

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13601 OF 2022

Shivaji Kisan Kanherkar

...Petitioner

Versus

State of Maharashtra & Others

...Respondents

...

Mr. Abhay Anturkar i/by Mr. Ranjit Shinde, for Petitioner.

Mr. Akshay S. Pansare i/by Mr. Sachindra B. Shetye for Respondent No.4.

Mr. Shriram Chaudhari a/w Mr. N.V. Gaikwad, for Respondent No.5.

Mr. P. P. Pujari, A.G.P., for Respondent Nos.1 to 3.

...

CORAM : SANDEEP V. MARNE, J.

DATE : OCTOBER 25, 2023

ORAL JUDGMENT

1. **Rule.** Rule made returnable forthwith, with the consent of the parties, the Petition is taken up for final disposal.

2. Petitioner challenges order dated 30 September 2022 passed by the Additional Divisional Commissioner, Pune Division allowing the Appeal filed by Respondent No.5 and declaring disqualification of the Petitioner under provisions of Section 14(1)(j-3) of the Maharashtra Village Panchayat Act, 1958 as a Member of Grampanchayat. Before the Additional Divisional Commissioner, the Respondent No.5 had challenged order dated 13 July 2022

passed by the Collector-Pune by which the application filed by Respondent No.5 seeking disqualification of the Petitioner was rejected. Petitioner is aggrieved by the order passed by the Additional Divisional Commissioner on 30 September 2022 disqualifying him and has accordingly filed the present Petition.

3. I have heard Mr. Abhay Anturkar, the learned counsel appearing for Petitioner. He would submit that the proceedings filed by Respondent No.5 seeking Petitioner's disqualification were barred by *res judicata* as similar proceedings instituted by one Shri. Pravin Ramchandra Kanherkar in the year 2013 were rejected holding that the alleged encroachment by the Petitioner was regularized by accepting penalty in the year 2006. He would further submit that the Collector had rightly rejected the application filed by Respondent No.5 seeking Petitioner's disqualification by relying upon the report submitted by Tahsildar. That the Divisional Commissioner has erroneously given more weightage to the entries in the encroachment register by ignoring the three reports submitted by Circle Officer and Tahsildar. That initially a report was submitted by Tahsildar on 5 July 2021 certifying that there was no permanent construction at Gat No.149 and that the family members of the Petitioner did not commit any encroachment. The report of

the Tahsildar dated 5 July 2021, according to Mr. Anturkar, was based on the site visit conducted by Circle Officer and his report dated 5 April 2021. Inviting my attention to the report of the Circle Officer dated 5 April 2021, he would submit that the Circle Officer had also clearly opined that no encroachment was committed at land bearing Gat No.149 and the construction was temporary in nature. He would further submit that one more report was submitted by the Tahsildar on 8 February 2022 once again opining that the land at Gat No.149 was vacant and that there was no construction. He would therefore submit that in the light of the two reports of Tahsildar and one report of Circle Officer, the Additional Divisional Commissioner could not have considered stale entries in the encroachment register for the purpose of drawl of a surmise that the Petitioner has indulged in unauthorized construction. He would submit that Petitioner is an elected representative and cannot be removed in a casual manner only on the basis of surmises. He would rely upon the Judgment of the Apex Court in the case of ***Ravi Yashwant Bhoir Vs. District Collector Raigad and Others***¹. He would also rely upon the Judgment of Apex Court in the case of ***Janabai Vs. Additional Commissioner and others***² in support of his contention that unless a person shares the

¹ 2012 4 SCC 407

² (2018) 18 SCC 196

encroached property by residing therein continuously, he cannot be treated as disqualified. Mr. Anturkar would submit that there is absolutely no material on record to indicate that the Petitioner or his family members have actually encroached upon the property in question or were residing therein on the date of inspection conducted by the Tahsildar and Circle Officer. He would therefore submit that the order passed by the Additional Divisional Commissioner deserves to be set aside.

4. *Per contra* Mr. Chaudhari, the learned counsel appearing for Respondent No.5 would oppose the Petition and support the order passed by the Additional Divisional Commissioner. He would take me through various entries in the encroachment register to indicate that not just Petitioner, but also his father had encroached upon the government land. He would submit that the said entries in the encroachment register still continue to exist, which is a clear indication that the encroachment at the site is still in existence. He would submit that in addition to the encroachment committed by the Petitioner himself in land at Gat No.149, Petitioner's father has also committed encroachment in a separate land bearing Gat No.453. That there is entry of construction of hut by Petitioner's father at land at Gat No.453.

5. Mr. Chaudhari would further submit that the Collector had committed an error in relying on only the second report of the Tahsildar dated 8 February 2022, which was completely vague. That in his earlier report dated 5 July 2021, the Tahsildar had not only made a specific reference to an entry in the encroachment register in respect of Gat No.149 but had also indicated construction of *inter alia* toilet tank. According to Mr. Chaudhari, construction of toilet tank is a permanent construction. That the Additional Divisional Commissioner has rightly taken into consideration the fact that the permanent construction is erected in the form of toilet tank by Petitioner in land at Gat No.149. He would submit that so long as the entries in the encroachment register are not deleted, mere temporary removal of unauthorized structures from the site at the time of conduct of inspection would not give rise to a presumption that the Petitioner has not committed any encroachment at the site. He would pray for dismissal of the Petition.

6. Rival contentions of the parties now fall for my consideration.

7. Petitioner is a democratically elected Member of Grampanchayat. His disqualification is sought under the provisions of Section 14 (1) (j-3) of the Maharashtra Village Panchayat Act, 1958, which provides as under :

“14. Disqualifications - (1) No person shall be a member of a Panchayat, or continue as such, who -

(a)...

(b)...

(c)...

(d)...

(e)...

(f)...

(g)...

(h)...

(i)...

(j) has voluntarily acquired the citizenship of a foreign State, or is under any acknowledge of allegiance or adherence to a foreign State; or

(j-1)...

(j-2)...

(j-3) has encroached upon the Government land or public property.”

8. There can be no dispute to the proposition that a democratically elected member cannot be removed from his position unless a concrete case for disqualification is made out. The law in this regard is well settled by the Judgment of the Apex Court in **Ravi Yashwant Bhoir (*supra*)** where the Apex Court held in Paragraph Nos.28, 32, 36, 37 as under:

“28. In *State of Punjab v. Baldev Singh etc. etc.*, AIR 1999 SC 2378, this Court considered the issue of removal of an elected office bearer and held that where the statutory provision has a very serious repercussions, it implicitly makes it imperative and obligatory on the part of the authority to have strict adherence to the statutory provisions. All the safeguards and protections provided under the statute have to be kept in mind while exercising such a power. The Court considering its earlier judgments in

Mohinder Kumar v. State, Panaji, Goa (1998) 8 SCC 655; and Ali Mustafa Abdul Rehman Moosa v. State of Kerala, AIR 1995 SC 244, held as under:-

"It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

32. In service jurisprudence, minor punishment is permissible to be imposed while holding the inquiry as per the procedure prescribed for it but for removal, termination or reduction in rank, a full fledged inquiry is required otherwise it will be violative of the provisions of Article 311 of the Constitution of India. The case is to be understood in an entirely different context as compared to the government employees, for the reason, that for the removal of the elected officials, a more stringent procedure and standard of proof is required.

36. In view of the above, the law on the issue stands crystallized to the effect that an elected member can be removed in exceptional circumstances giving strict adherence to the statutory provisions and holding the enquiry, meeting the requirement of principles of natural justice and giving an incumbent an opportunity to defend himself, for the reason that removal of an elected person casts stigma upon him and takes away his valuable statutory right. Not only the elected office bearer but his constituency/electoral college is also deprived of representation by the person of his choice.

37. A duly elected person is entitled to hold office for the term for which he has been elected and he can be removed only on a proved misconduct or any other procedure established under law like 'No Confidence Motion' etc. The elected official is accountable to its electorate as he has been elected by a large number of voters and it would have serious repercussions when he is removed from the office and further declared disqualified to contest the election for a further stipulated period."

9. Thus, for the purpose of seeking disqualification of an elected member, the burden on the complainant is heavy and a concrete case needs to be made out. An elected member cannot be removed from office on the basis of surmises or conjectures.

10. Having considered the position in law that a stringent procedure and strict standard of proof is required to be followed for removal of an elected member, I now proceed to examine as to whether Respondent No.5 made out any concrete case for seeking Petitioner's disqualification. In his complaint, Respondent No.5 has alleged unauthorized constructions by Petitioner in land admeasuring is 0.04 R at Gat No.149 and by Petitioner's father at land bearing Gat No.453. Additionally, there is an allegation about Petitioner's mother indulging in unauthorized construction at land bearing Gat No.452. In support of his contentions, Respondent No.5 essentially relied upon the entries in the encroachment register. I have gone through the said entries which would indicate that there is entry No.33 relating to land bearing Gat No.149 in the name of the Petitioner of house being constructed in the year 2003 and noticed in the year 2004. It is Petitioner's case that he faced disqualification proceedings previously in respect of the same allegation and the Collector, by his order dated 22 April 2013, recorded a finding of fact that penal action was taken against the Petitioner for retention of such unauthorized structure at land bearing Gat No.149 and he paid the penalty on 15 February 2006. The findings *prima facie* indicate that the unauthorized construction at Gat No.149 was for a period of 3 years from 2003 to 2006 and

Petitioner was made to pay penalty of Rs.2216/- on 15 February 2006. Respondent No.5 thus proved before the Collector that the Petitioner had indulged into unauthorized construction in the year 2006. The issue is whether the unauthorized construction existed on the date of contest of election and at the time when the Respondent No.5 filed a complaint seeking disqualification of the Petitioner. For the purpose of verifying the position at site, Tahsildar had deputed Circle Officer to conduct site inspection. Circle Officer submitted report dated 5 April 2021 submitting that no encroachment was committed by the Petitioner in land bearing 04 R at Gat No.149. His report does not indicate existence of any house at land bearing Gat No. 149. It was further stated that encroachment, if any, was by his father Kisan Ganpat Kanherkar, which was in the form of temporary structure and that there was no permanent construction at the land, which was vacant. Based on the report of the Circle Officer dated 5 March 2021, Tahsildar submitted a report to the Collector on 5 July 2021. In his report Tahsildar, did refer to the entry in the encroachment register. However, the Tahsildar stated in his report that the Petitioner had not undertaken any permanent structure at the site and certain equipment and agricultural material in addition to a toilet tank were found to be kept at the concerned portion of land. So far as the family members are

concerned, Tahsildar certified that no member of the family had indulged in any encroachment.

11. It appears that during the course of hearing of the proceedings on 23 November 2021, the Collector summoned another report from Tahsildar-Indapur for verifying whether there is indeed any encroachment at the site on the part of the Petitioner. In pursuance of the directions issued by the Collector, the Tahsildar submitted one more report on 8 February 2022, in which the Tahsildar opined that the members of family had separate Ration Cards. The Tahsildar further stated that the land admeasuring 04 R at Gat No.149, is a vacant land and that there is no construction at the site. After taking into consideration both the reports of Tahsildar as well as Circle Officer, the Collector passed order dated 13 July 2022 rejecting the application of Respondent No.5.

12. The Additional Divisional Commissioner, while reversing the order of Collector, has mainly relied upon the entries made in the encroachment register. He arrived at a conclusion that there is encroachment on the part of the Petitioner. In Paragraph 5.5 of his order, the Additional Divisional Commissioner has recorded a finding that till the entries in the

encroachment register are physically deleted or modified, mere removal of encroachment subsequently would not be a reason for concluding that there is no unauthorized construction/encroachment at the site. I find this finding of the Additional Divisional Commissioner to be totally perverse. The Additional Divisional Commissioner was dealing with the proceedings seeking disqualification of a democratically elected member. As held by the Apex Court in ***Ravi Yashwant Bhoir*** (supra), the standard of proof required for disqualifying an elected member is strict and more stringent procedure is required to be adopted. In the present case, the Additional Divisional Commissioner has merely drawn surmises and conjectures only on the strength of entries in the encroachment register and has proceeded to ignore the factual position at the site as indicated in the two reports of Tahsildar and one report of the Circle Officer. Another perverse finding recorded by the Additional Divisional Commissioner in Paragraph 5.4 of his order is that the 'toilet tank' is a permanent structure. This finding factually contradicts the report of Circle Officer dated 5 April 2021 in which the Circle Officer has specifically observed that the structures were of temporary nature. When an officer conducting a site inspection records a finding of fact that the construction is of a temporary nature, it is incomprehensible as to how the Additional Divisional

Commissioner, sitting in his office, can contradict such finding of fact and hold that the structure is of permanent nature.

13. In my view therefore, no concrete case was made out by Respondent No.5 to prove that the Petitioner indeed indulged in encroachment or unauthorized construction. On the contrary Petitioner successfully dispelled the doubts created by Respondent No. 5 by relying upon the entries in the encroachment register. The order passed by the Additional Divisional Commissioner dated 30 September 2022 suffers from the vice of perversity and is unsustainable.

14. The Petition accordingly succeeds. The Order dated 30 September 2022 passed by the Additional Divisional Commissioner, Pune is set aside. Writ Petition is accordingly allowed. Rule is made absolute in the above terms.

(SANDEEP V. MARNE, J.)