

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.**

WRIT PETITION NO. 1109 OF 2014

Ashruba Dhondiba Gade
Age : 32 years, occu.: agri.,
R/o Gambhirwadi, Taluka Kallam,
District Osmanabad.

Petitioner.

Versus

1. Rajendra Shankar Sutar
Age : 55 years, occu.: agri.,
R/o Gambhirwadi, Taluka Kallam,
District Osmanabad.

2. Mandakini Rajendra Sutar
Age : 50 years, occu.: household
R/o as above.

3. The Additional Collector,
Osmanabad.

4. Extension Officer (Panchayat)
Panchayat Samiti, Kallam,
District Osmanabad.

Respondents.

Mr. S.G. Chapalgaonkar, Advocate for the petitioner.

Mr. P.B. Rakhunde, Advocate for respondent Nos.1 and 2.

Mr. R.B. Bagul, A.G.P. for respondent Nos.4 and 4.

CORAM : T.V. NALAWADE, J.

Dated : 12 February 2019.

ORAL JUDGMENT :-

. Rule. Rule made returnable forthwith. By consent heard both sides for final disposal.

2. The present proceeding is filed to challenge the judgment and order of the learned Divisional Commissioner, Aurangabad in Appeal No. DB/Desk-2/ZPVP/Appeal/CR/88/2013 dated 14.11.2013, by which the learned Divisional Commissioner has set aside the order of disqualification passed against the petitioner by District Collector, Osmanabad. The Collector had passed order of disqualification on the ground that encroachment was made by respondent No.1 Rajendra and respondent No.2 Mandakini on Gairan land which was allotted to Public Works Department under the provisions of Section 14 (1) (j-3) of the Maharashtra Village Panchayat Act, 1959. For passing the order, learned Collector had considered the record of enquiry made by Tahsildar which included show-cause notices given by Tahsildar and the panchnama prepared by Village Panchayat in respect of the said construction. In addition to that, there was statement dated 28.06.2011 of Rajendra Sutar which was to the effect that in the past, the said space was open space, his son had made construction of the house on the said space, there was also toilet

block and before making construction of the house he was using the said toilet block and thus, before making construction of new house, prior to one year of the date of statement, he was living in Gairan by making construction of shed by using tin sheets.

3. The nomination form was filled in the year 2010 and the tenure of Village Panchayat was 2010 to 2015. In view of this record and the say of aforesaid nature of Rajendra, the order was made by District Collector against the petitioner of disqualification.

4. Learned Divisional Commissioner has referred one decision of this Court in Writ Petition No.3942 of 2012 (Ganesh Arun Chavan Vs. State of Maharashtra) decided on 24.09.2012 in which this Court had held that a Member could not be disqualified as there was no record to show that he had made encroachment.

In the present matter, a stand was taken by the father, Rajendra that his son Pawan was living separate from him and his son Pawan had made encroachment over the land belonging to Public Works Department. This stand was accepted as it is by the learned Divisional Commissioner and the order

made by learned Collector was set aside.

5. It needs to be kept in mind that every case needs to be decided on the basis of the facts and circumstances of that case. In such cases the ratio of the case decided by this Court cannot be applied as it is, if there is difference of one or two facts. When a Karta, father of joint Hindu Family is a Member of Village Panchayat, initially the Court or the Authority need to go with the presumption that only due to the post which is held by Karta of the Joint Hindu Family, the family could indulge into illegal activities. In the present matter, there is other record showing that Pawan and Rajendra were having common ration card and there is certificate issued on 28.02.2013 showing that even on that day they were using common ration card as the members of the same family. There is record of distribution of food-grains to this family for some period of the year 2013. This circumstance ought to have been considered by the Divisional Commissioner, but this circumstance and the aforesaid other circumstances including admission of Rajendra of aforesaid nature, is not considered by the Divisional Commissioner. Such cases are required to be decided on the basis of material available and the subjective

satisfaction of the Authority which is entitled to take decision in such cases. When subjective satisfaction of the Authority is involved, the appellate Authority is not expected to interfere in the decision taken by the Authority. In the present matter, this Court holds that the Divisional Commissioner has committed error in interfering in the order made by the Collector.

6. The submissions made show that due to the order made by learned Divisional Commissioner, the respondent Rajendra enjoyed his term. However, he again got elected for the next term and he is enjoying the subsequent term also. It is necessary to observe that if illegal construction is still there, then that gives continuous cause of action and action can be taken even in respect of the present tenure against him, after following the procedure laid down in the Act.

7. learned Counsel for the respondent Rajendra placed reliance on some observations made by Division Bench of this Court in Writ Petition No.3707 of 2016 (Mallesh Shivan Shetty Vs. The Commissioner and others) decided at Principal Seat in Civil Appellate Jurisdiction. The facts of that case were totally different and illegal construction made by a Member of

Corporation in the past was involved in that case. As already observed, each case needs to be decided on the basis of facts and circumstances of that case. So, the ratio of this case cannot be used in the present matter in favour of respondent Rajendra.

8. With the aforesaid observations, following order is passed.

(i). The petition is allowed.

(ii). The order made by learned Divisional Commissioner, Aurangabad is hereby set aside.

(iii) The order of Additional Collector, Osmanabad is restored.

9. Rule is made absolute in above-said terms.

(T.V. NALAWADE)
JUDGE

vdd/