

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO.4277 OF 2022

Vitthal Narayan Kadam

...Petitioner

vs.

Ali Ahmed Bashir Shaikh and Others

...Respondents

Ms. Rekha Musale i/b. Mr. Nitin Rajguru, for the Petitioner.

Mrs. V.S. Nimbalkar, AGP for Respondent-State.

CORAM : N. J. JAMADAR, J.
RESERVED ON : JULY 4, 2023
PRONOUNCED ON : OCTOBER 3, 2023

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally at the stage of admission.

2. The petitioner, who was elected as a member of Village Panchayat, Vadapuri, Tal. Indapur, Pune takes exception to the judgment and order passed by the Divisional Commissioner, Pune Division in an appeal under section 16(2) of the Maharashtra Village Panchayats Act, 1959 (the Act, 1959) affirming the judgment and order of the District Collector, Pune declaring the petitioner to have incurred disqualification under section 14(1)(j-3) of the Act, 1959 to continue as the member of the village panchayat.

3. Background facts can be stated in brief as under:-

3.1 The election to constitute the village panchayat, Vadapuri were held in the year 2018. The petitioner was elected from Ward No. 2 in the general category. On 5th November, 2018 the respondent No. 1 filed a dispute before the District Collector alleging that the petitioner has incurred disqualification under section 14(1)(j-3) of the Act, 1959. It was inter alia alleged that the house property No. 146, Vadapuri, Gut No. 685/1 was shown in the Encroachment 'E' register. Though the said encroachment was shown against the name of one Narayan Pandurang Chavan, yet, the said encroachment was, in fact, committed by the father of the petitioner Narayan Pandurang Kadam. Another ground of the petitioner not having submitted accounts of election expenses in respect of 2014 election was also raised.

3.2 By a judgment and order dated 8th November, 2019 the District Collector was persuaded to allow the Dispute Application. It was held that there was material to show that on 7th March, 2014 notices for removal of encroachment were issued to 20 villagers including the father of the petitioner. Since the house property No. 146 was constructed on a Gairan land, the petitioner incurred the disqualification.

3.3 The petitioner carried the matter in appeal before the Divisional Commissioner. By the impugned judgment and order dated 26th November, 2021 the Divisional Commissioner concurred with the view taken by the District Collector and held that there was adequate material to show that the house property No. 146 was constructed by committing encroachment over the Gairan land.

3.4 Being further aggrieved, the petitioner has invoked the writ jurisdiction.

4. When the petition was listed before this Court on 20th July, 2022, noticing that there was discrepancy in Gut number of the Gairan land in the orders passed by the Collector and the Additional Commissioner, the District Collector was directed to submit a report, and also transmit the original record and proceeding of the dispute.

5. A report came to be filed by the District Collector. An affidavit has also been filed on behalf of the respondent No. 3 by the District Collector, Pune.

6. By a further order dated 24th April, 2023, the State was

directed to produce the original E Register and the record pertaining to the notice issued under the Act, 1959, on 7th March, 2014.

7. Upon the original E Register being placed on record, I have heard Ms. Rekha Musale, the learned counsel for the petitioner and Mrs. Nimbalkar, learned AGP for Respondent-State at some length. The learned counsel took the Court through the pleadings and material on record.

8. Ms. Musale, the learned counsel for the petitioner strenuously submitted that the entire edifice of the case of encroachment is based on the entry in the E Register and the notices which were purportedly issued to the villagers on 7th March, 2014. However, in the E Register the name of the father of the petitioner does not find mention. Encroachment over a portion of Gut No. 685/1 is attributed to one Narayan Chavan, with whom the petitioner has no concern. The authorities below have not properly appreciated this specific contention raised on behalf of the petitioner. An endeavour was also made by Ms. Musale to draw home the point that the petitioner was residing separately from his father and even if it was assumed that there was some unauthorized construction in the

past by the father of the petitioner, the petitioner could not have been disqualified on the said count.

9. In opposition to this, Mrs. Nimbalkar, learned AGP supported the impugned orders. It was submitted that in the assessment list, the house property No. 146 stands in the name of father of the petitioner. Government is the holder of the said property as it forms part of Gairan land Gut No. 685/1. There are documents to show that the notices to remove the encroachment were issued in the year 2005 as well. Thus the endeavour on the part of the petitioner to take advantage of the discrepancy in the surname of the person in the E Register has rightly been rejected by the authorities below. Since the encroachment is by the father of the petitioner, the ratio laid down by the Supreme Court in the case of **Janabai vs. Additional Commissioner and Others**¹ clearly governs the facts of the case. Thus, the petition deserves to be dismissed, urged Mrs. Nimbalkar.

10. To begin with, it may be apposite to note the nature, import and the object of the disqualification prescribed under section 14(1)(j-3) of the Act, 1959. Under section 14(1)(j-3) no person shall be a member of a village panchayat, or continue as such, who has

¹ (2018) 18 Supreme Court Cases 196.

committed encroachment over the Government land or public property. The essence of disqualification is in encroachment over the Government land or public property. As a member of the village panchayat the person elected thereto is statutorily enjoined to perform the duties cast under the Act, 1959. One of the duties of the village panchayat is to remove the obstruction and encroachment over the Government land or public property. Under section 53 of the Act, 1959 elaborate provisions have been made for removal of obstruction and encroachment over the public property. If the panchayat fails to take action, the Collector is empowered to take the requisite action suo motu or on an application made to him, in this behalf.

11. The above object of prescribing the disqualification of person who commits encroachment over Government land or public property is to obviate a situation of conflict of duty and interest which occurs where the person who is statutorily enjoined to take action under the provisions of the Act, 1959 himself happens to be a privy to such unauthorized act either directly or indirectly. The scope of the expression, "person" is thus expanded to include a legal representative or family member of the person whose qualification to get elected or continue as a member of village panchayat on

account of alleged encroachment over the Government land or public property, is questioned.

12. The import of the provisions contained in section 14(1) (j-3) fell for consideration before a Division Bench of this Court in the case of **Devidas s/o. Matiramji Surwade vs. Additional Commissioner, Amaravati²**. A submission was sought to be canvassed on behalf of the petitioner therein that the alleged encroachment was by the father of the appellant, like the case at hand, and that too way back in the year 1966 and, thus, the petitioner could not have been visited with disqualification under section 14(1)(j-3).

13. Repelling the contention, this Court enunciated the law as under:-

4] We have heard the learned counsel for the appellant. On the facts described by the learned counsel for the appellant, we find that the State Legislature while enacting the said provision fully accepted the Statement of Objects and Reasons in respect of the said particular provision regarding encroachment on the Government properties. The Statement of Objects and Reasons states that the person, who has encroached on the Government property, shall not only be disqualified to be a member of Gram Panchayat, but also the disqualification shall be attached to such person till his tenure. In other words, on such disqualification the member can be disqualified and thus removed.

2 2017(1) Mh.L.J. 102.

5] We find that there is a definite object in making the said amendment to the provisions of disqualification and the object is that one, who encroaches upon the Government land or the Government property, cannot make any claim to represent the people by becoming an elected member of the Gram Panchayat. The term 'person' in the said amended provision has to be interpreted to mean the legal heirs of such person, who has encroached and continues to occupy the Government land or the Government property, his agent, assignee or transferee or as the case may be. If such an interpretation is not made in the said provision, the result would be absurd in the sense that the Government land would continue to remain encroached and the legal heirs or the assignees or the transferees remaining on such encroached Government land shall claim the right to get elected as a member of democratically elected body. In no case our conscious permits such type of interpretation to defeat the very object of the Bombay Village Panchayats (Amendment) Act, 2006.

14. The aforesaid exposition of the legislative object in prescribing the disqualification was approved by the Supreme Court in the case of **Janabai** (supra). Before advertng to the decision of the Supreme Court in the case of **Janabai** (supra), I deem it appropriate to note relevant provisions contained in section 53 of the Act, 1959 which prescribes penalty for the encroachment and also cast an obligation on the Panchayat to take action for removal of the obstruction or encroachment.

15. The relevant part of section 53 reads as under:-

53. Obstructions and encroachments upon public streets and open sites. -

(1) Whoever, [within the limits of the gaathan area of the village]

(a) builds or sets up any wall, or any fence, rail, post, stall, verandah, platform, plinth, step or structure or thing or any other encroachment or obstruction, or

(b) deposits, or causes to be placed or deposited, any box, bale, package or merchandise or any other thing,

(c) without written permission given to the owner or occupier of a building by a *panchayat*, puts up, so as to protect from an upper storey thereof, any verandah, balcony, room or other structure or thing.

In or over any public street or place, or in or over upon any open drains, gutter, sewer or aqueduct in such street or place, or contravenes any conditions, subject to which any permission as aforesaid is given or the provisions of any by-law made in relation to any such projections or cultivates or makes any unauthorised use of any grazing land, not being private property, shall, on conviction, be punished with fine, which may extend to fifty rupees and with further fine which may extend to five rupees for every day on which such obstruction, deposit, projection, cultivation or unauthorized use continues after the date of first conviction for such offence.

(2) The *panchayat* shall have power to remove any such obstruction or encroachment and to remove any crop unauthorisedly cultivated on grazing land or any other land, not being private property, and shall have the like power to remove any unauthorized obstruction or encroachment of the like nature in any open site not being private property, whether such site is vested in the *panchayat* or not, provided that if the site be vested in Government the permission of the Collector or any officer authorized by him in this behalf shall have been first obtained. The expense of such removal shall be paid by the person who has caused the said obstruction or encroachment and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter IX.

[It shall be the duty of the *panchayat* to remove such obstruction or encroachment immediately after it is noticed or brought to its notice, by following the procedure mentioned above.]

16. Sub section (1) of section 53, inter alia, prescribes a penalty for building a structure, within the limits of Gaathan area of the village, in or over any public street or place, not being private property. Under sub section (2) Panchayat shall have power to remove any obstruction or encroachment in any open site, not being private property, whether such site is vested in the Panchayat or not. However, if the site is vested in the Government, the permission of the Collector or any officer authorized by him in this behalf shall have first been obtained. The manner in which the power is to be exercised by the panchayat is, in a sense, a matter of regulatory significance only.

17. A conjoint reading of sub section (1) and (2) of section 53 unmistakably indicates the legislative object of proscribing obstruction or encroachment in or over the property which is not a private property. The expression, “not being private property” finds place both in sub section (1) and (2). This brings to the fore the legislative intendment that the encroachment over the property (not being the private property) is not tolerated. Thus, the distinction between the public and private property.

18. In the backdrop of the aforesaid legislative prescription and

object, the principal challenge to the impugned order on the count that the name of the father of the petitioner does not find mention in the encroachment register deserves to be appreciated. Before advertng to the entries in the encroachment register, especially the alleged discrepancy in the surname of the encroacher at Item No. 10, it may be appropriate to notice the description of the property in question, in the assessment list maintained at village panchayat, Vadapuri.

19. The assessment list for the year 2000-01 indicates that property No. 146 is located on Gairan land. Village panchayat is the holder of the said property. Narayan Kadam, the father of the petitioner, is the occupant thereof. It also describes the said property, as admeasuring 30 x 11 = 330 Sq.Ft. with brick and cement structure. In the assessment list, 2017-18 again the same position has been recorded as regards the holder and occupant with the change that the property is described to admeasure 30 x 12= 360 Sq.Ft., with roof of tin shade. For the assessment year 1995-95 there is another property bearing property No. 140 of which the holder and occupant is shown Narayan Kadam, the father of the petitioner.

20. It is in the context of these entries in the assessment lists, the entry in the E Register deserves to be noted. Indisputably, item No. 10 is in respect of encroachment over the land bearing No. 685/1 and the name of the encroacher is Narayan Chavan. The record of right in respect of Gut No. 685 shows the name of Sarpanch, Village Panchayat, Vadapuri as the holder of the said property. A conjoint reading of the record of right and entries in the E Register would indicate that the villagers have committed encroachments over the Gairan land.

21. The controversy sought to be created on behalf of the petitioner on the strength of the discrepancy in the surname of person at item No. 10 gets resolved if the documents on record are considered in juxtaposition with each other. Firstly, it is imperative to note even before the controversy arose, the village panchayat in exercise of the powers under section 53 of the Act, 1959 had addressed notices to remove encroachment over Gut No. 685/1 to as many as 20 villagers. The father of the petitioner was enlisted at Serial No. 3. Copy of the notice dated 7th March, 2014 contains the acknowledgment of the service of the notice on the father of the petitioner. Secondly, on the perusal of the original E Register one finds that another notice was addressed on 30th March, 2015 to

those 20 villagers who had committed encroachment over Gut No. 685/1. The petitioner's father was again shown at Serial No. 3. Thirdly, if these notices are read in conjunction with the assessment lists in respect of the property N. 146, the co-relation between the said house property and the Gairan land becomes explicitly clear. The fact that the name of the village panchayat is shown as the owner of the property and the father of the petitioner as the occupant thereof in the assessment lists consistently, rules out the scope of any ambiguity about the identity of the person who is named as the encroacher in the E Register.

22. I am, therefore, persuaded to hold that the thin thread of discrepancy in the surname, to which the learned counsel for the petitioner tried to assiduously cling is too fragile to advance the cause of the petitioner.

23. The second submission that the petitioner resides separately from his father and therefore could not have been disqualified is required to be sated to be repelled. One, it could not be established by the petitioner with an element of certainty that the petitioner had been residing separately from his father and did not share the house property which has been constructed and in the occupation

of the petitioner's family by committing encroachment over the Gairan land. Two, even if the said submission is taken at its face value, it is of little assistance to petitioner having regard to the legislative object.

24. The following observations of the Supreme Court in the case of Janabai (supra) constitute a complete answer to the submissions sought to be canvassed by Ms. Musale. Paragraph Nos. 26, 27 and 29 read as under:-

26] 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.

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29] 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.

25. In the light of the aforesaid exposition of the law, the Divisional Commissioner and the District Collector have committed no error in returning a finding that the petitioner had incurred a disqualification on account of the continued encroachment over the Gairan land.

26. It must be noted that after the orders were passed by this Court, the authorities have carried out a fresh inspection and submitted a report that there was indeed encroachment over the Gairan land by the father of the petitioner. However, I have not adverted to the said report, filed after the passing of the impugned order. I have evaluated the challenge to the impugned order on the basis of the material which was before the authorities below and yet found that those orders do not warrant interference in exercise of extraordinary writ jurisdiction.

Hence, the following order.

ORDER

- 1] The petition stands dismissed.
- 2] The interim order stands vacated.
- 3] Rule discharged.
- 4] No costs.

(N. J. JAMADAR, J.)

25. At this stage, the learned counsel for the petitioner seeks stay to the order passed by this Court. Since both the authorities below have held against the petitioner and this Court has also recorded a view that the petitioner has incurred the disqualification, the oral application for stay stands rejected.

(N. J. JAMADAR, J.)