the member of the Village Panchayat who had licenced the premises was materially and substantially interested in the permission to be granted to implement his licence agreement and derive benefit thereunder. The Court observed that the permission was necessary to advance and assist the implementation of the agreement and that constituted a direct pecuniary interest.

The Court laid down two tests for seeing the pecuniary interest thus:

1. "...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.

2....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".

15. The Court saw that the member was enabled to realise his pecuniary interest only upon the permission being granted. The Court further considered that the member would not be able to realise his pecuniary interest if the permission was not granted.

16. The same test has to be applied in this case as in the case of Lenocio Raicar (supra).

In that case the consideration payable under the agreement was dependent upon the commencement of construction work which in turn was dependent upon the licence of the Village Panchayat. The licence was, therefore, a condition precedent.

In this case though the licence is for running an Ice Cream Parlour the licence between respondent No. 3 and his licencee does not show that the condition precedent for the licence is the running of Ice Cream Parlour alone. It is the matter of agreement between the licensor and the licencee to alter and change the business that would be carried on by the licencee or to obtain possession and transact such business de-novo by the licensor . The licence only shows the kind of business that the parties would have preferred in the licenced premises. There is no condition precedent even implicit in the agreement because of which the agreement would stand frustrated.

17. Consequently the pecuniary interest cannot be implied.

18. The other resolution passed by the Village Panchayat is in respect of a premises illegally constructed by the father of respondent No. 3 in which HDFC Bank Ltd. wanted to open its shop. Counsel on behalf of both the parties argued upon the case of Gulam Yasinkhan (supra). Despite laying down the aforesaid parameters the Court held that though the Village Panchayat member may be interested in his son, who lived separately, he would not be interested in the employment of the son and consequently mere relationship of father and son cannot show the direct or indirect interest in the employment of the son.

19. In the case of Jagdish Bhobe vs. State of Goa and ors. in Writ Petition No. 295 of 2010 decided on 16th August, 2010 this Court considered the question of issue of construction licence by the Village Panchayat to one of its members who was the owner of the property. That member sought to transfer the property in the name of his mother. The member was seen to have taken a personal interest in the construction. He was present at the time of site inspection. The Court, applying the test of no narrow or restricted construction, held the transfer to the mother sought in the resolution to be an eyewash. It considered that the earlier statement of the member did not show that he was not concerned with the house in question or that his mother had constructed the structure. Consequently his pecuniary interest was seen to be direct; the case of an interest of a licencee is quite the contrary.

20. The case of Mr. Mohan Vithal Dabhale Vs. Mr. Santosh Vasant Morajkar and Others, is the case of a husband and wife which is on a wholly different footing in the system of communion of acquired properties between spouses in the State of Goa.

21. Case of Mr. Mansoor Mulla Vs. State of Goa by the Secretariat (Panchayat), Government of Goa, Mr. Mulla Hussain Muzawar and Village Panchayat of Curti is also in respect of the licence to be granted to the member of the Village Panchayat himself and is, therefore, wholly distinguishable.

22. The case of Zarina Blanca Fernandes vs. State of Goa and ors. In Writ Petition No. 289 of 2013 decided on 23rd July, 2013 is interesting. It is in respect of the property between a father and son. However the son was a minor. The father was his guardian. Upon the aforesaid cases and the distinction drawn in the case of Gulam Yasinkhan (supra) the Court held saw a pecuniary interest of the member of the Village Panchayat in the property of his minor son of which he was the guardian; the case of respondent No. 3 would be rather distinguishable, since the illegal construction belonged to his father and not himself.

23. Consequently despite the forceful and vehement argument of Mr. Lawande we find ourselves unable to agree with him that respondent No. 3 had pecuniary interest in either of the resolutions in which he was present and accordingly participated and consequently the writ of quo-warranto and the consequent declaration applied for by the petitioner cannot be granted. The petition is

accordingly dismissed and the Rule is discharged.