

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

WRIT PETITION NO.520 OF 2020

1 Raju s/o Mansaram Pawar,
Age : 50 years, Occupation : Up-Sarpanch,
R/o At Jamdighat, Post.Wadner,
Tq.Kannad, Dist.Aurangabad.

2 Yashoda w/o Raju Pawar,
Age : 49 years, Occupation : Member,
R/o At Jamdighat, Post.Wadner,
Tq.Kannad, Dist.Aurangabad.

...PETITIONERS

-VERSUS-

1 The Additional Divisional Commissioner,
Aurangabad Division, Aurangabad.

2 The District Collector,
Collector Office, Aurangabad,
Tq. and Dist.Aurangabad.

3 Raju s/o Ramchandra Pawar,
Age : 48 years, Occupation : Agriculture,
R/o At Jamdighat, Post.Wadner,
Tq.Kannad, Dist.Aurangabad.

...RESPONDENTS

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Advocate for the Petitioners : Shri Gore Ravindra Vitthal and Shri
S.J.Pahilwan

AGP for Respondents 1 and 2 : Shri S.W.Munde
Advocate for Respondent 3 : Shinde Abasaheb D.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 28th February, 2020

Oral Judgment :

1 Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2 The petitioners (husband and wife), who are elected members of the Village Panchayat, Jamdighat, Taluka Kannad, District Aurangabad, are aggrieved by the order dated 02.08.2019 passed by the District Collector disqualifying both of them under Section 14(1)(j-3) of the Maharashtra Village Panchayats Act. They are also aggrieved by the order of the Additional Divisional Commissioner, Aurangabad dated 12.12.2019 by which, their disqualification has been sustained.

3 I have considered the strenuous submissions of the learned advocates for the respective sides and the learned AGP appearing on behalf of respondent Nos.1 and 2. With their assistance, I have gone through the petition paper book.

4 Both the petitioners were elected as members of the Village Panchayat, Jamdighat in the year 2017. Subsequently, petitioner No.1/ husband was elected as the Up-Sarpanch of the said Village Panchayat. Respondent No.3/ original complainant, preferred a complaint before the District Collector on 30.01.2019 contending that the petitioner/ husband has encroached upon the forest land and has been conducting agricultural activities. The yield of such agricultural activities has been enjoyed by the petitioner/ husband and his wife/ petitioner No.2. The wife has, therefore,

enjoyed the encroachment. In 2010, Crime No.12/2010 was registered against the husband with the Kannad Police Station under Section 26 of the Indian Forest Act, 1927. The fact of registration of the criminal case against the husband was suppressed in the nomination form of the husband.

5 The petitioners have averred in the memo of the petition that the registration of a crime under Section 26 of the Indian Forest Act would not ipso facto disqualify the petitioner/ husband. No offence is registered against the wife. The offence registered against the husband is under sub clauses (e) and (f) of sub-section (1) of Section 26 of the Indian Forest Act, 1927. No offence as regards the encroachment has been registered. The wife is not subject matter of any criminal case and no first information report has been registered against her. Regular Criminal Case No.201/2010 is still pending for 10 years and is now ready for final adjudication. Until the petitioner/ husband is convicted and there being no case registered regarding the purported encroachment of the petitioner, Section 14(1)(j-3) of the Maharashtra Village Panchayats Act would not be attracted.

6 The learned advocate for respondent No.3 submits, on the basis of the affidavit in reply filed, that there is no dispute insofar as the revenue records are concerned that petitioner No.1 is the encroacher. Along with the affidavit in reply of respondent No.3/ original

complainant, the panchanama and the statements of the objectors are annexed, which indicate that petitioner No.1, who was present at the spot of encroachment, was counseled by the panchas to remove the encroachment and give up 04 acres of land which he had forcibly occupied and was utilizing for agricultural purposes. Petitioner No.1 became extremely aggressive during the inspection and had threatened the panchas and revenue authorities. He had used foul and filthy language and the ladies accompanying him had pelted stones at the revenue authorities. As the situation became violent, the police officers, forest guard, watchman and officers of the Forest Department moved away from the site and prepared the panchanama.

7 The learned advocate for respondent No.3 further points out the documents placed on record, which would indicate that petitioner No.1 along with his wife/ petitioner No.2 had entered an application Form No.47 under the Scheduled Tribe and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Rules, 2007 for seeking regularization of encroachment over 04 acres of forest land. Both had submitted 10 documents along with the said claim. Certain revenue records and the resolution of the Gram Sabha indicating that the petitioners were encroachers over 04 acres of forest land were also submitted. Details in the said form were filled in by the petitioners. These documents were suppressed before the Collector and they were produced

before the Additional Divisional Commissioner by the complainant when the hearing in the matter took place. It is, therefore, contended that there is no argument available for the petitioners to contradict their own application tendered for seeking regularization of encroachment over 04 acres of forest land.

8 Respondent No.3 has relied upon the judgment delivered by the Honourable Supreme Court (three Judges Bench) in the matter of ***Janabai vs. Additional Commissioner and others, AIR 2018 SC 5068***, to support the contention that inheritance of the encroachment or enjoyment of the encroachment by the kith and kin/ elected representative, would also amount to encroachment. Reliance is also placed upon the judgments delivered by this Court in the matters of ***Sandip Ganpatrao Bhadade vs. Additional Commissioner, Amravati and others, 2017 (1) Mh.L.J. 79 : 2017 (7) Bom.C.R. 248*** and ***Sanjay Kantilal Thakare vs. State of Maharashtra and others, 2019 (3) Mh.L.J. 730***.

9 The learned advocate for the petitioners has made a valiant attempt to extricate the petitioners out of the situation in the light of the application filed by the couple for seeking regularization of the encroached land. The contention is that if the Government regularizes the encroachment, there would be no encroachment and the petitioners would be authorized occupants and users of 04 acres of forest land. They are landless and they belong to the Scheduled Tribe category and hence,

the Government can regularize the said encroachment, which would render the act of the petitioners legal and would no longer be termed as encroachment.

10 The learned AGP submits that the Government has not yet taken any decision with regard to the application for seeking regularization, jointly filed by the petitioners.

11 Similar issue of encroachment committed by an elected representative and the claim for regularization of encroachment, was before this Court (Coram : Myself) in the matter of ***Sanjay Kantilal Thakare (supra)***. While dealing with the said case, I had placed reliance upon the judgment of the Honourable Supreme Court in the matter of ***Janabai (supra)*** and I had recorded my findings in paragraphs 14 to 23 as under :-

14. *I find from the record that the sarpanch in the instant case has boldly taken a stand that her husband has encroached upon the government land, he has applied for regularization, he is paying taxes with regard to the encroached land and he has every hope of the encroachment being regularized pursuant to the G.R. dated 16/02/2018. It is not disputed that after marriage the sarpanch has been living with her husband in the same premises which are constructed on government land and which is the encroachment at issue.*
15. *At times, I find it quite intriguing that when politicians cause encroachment on their own motherland, the State Government brings out a G.R. to regularize such enroachment. In the instant case, the husband of the Sarpanch has moved the State to regularize such encroachment. I hope that the State Government would*

ensure that a clean and fair atmosphere is maintained and all those causing encroachment be dealt with, with an iron hand. If not, I find that policies promoting regularization of encroachments would be counter productive and would embolden such people since they would be under the impression that they could resort to encroachment and subsequently influence the policy makers to get such encroachments regularized.

16. *The submissions on behalf of the sarpanch have to fail for reasons, more than one. In Janabai (supra), the Honourable Apex Court has not recorded that the view taken in Dhundare (supra) would stand overruled prospectively. So also, even if it is to be accepted that the case of this sarpanch would be covered by Sagar Dhundare's judgment, the facts in the Dhundare's case (supra) would reveal that the issue of an elected representative inheriting encroached property of her spouse and enjoying the said property before elections and after elections, was not before the Honourable Apex Court.*
17. *The contention of the sarpanch is that her case has attained finality after the Additional Commissioner delivered the impugned verdict on 19/06/2018. This submission needs to be rejected instantaneously since the impugned judgment is now being subjected to judicial review of this Court in its supervisory, as well as, revisionary jurisdiction. The impugned judgment, if one such argument is to be accepted, can be said to be sustainable as on the date on which it was delivered. However, the law which became the foundation of the impugned judgment having been held to be bad, would remove such foundation and as such, in this continuing litigation, the law laid down in Janabai's case would be applicable at this moment.*
18. *The contention of the sarpanch then is that undue burden would be created on the State Government if Janabai (supra), is to be made applicable to such pending cases in which the Additional Commissioner has already delivered a verdict. In my view, it cannot be overlooked that though the administration would be burdened by holding elections on such posts which have fallen vacant due to such disqualification, such burden would not be over so*

whelming that the purpose and the object for which Section 14(1)(j3) was introduced, could be ignored. It has to be kept in mind that the duty of the legislature, the administration and even the courts is to uphold the rule of law and to ensure that such law is effectuated by resorting to such executive action that would be a lesson to elected representatives from encroaching upon and robbing their motherland. It cannot be tolerated that elected representatives would get a right to resort to encroachment.

19. The sarpanch in this case has inherited the encroachment made by her husband. She has boldly accepted the encroachment and has also conceded that she is enjoying the encroached property. In such circumstances, if the law laid down in Janabai (supra) would not be made applicable, such elected representative would mock at the law and would gleefully believe that he/she has succeeded in hoodwinking the law.
20. In Ashok kumar Gupta (Supra), the Honourable Apex Court has observed that it has to be assessed whether, retrospective operation of overruling and the earlier law would accelerate or retard the law meant to protect the rights of the people.
21. In view of the above and since in Sagar Dhundare's case, (supra) such case of a sarpanch inheriting encroached property and enjoying the said property during the elected term, was not being considered, I find that the impugned orders deserve to be quashed and set aside in view of the law laid down in Janabai (supra).
22. As such, this petition is allowed. The impugned order of the District Collector dated 23/02/2018 and the impugned order of the Additional Divisional Commissioner dated 12/06/2018 stand quashed and set aside. Respondent No.5 stands disqualified as a sarpanch/member in view of Section 14(1)(j3).
23. Needless to state, it is open to the statutory authorities to initiate steps insofar as the effects of the encroachment are concerned. It is, however, made clear that this Court has not expressed a view insofar as the pending proposals before the Committee for regularization are concerned."
(Emphasis supplied)

12 The learned AGP submits that the Government is yet to consider the above observations of this Court and is yet to take a decision on regularizing the encroachment by elected representatives. He was unable to make any contention as regards the observations of this Court as to whether, the elected representatives can be permitted to encroach upon the Government land and rob one's mother land and then, seek issuance of a Government resolution for regularizing such encroachments.

13 I find that the Honourable Supreme Court, while dealing with Janabai's case (*supra*), concluded that the view taken by it in ***Sagar Pandurang Dhundare vs. Keshav Aaba Patil and others, AIR 2017 SC 5420***, was not the correct law. The Honourable Supreme Court had made the following observations in ***Janabai (supra)*** in paragraphs 24 to 29 :-

"24. As we understand from the above paragraph, the two-Judge Bench has been guided by the word "person" as used in Section 14(1) and further influenced by the language employed in Section 53. That apart, the analysis made by the two-Judge Bench, as we notice, has given a restricted meaning to the word "person" who has encroached upon the government land or public land. It has also ruled that such a person is one who has actually for the first time encroached upon the government or public land. In *Devidas Surwade (supra)*, the Division Bench of the Bombay High Court, placing reliance on the Statement of Objects and Reasons and laying stress on the word "person", noted that the legal heirs of an encroacher who continue to occupy the government land or government property are to be treated as encroachers. It has been held that if such an interpretation is not adopted, the result would be absurd, for the government land would continue to remain encroached and the legal heirs or the assignees

or the transferees remaining on the encroached government land shall claim the right to get elected as a member of a democratically elected body. According to the Division Bench of the Bombay High Court, such an interpretation would defeat the very object of the Bombay Village Panchayat (Amendment) Act, 2006.

25. First, we are obliged to remind ourselves that the view expressed by the Bombay High Court in *Devidas Surwade* (supra) has been affirmed by this Court in Special Leave Petition. It is worth noting here that this Court, while dismissing the special leave petition, had observed that it had not found any merit in the petition. Whether such an order would tantamount to be a binding precedent or not is another matter.
26. We may hasten to add here that we do not intend to take the said route. We think it appropriate to analyse the provision, understand the purpose and the contextual relevance and also appreciate the nature of the provision in the backdrop of the democratic set-up at the grass root level. Having said that, we shall now analyse the statutory scheme. Section 53 that occurs in Chapter III deals with obstruction and encroachment upon public streets and upon sites. It confers power on the Panchayat to remove such obstruction or encroachment or to remove any unauthorizedly cultivated grazing land or any other land. That apart, it also empowers the Panchayat to remove any unauthorized obstruction or encroachment of the like nature in or upon a site not being private property. The distinction has been made between private property and public property. It has also protected the property that vests with the Panchayat. If the Panchayat does not carry out its responsibility of removing the obstruction or encroachment after it has been brought to its notice in accordance with the procedure prescribed therein, the higher authorities, namely, the Collector and the Commissioner, have been conferred with the power to cause removal. There is a provision for imposition of fine for commission of offence.
27. On a schematic appreciation of the Act including

Sections 10, 11 and 53, it is quite vivid that the Members elected in Panchayat are duty bound to see to it that the obstruction or encroachment upon any land, which is not a private property but Government land or a public property, should be removed and prosecution should be levied against the person creating such obstruction or encroachment.

28. Section 184 of the Act provides that every Member of the Panchayat and every officer and servant maintained by or being employed under the Panchayat shall be deemed to be a public servant for the purpose of Section 21 of the Indian Penal Code. Analysing the various provisions, the learned Single Judge in Sandip Ganpatrao Bhadade (supra) has opined:-

"11. It is in the background of the aforesaid provisions of law, that the provisions of qualifications and disqualifications to vote, contest the election and being continued as a member of Panchayat, are required to be considered. Section 13 of the said Act deals with the persons qualified to vote and be elected. The persons incurring any disqualification under the provisions of the said Act are neither qualified to vote nor to be elected as a member of a Panchayat. Section 14 deals with different kinds of disqualifications, as stipulated in clauses (a) to (k) under sub-section (1), which operate against two kinds of persons – (i) who proposes to become a member of a Panchayat, and (ii) who has become a member of a Panchayat. If a person has incurred any one or more disqualifications, then he is prohibited from becoming a member of a Panchayat, and if becomes a member of a Panchayat, then his is not entitled to continue as such. The disqualification under Section 14 is in respect of the acts, events, deeds, misdeeds, transactions, etc, which have not been done, happened or occurred before entering into the office as a member of a Panchayat as well as those which take place during continuance as a member of a Panchayat."

And again:-

"13. The very object of introducing the provision of

disqualification under Section 14 (1) (j-3) of the said Act is to avoid the conflict of interest by prohibiting the persons, who are the encroachers upon the Government land or public property to get elected or continued as a member of the Panchayat, which is democratically elected body of the villagers. It is beyond comprehension to assume that a person under statutory obligation or a duty to protect the Government land or public property from encroachment, commits an act of such encroachment.

To permit person, who proposes to become a member or becomes a member of the Panchayat to be the encroacher upon the Government land to public property, would be anathematic, acting in breach of statutory duty, exposing himself to prosecution under sub-sections (1) and (4) of Section 53, resulting ultimately in losing the protection under Section 180 read with Section 184 of the said Act. It is in this context that the text of disqualification under Section 14(1)(j-3) of the said Act is required to be analyzed and interpreted."

In the case of Devidas Surwade (supra), it has been clearly stated, as noticed earlier, that the term "person" has to include the legal heirs, if any, of the encroacher who continue to occupy the government land. Emphasis has been laid on encroachment and continued encroachment. After the said Division Bench judgment, number of learned Single Judges have adopted a different approach without noticing the judgment which is against judicial discipline.

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 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."

14 It was thus, concluded that if a person continues to remain in occupation of the encroached property and has a conflict of interest, the interpretation that the first encroacher or encroachment made by a person alone would suffer disqualification, would lead to an absurdity. The concept of purposive interpretation of the provisions of the law would constrain the Court to hold that if a person shares the encroached property and continues to enjoy the encroached property, the disqualification would also cover such person.

15 The learned advocate for the petitioners has then made an attempt to rescue petitioner No.2/ wife from this situation by contending that she is not an encroacher and merely because she is the wife of petitioner No.1, who may be encroacher, would not attract any disqualification. I find this submission to be fallacious and not worthy of any consideration for reasons more than one. Firstly that, petitioner No.1

along with his wife (petitioner No.2) have made the application for seeking regularization of their encroachment. Secondly that, petitioner No.1 is said to be cultivating the said land for the last ten years as per the revenue records and types of agricultural yield that he has reaped from such agricultural activities, have been enjoyed by whole family as it was the family's agricultural yield.

16 In view of the above, I do not find that the impugned orders disqualifying both the petitioners could be termed as being perverse or erroneous.

17 This Writ Petition, being devoid of merit is, therefore, dismissed. Rule is discharged.

kps

(RAVINDRA V. GHUGE, J.)