

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4545 OF 2017

1. Mrs. Satyabhama W/o Santosh Barse,
Age:30 years, Occu: Household,
2. Mr. Santosh S/o. Laxman Barse,
Age:36 years, Occu.:Agriculture,
Both R/o Vishnupuri,
Tq. & Dist. Nanded = **PETITIONERS**

VERSUS

- 1) The State of Maharashtra
Through Secretary,
Rural Development Department,
Mantralaya, Mumbai
- 2) The Additional Commissioner,
Aurangabad Division, Aurangabad
- 3) The Collector,
Nanded, Tq. & Dist. Nanded
- 4) The Tahsildar/Returning Officer,
Nanded Tq. & Dist. Nanded
- 5) Janabai W/o Govind Shembole,
Age:30 years, Occu.: Household,
R/o. Vishnupuri,
Tq. & Dist. Nanded = **RESPONDENTS**

Mr.Anil M.Gaikwad, Advocate for Petitioners;
Mr.SP Tiwari,AGP for Respondent Nos. 1 to 3;
Mr.SK Sawangikar, Adv. For Resp.No.5.

CORAM : P.R.BORA, J.

DATE : 6th April, 2017.

ORAL JUDGMENT:

1) Heard. Rule. Rule is made returnable forthwith by consent of learned Counsel appearing for the parties.

2) The petitioners have filed the present petition taking exception to the order passed by Additional Commissioner, Aurangabad Division, Aurangabad on 1st March, 2017 in an appeal bearing No.340/2016 filed by the present petitioners against the order dated 19th September, 2016 passed by the Additional Collector, Nanded in Gram Panchayat Dispute No.6/2016.

. The aforesaid Dispute was filed by present Respondent No.5 before the Collector, Nanded. It was the contention of Respondent No.5 that the petitioners shall be disqualified from holding respectively the post of Sarpanch and member of the Gram Panchayat since they have committed encroachment on the government land. The Dispute/Complaint so filed by Respondent No.5 was allowed by the Collector, Nanded and thereby

the petitioners are disqualified from holding their respective post of Sarpanch and member of the Gram Panchayat, Vishnupuri. Against the decision of the Collector, Nanded, in the aforesaid Gram Panchayat Dispute, the petitioners preferred an appeal bearing Appeal No.340/2016 to the Commissioner, Aurangabad Division, Aurangabad. In the said appeal, the petitioners also filed an application seeking stay to the order passed by the Collector, Nanded. However, the said application was rejected by the learned Additional Commissioner, vide the order passed on 19.11.2016.

3) It is the contention of the petitioners that thereafter the appeal was not heard on merits by the learned Commissioner and has been dismissed in default on 1st March, 2017. It is the further contention of the petitioners that in the order passed on 19.11.2016, though the next date was given as 7th December, 2016, the matter was not on Board on that day and thereafter the

date was given as 21st December, 2016. It is the further contention of the petitioners that on 21st December, 2016, the appeal was not heard and the matter was simply adjourned to 13th January, 2017. On 13th January, 2017, the Advocate for the petitioners could not remain present before the learned Additional Commissioner and as such, the appeal could not be heard. It is the further contention of the petitioner that thereafter no further date was given and the petitioners were not aware as about the further progress in the appeal so filed by them. It is the further contention of the petitioners that only after the order was served upon them on 7th March, 2017 that they come to know that the appeal so filed by them, has been dismissed for want of prosecution on 1st March, 2017. Thereafter, the petitioners applied for certified copy of the order passed by the learned Commissioner on 1st March, 2017 and after receiving the copy of the said order and after having collected the other necessary documents, preferred an application before the

learned Commissioner on 30th March, 2017 seeking restoration of the appeal so dismissed for want of prosecution.

4) Shri Gaikwad, learned counsel for the petitioners, submitted that on 30th March, 2017 itself the notice was issued by Collector, Nanded declaring the programme for election of Sarpanch of Gram Panchayat, Vishnupuri. The learned Counsel submitted that the petitioners, therefore, immediately filed an application seeking stay to the said election and to postpone the said election till decision of the appeal filed by them. The learned Counsel further submitted that after hearing the arguments of the counsel appearing for the petitioners, the learned Commissioner, orally informed the petitioners that their application has been rejected and the reasoned order will be passed. The learned counsel further submitted that considering the urgency in the matter, the petitioner immediately filed the present petition

challenging the order so passed by the Additional Commissioner. The learned Counsel further submitted that in the meanwhile, a copy of the order passed by the learned Commissioner is received to the petitioners whereby the application for stay was rejected by the Commissioner. The learned counsel submitted that the restoration application has been filed by the petitioners well within time. The learned counsel submitted that there are just and valid grounds for seeking restoration of the appeal by the petitioner, which has been dismissed for want of prosecution. The learned counsel submitted that the appeal filed by the petitioners, needs to be heard on merits and till then the election for the post of Sarpanch shall be directed to be postponed.

5) The learned counsel appearing for the respondents has strongly opposed for granting any such relief. Respondent No.5, who is the contesting respondent, has tendered an affidavit

in reply across the Bar. The learned counsel appearing for Respondent No.5 submitted that because of the inaction and lethargy on the part of the petitioners, the appeal has been dismissed in default. The learned Counsel submitted that the petitioners ought to have shown due diligence in prosecuting their appeal. The learned counsel submitted that the appeal has been dismissed for want of prosecution only because of inaction on the part of the petitioners and no relief in such circumstances can be granted in their favour and no fault can be found with the impugned order. The learned counsel further submitted that from the evidence on record, it has been sufficiently proved that the petitioners have encroached upon the portion of the Government land. The learned Counsel submitted that the Collector in his order has recorded a concrete finding as about the encroachment made by the petitioners on Government land and as such, no case is made out in favour of the petitioners for grant of any relief. The learned counsel further submitted

that when the election process has commenced, no interference can be caused. The learned Counsel has referred to Article 243-O(b) of the Constitution of India and has also placed reliance on the judgment in the case of Shri Sant Sadguru Janardhan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and anr. Vs. State of Maharashtra and Ors. - AIR 2001 SC 3982.

The learned counsel submitted that all other remedies are available for the petitioners.

6) Learned AGP appearing for Respondent Nos. 1 to 4, has supported the impugned order. Learned AGP submitted that no interference is required in the order so passed.

7) I have carefully considered the submissions made on behalf of the learned Counsel appearing for the respective parties. I have also perused the entire material on record. The material on record shows that Respondent No.5, who filed the Gram Panchayat Dispute to Collector, Nanded, alleging that the petitioners

have committed encroachment on the Government land and thereby have incurred the disqualification to be continued as members of the Gram Panchayat, has also filed the civil suit before the Court of Civil Judge, Senior Division, Nanded seeking injunction against the present petitioners, restraining them from carrying out any Pakka construction on the Government land. In the said civil suit, Respondent No.5 had also filed an application seeking interim injunction and the same was granted in favour of Respondent No.5 and the petitioners were thereby restrained from carrying out any Pakka construction allegedly on the Government land. The material on record further shows that against the interim injunction, so granted by the Civil Court, the present petitioners preferred Misc.Civil Appeal No.69/2015 before the District Judge, Nanded and the same has been allowed and thereby the order passed by the Civil Judge, Senior Division below Exh.5 in RCS No.357/2015 has been set aside. The material on record further shows that along with

the petitioners, plots were allotted to several other villagers by the Government on the Government land way back in the year 1992. The plots so allotted are stated to be of the size of 35 x 45 ft. The construction, as on today, standing on the plot of the petitioners is alleged to be of more than 45 ft.in length. Thus, in the 5 ft. area, the petitioners are alleged to have committed encroachment.

8) The learned counsel for the petitioners has placed on record the lay out of the plots as allotted by the Government to the villagers including the petitioners. Taking me through the said layout, learned Counsel brought to my notice that though many of the plots are not in square shape and some are even in rectangular shape, the sizes of all these plots are stated to be 35' x 45'. The learned Counsel specifically inviting my attention to the plot allotted to the petitioners, in the said layout, submitted that the said plot is also not in square shape. On

perusal of the layout and more particularly the plot allotted to the petitioners, there appears reason to believe that the measurement of the subject plot may be bit different than as mentioned in the allotment.

9) It is the assertive contentions of the petitioners that neither they have carried out any pakka construction nor they have made any encroachment. The learned Counsel for the petitioners submitted that even according to the complaint of Respondent No.5, the alleged construction is of a bath-room and toilet which is covered by a tin-shed and cannot be termed as Pakka construction. The learned counsel submitted that even according to the allegation in the complaint only two and half ft. portion is alleged to have constructed on the Government land, more particularly on the road. The learned counsel submitted that if the correct measurements are carried out by an expert, the petitioners are sure that whatever construction

they have made will be held to have been made by them without making any encroachment. The learned Counsel further submitted that before carrying out the construction, the permission has been obtained by the petitioners from the Gram Panchayat. It is, however, the allegation of Respondent No.5 that the petitioners have constructed beyond the permission granted to them and thus cannot deny the allegation that they have not committed encroachment.

10) After having considered the rival contentions and the material on record, it is evident that unless the matter is heard finally, it is difficult to arrive at to any concrete conclusion whether the petitioners have made any encroachment on the Government land or their construction is within the limits of their plot allotted to them. The findings recorded by the learned Additional District Judge while deciding the Misc. Civil Appeal filed by the petitioners, prima facie, support the case of the petitioners.

As has been argued by the petitioners, the learned Collector has relied on the spot inspection report submitted by non-technical person. No exact measurements were before the learned Collector nor there was any sketch of the alleged construction. There is substance in the argument made by the learned Counsel for the petitioners that for proving the encroachment, there must be very concrete evidence on record. Since the petitioners are disqualified on the ground that they have committed encroachment on the Government land, there must have been unimpeachable evidence to show that the petitioner have committed such encroachment on the Government land. The very issue whether such encroachment has been committed or otherwise, needs to be decided in an appeal filed by the petitioners. It is a matter of record that the appeal so filed by the petitioners has been dismissed in default. It is also the matter of record that the petitioners have filed the application within the stipulated period of

limitation praying for restoration of the appeal. Admittedly, the said application is pending before the learned Commissioner. The grounds which are stated by the petitioners for restoration of their appeal, prima facie, appear to be just and sufficient for restoration of the appeal.

11) In the circumstances, as above, the petitioners have certainly made out a case for restoration of their appeal before the Additional Commissioner and its decision on merits. Till then, the Collector, Nanded needs to be restrained from holding the election for the post of Sarpanch of Gram Panchayat, Vishnupuri scheduled to be held on 7th April, 2017.

12) In the result, the following order, -

ORDER

i) The order dated 1st Mach 2017 passed by Respondent No.2 is set aside, consequently, the Appeal No.340/2016

filed by the petitioners is restored to file;

ii) The learned Additional Commissioner, Aurangabad Division, shall hear and dispose of the said appeal by giving due opportunities to the parties to the said appeal, as expeditiously as possible and preferably within the period of four weeks from the date of this order;

iii) The process of election scheduled on 7th April, 2017 declared by the Returning Officer, vide notice dated 30th March, 2017 for electing the Sarpanch to the Village Panchayat, Vishnupuri, shall stand stayed till decision of the appeal by the Additional Commissioner, Aurangabad;

iv) The petitioners and Respondent No.5 shall appear before Additional Commissioner, Aurangabad on 10th April,

2017 at 10.30 a.m. and shall abide by the further instructions which may be issued by the said authority for conduction of the appeal;

13) The writ petition stands allowed as above. Rule is made absolute in the aforesaid terms.

. Parties to act on authenticated copy of this judgment.

(P. R. BORA)
JUDGE

bdv/