

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 13965 OF 2018

Shri. Sagar Pandurang Dhundare	...Petitioner
<i>Versus</i>	
Shri Keshav Aba Patil and others	...Respondents

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Mr. Drupad S. Patil, Advocate for the Petitioner.
Mr. S.G. Deshmukh i/b. Dilip Shinde, Advocate for Respondent No.1.
Mr. S.H. Kankal, A.G.P., for Respondent No.4-State.

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CORAM : R. G. KETKAR, J.

DATE : 13th DECEMBER, 2018

P.C.

1. Heard Mr. Drupad Patil, learned counsel for the petitioner, Mr.S.G. Deshmukh, learned counsel for respondent No.1 and Mr.S.H. Kankal, learned counsel for respondent No.4-State, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 4.12.2018 passed by the Collector, Kolhapur in Dispute Application No.00042/2018. By that order, the Collector, Kolhapur overruled the objection raised by the petitioner in an application of October, 2018 in Dispute Application filed by the first respondent herein.
3. Respondent No.1 filed Dispute Application No.42/2018 before the Collector under Section 14(1)(j-3) of the Maharashtra Village

Panchayats Act (for short, 'Act'). Respondent No.1 contended that the petitioner herein was elected from ward No.3 reserved for O.B.C. in the elections of Grampanchayat Rashivade (Budruk) (for short, 'Grampanchayat') for the period from 2017 to 2022. The petitioner is a member of the family who has committed encroachment and, therefore, under Section 14(1)(j-3) of the Act is liable to be declared as disqualified. Reliance was placed upon the decision of Apex Court rendered by three learned Judges of Apex Court in **Janabai Vs. Additional Commissioner and others, 2018(5) Mh.L.J. 921.**

4. The petitioner filed application in October, 2018 *inter alia* contending that respondent No.1 has suppressed the decision of Apex Court rendered by two learned Judges of Apex Court in **Sagar Pandurang Dhundare (petitioner herein) Vs. Keshav Aaba Patil (respondent No.1 herein), (2018) 1 SCC 340.** As the issue of encroachment is concluded by the Apex Court by that decision, the present dispute application filed by the first respondent is barred by the principles of *resjudicata*.

5. By the impugned order, the Collector, Kolhapur has overruled the objection and held that the dispute application is required to be decided on merits in accordance with law and fixed the hearing on 6.12.2018. It is against this order, the petitioner has instituted present petition.

6. Mr. Deshmukh raised preliminary objection on the ground that the petitioner has filed application under Section 9-A of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'). In view of the Ordinance deleting Section 9-A, said application is not maintainable. He further submitted that even if it is held that the application is not under Section 9-A of C.P.C., nonetheless the Collector, Kolhapur has no authority to frame and decide the preliminary issue. He, therefore, submitted that the application filed by the petitioner for framing and deciding the preliminary issue itself is not maintainable.

7. I do not find any merit in the submission of Mr. Deshmukh. A perusal of the application filed by the petitioner does not indicate reference to Section 9-A of C.P.C. In other words, the application is not filed under Section 9-A of C.P.C. A perusal of the impugned order shows that the Collector observed that the petitioner has raised the issue based upon Section 9-A of C.P.C. during the course of arguments. Said observation is to be found in paragraph-2 of the impugned order. In paragraph-8, the Collector has referred to the contention advanced on behalf of the first respondent. In paragraph-9, the Collector observed that the superior Court has not granted any stay order and as the Authority is invested with the powers to decide the dispute under Section 14(1)(j-3) read with Section 16 of the Act, it can proceed with the matter on merits. In other words, the Collector did not record any

finding as to whether the dispute is barred by the principles of *resjudicata* or not.

8. During the course of hearing, Mr. Deshmukh invited my attention to the findings recorded by the learned Single Judge in paragraph-7 of the order dated 19.7.2016 passed in W.P. No.6916/2016 instituted by the petitioner herein against respondent No.1 challenging the order dated 9.6.2016 passed by the Additional Commissioner, Pune Division, Pune. He submitted that in paragraph-7, the learned Single Judge dealt with the contention that in view of the decree in favour of respondent No.2 therein (namely father of the petitioner herein) of declaration of his title to the land at C.T.S. No.538, there is no question of encroachment by him on the government or public property so as to incur disqualification under Section 14(1)(j-3) of the Act and observed as under :

“In my opinion, there cannot be any substance in the argument advanced because the very decree on which the petitioner desires to rely upon is founded on the admission of encroachment on the government property by respondent no.2. Merely because there is a decree of title by adverse possession in favour of respondent no.2, the fact of encroachment does not get annulled. In any case, the allegation of respondent no.1 is that the decree has been obtained in collusion with the Grampanchayat and the then Gramsevak and there are proceedings pending for setting aside of the decree on the ground of fraud being played upon the court.”

9. Mr. Deshmukh submitted that this part of the finding is not set aside by the Apex Court in **Sagar Pandurang Dhundare's** case (supra). I do not find any merit in this submission. A perusal of the decision in **Sagar Pandurang Dhundare's** case (supra) and in particular paragraph-17 shows that the Apex Court has set aside the judgment dated 19.7.2016 passed by the learned Single Judge of this Court in W.P. No.6916/2016. If that judgment is set aside the findings recorded therein cannot be relied upon by any of the parties.

10. This brings me to the merits of the case. As mentioned earlier, the petitioner has filed application for framing and deciding preliminary issue on the ground that present dispute application filed by the first respondent is barred by principles of *resjudicata* in view of the decision of the Apex Court rendered in **Sagar Pandurang Dhundare's** case (supra). With the assistance of the learned counsel appearing for the parties, I have carefully gone through that decision. In paragraphs-15 and 16 of that decision, the Apex Court observed thus :

“15. From the Statements of Objects and Reasons for the amendment introduced in 2006, it is seen that the purpose was “to disqualify the person who has encroached upon the Government land or public property, from becoming member of the Panchayat or to continue as such”. The person, who has encroached upon the Government land or public property, as the law now stands, for the purpose of disqualification, can only be the person, who has

actually, for the first time, made the encroachment. However, in view of Section 53(1) of the Act, in case a member has been punished for encroachment, he shall be dismissed. Similarly, a member against whom there is a final order of eviction under Section 53(2) or (2A), shall also not be entitled to continue as a member.

16. In case, the appellants suffer from any of the three situations indicated above, they shall be unseated. The rest is for the State to clarify by way of a proper amendment in case they really and truly want to achieve the laudable object of preventing persons with conflicting interest from becoming or continuing as members of the Panchayat. The extent of conflicting interest is also for the Legislature to specify.”

11. A perusal of the above extracted portion clearly shows that the Apex Court observed that the person who has encroached upon the Government land or public property for the purpose of disqualification **can only be the person who has actually, for the first time, made the encroachment.** The Apex Court further observed that in view of Section 53(1) of the Act, in case a member has been punished for encroachment, he shall be disqualified. Similarly, a member against whom there is a final order of eviction under Section 53(2) or 53(2A), shall also not be entitled to continue as a member.

(emphasis supplied)

12. In the present case, Sections 53(2) or 53(2A) are not attracted. Thus, the short controversy is whether the petitioner can be disqualified only if he has committed encroachment on the Government

land or public property. Insofar as the decision in the case of **Janabai** (supra), the three learned Judges of the Apex Court observed in paragraph-29 thus :

“29. We may note here with profit that the word 'person' as used in Section 14 (1) (j-3) is not to be so narrowly construed as a consequence of which the basic issue of “encroachment” in the context of disqualification becomes absolutely redundant. The legislative intendment, as we perceive, is that encroachment or unauthorized occupation has to be viewed very strictly and Section 53, therefore, provides for imposition of daily fine. It is also to be borne in mind that it is the Panchayat that has been conferred with the power to remove the encroachment. It is the statutory obligation on the part of the Panchayat to protect the interest of the properties belonging to it. If a member remains in occupation of an encroached property, he/she has a conflict of interest. If an interpretation is placed that it is the first encroacher or the encroachment made by the person alone who would suffer a disqualification, it would lead to an absurdity. The concept of purposive interpretation would impel us to hold that when a person shares an encroached property by residing there and there is continuance, he/she has to be treated as disqualified. Such an interpretation subserves the real warrant of the provision. Thus analysed, we are of the view that the decision in Sagar Pandurang Dhundare (supra) does not lay down the correct position of law and it is, accordingly, overruled.”

13. A perusal of paragraph-29, extracted hereinabove, shows that the Apex Court held that the word 'person' used in Section 14(1)(j-3) cannot be so narrowly construed as a consequence of which the basic issue of “encroachment” in the context of disqualification becomes

redundant. The legislative intendment is that encroachment or unauthorized occupation has to be viewed very strictly. The Apex Court observed that thus it is also required to be borne in mind that it is the Panchayat that has been conferred with the power to remove the encroachment. It is the statutory obligation on the part of the Panchayat to protect the interest of the properties belonging to it. If a member remains in occupation of an encroached property, he/she has a conflict of interest. If an interpretation is placed that it is the first encroacher or the encroachment made by the person alone who would suffer a disqualification, it would lead to an absurdity. The concept of purposive interpretation would impel to hold that when a person shares an encroached property by residing there and there is continuance, he/she has to be treated as disqualified. Such an interpretation subserves the real warrant of the provision. The Apex Court accordingly overruled the decision in **Sagar Pandurang Dhundare** (supra). Thus, in the case of **Sagar Pandurang Dhundare** (supra), the Bench of two learned Judges of Apex Court held that the person who has encroached upon the Government land or public property, for the purpose of disqualification, can only be the person who has actually for the first time made the encroachment. As against this, in the case of **Janabai** (supra), the Bench of three learned Judges of Apex Court held that a person who shares an encroached property by residing there and there is

continuance, he/she has to be treated as disqualified. The present proceedings, therefore, cannot be said to be barred by the principles of *resjudicata*. In view thereof, I do not find any merit in the submission of Mr. Patil that the dispute application filed by respondent No.1 is barred by principles of *resjudicata*.

14. In the light of the above discussion, I do not find that any case is made out for interfering with the impugned order albeit for different reasons. Hence, the Petition fails and the same is dismissed. All contentions of the parties are expressly kept open. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)