

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

**WRIT PETITION NO. 13570 OF 2019**

Haridas s/o Dagdu Nevhal  
Age : 54 years, occ : agri./business,  
R/o Shivrai, Post Waluj,  
Taluka Gangapur, Dist. Aurangabad

**Petitioner.**

**Versus**

1. The State of Maharashtra  
Through Collector, Aurangabad
2. The Divisional Commissioner,  
Commissioner Office, Aurangabad.
3. The Additional Commissioner,  
Divisional office, Aurangabad.
4. Grampanchayat Shivrai,  
Through its Gramvikas Adhikari,  
Shivrai, Taluka Gangapur,  
District Aurangabad.
5. Damodhar Devrao Nevhal  
Age : 50 years, occ : agri.,  
R/o Shivrai, Taluka Gangapur,  
District Aurangabad.
6. Pundlik Sudhir Sabale  
Age : 25 years, occ : agri.,  
R/o Shivrai, Taluka Gangapur,  
District Aurangabad.

**Respondents**

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Mr. A.D. Kasliwal, Advocate for the petitioner.

Mr. K.B. Jadhavar, A.G.P. for respondent Nos.1 to 3.

Mr. Y.V. Kakade, Advocate for respondent Nos. 5 and 6..

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**CORAM** : **N.J. JAMADAR, J.**  
**Judgment reserved on** : **12<sup>th</sup> March 2021.**  
**Judgment pronounced on** : **23<sup>rd</sup> April 2021.**

### **JUDGMENT.**

Rule. Rule made returnable forthwith and with the consent of learned Counsel for the parties, heard finally at the stage of admission.

2. The petitioner, who has been held to have incurred disqualification under Section 14(1) (j-3) of the Maharashtra Village Panchayat Act, 1958 (the Act 1958), has invoked writ jurisdiction.

3. The petition arises in the backdrop of the following facts :

a) In the general elections held for the constitution of Village Panchayat, Shivrai, for the term 2017 to 2022, the petitioner was elected from Ward No. 3. Respondent Nos. 5 and 6, the registered voters of the Village Panchayat, lodged a dispute with the District Collector, Aurangabad with the allegations that the petitioner has incurred disqualification under Section 14 (1) (j-3) of the Act 1958, as the petitioner had committed encroachment upon the Government land. To lend

support to the said allegations, respondent Nos. 5 and 6 primarily banked upon the entries made in the encroachment register (अतिक्रमण नोंदवही), for the year 2016-2017, maintained by the Village Officer in the prescribed form *Gaon Namuna 1-E*. The name of the petitioner was allegedly shown at Sr. No. 1 in the said form for having committed encroachment over the land bearing Gut No. 79 situated at Shivrai, to the extent of 1 Hectare 62 Aar.

b) The District Collector commenced enquiry in the said dispute - application No. 24/2018. In response to the notice, petitioner appeared and resisted the claim of respondent Nos.5 and 6. It was, *inter alia*, contended that the entry in the encroachment register was not authenticated and valid. Respondent Nos.5 and 6 had fabricated the entry in the said register with a view to wreck vengeance as the petitioner had defeated applicant No. 2- respondent No.6 in the Village Panchayat Elections. From the intrinsic evidence of the said register, it became evident that the entries therein were not certified by the Tahsildar and rest of the columns in the said entries were left blank. The said register was, thus, unreliable. It was further asserted that the land Gut No. 79 was acquired for irrigation purpose by the Minor Irrigation Department,

Gangapur in the year 1982 and in the record of rights the said land stood in the name of the Government and was shown barren all along. It was further contended that the petitioner had cultivated a portion of the said land after depositing the necessary charges with the concerned authority, when the land was not submerged and could be put to cultivation.

c) The District Collector, after appraisal of the rival contentions and material on record, was persuaded to hold that the petitioner could not bring on record any material to indicate that the entries made in the encroachment register, in *Form 1-E*, were not authentic. The fact that the petitioner had produced a receipt evidencing the deposit of amount for permission to cultivate a portion of the said land bearing Gut No. 79 didn't dilute the factum of encroachment, held the Collector. On the said premise, by the judgment and order dated 10<sup>th</sup> July 2018, the petitioner was declared to have incurred disqualification under the provisions of Section 14 (1) (j-3) of the Act 1958.

d) Being aggrieved, the petitioner preferred appeal under Section 16 of the Act 1958 before the Divisional Commissioner. In Appeal No. 83/2018, by judgment and order dated 30<sup>th</sup> January 2019, the then Additional Commissioner was persuaded to remand the matter for afresh hearing and

determination as material was placed before the Appellate Authority which raised questions : Whether the petitioner – appellant had in fact committed encroachment? What was the extent of encroachment? Whether the Acquiring Body had permitted the petitioner – appellant to cultivate a portion of land bearing Gut No. 79? What was the area of the land so permitted to be cultivated?

e) Post remand, the District Collector considered the reports submitted by the concerned officers and again came to the conclusion that the petitioner committed encroachment over the land bearing Gut No. 79. Support was sought to be drawn from the reports submitted by Tahsildar, Gangapur and the entries made in the encroachment register. Thus, by judgment and order dated 9<sup>th</sup> July 2019, the petitioner was declared to have incurred disqualification within the meaning of Section 14 (1) (j-3) of the Act 1958.

f) The petitioner again approached the Divisional Commissioner in appeal. By the impugned judgment and order dated 30<sup>th</sup> September 2019, the Additional Divisional Commissioner was persuaded to dismiss the appeal holding, *inter alia*, that even if it is assumed that the petitioner had paid the charges for cultivation of the land which is acquired as a part

of the submerged land, to the extent of 1 Hectare, yet the fact remained that the petitioner was cultivating 62 Aar more land by committing encroachment over the said land. Hence, the judgment and order of the District Collector, disqualifying the petitioner, came to be upheld.

f) Being aggrieved by and dissatisfied with the impugned judgment and order upholding the disqualification for having committed encroachment over the Government land, the petitioner is before this Court.

4. I have heard Mr. A.D. Kasliwal, the learned Counsel for the petitioner, Mr. Jadhavar, the learned A.G.P. for respondent Nos. 1 to 3 and Mr. Y.V. Kakade, the learned Counsel for respondent Nos. 5 and 6. With the assistance of the learned Counsels for the parties, I have perused the material on record.

5. Mr. Kasliwal, the learned Counsel for the petitioner submitted that the very foundation of the application for disqualification was the entries allegedly made in the encroachment register. However, there is no statutory mandate for maintaining such encroachment register. The District Collector and the Divisional Commissioner have proceeded on the premise that the entries made in the encroachment register

are sacrosanct. The authorities ought to have considered that, on the one hand, there is no statutory mandate for maintaining such encroachment register and, on the other hand, the very intrinsic evidence of the said entries renders it extremely unsafe to place implicit reliance thereon. To add to this, according to Mr. Kasliwal, there is material on record in the form of the reports of Tahsildar to the effect that there is no record to indicate that there were directions to maintain such encroachment register or such register was, in fact, maintained by the concerned Village Officer.

6. Mr. Kasliwal, further submitted that in the peculiar facts of the case, there can be no valid charge of encroachment. Indisputably, the land Gut No. 79 was acquired for the purpose of submerged area for the irrigation project. The petitioner has placed material on record to indicate that the petitioner has been lawfully, like other agriculturists, cultivating portions of land bearing Gut No. 79, whenever the land is not submerged, after payment of due charges. It is not the case that the petitioner has unlawfully or surreptitiously cultivated a particular portion of the land bearing Gut No. 79. The Collector as well as the Appellate Authority have not at all adverted to this aspect of the matter and the petitioner has been disqualified on the basis

of the entry made in the encroachment register which is of highly doubtful evidentiary value, if considered in the light of the material placed on record, urged Mr. Kasliwal. A people's representative, who is lawfully elected by a popular mandate, cannot be non-suited on unsustainable grounds at the behest of a disgruntled opponent, canvassed Mr. Kasliwal.

7. As against this, the learned A.G.P. would urge that the authorities below were justified in entering a finding that the petitioner has incurred the disqualification. There is no reason to question the authenticity and reliability of the entries made in the encroachment register. Moreover, since the petitioner claims that he has been cultivating portions of land bearing Gut No. 79 and could, at best, demonstrate that he had paid charges for cultivation of the land to the extent of 1 Hectare, no other inference than that of encroachment over the balance land of 62 Aar, is possible. Thus, the Additional Commissioner was fully justified in recording a finding that to the extent of 62 Aar land a clear case of encroachment at the hands of the petitioner was made out.

8. Mr. Kakade, the learned Counsel for respondent Nos.5 and 6 joined the issue by canvassing a submission that the encroachment register is required to be maintained in

accordance with the Manual issued by the Government of Maharashtra in Revenue and Forest Department. The provisions in Chapter 1, para 20 and Chapter 2 para – 33 (5) enjoin the Village Officer to maintain the encroachment register. Form of the encroachment register, Form – 1-E, is also prescribed. Provisions have been made as to how the entries ought to be made in the said *Form 1-E*. Thus, the submission on behalf of the petitioner that there is no mandate for maintaining the encroachment register, according to the learned Counsel for respondent Nos. 5 and 6, is plainly unsustainable. Laying emphasis on the fact that even in the encroachment register for the year 2010-2011, the name of the petitioner was shown at Sr. No.1, it was submitted that the entry in the encroachment register for the year 2006-2007 fortifies the fact that the petitioner has committed encroachment over the Government land right through 2010-2011.

9. The learned Counsel for respondent Nos. 5 and 6 mounted a strong criticism against the report submitted by the Tahsildar on 4<sup>th</sup> November 2019 to the effect that there was no basis for making entries in the encroachment register as the said report was submitted post-closure of the matter for decision by the authorities below. No mileage can be drawn from the

subsequent report, urged the learned Counsel for respondent Nos. 5 and 6. It was further submitted that the petitioner had made an endeavour to wriggle out of the situation by depositing the amount with the authorities of the Irrigation Department after the dispute was raised by the respondent Nos. 5 and 6. In the circumstances of the case, such endeavour, according to the learned Counsel for respondent Nos.5 and 6, reinforces the fact that the petitioner had committed encroachment over the Government land and a half-baked effort was made to show lawful possession thereof.

10. In order to lend support to the aforesaid submission, Mr. Kakade placed reliance on the judgment of a learned Single Judge of this Court in the case of ***Shrikrishna Wasudeo Dhage Vs Shivcharan Trimbakrao Kalne, 2010 (3) Mh.L.J. 281***, wherein the following observations were made :

*"6. ....Even if it is presumed that encroachment is prior to her election and was not recorded in her name, her own act of getting it regularized in her name shows that she can be treated as encroacher. Her name was recorded in the encroachment register in 2007-08 and thereafter she applied for its regularization. She has therefore become encroacher qua the structure in 2007-08 and accepted it by moving an application for its regularization. Had respondent no.4 not moved an application for her disqualification, it is clear that she would have succeeded in getting that encroachment regularized.*

7. Provisions of Section 14[1][j-3] are added to Statute book to deal with only such situation. The act of petitioner in trying to get her encroachment regularized clearly shows abuse of her position and is contrary to that clause. She is therefore correctly found to have incurred disqualification by both the authorities. The name of petitioner has been recorded as encroacher in 2007-08 and she has tried to get it regularized”.

11. Mr. Kakade, the learned Counsel for respondent

Nos.5 and 6 also placed reliance on the following judgments :

- (1) *Janabai Vs Additional Commissioner and others* 2018 (5) Mh.L.J. 921.
- (2) *Mainabai Pacharne Vs. State of Maharashtra and others* 2017 (1) Mh.L.J. 930.
- (3) *Sandip Gapatrao Bhadade Vs. Additional Commissioner, Amravati*, 2017 (1) Mh.L.J. 79.
- (4) *Raju Pawar and others Vs Additional Divisional Commissioner, Aurangabad (Writ Petition No. 520 of 2020)*
- (5) *Dnyaneshwar Satav Vs. Jalindhar Dhondiba Kharabi* 2014 (1) ALL MR 631
- (6) *Sanjay Kantilal Thakare Vs State of Maharashtra* 2019 (3) Mh. L.J. 730.

12. It would be suffice to make reference to the three Judge Bench judgment of the Supreme Court in the case of *Janabai Vs Additional Commissioner and others* (supra), wherein the Supreme Court put to rest the controversy as to whether a member of the Village Panchayat incurs disqualification if the encroachment is alleged to have been committed by one of his

family members. The Supreme Court overruled its earlier decision in the case of ***Sagar Pandurang Dhundare vs. Keshav Aaba Patil and others, (2018) 1 SCC 340*** wherein the word "person", used in Section 14 (j-3) of the Act 1958, was construed in a restricted sense. The observations of the Supreme Court in paragraph No. 29 are instructive and hence extracted below :

*"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 the 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 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. Section 14 (1) (j-3) of the Act 1958 reads as under :

*14 (1) No person shall be a member of a Panchayat continue as such, who -  
(j-3) has encroached upon the Government land or public property.*

14. From the phraseology of the aforesaid section, it becomes evident that a person, who has committed encroachment over the Government land or public property, is disqualified to be a member of the Panchayat, and if a member of the Panchayat commits such encroachment, after assuming office, then also he incurs such disqualification. The legislature has incorporated the aforesaid disqualification with the object of promoting probity in public life. The person who commits encroachment over the Government land or public property, is not considered worthy enough to represent the citizenry in an elected body at the grass root level. The purpose is to discourage and disable the persons who indulge in unlawful acts of committing encroachment over the public land from holding an elected office in the local self government. Keeping this object in view, the charge of encroachment over the Government land is required to be considered.

15. In the case of *Sandeep vs. Additional Commissioner, Amravati* (supra), a learned Single Judge of this Court had an occasion to consider as to what the term 'encroachment'

connotes and what should be the test for attracting disqualification under Section 14 (1) (j-3) of the Act 1958. The observations in paragraph Nos.14 to 16 are material. They read as under :

*"14. The word 'encroach' is a verb, which is defined in Black's Law Dictionary as under:*

*"encroach, vb. 1. To enter by gradual steps or stealth into the possessions or rights of another; to trespass or intrude. 2. To gain or intrude unlawfully upon another's lands, property, or authority."*

*Similarly, it is defined in Advanced Law Lexicon as under:*

*"Encroach. To intrude usurpingly; make gain upon, occupy, or use the land, right, or authority of another; to gain unlawfully lands, property or authority of another."*

*The word 'encroachment' is a noun, and it is defined in Black's Law Dictionary as under:*

*"encroachment, n. 1. An infringement of another's rights. 2. An interference with or intrusion onto another's property."*

*Similarly, in Advanced Law Lexicon, it is defined as under:*

*"Encroachment -*

*Is "an unlawful gaining upon the right or possession of another man", a gradual entering on and taking possession by one of what is not his own; the gaining upon the rights or possession of another.*

*The action of encroaching i.e. intruding usurpingly (on others' territory, rights etc.)"*

*15. "To encroach" means to enter, intrude, infringe gradually upon the rights of others by unlawfully and without authority taking possession of the property, which is not of his own. Upon completion of such act, it becomes an "encroachment". The*

*further act of continuing or remaining in such occupation or possession of the property with an intention or object of beneficial enjoyment would mean that the person committing encroachment has 'encroached' upon the property. An encroacher is a person, who encroaches.*

*16. In view of the aforesaid meaning of the terminologies - "to encroach", "encroachment", "encroacher" and "encroached", whoever resides in the property or any portion thereof, which is an encroachment upon the Government land or public property, can be said to have "encroached" upon it and becomes an "encroacher". Whether such an encroachment is jointly with others and/or individually, either at one time or at different times remains hardly of any significance' as he becomes liable to be removed and prosecuted under Section 53 of the said Act. Whether a person has become liable to be removed and/or prosecuted under Section 53 of the said Act from the Government land or public property, becomes a real test of attracting disqualification under Section 14 (1)(j-3) of the said Act. If the answer is in the affirmative, the disqualification is incurred.*

*17. In view of the aforesaid position, the provision of Section 14 (1) (j-3) of the said Act is attracted even in a case where a member of a Panchayat resides in the property or any portion thereof, which is an encroachment upon the Government land or public property. The question as to whether any other person or a member of a family has already made an encroachment, loses its significance and as soon as a member or proposed member joins such act, he cannot escape from the clutches of disqualification under Section 14 (1) (j-3) of the said Act. The question framed, is answered accordingly".*

16. At the same time, while considering a case of disqualification against an elected representative, the Court

cannot be oblivious to another competing public interest. Undoubtedly, the provisions incorporating disqualification are to be construed so as to advance the object thereof. However, the authorities are under an obligation to satisfy themselves that there is clear proof of the act or conduct which entails disqualification. Such a finding must be based on facts and not mere surmises and conjectures. Lest, there is risk of not only defeating the civil rights of an elected candidate but also overturning the popular mandate, which may prove counter productive for a healthy electoral democracy. In a case where no clear proof of proscribed conduct is made out and an elected representative is unseated, there is a danger of the will of the people, expressed through ballot, being subverted.

16. On the aforesaid touchstone, reverting to the facts of the case, at the threshold, it is imperative to note that the challenge on behalf of the petitioner on the count that there is no mandate to maintain encroachment register under the provisions of the Maharashtra Land Revenue Code, 1966 and the Rules thereunder, is not sustainable. The reliance placed by Mr. Kakade, on the Manual of Land Revenue appears to be well-founded. Indeed, there are provisions in the Chapter 1, para-20, Chapter 2, para-33 (5), which warrant keeping of such

encroachment register and making of entries therein. Even the form in which encroachment register is to be maintained i.e. Form 1-E, is prescribed. Moreover, Section 53 of the Act 1958 casts duty on the Village Panchayat to remove the obstruction and encroachment over grazing land or any other land or open site not being a private property. Thus, the broad submission that the encroachment register is not at all required to be maintained by the Village Officer, does not merit acceptance.

17. In the case at hand, the issue revolves around the authenticity and veracity of the encroachment register maintained by the Village Officer. I am conscious of the fact that in exercise of the writ jurisdiction, this Court would not be justified in embarking upon a factual inquiry. Nor this Court would be justified in interfering with the order passed by the statutory authority if the error is in the realm of assessment of facts only. However, this Court is confronted with the question as to whether the authorities took into account the relevant material or allowed themselves to be swayed by irrelevant material, in arriving at finding that there was encroachment over the Government land or public property.

18. For a legitimate answer, it is necessary to appreciate the nature of the land over which the petitioner allegedly

committed encroachment. There is not much controversy over the fact that the land bearing Gut No. 79 is an acquired land. It stands in the name of the Government. In the revenue record it is shown as *Gairan*. The land was acquired for submergence area of Tembhapuri Irrigation Project. The allegation against the petitioner is that the petitioner cultivated an area admeasuring 1 Hectare 61 Aar by committing encroachment over the said submergence area.

19. The principal document which allegedly sustained the said charge is the encroachment register for the year 2016-17, which records that the petitioner had committed an encroachment to the extent of 1 Hectare 62 Aar. It would be contextually relevant to note that in the wake of the controversy, when the reports were called by the District Collector, the Tahsildar Gangapur submitted a report on 3<sup>rd</sup> May 2018 along with the report of Circle Inspector, Waluj and Gramsevak, Shivrai. The Circle Inspector Waluj, in the report dated 26<sup>th</sup> April 2018, had mentioned that there was entry of encroachment to the extent of 1 Hectare 61 Aar against the name of the petitioner since the year 2010-11. The report of Tahsildar, interestingly, refers to the report of the Gramsevak dated 16<sup>th</sup> April 2018, wherein it is recorded that there is no record with

the Village Panchayat to the effect that the petitioner had committed encroachment over any Government land.

20. The confusion is further confounded by the fact that in the report dated 8<sup>th</sup> June 2018, based on the report of Sub-Divisional Officer, Nandur-Madhmeshwar Patbandhare, Sub-Division, Gangapur dated 7<sup>th</sup> June 2018, it was mentioned that the land in question falls in the submerged area of Tembhapuri Project. Since there was no water in the dam, the petitioner was cultivating 80 Aar land. As the land is acquired, there was no encroachment. Though for the year 2018-19 the land falling in the submergence area was not allotted for cultivation, yet for the year 2017-18 the land was allotted for cultivation.

21. It would be contextually relevant to note that the petitioner claimed that whenever the dam is not filled to its capacity, the land in the submergence area is allotted for cultivation. The petitioner has been cultivating portions of the land bearing Gut No. 79 by depositing charges for cultivation (*Galpera*) with the Irrigation Department. A certificate dated 4<sup>th</sup> October 2019 came to be issued to indicate that the petitioner had paid charges as under :

| Year    | Gut No. | Area        | Amount/<br>Hectare |
|---------|---------|-------------|--------------------|
| 2017-18 | 79      | 1 Hectare   | Rs. 2000/-         |
| 2018-19 | 79      | 1 Hectare   | Rs. 2000/-         |
| 2019-20 | 79      | 1 H. 20 Aar | Rs. 2400/-         |

The receipts were also placed on record to evidence the aforesaid payment.

22. In the aforesaid backdrop, in the first round of appeal the Additional Commissioner was persuaded to remand the matter back to the District Collector to ascertain the questions as to whether the petitioner had in fact committed encroachment? What was its extent? Whether the Irrigation Department had permitted the petitioner to cultivate the suit land by accepting charges therefor?. The Additional Commissioner, thus, directed that the spot inspection be carried out and measurement at the site be taken and thereafter the question of disqualification be adjudicated.

23. From the perusal of the judgment and order dated 9<sup>th</sup> July 2019, post remand, it does not appear that the order of the Additional Commissioner was complied with in letter and spirit. The District Collector took into account the very same reports, which were before him, when the first order was

passed. Banking upon the entry in the encroachment register, the issue was answered against the petitioner. In appeal also, the Additional Commissioner did not advert to the aspect as to whether, on the second occasion, there was enquiry into the question of encroachment in terms of his order dated 30<sup>th</sup> January 2019. Instead, the Commissioner was of the view that even if the case of the petitioner is taken at par, the petitioner had paid charges for cultivation of 1 Hectare of land only and thus there was encroachment to the extent of 62 Aar, if considered in the backdrop of the entry made in the encroachment register, Form 1-E, wherein the petitioner is shown to have encroached to the extent of 1 Hectare 62 Aar.

24. The situation which thus obtains is that the authorities have proceeded on the premise that the entries in the encroachment register reflect the true state-of-affairs. This approach of the authorities, in the facts of the case at hand, does not seem to be commendable. Mr. Kasliwal was justified in advancing a submission that the entries in the encroachment register for the year 2016-17 or for that matter 2010-11 could not have been relied upon unhesitatingly. Firstly, the register does not seem to have maintained in regular course of official business as the entries in column Nos. 5 to 10 thereof are blank.

Secondly, in the report itself of the Tahsildar Gangapur, dated 3<sup>rd</sup> May 2018, on which reliance was placed by the District Collector, it was categorically mentioned that no record was found to have been maintained to indicate the encroachment at the Village Panchayat. Thirdly, a communication was addressed to the petitioner on 4<sup>th</sup> November 2009 to the effect that the entries in the encroachment register Form 1-E in respect of the land bearing Gut No. 79, which was allotted for cultivation by the Irrigation Department, were not made in pursuance of any authority.

25. Respondent Nos.5 and 6 joined the issue by filing affidavit in rejoinder and assailed the veracity of the aforesaid communication dated 4<sup>th</sup> November 2019. An endeavour was made to demonstrate that the said communication has been addressed to suit the case of the petitioner.

26. The veracity of the communication dated 4<sup>th</sup> November 2019 may be susceptible to challenge. However, the fact remains that the authorities have not put unto themselves the most pertinent question as to whether the cultivation of portion of Gut No. 79 by the petitioner constituted "encroachment" in the peculiar facts of the case. The land falls in the submergence area of Tembhapuri Dam. If the dam is

filled to its capacity, there is no question of cultivation. Whenever the dam is not filled to its capacity and the submergence area becomes available for cultivation, the authorities of the Irrigation Department have been allotting the land for cultivation to the agriculturists after acceptance of charges (*Galpera*) on yearly basis. There is material on record to indicate that the petitioner has paid the charges for such cultivation.

27. In the aforesaid context, the singular reason ascribed by the Additional Commissioner is that the land under cultivation of the petitioner is 1 Hectare 62 Aar and he has paid cultivation charges for 1 Hectare land only, and thus, there was encroachment to the extent of 62 Aar. The said finding is simply not borne out by the record. In the report of the Tahsildar dated 8<sup>th</sup> June 2018, it was categorically recorded that during visit to the site, it was noticed that an area admeasuring 80 Aar only was under cultivation of the petitioner. This report was based on the report of Sub-Divisional Officer, Nandur – Madhmeshwar Patbandhare Sub-Division dated 7<sup>th</sup> June 2018. As indicated above, there is a certificate to the effect that the petitioner had paid cultivation charges for an area admeasuring 1 Hectare for the year 2018-2019. In fact, these factors had weighed with the

Additional Commissioner to remand the matter, in the first round of litigation, and direct that the spot inspection be made and the area under cultivation of the petitioner be measured. It appears that eventually the District Collector as well as the Additional Commissioner adjudicated the issue based on the reports of the Tahsildar and Circle Inspector without ascertaining the issue of actual encroachment.

28. In my considered view, in the face of such ambivalent record, especially the report of the Tahsildar based on the report of a competent officer of the Irrigation Department to the effect that the area under cultivation of the petitioner was 80 Aar only and for that the petitioner had paid the charges for yearly cultivation (*Galpera*), a finding of encroachment to the extent of 1 Hectare 62 Aar on the basis of the entry in the encroachment register, could not have been recorded. There can be no qualm over the proposition that a tainted person should not be allowed to hold the office. However, action of disqualification of an elected representative *sans* a clear proof of the misdemeanor, cannot be sustained. Since the disqualification operates in rem, in the sense that, a person who is found guilty of encroachment is disqualified to become a member of the Panchayat in future as well, I deem it in the

fitness of things that the issue be decided by the authorities on the basis of reliable material.

29. For the forgoing reasons, in my considered view, the impugned order passed by the Additional Commissioner dated 30<sup>th</sup> September 2019 in Appeal No. CR/160/2019 is required to be quashed and set aside and the matter is required to be remitted back with a direction to the Divisional Commissioner to cause a site inspection of the land under cultivation of the petitioner by a Competent Officer in the office of District Inspector of Land Record, in the presence of the Competent Officer of the Irrigation Department, so as to ascertain the exact area of land under cultivation of the petitioner and thereafter decide the appeal. Hence, the following order.

#### **ORDER**

- (i) The petition stands partly allowed.
- (ii) The impugned order dated 30<sup>th</sup> September 2019 passed by the Additional Commissioner in Appeal No. CR/160/2019 stands quashed and set aside.
- (iii) The matter stands remitted to the Divisional Commissioner, Aurangabad and the Appeal No. CR/160/2019 stands restored to the file of the Divisional Commissioner, Aurangabad.
- (iv) The Divisional Commissioner, Aurangabad shall cause a site inspection of the land under cultivation of the petitioner by a Competent Officer in the office of District Inspector of

Land Record, in the presence of the Competent Officer of the Irrigation Department, so as to ascertain the exact area of land under cultivation of the petitioner.

- (v) The Divisional Commissioner shall decide the appeal afresh after considering the aforesaid report to be submitted by the concerned officer and providing an opportunity of hearing to all concerned.
- (vi) The Divisional Commissioner shall make an endeavour to decide the appeal as expeditiously as possible and preferably within a period of four months from the date of the appearance of the parties.
- (vii) The parties shall appear before the Divisional Commissioner on 13<sup>th</sup> May 2021.
- (viii) The disqualification shall stand stayed till the decision of the appeal by the Divisional Commissioner.

Rule made absolute in aforesaid terms.

No order as to costs.

( N.J. JAMADAR, J. )

VD\_Dhirde