

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

WRIT PETITION NO.12614 OF 2022

Nikhil Uttam Undre

...Petitioner

vs.

State of Maharashtra and Others

...Respondents

VISHAL
SUBHASH
PAREKAR

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VISHAL
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Mr. Surel Shah i/b. Mr. Abhijit Kadam, for the Petitioner.
Mr. S.D. Rayrikar, AGP for Respondent Nos. 1 to 5.
Mr. Sandeep Pathak, for Respondent No. 6.

CORAM : N. J. JAMADAR, J.
RESERVED ON : APRIL 21, 2023
PRONOUNCED ON : JUNE 5, 2023

JUDGMENT :

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

2. This petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of the judgment and order dated 28th September, 2022 passed by the Additional Divisional Commissioner, Pune in Gram Panchayat Appeal No. 5/2022 whereby the appeal preferred by respondent No. 5 under section 16(2) of the Maharashtra Village Panchayats Act, 1959 (the Act, 1959) came to be allowed by setting aside the order passed by the District Collector in Gram Panchayat Dispute No. 207 of 2021 dated 25th February, 2022, and thereby declaring that the

petitioner incurred disqualification to continue as a member of village panchayat, Manjri (Khurd), Tal. Haveli, District Pune under the provisions of section 14(1)(j-3) of the Act, 1959.

3. The background facts leading to this petition can be stated as under:-

a} In the election held in the year 2001 the petitioner was elected as a member of village panchayat, Manjri. The petitioner was also elected as the Sarpanch of the village panchayat.

b} The respondent No. 6 lodged Dispute Application No. 207 of 2021 before the District Collector, Pune, the respondent No. 3, purportedly under section 14(1)(j-3) of the Act, 1959 alleging that the petitioner incurred disqualification for having committed encroachment on the government land. It was, inter alia, alleged that the petitioner had committed encroachment on Gaathan land bearing village panchayat property No. 553. The family members of the petitioner had also committed encroachment over Gaathan land and erected unauthorized construction. Thus, the petitioner had allegedly incurred disqualification to continue as a member of the village panchayat.

c} The petitioner resisted the Dispute Application by filing reply. It was categorically denied that the petitioner had committed

encroachment over any government property. Sahebrao Undre, the uncle of the petitioner, was stated to be the holder of village panchayat property No. 553. The petitioner had no concern with the said property, even remotely. It was contended that the petitioner, his wife and son were residing separately from the petitioner's father Uttam Undre. Neither the petitioner nor any of his family members were named as the person who has committed encroachment in the Register maintained by the village panchayat, in Form E. No notice was ever issued to the petitioner by any competent authority to remove the encroachment.

d} The District Collector, after considering the contentions of the parties and the material on record, was persuaded to dismiss the application holding that the respondent No. 6/ complainant could not establish that the petitioner or any of his family members had committed encroachment over the government property. The fact that the survey had not been completed at village Manjri weighed with the District Collector. It was further noted that a case for disqualification of the petitioner for the alleged encroachment by Sahebrao Undre, the petitioner's uncle, was not made out.

e} Being aggrieved, respondent No. 6 preferred an appeal before the Additional Divisional Commissioner, Pune. By the impugned judgment and order the Additional Divisional Commissioner was

persuaded to allow the appeal and hold that the petitioner did incur the disqualification. Giving weight to the entries made in the Inquiry Register to the effect that Namdeo Undre, the grandfather of the petitioner, had laid claim over the Gaothan land entered at Item No. 6 of the Register and the name of Namdeo Undre was entered as the person in occupation of the Gaothan land therein, the Additional Divisional Commissioner arrived at a finding that the property No. 359, Survey No. 2/1 was government property.

f) The Additional Divisional Commissioner further held that the ration card, in which the wife of the petitioner was shown to be the head of the family consisting of the petitioner and their son, was obtained on 4th February, 2022, post election of the petitioner, with a view to insulate the petitioner from possible disqualification and the petitioner failed to establish that he has been residing separately from the family members at a place distinct from property No. 359, Survey No. 2/1.

4. Following to the pronouncement of the Supreme Court in the case of **Janabai vs. Additional Commissioner and Others**¹, the Additional Commissioner held that the petitioner and his family members were in the occupation of the house erected on Gaothan land. Resultantly, the petitioner incurred the disqualification.

1 (2018) 18 Supreme Court Cases 196.

5. Being aggrieved, the petitioner has invoked the writ jurisdiction of this Court.

6. I have heard Mr. Surel Shah, learned counsel for the petitioner, Mr. Rayrikar, learned AGP for respondent Nos. 1 to 5 and Mr. Sandeep Pathak, learned counsel for respondent No. 6 at some length. The learned counsel took the Court through the material on record including the orders passed by the authorities below.

7. Mr. Surel Shah, the learned counsel for the petitioner, would urge that the Additional Divisional Commissioner committed a manifest error in interfering with the order passed by the District Collector. In the process, the Additional Divisional Commissioner banked upon documents which were not before the District Collector. In any event, according to Mr. Shah, the view taken by the Additional Divisional Commissioner that the property enumerated at Item No. 6 in the inquiry register, was the government property is completely erroneous. There was no material to arrive at such a finding. Inviting the attention of the court to the provisions contained in the Maharashtra Land Revenue (Village, Town and City Survey) Rules, 1969, Mr. Shah would urge that there was no

material to show that the procedure prescribed under the said Rules especially sub rule (3) of Rule 6 was complied with. In the absence thereof, the Additional Divisional Commissioner was clearly in error in recording a finding that the village panchayat property No. 359 is a Gaothan land. Mr. Shah strenuously submitted that a democratically elected member of the village panchayat could not have been unseated on the basis of mere surmises and conjectures. Such a view has the propensity to undermine democratic principles, urged Mr. Shah.

8. As a second limb of the submission, Mr. Shah would urge that the Additional Divisional Commissioner could not have discarded the claim of the petitioner that he has been residing separately from his father and did not occupy property No. 359, as is evidenced by the separate ration card. A factual error in ascertaining the date since when the names of the petitioner, his wife and son were deleted from the original ration card, which stands in the name of petitioner's grandfather, vitiated the finding of the Additional Divisional Commissioner, urged Mr. Shah.

9. Mr. Shah further submitted that the Additional Divisional Commissioner could not have brushed aside the report submitted

by Tahsildar, Haveli dated 14th September, 2021 that neither the petitioner nor any of his family members had committed encroachment over the government property and no notice to remove the encroachment was issued to the petitioner and his family members under sections, 52, 53, 54 of the Act, 1959. Likewise, the fact that the survey at village panchayat, Manjri had not been completed was also unjustifiably discarded by the Additional Divisional Commissioner. Laying emphasis on the report dated 16th August, 2019 of the office of Dy. Superintendent, Land Record that survey at village Manjari Khurd was still incomplete, Mr. Shah would urge that the said report bears upon the claim that the property No. 359 is situated on a Gaothan land.

10. In contrast, Mr. Rayrikar, the learned AGP supported the impugned order. It was submitted that the Additional Divisional Commissioner correctly appreciated the facts and arrived at a legitimate conclusion which is not amenable to correction in exercise of writ jurisdiction.

11. Mr. Sandeep Pathak, the learned counsel for respondent No. 6 submitted that the fact that property No. 359 is located on a Ggaothan land is established beyond the pale of controversy by the

entries in the Inquiry Register. Mr. Pathak strenuously submitted that there is no document to support the claim of the petitioner or his predecessor in title over the property enumerated at Item No. 6 in the inquiry register. Placing heavy reliance on the remark in column No. 13 of the Inquiry Register, Mr. Pathak submitted that the fact that house of the petitioner is located on a Gaothan land can hardly be disputed. Consistent with the aforesaid submission, Mr. Pathak urged with tenacity that all lands otherwise vest in the State Government under section 20 of the Maharashtra Land Revenue Code, 1966, in the absence of documents to show individual proprietary title thereto. Therefore, the fact that survey at village panchayat, Manjri has not yet been completed is of little significance.

12. Mr. Pathak submitted that the case at hand is clearly covered by the pronouncement of the Supreme Court in the case of Janabai (supra). It was urged that the endeavour on the part of the petitioner to obtain separate ration card in the year 2022 clearly shows the design to wriggle out of the situation. In fact, the petitioner could not place any material to demonstrate that he has been residing separately from his father and grandfather. In the circumstances, according to Mr. Pathak, the Additional Divisional Commissioner,

committed no error in declaring that the petitioner has incurred the disqualification. Any other view would frustrate the object of prescribing the disqualification, submitted Mr. Pathak.

13. Under section 14(1)(j-3) no person shall be a member of a village panchayat, or continue as such, who has 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.

14. 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 statutory 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.

15. The import of the provisions contained in section 14(1) (j-3) fell for consideration before Division Bench of this Court in the case of **Devidas s/o. Matiramji Surwade vs. Additional Commissioner, Amaravati**². A submission was sought to be canvassed on behalf of the petitioner therein that the alleged encroachment was by the father of the appellant 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).

16. 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

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

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.

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.

17. The aforesaid exposition of the legislative object in prescribing the disqualification was approved by the Supreme Court in the case of Janabai (supra). Before advertent 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 Maharashtra Village Panchayats Act, 1959 which prescribe

penalty for the encroachment and also cast an obligation on the panchayat to take action for removal of the obstruction or encroachment.

18. 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, or

(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.]

19. Sub section (1) of section 53, inter alia, prescribes a penalty for building a structure, within the limits of Gaothan 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.

20. The manner in which the power is to be exercised by the panchayat is, in a sense, a matter of regulatory significance only. 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. Hence, where it is alleged that a person has committed an encroachment, a defence that it is a private property is conceivable. In fact that seems to be the only defence where the factum of erection or construction is incontestible.

21. In the light of the aforesaid nature of the provision contained in section 53 of the Act, 1959, the challenge to the impugned order on the ground that there is no material to demonstrate that the property No. 359, Survey No. 2/1 is a Government property deserves to be appreciated. The entries in Inquiry Register, especially the endorsement in column No. 13 are of material significance. It seems that the name of the grandfather of the petitioner Namdeo Sonba was entered as the deemed holder to the property at Item No. 6. Whereas the names of Sahebrao Undre and Ankush Undre were entered as deemed holders to the properties at Item Nos. 7, 8 and 9. The endorsement in column No. 13 indicates

that Namdeo Undre, the grandfather of the petitioner, during the course of inquiry, could not substantiate his claim that the property at Item No. 6 (along with properties at Item Nos. 4 and 5) were his ancestral properties. No documents could be produced to support the said claim. It was, however, asserted that since the agricultural lands were abutting the Goathan land, he was residing in the Goathan land by constructing house thereon. As regards the properties at Item Nos. 7, 8 and 9, an endorsement was made that those lands were Goathan lands and nobody could establish the proprietary and possessory title thereto, nor any entry was made in the village panchayat register and, therefore, the State of Maharashtra was shown as the holder of the said lands. It is on the basis of the aforesaid entries in the Inquiry Register, the Divisional Commissioner recorded a finding that the properties at Item Nos. 6, 7 and 8 of the Inquiry Register were the Goathan lands and the State Government was the holder thereof.

22. Mr. Shah, the learned counsel for the petitioner would assail the aforesaid finding on the ground that the entries in the Inquiry Register could not have been relied upon as the procedure contemplated under the Maharashtra Land Revenue (Village, Town and City Survey) Rules, 1969 (the Rules, 1969) had not been

followed. Emphasis was laid on Rule 6 of the Rules, 1969 which reads as under:-

6. Procedure of enquiry. - (1) It shall be the duty of the Inquiry Officer to determine for each parcel of land situated within the limits of the area under survey who is entitled to be confirmed in possession of each such parcel of land, what possession constitute encroachments, easements or licences and what land vest in local authority or Government and in case of land adjudged to be in the legitimate possession of a private individual or body, its tenure and liability to pay land revenue.

(2) For purposes of determining the right, title and interest of individuals and bodies in respect of lands under survey under sub-rule (1), the Inquiry Officer shall hold an enquiry under Section 20 of the Code or, as the case may be, Section 91 E of the Bombay Municipal Corporation Act, 1948, Section 69 of the City of Nagpur Municipal Corporation Act 1948, Section 80 of the Bombay Provincial Municipal Corporation Act, 1959, Section 59 of the Bombay Village Panchyats Act, 1958 or Section 89 of the Maharashtra Municipalities Act, 1965. The maps and registers referred to in rule 5 shall be corrected in accordance with the decision of the Inquiry Officer or, where an appeal is filed or a civil suit instituted in accordance with the final order passed in appeal or civil suit.

(3) The Inquiry Officer shall send a list of unoccupied vacant plots of waste land which are not claimed by any person to the Collector. The Collector shall, on receipt of such list, cause a public notice in Form 'C' to be affixed on each such plot requiring any person desiring to claim any interest in plots to appear before the Inquiry Officer within the period specified in the notice with documentary evidence of title to the plot.

If any claim is made in relation to such plot, the Inquiry Officer shall proceed to determine it in accordance with sub-rule (2). If no claim is made within the period aforesaid, the plot shall be entered as land vesting in the State Government.

23. Since the Inquiry Officer had not determined the claim in accordance with the sub rule (2) of Rule 6, according to Mr. Shah, the property at Item No. 6 could not have been entered in the name of the State Government.

24. I am afraid to accede to the aforesaid submission. The entries in the Inquiry Register appear to have been made in regular course of official business. The Inquiry Officer has in terms recorded that the grandfather of the petitioner could not substantiate his claim over the property at Item No. 6 nor any document could be tendered in respect of the said claim. The Inquiry Officer further recorded that the grandfather of the petitioner claimed that since his agricultural land was situated near the Gaothan land, he was occupying the Gaothan land by constructing a house thereon. Whereas in respect of the properties at Item Nos. 7, 8 and 9, in fact, no claim of ownership thereon was made.

25. At this juncture, the legislative object in incorporating the provisions contained in section 53 by making a pointed distinction between the encroachment over the public property and private property deserves to be kept in view. In absence of any material to show that the property at Item No. 6 of the Inquiry Register is a

private property, the entire in the Inquiry Register, cannot be discarded by merely pointing out alleged infraction in following the procedure.

26. At this stage, a profitable reference can be made to the judgment of the Supreme Court in the case of **Janabai** (supra).

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.

27. If the facts of the case at hand are appraised on the touchstone of the legislative object in prescribing the disqualification, as expounded above, it becomes evidently clear that the failure on the part of the petitioner to demonstrate that the property No. 359, Survey No. 2/1 is a private property as distinguished from the Gaothan land, shown in the Inquiry Register, runs counter to the claim of the petitioner.

28. The Divisional Commissioner correctly appreciated that the initially the name of the petitioner was included in the ration card which stood in the name of Namdeo Undre, the grandfather of the petitioner, and subsequently a separate ration card, with the wife of the petitioner as the head of the family, came to be issued on 4th February, 2022 after the election of the petitioner. This betrays a clear intent to salvage the position by asserting that the petitioner and his family has been residing separately from his father and other family members. The said ration card bearing No. 1319362 seems to have been issued on 4th February, 2022.

29. Mr. Shah's endeavour to show that the name of the petitioner was deleted in the year 2017 itself does not carry the matter any further. It is imperative to note that no material could be placed on record to show that the petitioner had been residing separately from his father and rest of the family members at a place distinct from the property No. 359.

30. In this view of the matter, the report by the Tahsildar, Haveli that no property was registered in the name of the petitioner in village panchayat register No. 8 and therefore the petitioner had not committed any encroachment on the Gaothan land cannot be pressed into service to resist disqualification.

31. In the totality of the circumstances, in my view, the Divisional Commissioner correctly appreciated the facts and after applying the proposition of law enunciated in the case of **Janabai** (supra) came to a justifiable conclusion that the petitioner has incurred the disqualification under section 14(1)(j-3). I am, therefore, not inclined to interfere with the order passed by the Divisional Commissioner in exercise of writ jurisdiction.

Hence, the following order.

ORDER

1] The petition stands dismissed.

2] Rule discharged.

3] No costs.

(N. J. JAMADAR, J.)