

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1620 OF 2016

Narayan Diwakar s/o. Late Sh. Chatti Ltd. ... Petitioner
Vs.
The State of Maharashtra & Anr. ... Respondents

Mr. Sanjay Diwakar a/w. Mr. Sushil Gupta, Ms. Rina Mishra i/b. Upendra Lokegaonkar, Advocate for the petitioner.
Mrs. P.P. Shinde, APP for respondent no. 1/State.
Mr. H.S. Venegavkar, Advocate for respondent no. 2/CBI.

CORAM : MRS.MRIDULA BHATKAR, J.
RESERVED ON : 22nd December, 2016
PRONOUNCED ON : 1st February, 2017

JUDGEMENT:

Rule. By consent, rule is made returnable forthwith and heard finally.

2. This Petition is directed against the orders dated 29th July, 2011 and 15th July, 2015 passed by the learned Special Judge, CBI, Daman in Sessions Case No. 131 of 2010 under FIR No. 64(A)/93-Bom. rejecting the application for discharge. The petitioner was working as a Secretary (Finance) in administration of Daman & Diu, Dadra and Nagar Haveli in the year 1993. The Collector of Daman went on maternity leave in the beginning of year 1993 and, therefore, the petitioner was given an additional charge of the Collector in her absence. At that time, 13 applications seeking permission for N.A. land by original accused nos. 7,8 and 9 were made before the petitioner. The petitioner along with other

accused, i.e., accused no. 2/Architect and the other staff from his office, i.e., accused nos. 3 to 6 conspired and without following the proper procedure, gave permission for N.A. in favour of original accused nos. 7 to 9 thereby causing wrongful gain to them and therefore, was prosecuted for the offences punishable under section 13(2) r/w. section 13(1)(d) of the Prevention of Corruption Act and under sections 467, 468, 471, 420 and 120B of the Indian Penal Code. The learned Sessions Judge took cognizance and issued process on 29th July, 2011. Thereafter the petitioner preferred an application for discharge under section 227 of Cr. P.C. which was rejected by the Special Judge, Daman on 29th July, 2011. Hence, this Petition.

3. The learned counsel for the petitioner has submitted that the petitioner at the relevant time was given an additional charge of Collector of Daman and, therefore, he has passed the orders of permission for N.A. land while discharging his duties or functions. The petitioner has passed the order of N.A. under section 30 of Goa, Daman and Diu Land Revenue Code of 1968 and thus, under section 165 of the said Code, the Revenue Officer while deciding any question under the Code is a Revenue Court and to be treated as a Civil Court. Under section 180 of the Code it shall be deemed a Civil Court for the purpose of all inquiries. The learned counsel submitted that the Collector of Daman squarely falls under the

definition of Judge under section 19 of the Indian Penal Code and thus is protected under section 3 of the Judges Protection Act. For the purpose of definition of Judge, the learned counsel relied on Section 2 of the Judges (Protection) Act, 1985. He submitted that the learned Special Judge of Daman has erred in appreciating the protection given under section 77 of the Indian Penal Code and under section 3 of the Judges Protection Act to the act done by the Judge in discharge of his duties. Granting permission for non-agricultural land is a judicial decision taken by the Collector. For the definition of Judge, he relied on-

Section 2 of The Judges (Protection) Act, 1985

In this Act, "Judge" means not only every person who is officially designated as a Judge, but also every person -

(a) Who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive; or

(b) who is one of a body of persons which body of persons is empowered by law to give such a judgment as is referred to in Cl.

(a).

Section 19 of Indian Penal Code – "Judge"

The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which is confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

He submitted that as the the petitioner acting in the capacity of Collector,

Daman under the Code is a Judge, he is protected under the Judges Protection Act so also enjoys immunity to the extent of his judicial functions.

Section 3 of The Judges (Protection) Act, 1985

(1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-sec.(2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function.

(2) Nothing in sub-sec.(1) shall debar or affect in any manner the power of the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority under any law for the time being in force to take such action (whether by way of civil, criminal, or departmental proceedings or otherwise) against any person who is or was a Judge

4. The learned counsel heavily relied on the ratio laid down in the judgment of Division Bench of the High Court in the case of **E.S. Sanjeeva Rao vs. CBI**¹, where the meaning of Judge is extensively discussed. The learned counsel submitted that the Provident Fund officer deciding the issue of liability to pay provident fund and fixing the amount therein is declared as a Judge. In order to elaborate his submissions, he relied on the definition of Judge and submitted that the three ingredients are required for a Judge - (i) a person is empowered by law; (ii) There should be a legal proceeding; and (iii) He should give a definitive judgment. All

1 2012 Cri. L.J. 4053

these factors are present when the petitioner was holding the charge as a Collector and gave permissions for NA land. He referred and relied on the report of the Development Commissioner filed on 11th October, 1993 which was submitted to the Ministry of Home Affairs wherein the details about the non-culpability of Narayan Diwakar and the action taken against the architect is mentioned. He submitted that though a picture is created by the prosecution that on the last day of his charge as a Collector, the petitioner gave permissions for NA land hastily in favour of the accused is incorrect. The Collector has not taken maternity leave for fixed period but she has extended her leave on the last day also. Moreover, he has been exonerated from any culpable liability by the Development Commissioner. He argued that if this Court is going to accept his submissions that he is a Judge, then giving permission for NA land was the acts done judicially directly covered under section 77 of Indian Penal Code, which reads thus-

Section 77 of Indian Penal Code - Act of Judge when acting judicially

Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

He submitted that the present petitioner is facing the charge under section 13(1)(d)(i) of the Prevention of Corruption Act, however, there is no evidence in respect of giving or taking bribe or any evidence on record that the petitioner has obtained any amount by corrupt or illegal means. The

petitioner is not a beneficiary of this transaction and the said section cannot be attracted. There is no material to show that there is any association of the petitioner and the other accused in whose favour permissions for NA land were granted. In support of his submissions, he relied on the following judgments of the Hon'ble Supreme Court:

- (i) Subash Parbat Sonavane vs. State of Gujarat².
- (ii) Union of India & Anr. vs. Major J.S. Khanna; and Major I.C. Lala³.
- (iii) Major S.K. Kale vs. State of Maharashtra⁴.
- (iv) S.P. Bhatnagar & Anr. vs. The State of Maharashtra⁵.
- (v) Abdulla Mohammed Pagarkar vs. State (Union Territory of Goa, Daman & Diu)⁶.
- (vi) R. Balakrishna Pillai vs. State of Kerala⁷

5. Learned counsel Mr. Venegavkar appearing for CBI has opposed this Application and submitted that the proceedings before the Collector under Goa, Daman and Diu Land Revenue Code (for short "Code") is not a judicial proceedings but to give permission for NA is an administrative function. He relied on Section 6 of the Code on the point of function of the Collector wherein it is mentioned that the Collector is in charge of the

2 2002 Cri. L.J. 2787

3 1972 Cri. L.J. 849 (V 78 C 212)

4 AIR 1977 SC 822

5 AIR 1979 SC 826

6 AIR 1980 SC 499

7 AIR 2004 SC 1012

revenue administration of the district and shall exercise the powers of superintendence and control within the district and over the officers subordinate to him. Giving permission for non-agricultural use is covered under section 30 of the Code, which reads thus-

30. Permission for non-agricultural use.— No land used for agriculture shall be used for any non-agricultural purpose; and no land assessed for one non-agricultural purpose shall be used for any other non-agricultural purpose or for the same non-agricultural purpose but in relaxation of any of the conditions imposed at the time of the grant or permission for non-agricultural purpose, except with the permission of the Collector under section 32.

The permission or relaxation of the conditions imposed at the time of grant of permission of non-agricultural purpose is a function of the Collector. Section 32 lays down the procedure for conversion of use of land from one purpose to another. The learned counsel highlighted sub-section (c) of Section 32 for details of the procedure.

32. Procedure for conversion of use of land from one purpose to another -

(2)(c) may, after due enquiry, either grant the permission on such terms and conditions as he may specify subject to any rules made in this behalf by the Government; or refuse the permission applied for, if it is necessary so to do to secure the public health, safety and convenience or if such use is contrary to any scheme for the planned development of a village, town or city in force under any law for the time being in force and in the case of land which is to be used as building sites in order to secure in addition that the dimensions, arrangement and accessibility of the sites are adequate for the health and convenience of the occupiers or are suitable to the locality; where an application is rejected, the Collector shall state the reasons in writing of such rejection.

He argued that the power to exempt the land from the provisions of Sections 30 to 34 vests with the Government. Hence, these powers are delegated to the Collector by the Government. He submitted that under section 180 of the Code though any authority holding a formal or summary inquiry shall be deemed to be a Civil Court for the purposes of such inquiry. Though it is a civil court, the Collector is not a Judge while conducting inquiry in permission for NA. He further submitted that while deciding the application of permission for NA land, the Collector has to look into extraneous factors to protect the interest of the public. Section 32 does not state about "order" but has used the word "permission". He argued that all judgments include decisions but all decisions are not judgments. He further relied on the definition under section 19 of Indian Penal Code and submitted that Section 19 contemplates definitive judgment which is not delivered while deciding application for NA permission. He further argued that as the Collector is not a Judge, the present petitioner is not entitled to get the protection under section 3(1) of the Judges (Protection) Act. Assuming that a Judge gets protection under section 3(1) of the Judges (Protection) Act, under section 3(2) the Government is not empowered to prosecute the Judge. Thus, section 3(2) controls section 3(1) of the Judges (Protection) Act.

6. On facts, the learned counsel Mr. Venegavkar argued that the

petitioner was holding the additional charge of Diu, Daman as a Collector and the date on which he was supposed to vacate the charge, he gave 13 permissions for NA land to the co-accused. He relied on the statements of regular Collector Smt. Satbir Silas who has stated that there are glaring irregularities and in a day such permissions cannot be granted. He also relied on the statement of Mr. P.L. Patel and one Swadeen Badmera from the Town Planning Department. Learned APP submitted that situations in Town Planning map was changed and simultaneously the plan was forged on 7th April, 1993 by co-accused Architect Tapas Neogy and the orders were passed on the next day, i.e., 8th April, 1993. On the same day forged plan was approved from the Town Planning Committee. Thus, the order passed by the Court is to be maintained.

7. The learned counsel Mr. Diwakar, in reply, has submitted that section 3(2) does not override section 3(1) of the Judges (Protection) Act. In support of his submissions, the learned counsel heavily relied on the judgment of **E. Sanjeeva Rao** (*supra*). He again pointed out Section 77 of Indian Penal Code, which is an exception to the offence when a person is acting judicially in exercise of powers. The learned counsel submitted that the accused has acted judicially in exercise of powers, as he was sitting Judge at the relevant time. The powers of the Collector acting under Goa, Diu and Daman Land Revenue Code are not sub-delegation but the

powers are given directly from the Code itself. He argued that Section 180 covers the entire code and for every inquiry under the code and under section 165 of Goa, Daman and Diu Land Revenue Code of 1968 it is a Civil Court.

8. Perused the order passed by the learned Sessions Judge, the record and case laws placed before me.

9. The main submissions of learned counsel for the petitioner is based on Section 165 of Goa, Daman and Diu Land Revenue Code of 1968 wherein it is mentioned that Revenue Court is to be treated as Civil Court when it deals with enquiries. Section 165 reads thus-

165. Revenue Court.— (1) A revenue officer not below the rank of Mamlatdar, while exercising jurisdiction under this Code or any other law for the time being in force to inquire into or to decide any question arising for determination between the Government and any person or between parties to any proceedings, shall be a revenue court.

(2) A revenue Court shall be deemed to be a Civil Court for the purposes of enquiries under this Code.

Thus, the Collector while conducting an enquiry under section 32 of the Act, he determines a question or decides it. The section states that when a revenue officer has to enquire into or to decide any question arising for determination between the Government and any person to any proceedings shall be a revenue court. Further it is to be plainly interpreted

that by virtue of section 165(2) a Revenue Court shall be treated a Civil Court and there cannot be any other different interpretation to that. However, the learned counsel has interpreted sub-section (2) of Section 165 conveniently that a Revenue Court shall be deemed to be a Civil Court for the purposes of enquiries in the Court, therefore, a Collector presiding over the said Court be treated as a Judge. The supplemental inference drawn by the learned counsel is fallacious. A Judge is always a part of the Court, however, still the duties, norms, character, qualities of a Judge are totally different, therefore, an establishment, set up and proceedings and Presiding Officer may form a Court yet that Presiding Officer sometimes cannot have a status of a Judge. Thus, the Judge is that entity who sits in a Court as a part of a Court, however, not necessarily in each case the Presiding officer who is discharging the duties of determining a question or the issue, is a Judge. Similarly, all judgments are decisions, however, all decisions are not necessarily judgments. For this interpretation, one finds help inbuilt. In Section 165(1) the legislature has used the word "revenue officer" and it ended with "shall be a revenue court". Similarly, in Section 165(2), it has used the word "revenue Court shall be deemed to be a Civil Court". Nowhere in this section pertaining to enquiry, the legislature has used the word "Judge" but has used the word "Court". The legislature did not intend that revenue officer under the Code shall be deemed to be a Judge. The

legislature deliberately and carefully have drafted Section 165(2) by saying that a Revenue Court shall be treated to be a Civil Court. Thus, under the Code, the Collector does not enjoy the immunity which is available under Section 3 of the Judges Protection Act of 1985 and under section 77 of Indian Penal Code.

10. In India, originally all lands are agricultural or forest lands. Whenever there is town planning or construction, a permission for various zones are required to be sought from the authority, i.e., Collector under Land Revenue Code. Under the Code, the power of the Government to collect revenue is regulated. The Collector has to verify the documents, purpose, request made by the applicant and grant permission to use the land for non-agricultural purpose.

11. Section 180 deals with formal and summary enquiries-

180. Formal and summary inquiries to be deemed judicial proceedings.— (1) A formal or summary inquiry under this Code shall be deemed to be a judicial proceeding within the meaning of sections 193, 219 and 228 of the Indian Penal Code, and the office of any authority holding a formal or summary inquiry shall be deemed a civil court for the purposes of such inquiry.

(2) Every hearing and decision, whether in a formal or summary inquiry, shall be in public, and the parties or their authorized agents shall have due notice to attend.

12. Section 193 of Indian Penal Code is about the punishment for giving false evidence. Under Section 219, if public servant acting corruptly or

maliciously, then he can be punished. Under Section 228, if anybody intentionally insults or interrupts the public servant sitting in judicial proceeding, he can be penalized. Thus, the legislature wants to give protection to a Collector while conducting formal or summary enquiry and also takes care that the evidence coming before the Collector should not be false but truthful and similarly intends to maintain the sanctity of the proceedings. Therefore, the proceedings of formal and summary enquiries deemed to be judicial proceedings.

13. Besides formal and summary enquiries there are ordinary enquiries which are dealt with under section 181 of the Code, which reads as under:

“181. Ordinary inquiries how to be conducted.— An inquiry which this Code does not require to be either formal or summary, or which any revenue or survey officer may on any occasion deem to be necessary to make, in the execution of his lawful duties, shall be conducted according to such rules applicable thereto, whether general or special, as may have been prescribed by the Government, or an authority superior to the officer conducting such inquiry, and except in so far as controlled by such rules, according to the discretion of the officer in such way as may seem best calculated for the ascertainment of all essential facts and the furtherance of the public good.”

14. Thus, the code lays down the procedure of three types of inquiries (i) Formal; (ii) Summary; and (iii) Ordinary. As rightly pointed out by learned counsel Mr. Diwakar, under section 180, when any authority holding formal or summary inquiry, then the authority is deemed a Civil Court for the purposes of such inquiry. However, grant of permission for

NA is neither a formal nor summary inquiry but it is an ordinary inquiry. In Clause (c) of sub-section (2) of section 32 of the Code, the adjective before the inquiry used is due inquiry. It means appropriate or proper enquiry. After going through the procedure laid down in Section 32 of the Code, I am of the view that the inquiry is neither a formal nor a summary but it is an ordinary inquiry. Hence, not covered under section 180 of the Code, so the proceedings of ordinary inquiry is not deemed to be judicial proceedings.

15. The submissions of Mr. Venegavkar that the word “order” is not used in Section 30 or 32 which directly deal with permission for NA land also have substance. The status/function or power of the Collector acting under the Code is distinguishable from the function and the powers of the Regional Provident Fund Commissioner working under Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 which was a subject matter before the Division Bench of this Court in the case of

E. Sanjeeva Rao (*supra*). Section 7A reads as under:

“7A. Determination of moneys due from employers. – (1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner or any Assistant Provident Fund Commissioner may, by order,

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any

provision of this Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.

(2) The officer conducting the inquiry under sub-section 1 shall, for the purposes of such inquiry have the same powers as are vested in a court under the code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely:-

(a) enforcing the attendance of any person or examining him on oath:

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses, and

any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code 45 of 1960.

(3)

(3A)

(4)

(5)”

16. On bare perusal of Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act and Sections 30 and 32 of the Code, it can be easily gathered that the procedure laid down and the work of Provident Fund Commissioner and the powers enjoyed by him acting under section 7A of the Act are entirely different than the Collector using his power under sections 30, 32 of the Code. The words used in Section

7A are : 'Determine the amount'. Under both the sections, though both the officers are conducting inquiry, the procedure laid down of the inquiry under sub-section (2) of Section 7A is specific and akin to judicial proceeding wherein Presiding officer enjoys the powers to enforce the attendance of person or the power of discovery and production of document so also the receiving evidence on affidavit and examines witnesses on oath. However, such procedure is absent under section 32 of the Code and therefore, this is an ordinary inquiry conducted by the Collector. Thus, the procedure laid down to carry out the function of the Provident Fund Commissioner under section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 is very much distinguishable from the enquiry conducted for giving NA permission for the land by the Collector acting under section 32 of the Code and, therefore, the ratio laid down in the case of **E. Sanjeeva Rao** (*supra*) is not applicable in the present case.

17. The learned counsel for the petitioner has relied on case laws in order to illustrate the meaning and scope of the offence defined under section 13(1)(d)(i) of the Prevention of Corruption Act. The ratio of those cases is culled out as follows:

In the case of Subash Parbat Sonvane vs. State of Gujarat (*supra*), the Hon'ble Supreme Court while dealing with the offence under

section 13(1)(d)(i) has reproduced the finding given in the case of **Ram Krishan and Anr. vs. The State of Delhi (1956) SCR 183** -

“The word “obtains”, on which much stress was laid does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver. One may accept money. This is offered or solicit payment of a bribe or extort the bribe by threat or coercion; in each case, he obtains a pecuniary advantage by abusing his position as a public servant.”

Further, the Supreme Court has observed that -

“It is enough if by abusing his position as a public servant a man obtains for himself any pecuniary advantage, entirely irrespective of motive or reward for showing favour or disfavour.”

18. This observation is limited to the obtaining for oneself, however, section 13(1)(d) is also extended to a valuable thing or pecuniary advantage or any other person by abusing his position or without any public interest.

19. In the case of **Major S.K. Kale** (*supra*) and **S.P. Bhatnagar** (*supra*) the Hon'ble Supreme Court has discussed the meaning of “abuse of position by public servant” in Section 5(1)(d), however, at this stage of discharge on the basis of documents which are produced by the prosecution, *prima facie* it appears there is abuse by the present applicant. While applying the ratio laid down in any case, the facts of the case in hand are to be taken into account.

20. In the case of **Abdulla Mohammed Pagarkar** (*supra*) the Hon'ble Supreme Court held that strong suspicion against the accuse due to irregularities in the execution of work is not sufficient for conviction. Hence, this observation is not useful in the present case.

21. In the case of **R. Balakrishna Pillai** (*supra*) the Hon'ble Supreme Court had opportunity to deal with the criminal misconduct by the public servant as contemplated under section 5(1)(d) of Prevention of Corruption Act and has discussed the concept of 'actus reus' and 'mens rea'. Even the ratio laid down in this case is not useful to the present applicant/accused.

22. The evidence placed before this Court, facts of the case and the circumstances and manner in which the offence is committed, have cumulative effect and considering all these aspects, there is evidence to frame charge against the accused. Hence, is not a case for discharge. Writ Petition is dismissed.

(MRIDULA BHATKAR, J.)