

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.14889 OF 2021

Shaikh Wahed Yakub,
Age-36 years, Occu-Business,
Presently working as Sarpanch
Village Panchayat Chitegaon,
Tq.Paithan, Dist.Aurangabad,
R/o Plot No.55, Paithan-Aurangabad Road,
At Post Chitegaon, Tq.Paithan,
Dist.Aurangabad

-- PETITIONER

VERSUS

1. The Collector,
Aurangabad, Dist.Aurangabad,

2. Krushna Sukhdeo Gidhane,
Age-34 years, Occu-Member Village Panchayat
Chitegaon, At Post Chitegaon,
Tq.Paithan, Dist.Aurangabad,

3. Sayyed Habib Imam,
Age-55 years, Occu-Agriculturist,
R/o At Post : Chitegaon,
Tq.Paithan, Dist.Aurangabad

-- RESPONDENTS

Mr.Y.V.Kakde, Advocate for the petitioner.
Mr.P.G.Borade, AGP for respondent No.1.
Mr.R.V.Gore, Advocate for respondent No.2.

(CORAM : BHARATI H. DANGRE, J.)

RESERVED ON : 10th January, 2022

PRONOUNCED ON : 25th January, 2022

JUDGMENT :

1. The petitioner, elected as a Member of Village Panchayat Chitegaon and subsequently it's Sarpanch in June 2021, is aggrieved by an order passed on 16.12.2021 by the Collector, Aurangabad, questioning the maintainability of the proceedings filed before him and requesting to frame preliminary issue about the maintainability of the proceedings.

2. Heard the learned counsel Mr.Kakde for the petitioner, learned counsel Mr. Gore for respondent No.2 and the learned AGP Mr.Borade for the State.

3. The facts involved lie in a very narrow compass. The general election for Village Panchayat Chitegaon was held in the month of January 2022 and the petitioner came to be elected and subsequently appointed to hold the post of Sarpanch.

Respondent Nos. 2 and 3 filed a dispute before the Collector, Aurangabad by invoking Section 14 (j-3) and Section 16 of the Maharashtra Village Panchayats Act, 1959 seeking his disqualification on the ground that the petitioner has made encroachment over the

Government land. The specific grievance pleaded by the complainant/respondent Nos. 2 and 3 is to the effect, that one Shaikh Akbar Miya had made a complaint to the Block Development Officer on 14/02/2019 wherein it was alleged that on the drainage line of Sant Dnyaneshwar Nagar, a common toilet is to be constructed, but the petitioner has made construction on the said piece of land. It was further stated that as per the report submitted to the Deputy Chief Executive Officer on 29.05.2019, it was declared that the petitioner had made encroachment and u/s 52 and 53 of the Maharashtra Village Panchayats Act, the construction was directed to be stopped. A copy of the complaint/application specifically alleged that the Block Development Officer, by his order dated 26.03.2019 had directed the petitioner to remove the encroachment and therefore he has incurred a disqualification.

4. The petitioner appeared before the Collector and requested for framing a preliminary point for consideration about the maintainability of the proceedings in view of the reported judgment of the Apex Court in **State of Himachal Pradesh and others Vs. Surinder Singh Banolta [AIR 2007 SCW 602]**.

5. On careful reading of the avernments in the plaint by the respondent, the allegation lavelled is, before the general election of village Chitegaon in the year 2019, the Authority had come to the conclusion about the encroachment made by the petitioner. Relying upon the aforesaid decision of the Apex Court, where the authority had come to a conclusion about a person already declared as an encroacher getting elected, it has been authoritatively pronounced that in such a constituency, a question has to be decided by filing an election petition.

The application so filed was opposed by respondent Nos. 2 and 3 by claiming that the statement of the petitioner is in utter ignorance of the reported decisions. The respondent No.1 rejected the said application on the ground that Maharashtra Village Panchayats Act is a complete Code and hence there is no need to frame the preliminary objection as sought for and the order passed by respondent No.1 reads as under, "Considering the avernments made in the dispute application and in view of the provisions of the Maharashtra Village Panchayats Act and Section 14(1) (j-3) and Section 12, the Maharashtra Village Panchayats Act is a complete Code. Hence issue raised by the respondents is not maintainable. Hence instant application raised by respondent No.1 is hereby rejected. Case is posted for further

consideration on merits."

6. The submission advanced on behalf of the petitioner is to the effect that depending upon whether the disqualification is possessed by a candidate at the time of his election as a Member of the Village Panchayat or whether the disqualification is incurred after his election, depending upon the two distinct contingencies, two remedies are provided under the Maharashtra Village Panchayats Act and these remedies exist in the form of disqualification as prescribed u/s 14 which contemplates that no person shall be a member of a Panchayat, continue as such who incurred the disqualification specified in the said Section which include a stipulation where a person has encroached upon a Government land or a public property. According to the learned counsel for the petitioner, Section 16 prescribe disability from continuing as a Member and any member of a panchayat, who is elected or appointed as such, was subject to any disqualification mentioned in Section 14 at the time of his election or appointment or during the term for which he was appointed or elected incurs any of the disqualification mentioned in Section 14, he shall be disabled from continuing to be a member and his office shall become vacant.

Other remedy which is prescribed in Section 15 of the Act is a remedy of election petition which will determine the validity of election of a candidate, when brought in question by any candidate at such election or by any person qualified to vote at the election, to which such question refers and such a petition will lie before the Civil Judge (J.D.) / (Sr.Dn.) having ordinary jurisdiction in the area within which the election has been or should have been held for determination of such a question. Upon an inquiry being held, the Judge may set aside the election and declare a date for holding a fresh election.

The learned counsel would submit that in the wake of the distinct statutory scheme, in an application which has been preferred by the respondents u/s 14(1)(j-3) r/w Section 16, the maintainability of the proceedings should be framed as a preliminary issue. This argument of his is based on the decision of the Apex Court in case of State of Himachal Pradesh (*supra*).

7. Part IX of the Constitution of India inserted by the Constitution (73rd amendment) prescribe for the Panchayats and Panchayat is defined under the said Chapter as an Institution (by whatever name called) of self-governance constituted under article 243B, for the Rural

areas. The duration of panchayat is specified under the said chapter to be for 5 years from the date of appointment for its first meeting and Section 243F prescribes for Disqualifications for membership ; *(1) A person shall be disqualified for being chosen as, and for being, a member of a Panchayat,*

(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned; (b) If he is so disqualified by or under any law made by the Legislature of the State.

Sub Article 2 of Article 243F reads thus :-

"If any question arises as to whether a member of a Panchayat has become subject to any of the disqualifications mentioned in clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide."

8. Article 243-O contained in the said Chapter impose a bar to interference by Courts in electoral matters and sub clause (b) of 243-O states that no election to any panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature

of a State.

9. The Maharashtra Village Panchayats Act, 1959 is a Law enacted by a State Legislature relating to constitution and administration of Village Panchayats in the State with a view to establish village panchayats for every village or group of villages and investing them with such power and authority as may be necessary to enable them to function as units of local self government and of development activities in rural areas. Section 11 of the said Act provides for an election to constitute a Panchayat and Section 13 prescribe the qualification of the persons to be elected and also for the persons entitled to vote. Section 14 provide for disqualifications and it set out that no person shall be a member of a Panchayat and continue as such who has incurred the disqualification prescribed under the said provision. In the present case, we are concerned with Section 14(1)(j-3) which set out the disqualification of a Member if he has encroached upon the Government land or a public property.

Reference is already made to Section 16 about a disability from continuing as a Member to be decided by the Collector within a period of 60 days from the date of receipt of such application, where a vacancy

has occurred under the said section on account of disability of the office falling vacant, on a member being disabled from continuing as such.

10. Section 15 of the Maharashtra Village Panchayat Act prescribes a remedy for election petition by a Judge, having jurisdiction in the area within which the election has been or should have been held, for determination of such a question, and who can set aside the election, if on holding enquiry he finds that the candidate has, for the purposes of election, committed a corrupt practice within a meaning of the Section and such a candidate shall be declared as disqualified for the purpose of that election and of such fresh election as has been held under sub section (2) and the election is liable to be set aside. Sub section (6) of Section 15 set out the contingency, when a person shall deem to have committed a corrupt practice. The grounds on which the election can be called in question are thus limited to Section 15.

11. This scheme of the Bombay Village Panchayat Act is distinct and dissimilar to the scheme under the Himachal Pradesh Panchayat Raj Act, 1994 and the Apex Court in case of **State of Himachal Pradesh and others Vs. Surinder Singh Banolta** (supra) has construed the provisions

of the Himachal Pradesh Panchayat Raj Act, 1994.

The said enactment by Section 122 prescribe disqualification for being chosen as and for being an office bearer of a Panchayat and sub section 2 of Section 122, provides as to who would determine whether a person is or has become subject of any disqualification under sub section 1 of Section 122 and there are two distinct mechanisms provided thereunder ; if such a question arises during the process of election, then it shall be determined by an Officer authorized in this behalf by the State Government, in consultation with the State Election Commission and if such question arises after the election process is over, then by the Deputy Collector.

12. Section 163 of the Act, which is included in Chapter XI, which is under the head "Disputes relating to election", Section 162 specifically provide for a remedy of election petition to be presented in accordance with the provisions of the Chapter. Section 163 provides for presentation of the petition and it prescribes that the election petition can be filed on one or more of the grounds specified in Sub Section (1) of Section 175 to the Authorized Officer, in writing, against the election of any person under the Act. Section 175 then set out the grounds for

declaring election to be void and one of the ground is ; "that on the date of his election, the elected person was not qualified or was disqualified to be elected under this Act." Thus a disqualification which had fallen upon a person before his election, which hold him disqualified to contest the election, is also one of the ground on which his election can be set aside.

It is in the backdrop of the aforesaid statutory scheme, the Hon'ble Apex Court had drawn a distinction between the two provisions and held that as once a person is declared to be an encroacher prior to the date on which he is declared as elected and if the said order has attained finality, the question as to whether he is to be disqualified in terms of provisions of Section 122 of the Act, must be raised by way of an election petition alone, since there cannot be two parallel proceedings which can be continued since a candidate or a voter, if he had the knowledge that an elected candidate was disqualified u/s 122, he may also file an application and the order of eviction, if it come to the notice of some other person after the election process is over, then he may file another proceedings, which situation according to the Apex Court, would lead to an absurdity with two different Forums adjudicating the same issue and coming to contradictory decisions.

13. However, considering the scheme of the Maharashtra Village Panchayats Act, where the election petition cannot be filed on the ground of disqualification and since disqualification either before the election or during his tenure as a Sarpanch/Member is incurred, the remedy will lie by filing proceedings u/s 16 seeking a disqualification u/s 14(1)(j-3). The decision of the Apex Court is therefore clearly distinguishable and the learned Judge has rightly rejected the application of the petitioner by recording that the Maharashtra Village Panchayats Act, being a complete Code, the plea that a preliminary issue has to be framed whether an election petition would lie, relying upon the decision of the Apex Court in Surinder case (supra), has been rightly declined. The respondent has sought for disqualification of the petitioner, on ground available in Section 14(1)(j-3) and it shall be determined by the Collector.

The writ petition, therefore, do not deserve any indulgence and by upholding the impugned order, the same is dismissed.

(BHARATI H. DANGRE, J.)