

AFR

HIGH COURT OF CHHATTISGARH BILASPUR**Judgment Reserved on 02.02.2021****Judgment Delivered on 11.02.2021****Writ Appeal No. 31 of 2021***(Arising out of order dated 13.01.2021 passed in Writ Petition (C) No.44 of 2021 by the learned Single Judge)*

1. Smt. Neera Manhar W/o Shri Sukhram Manhar Aged About 45 Years Sarpanch, Gram Panchayat Thuthi Janpad Panchayat Jaijaipur District Janjgir Champa Chhattisgarh, R/o Village Thuthi, Tahsil Jaijaipur, District Janjgir Champa Chhattisgarh.
2. Smt. Durga Manhar W/o Shri Gautam Manhar Aged About 28 Years Panch, Ward No. 12 ff Gram Panchayat Thuthi Janpad Panchayat Jaijaipur District Janjgir Champa Chhattisgarh, R/o Village Thuthi, Tahsil Jaijaipur, District Janjgir Champa Chhattisgarh

---- Appellants**Versus**

1. State of Chhattisgarh Through The Secretary, Department Panchayat and Rural Development, Mantralaya, Mahanadi Bhawan, Naya Raipur, Post Office and Police Station Rakhi, District Raipur Chhattisgarh.
2. Collector Janjgir Champa District Janjgir Champa Chhattisgarh.
3. Sub Divisional Officer (Revenue) Jaijaipur, District Janjgir Champa Chhattisgarh.
4. Shivkumar Chandra S/o Laxman Prasad Chandra Village Thuthi, Tahsil Jaijaipur District Janjgir Champa Chhattisgarh

---- Respondents

For Appellant : Shri Ishan Verma, Advocate

For Respondent/State : Shri Ashish Tiwari, Govt. Advocate

For Respondent No.4 : Shri Prateek Sharma, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C A V Judgment
Per Parth Prateem Sahu, Judge

1. Challenge in this writ appeal is to the order dated 13.01.2021 passed in Writ Petition (C) No.44 of 2021 whereby learned Single Judge declined to interfere with the order passed by Collector, Janjgir-Champa dated 07.12.2020 allowing the application filed under Section 36(2) of the Chhattisgarh Panchayat Raj Adhiniyam, 1993 (hereinafter referred to as 'Adhiniyam, 1993') and declared the post of Sarpanch and Panch of Ward No.12 of village Panchayat Thuthi to be vacant under Section 36(3) of the Adhiniyam, 1993.

2. The facts as pleaded by the appellants are that, appellants contested Panchayat election, which took place on 30.01.2020 for the post of Sarpanch and Panch of Ward No.12 respectively, of village Panchayat, Thuthi. After conclusion of election proceedings, appellants No.1 and 2 have been declared to be elected on their respective posts and election certificates were also issued to them. Respondent No.4, filed an application before respondent No.2 Collector, Janjgir-Champa under Section 36(3) of the Adhiniyam, 1993 for declaring the appellants to be disqualified and post of Sarpanch and Panch of Ward No.12 of village Panchayat, Thuthi to be vacant. Respondent No.2 registered the case and thereafter, passed an order on 07.12.2020 (Annexure P/1) declaring the post of Sarpanch and Panch of Ward No.12 of village Panchayat, Thuthi to be vacant. This made the appellants to file a writ petition with

following reliefs :-

“10.1 This Hon'ble Court may kindly be pleased to set-aside/quash the impugned order dated 07.12.2020 (P/1) passed in by the Collector, Janjgir-Champa in case vide No.202009060100004/A-89-23;

10.2 Hon'ble Court may kindly be pleased to issue any other order or orders writ or writs, direction or directions as this Hon'ble Court may deem fit in the facts and circumstances of the case in favour of the petitioners, in the interest of justice.”

3. Learned Single Judge upon hearing the learned counsel for respective parties, dismissed the writ petition by impugned order dated 13.01.2021.

4. Shri Ishan Verma, learned counsel for the appellants submits that appellants have been duly elected in Panchayat election held on 30.01.2020. They have been issued election certificate and hence, if for any reason, appellants are declared to be disqualified to contest the election or to hold the post, then it could only be by way of filing an election application under Section 122 of the Adhiniyam, 1993. He further submits that Collector is not having jurisdiction to pass Annexure P/1 order dated 07.12.2020 against elected persons of village Panchayat under the Adhiniyam, 1993. It is contended that earlier also, similar nature of application has been filed before Additional Collector challenging the election of appellant No.1 on the post of Sarpanch in the year 2006. After considering the fact that

encroachment as alleged was not by appellant No.1 herself, but by her father-in-law Garamlal Satnami, dismissed the application filed under Section 36 of the Adhiniyam, 1993 vide Annexure P/5 and the said order was not put to challenge. It is further contended that provisions of Section 36 of the Adhiniyam relates with disqualification for being office-bearer of Panchayat and from the heading itself, it is apparent that provision will apply against any candidate only prior to holding of election and not post election of office-bearer. He pointed out that appellants have placed on record interim order passed by learned Single Judge in Writ Petition (C) No.1091 of 2017 (Smt. Usha Devi v. State of Chhattisgarh), wherein learned Single Judge has stayed the order passed under Section 36 of the Adhiniyam, 1993 in similar circumstances and submits that order passed by Collector to be bad in law. It is also contended that appellants have placed on record copy of Bhumiswami rights given vide Annexure A/7 to Ghasnin Bai widow of Garamlal Satnami for disputed land, which was not considered by learned Single Judge and passed the impugned order. He also submits that order impugned passed by learned Single Judge in Writ Petition (C) No.1091 of 2017 is not sustainable and liable to be interdicted.

5. Per contra, Shri Ashish Tiwari, Govt. Advocate representing the State submits that Collector has passed an impugned order Annexure P/1 dated 07.12.2020 within its jurisdiction as envisaged under Section 36(3) of the Adhiniyam, 1993. He further submits that respondent No.4 has filed an application under Section 36(3) of the

Adhiniyam, 1993 for declaring the posts to be vacant as appellants are disqualified of being an office bearer of Panchayat, upon which, Collector has called for report from Sub Divisional Officer, inquiry was conducted, appellants were provided opportunity of hearing and only thereafter, orders have been passed. It is contended that it is the case of appellants themselves that father-in-law of appellant No.1 and grandfather of appellant No.2 has encroached upon the land/Government land, which is a grassland and father-in-law has been imposed with fine upon his acceptance of encroachment upon the Government land. Once encroachment has been accepted and fine has been imposed in an order passed by competent authority, which was not put to challenge, then encroachment over the Government land is proved. It is further contended that Collector after concluding inquiry in accordance with law has passed the order.

6. Shri Prateek Sharma, learned counsel representing the 4th respondent while supporting the impugned order passed by learned Single Judge submits that appellants are not disputing with regard to occupying and use of building constructed over encroached Government land, but it is the case of appellants that said encroachment and construction of building was by father-in-law of appellant No.1. He further submits that this very issue has been considered by Hon'ble Supreme Court in case of **Janabai v. Additional Commissioner and Others** reported in **(2018) 18 SCC 196 : AIR 2018 SC 5068**, and held that if office-bearer of village

Panchayat is in continuation of use of building which has been constructed over the encroached land by ancestral, will himself or herself become encroacher of the said property. The Collector has passed the order strictly in accordance with law within its jurisdiction as envisaged under Section 36 of the Adhiniyam, 1993. He referred to provision of Sections 36(1), 36(2) and 36(3) of the Adhiniyam, 1993 in support of his contention. It has been argued that Bhumiswami right/patta placed along with writ petition for the first time, which was not placed in proceedings before the Collector, hence, learned Single Judge has rightly not considered the same. Even if said patta is taken into consideration i.e. in the name of mother-in-law of different portion of land, encroachment is on the adjacent land to land given under Bhumiswami right, therefore, in the encroachment proceedings drawn against father-in-law of appellant No.1, he was fined on the ground that he has made encroachment over grassland. It is lastly contended that under the provisions of Section 36(2) of the Adhiniyam, 1993, it is very specifically provided that Section 36 would also apply to the persons elected as office-bearer, but subsequently found to be disqualified to hold office and not for considering disqualification pre-election only.

7. We have heard learned counsel for the respective parties and perused the documents annexed with the writ petition as well as writ appeal.

8. To appreciate the submissions made by learned counsel for the appellants, we have glanced to the provisions of Section 36 of

the Adhiniyam, 1993, relevant portion of which is extracted below :

“36. Disqualification for being office-bearer of Panchayat. - (1) No person shall be eligible to be an office-bearer of Panchayat who,-

* * * *

* * * *

(2) If any person having been elected [xxx] as an office-bearer of Panchayat,-

- (a) subsequently becomes subject to any of the disqualification mentioned in subsection (1) and such disqualification is not removable or being removable is not removed [or becomes office-bearer concealing his disqualification for it which has not been questioned and decided by any election petition under Section 122];
- (b) accepts employment as legal practitioner against the Panchayat;
- (c) absents himself from three consecutive meetings of the Panchayat or its Committee or does not attend half the number of meetings held during the period of six months without the leave of the Panchayat;

he shall, subject to the provisions of subsection (3), cease to be such office-bearer and his office shall become vacant:

Provided that where an application is made by an office-bearer to the Panchayat for leave to absent himself under clause (c) and the Panchayat fails to inform the applicant of its decision on the application

within a period of one month from the date of receipt of the application, the leave applied for, shall be deemed to have been granted by the Panchayat.

(3) In every case the authority competent to decide whether a vacancy has occurred under sub-section (2) shall be Collector in respect of Gram Panchayat and Janpad Panchayat and [Director, Panchayat] in respect of Zila Parishad who may give his decision either on an application made to him by any person or on his own motion. Until, the Collector or [Director, Panchayat], as the case may be, decides that the vacancy has occurred, the person shall not cease to be an office-bearer :

Provided that no order shall be passed under this sub-section against any office-bearer without giving him a reasonable opportunity of being heard.”

9. Before adverting to aforementioned provision, it will be beneficial to consider facts of the case in order passed by Additional Collector vide Annexure P/5 on 01.07.2006. While considering earlier application against appellant No.1, Additional Collector has recorded that Late Garamlal Satnami, father-in-law of appellant No.1 has encroached over Government grassland in 1971, measuring 0.16 acre by constructing 'kachha house'. In 1996, after demolition of kachha house, 'pakka house' was constructed by him and in a proceeding drawn by competent authority, Garamlal Satnami was fined for Rs.100/-. The said proceeding was concluded in favour of

appellant No.1 observing that appellant No.1 the then Sarpanch has not encroached over Government land, but the encroacher is her father-in-law. Even before this Court also, similar argument is raised by learned counsel for the appellants that the house over Government land was constructed by father-in-law of appellant No.1. On pin-pointed question made to learned counsel for the appellants, he submits that appellants are residing in the same house which was constructed by father-in-law of appellant No.1. This being the position, now the question for consideration is whether provisions of Section 36(1)(q) of the Adhiniyam, 1993 would apply to the elected office-bearer like appellants and the said elected office-bearer incur disqualification as envisaged under Section 36(2) of the Adhiniyam, 1993 and Collector was justified in passing orders under Section 36(3) of the Adhiniyam, 1993.

10. Sub-section (2) of Section 36 of the Adhiniyam, 1993 is very specific in this regard. It deals only with the situation to be considered for elected office-bearers. Sub-section (2) of Section 36 provides that office-bearer of Panchayat if subsequently becomes subject to any of the disqualification mentioned in sub-section (1). In case at hand, the appellants suffered disqualification under Section 36(1)(q), by virtue of the provision under Section 36(2), appellants cease to be office-bearers of Panchayat subject to sub-section (3) of Section 36 of the Adhiniyam, 1993. Sub-section (3) of Section 36 envisages competent authority to decide whether any disqualification is attracted against elected office-bearer and his/her

office has become vacant or not and to pass appropriate orders after giving opportunity of hearing to respective persons. In the case at hand, upon receiving an application under Section 36(3) of the Adhiniyam, 1993, Collector initiated inquiry, called for report from competent authority, gave opportunity of hearing to appellants and considering the entire material available before him, passed an order under sub-section (3) of Section 36 of the Adhiniyam, 1993.

11. Section 49 of the Adhiniyam, 1993 provides for functions of Gram Panchayat, relevant portion of which reads as follows :

“49. Functions of Gram Panchayat. - It shall be the duty of a Gram Panchayat in so far as the Gram Panchayat funds allows to perform within its areas the following functions :-

* * * *

* * * *

(8) removing of obstructions and projections in public streets or places and in sites not being property or which are open to use of public, whether such sites are vested in the Panchayat or belong to the State Government;

* * * *”

12. One of the functions of Gram Panchayat as envisaged under Section 49 of the Adhiniyam, 1993 is to remove obstructions and projections in public streets or places and in sites, which are open to use of public. The responsibility attached with the office-bearer of the Panchayat is to guard and protect the Government property. If

any of the office-bearer himself/herself is occupier of Government property under encroachment, then he/she will not be able to command and discharge the duties attached to the post properly. Other aspect is that having this official duty upon office-bearer of Panchayat to remove obstructions, the office-bearer who is in encroachment upon Government land and caused obstructions in the use of open land by public, then the interest attached with the office and personal interest of such office-bearer are in conflict with each other. Therefore, provision of Section 36(2) of the Adhiniyam, 1993 has been made applicable to elected office-bearer by way of amendment. The lawmakers have inserted the provision with purpose and object. The provision under the Adhiniyam, 1993 is to be read and applied to subserve the object of the Act.

13. The Hon'ble Supreme Court in case of **Janabai** (supra) has considered this issue and held that persons who are using property encroached by their ancestral, will become encroacher of said property, relevant portion of the judgment is as follows :

“30.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 v. Keshav Aaba Patil*, (2018) 1 SCC 340 does not lay down the correct position of law and it is, accordingly, overruled.”

14. In view of aforementioned discussions, in the facts and circumstances of the case and in the light of ruling rendered by Hon'ble Supreme Court in case of **Janabai** (supra), we do not find any merit in the submissions made by learned counsel for the appellants. The appeal being devoid of substance, is liable to be and is hereby dismissed.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge