

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.415 OF 2016

1 Mr Raul Aires Fernandes,
Aged 83 years, married, Indian National,
Resident of House No.E-236,
Corte De Oiteiro,
Behind Old Income Tax Office,
Panaji Goa 403 001

2 Mr John Aires Fernandes,
Aged 42 years, married, Indian National,
Resident of House No.E-236,
Corte De Oiteiro,
Behind Old Income Tax Office,
Panaji Goa 403 001

... Petitioners

Versus

1 State of Goa, through its
Chief Secretary, having office at
Secretariat, Alto Porvorim,
Bardez Goa.

2 North Goa Planning and Development
Authority,
Through its Member Secretary,
having office at Mala link Road, Panaji Goa.

3 Office of the Chief Town Planner
& Member Secretary of Conservation
Committee, Through its Chief Town Planner &
Member Secretary, having Office at Dempo
Tower, Panaji Goa.

4 Mr Ketak S. P. Nachinolkar,
Architect
209, Govinda Building,
M. G. Road,
Panaji Goa 403 001

...Respondents

Mr Rohit Bras De Sa and Mr P. Naik, Advocates for the Petitioners.
Mr D. Pangam, Advocate General with Mr Manish Salkar,
Government Advocate for Respondent Nos. 1 to 3.
Mr Nigel Da Costa Frias and Ms Bavina Kukalekar, Advocates for
Respondent No.4.

**CORAM: M. S. SONAK &
BHARAT P. DESHPANDE,JJ**

DATED : 7th JUNE 2023

ORAL JUDGMENT (Per M. S. Sonak, J)

1. Heard Mr Rohit Bras De Sa, learned counsel for the Petitioners, Mr D. Pangam, learned Advocate General along with Mr Manish Salkar, learned Government Advocate for Respondent Nos. 1 to 3 and Mr Nigel Da Costa Frias, learned counsel for Respondent No.4.

2. The Petitioners, by instituting this petition, had sought a writ of quo warranto or, in any case, a declaration that Respondent No.4 stood disqualified to continue as a member of the Conservation Committee constituted under the Goa (Regulation of Land Development and Building Construction) Act, 2008 (the said Act) and the Regulations made thereunder (the said Regulations).

3. The Goa (Regulation of Land Development and Building Construction) Act, 2008, was enacted to provide for the regulation and control on building construction and land development in the State of Goa and other incidental and ancillary matters connected therewith. Section 4 of the said Act provides that the Government may by notification in the Official Gazette frame regulations not inconsistent with the provisions of the said Act, for carrying out the provisions of the said Act by following the procedure specified under Sections 5, 6, and 7 of the said Act.

4. In the exercise of powers conferred by Section 4 of the said Act, and all other powers enabling it on this behalf, the Government of Goa has made the Goa Land Development and Building Construction Regulations, 2010, and published the same in the Official Gazette.

5. Annexure -IX appended to and forming part of the said Regulations is concerned with the Regulation for Conservation. Detailed provisions have been made to regulate the construction and development in the conservation zone. This Annexure, *inter alia* provides the constitution and composition of the Conservation Committee.

6. The Regulations also provide for the conduct of the proceedings of the Conservation Committee. Clause (5) *inter alia* provides for special powers vested in this Committee, term of office and tenure of

members, and several other aspects relating to the conduct of proceedings of the Conservation Committee.

7. Sub-clause (n) of clause (5) referred to above is concerned with the disqualification of Member/Barring of Member from proceedings. Since the same is relevant to the issue raised in this petition, the same is transcribed below for the convenience of reference.

“(n) Disqualification of Member/Barring of member from proceedings: —A member shall cease to be member of the Committee if he—

i) is declared to be of unsound mind by a competent Court; or

ii) is adjudged insolvent; or

iii) has been convicted by any Court in India of any offence, and sentenced to imprisonment for not less than two years; or

iv) is absent without the permission of the Committee in writing from three consecutive meetings thereof or from all the meetings of the Committee for six consecutive meetings;

v) A member, who is directly or indirectly concerned or interested in any proposal before the Committee, or is professionally interested on behalf of a principal or other person in any manner concerning the Committee, or is engaged at the time in any proceedings against the Committee, shall at the earliest possible opportunity, disclose the nature of his interest to the Committee and the disclosure shall be recorded in the minutes of the Committee. The said member shall not be present at any meeting of the Committee when such a proposal is discussed, unless his presence is required by the other members for purpose of eliciting information, but no member so required to be present shall vote on such proposal.”

8. The Petitioners have alleged that Respondent No.4, being a member of the Conservation Committee, participated in the proceedings of the Conservation Committee held on 26.08.2013, where the proposal of addition/alteration to the existing structure in the property bearing Chalta No.178 and 179 of P. T. Sheet No.45 at Panaji by Mr Barnabe Sapeco (File No. 27/15-3/728/TCP/2013/4082 dated 14.10.2013) was taken up for consideration. The Petitioners alleged that the plans for this proposal were prepared by Respondent No.4, a qualified Architect. The Petitioners have alleged that despite duty to make full disclosure, Respondent No.4 failed to disclose his involvement and interest in the said subject matter and, further, participated in the meeting of the Conservation Committee held on 26.08.2013, in which, the proposal was recommended for approval. Accordingly, relying upon sub-clause (n) of Clause (5) quoted above, the Petitioners urged for a writ of quo warranto or in the alternate, a declaration that Respondent No.4 stood disqualified as a member of the Conservation Committee.

9. None of the Respondents except Respondent No.4 has chosen to file an affidavit in this matter. Respondent No.4, in his affidavit dated 26.10.2016, admitted that Mr Barnabe Sapeco had engaged him as an Architect for the project in question sometime in 2009-2010, much before Respondent No.4 was appointed as a member of the Conservation Committee. Respondent No.4 also admitted that he had prepared plans submitted by Mr Barnabe Sapeco for approval. He

pointed out that other technical members of the Conservation Committee considering these plans and site visit suggested some changes. Accordingly, changes were incorporated in the plans and the same were resubmitted by Mr Barnabe Sapeco to the Conservation Committee which then recommended the proposal for approval. Respondent No.4 relied upon and annexed to his affidavit the minutes of the 5th Conservation Committee meeting and pleaded that the minutes show that there was no undue favoritism afforded to Mr Barnabe Sapeco by the Conservation Committee.

10. Respondent No.4, in the context of failure to disclose his interest to the Conservation Committee or in the context of sub-clause (n) of Clause (5) of the Regulations referred to above, pleaded the following in paragraphs 5 to 9 of his affidavit dated 26.10.2016.

“5. I say that my interest in the approval of the plans of Mr Sapeco were evident with my name being directly mentioned as the Architect and with my signature on the plans. The presence of any member who is interested can still be sought for by the Conservation Committee for eliciting information but the member so present and who is interested is not entitled to vote on the proposal.

6. I say that so far as the plans of Mr Sapeco were concerned, the Agenda itself mentioned that the required changes had been effected and that the Technical members had recommended the proposal for approval and hence for the approval of the proposal the

Conservation Committee did not require the need for any voting.

7. *I say that at the meeting of the Conservation Committee on 13/8/2013 I had disclosed before the committee that I had prepared the plans submitted by Mr Sapeco and this is apparent from the plans which were before the committee which bear my name and signature.*

8. *I say that it is not recorded in the minutes of the meetings of the conservation committee that I had disclosed my involvement in the preparation of the plans submitted for approval by Mr Sapeco, however this may have been due to oversight by the member secretary of the committee. I say that there are other such instances where the involvement of a member of the committee in the case discussed/placed before the committee was brought to the notice of the committee but was not minuted.*

9. *I deny the contents of paragraph 7 of the petition to extent it is alleged that I had not disclosed my interest in the matter to the committee and I had voted on the proposal. As a matter of fact the proposal of Mr Barnabe Sapeco was not put to vote as he had complied with the requisitions of the committee. I therefore deny that I am liable to be disqualified as a member of the conservation committee.”*

11. The minutes of the 5th Conservation Committee meeting held on 26.08.2013 concerning the Item No.4 are relevant and the same read as follows:-

“Item No.4: Proposed addition/alteration to the Existing structure in the property bearing chalta no.178 and 179 of P.T. Sheet No.45 at Panaji by

Shri Barnabe Sapeco (file No.27/15-3/728/TCP/2013).

The Member Secretary of North Goa Planning & Development Authority vide letter no. NGPDA/1751/3187/2013 dated 13/03/2013 has forwarded the proposal. It is informed that the case was placed before the 4th Authority Meeting held on 08/03/2013 and the Authority approved the proposal subject to the clearance from Conservation Committee.

Technical members inspected the site and certain modifications were suggested to the applicant. Accordingly, the applicant has submitted the revised plans vide letter dated 21/08/2013 as advised.

Since the required changes have been affected, the Technical Members have recommended the proposal for approval.”

12. Based upon the above material, mainly emanating from Respondent No.4 himself, it is evident that Respondent No.4 was directly or in any case, indirectly or in any case professionally interested in Mr Sapeco's proposal, which was prepared by him for the approval of the Conservation Committee. This much is admitted by Respondent No.4 in his affidavit. Respondent No.4 admitted that Mr Sapeco had engaged him as his Architect. Under such professional engagement, Respondent No.4 had prepared the plans, which Mr Sapeco then submitted for approval to the Conservation Committee. He also admitted that he revised the plans based on the suggestions of the technical members of the Conservation Committee and that these revised plans were considered by the Conservation Committee in its 5th meeting.

13. In the above circumstances, it was incumbent upon Respondent No.4 to disclose the nature of his interest to the committee, and further such disclosure was required to be recorded in the minutes of the Committee. Even further, Clause (5)(n)(v) required that Respondent No.4 should not have been present at any meeting of the Committee when such proposal was to be discussed unless his presence was required by the other members for the purpose of eliciting information, but no member so required to be present could vote on such proposal.

14. The minutes produced on record by Respondent No.4 show that Respondent No.4 did not disclose his interest in the proposal. The contention that Respondent No.4's interest was evident because his name was directly mentioned as an Architect or because he had signed the plans cannot be a substitute for failure to disclose. The regulations were conscious that not all the members scrutinise the documents and plans before them in detail. Mr Costa Frias, however, submitted that Respondent No.4 had disclosed his interest to the Conservation Committee though this fact may not have been recorded in the minutes.

15. In the affidavit filed by Respondent No.4, there is a statement about disclosure in the meeting of the Conservation Committee held on 13.08.2013. No minutes of this meeting have been produced. However, assuming that the reference to 13.08.2013 is an error and

the correct date of the Conservation Committee meeting was 26.08.2013, such alleged disclosure should have been reflected in the meeting minutes of the Conservation Committee.

16. As noted earlier, Clause (5)(n)(v) unambiguously provides that a member must disclose his interest to the Committee, and such disclosure shall be recorded in the minutes of the Committee. The fact that such disclosure is not recorded in the minutes of the meeting of the Conservation Committee is sufficient to hold that there was indeed a failure to disclose. Even the member secretary did not choose to file any affidavit to support the plea of disclosure. Therefore, the self-serving plea of disclosure cannot be accepted.

17. Mr Costa Frias submitted that Respondent No.4 has no control over the writing of the minutes of the Conservation Committee. Even this contention cannot be accepted. The provisions of Clause (5)(n)(v) are clear and unambiguous. Respondent No.4 was a member of the Conservation Committee and, therefore, had complete control over the writing of the minutes. If any disclosure was indeed made, then Respondent No.4, for his own protection, should have ensured that this disclosure was recorded in the minutes of the Committee given the clear and unambiguous provisions of Clause (5)(n)(v). Further, Respondent No.4 should have refrained from attending the committee meeting when this proposal was considered. Neither the minutes nor

the affidavit reflects that Respondent No.4 abstained from attending the proceedings when this proposal was taken up.

18. There is no material to suggest that other members of the Conservation Committee had required Respondent No.4 to remain present to elicit information. There is a statement in the affidavit that failure to record the disclosure allegedly made by Respondent No.4 was due to an oversight by the Member Secretary of the committee. In the affidavit, Respondent No.4 also alleged that there are other such instances where the involvement of a committee member in the case discussed/placed before the committee was brought to the notice of the committee, but the same was not minuted. All these contentions or rather excuses are not sufficient given the clear and unambiguous provisions of Clause (5)(n)(v) quoted above.

19. Respondent No.4 also contended that the proposal of Mr Sapeco was not put to the vote as he had complied with the requisitions of the committee. Again, this is not a correct interpretation of the minutes, which suggest that Mr Sapeco's proposal was unanimously approved and recommended by the Conservation Committee.

20. Thus, the material on record establishes that Respondent No.4 had direct or at least professional interest in Mr Sapeco's proposal, which was taken up for consideration by the Conservation Committee

in the meeting held on 26.08.2013. Further, such interest was not disclosed by Respondent No.4 to the committee. Respondent No.4 did not even abstain from participating in the proceedings when such a proposal was considered. The proposal was unanimously approved and recommended by the Conservation Committee. This is sufficient to attract disqualification Clause (5)(n)(v) of the Regulations quoted above.

21. Given the clear and unambiguous provisions of Clause (5)(n)(v), there was a duty cast upon Respondent No.4 to not only disclose his interest in Mr Sapeco's proposal but further ensure that such disclosure is recorded in the minutes of the Conservation Committee. Additionally, there was a duty cast upon Respondent No.4 not to remain present at the meeting of the Conservation Committee when such a proposal was to be discussed unless the other members specifically required his presence to elicit information. In any case, Respondent No.4 could not have voted on such a proposal. Any action in breach of clear and unambiguous provisions set out in Clause (5)(n)(v) would invite the wrath of disqualification, particularly because Clause provides that a member shall cease to be a member of the Committee if there is any breach of the conditions prescribed in sub-clause (v) of Clause (5)(n).

22. In *Nazir Ahmed's case*¹, the Judicial Committee of the Privy Council had observed the principle applied in *Taylor v. Taylor* (1875) 1 Ch. D. 426, to a Court, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden.

23. The Hon'ble Supreme Court has followed this principle in the case of *State of Uttar Pradesh Vs Singhara Singh and others*² and held that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.

24. The provisions in Clause (5)(n)(v) embodies the principle that there should not be any conflict between the interest and duty of a member of committees like the Conservation Committee. The Conservation Committee discharges a very important public function of conserving heritage and heritage structures. Therefore, the Members of the Conservation Committee must be guided solely by the regulations framed for conservation and the matters connected

¹ L.R. 63 I.A. 372

² AIR 1964 SC 358

therewith. Suppose the Members have any personal pecuniary or even professional interest in any proposal before the Conservation Committee. In that case, it is their duty to not only disclose the precise nature of their interest but further such Members should abstain from taking part in the proceedings. Clause (5)(n)(v), in fact, provides that such Members shall not even remain present in the meeting of the Committee when such proposal in which they may have a direct or indirect interest is being discussed unless other Members require their presence for eliciting information. In any case, such Members should never vote on such a proposal.

25. These provisions are made to uphold the principle that there should not be any conflict between the interest and the duties of the Committee members. The question in such matters is not whether the interested member will actually favour the project proponent. Actual favour would be extremely difficult to establish. Therefore, in clear and unambiguous terms, the provisions provide that the moment there is any direct or indirect interest, the Member concerned must disclose the same and refrain from participating in the proceedings unless his presence is specifically required to elicit information.

26. The principle of avoidance of conflict of interest does not require the actual proof of any pecuniary gain or pecuniary loss because this principle is a much wider, equitable, legal and moral principle which seeks to prevent even the coming into existence of a

future and/or potential situation which would inhibit benefit or promise through any commercial interest in which the principal actors are involved. The entire purpose of '*conflict of interest*' rule is to prevent and not merely to cure situations where the fair and valid discharge of one's duty can be affected by commercial interests which do not allow the fair and fearless discharge of such duties. (See opinion of G. S. Misra, J in ***A. C. Muthiah Vs Board of Control for Cricket in India and another***, (2011) 6 SCC 617).

27. The provisions to prevent the conflict between the interest and duties of the directors had been enacted under the Companies Act, 1956. In the context of such provisions, the Hon'ble Supreme Court, in ***Ram Parshotam Mittal and others Vs Hotel Queen Road Private Limited and others***³ referred to ***Firestone Tyre & Rubber Co. Vs Synthetics & Chemicals Ltd.***⁴ This decision in turn referred to ***Aberdeen Rly. Co. Vs Blaikie Bros.***⁵, ***Transvaal Lands Co. vs New Belgium (Transvaal) Land & Development Co.***⁶ and ***Parker Vs McKenna***⁷. All these decisions hold that the rule to prevent conflict between the interest and duties was not a technical or arbitrary rule but a rule founded upon the highest and truest principle of morality. Thus, this rule applies not only where there is a conflict of

³ (2019) 20 SCC 326

⁴ 1969 SCC OnLine Bom 49

⁵ (1854) 1 Macq 461 (HL)

⁶ (1914) 2 Ch 488 (CA)

⁷ (1874) LR 10 Ch App 96 (DC)

interest or conflict of interest and duty but also where there is a conflict to two duties. It is immaterial whether the interest is a personal interest or arises out of a fiduciary capacity or whether the duty which is owed is in a fiduciary capacity. Further, the actual conflict is also not necessary. A possibility of conflict is enough to bring the case within the ambit of this rule. The application of this rule does not depend upon the extent of the adverse interest. Directors stand towards the company in a fiduciary position. In India this fiduciary character has received statutory recognition in Section 88 of the Indian Trusts Act, 1882. The reason underlying this rule is that the company has a right to the unbiased voice, advice and collective wisdom of its directors.

28. In *Madras Tube Co. Ltd. Vs Hari Kishon Somani*⁸, the Madras High Court held that it is, therefore, of prime importance that in any transaction in which the directors participate as directors of the company they should not only declare their personal interests therein, but they must desist from participation in any decision-making. The theory is that the Board acts as a body. How the act of the Board as a body is shaped is a matter left to the interplay of the minds of the directors, and the respective strength or weakness of each to carry the others along with him. If, therefore, a director who could sway the decision of the Board, one way or the other is a person interested in the subject-matter of the deliberations and nevertheless participates in

8 (1985) 1 Comp LJ 195 (Mad)

the meeting, and the interests of the director are not identical with those of the company, the ultimate damage to the company and the shareholders could well be imagined. This principle that where a director has a personal interest, he ought not to participate in the Board's deliberation is so sacred that no further inquiry is necessary to set at naught decisions brought about in violation of the principles. No harm might result to the company by allowing participation of an interested director, and yet the participation, per se, is vicious. This decision was quoted with approval by the Hon'ble Supreme Court in *Ram Parshotam Mittal* (supra).

29. Accordingly, the Petitioners have made out a case for issuance of a writ of quo warranto or a declaration for disqualification of Respondent No.4. However, the record bears out that Respondent No.4 was a member of the Conservation Committee from 2012 to 2015. Respondent No.4 was reappointed as a member of the Conservation Committee on 25.05.2017 and again for a further term on 04.05.2022. Therefore, the disqualification incurred by Respondent No.4 was for the term between July 2012 and July 2015. Accordingly, no purpose will be served by issuing a writ of quo warranto or a declaration as prayed for at this point in time.

30. Mr Rohit Bras De Sa, learned counsel for the Petitioners, could not point out any provisions to the effect that a disqualified member would be ineligible to be appointed as a member of the Conservation

Committee for a new term. Accordingly, it would not be proper for us to issue a writ of quo warranto or a declaration about the disqualification of Respondent No.4 during his current term.

31. The Conservation Committee must, however, ensure that there is scrupulous compliance with the Conservation Regulations including, in particular, the Regulation dealing with disqualification of member or barring of member from proceedings referred to in Clause (5)(n) quoted above. In particular, the Conservation Committee must ensure that the members who have direct or indirect interest or professional interest in any proposal that comes for consideration before the Conservation Committee must disclose such interest and if such disclosure is made, the same must be recorded in the minutes of the meeting of the Committee. If there is any breach, then, such interested member would cease to be a member of the Conservation Committee as provided under Clause (5)(n) quoted above. This provision must be scrupulously observed so that there is no conflict between the interest and duties of the members of the Conservation Committee.

32. With the above directions, we dispose of this petition. However, there shall be no order for costs.

BHARAT P. DESHPANDE, J

M. S. SONAK, J