

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

WRIT PETITION NO.1121 OF 2022

Yogini Dilip Khandage

...Petitioner

vs.

The Additional Divisional Commissioner,
Pune and Others

...Respondents

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Mr. Tushar Sonawane a/w. Ms. Pooja Satpute, for the Petitioner.
Ms. Madhubala Kajle, for the State-Respondent Nos. 1, 2, 5 & 7.
Ms. Rekha Musale, for Respondent No. 3.

CORAM : N. J. JAMADAR, J.
RESERVED ON : APRIL 6, 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 226 of the Constitution of India takes exception to a judgment and order dated 29th November, 2021 passed by the Additional Divisional Commissioner, Pune, Division Pune in Appeal No. 7 of 2021 whereby the appeal preferred by the petitioner under section 16(2) the Maharashtra Village Panchayats Act, 1959 (the Act, 1959) came to be dismissed by affirming an order dated 23rd March, 2021 passed by the District Collector in Village Panchayat Dispute Application No. 48 of 2019 whereby the

petitioner was declared to have incurred disqualification to continue as the Sarpanch/ Member of the village panchayat, Mouje Devgaon, Tal. Ambegaon, District Pune under section 14(1)(j-3) of the Act, 1959.

3. Briefly stated the background facts are as under:-

In the general election held in the year 2019, the petitioner was elected as the Sarpanch/Member of village panchayat, Devgaon. Respondent Nos. 2 and 3 lodged a Dispute Application No. 48 of 2019 before the District Collector, Pune alleging that the petitioner had incurred disqualification for continuation as a member of village panchayat on account of encroachment having been committed on the government property. It was, inter alia, alleged that the petitioner was residing in a joint family which had a house constructed by committing encroachment over gairan land bearing Gut No. 1/1, which was numbered as village panchayat property No. 218 and 218/1. The encroachment was recorded in the Register duly maintained by the village panchayat. It was recorded that Radhabai Khandge, mother in law of the petitioner, was the person who had constructed the house and cattle shed by committing encroachment over the gairan land.

4. The petitioner resisted the Dispute Application.

5. The District Collector, after appraisal of the material on record, including the report submitted by Tahsildar Ambegaon dated 13th March, 2020 and the Block Development Officer, Panchayat Samiti, Ambegaon dated 23rd November, 2020, was persuaded to return a finding that there was material to show that the mother in law of the petitioner had committed encroachment over the gairan land bearing Gut No. 1, and under Resolution dated 29th August, 2018 the encroachments were recorded for the purpose of taxation only. Moreover, the name of Radhabai Khandge was included in the list of encroachers maintained by the village panchayat so as to regularize encroachments committed over the Government land. The Tahsildar, Ambegaon had reported that mother in law of the petitioner had committed the encroachment.

6. Having found that the petitioner was residing in a joint family, comprising Radhabai Khandge, in the said house property built on a Government land and thus in the use and occupation of the encroached property, the District Collector by applying the law laid down by the Supreme Court in the case of **Janabai vs. Additional Commissioner and Others**¹ held that the petitioner had incurred the

1 (2018) 18 Supreme Court Cases 196.

disqualification to continue to be a sarpanch/ member of village panchayat, Amebgaon under section 14(1)(j-3) of the Act, 1959.

7. Being aggrieved, the petitioner assailed the order in appeal before the Divisional Commissioner. By the impugned judgment and order, the Additional Divisional Commissioner dismissed the appeal opining inter alia that both the factum of encroachment over the Government property and occupation thereof by the petitioner as a member of the joint family were adequately established. In fact, the petitioner had conceded that she had been residing in the house premises along with her family members. Thus, the Additional Divisional Commissioner found no reason to interfere with the disqualification order passed by the District Collector.

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

9. I have heard Mr. Tushar Sonawane, learned counsel for the petitioner, Ms. Madhubala Kajle, learned counsel for the State-respondent Nos. 1, 2, 5 & 7 and Ms. Rekha Musale, learned counsel for respondent No. 3 at some length. The learned counsel took the Court through the pleadings, the material tendered before the

authorities below and the impugned orders.

10. Mr. Sonawane, the learned counsel for the petitioner, would submit that the authorities below committed a manifest error in not appreciating the clear inconsistency between the reports submitted by Tahsildar, Ambegaon and the Block Development Officer, Panchayat Samiti, Ambegaon. According to Mr. Sonawane, the contradictory reports, by two officers, worked out retribution of the claim of encroachment. The District Collector, as well as the Additional Divisional Commissioner simply brushed aside the said inconsistent reports and that vitiated the ultimate finding recorded by them, urged Mr. Sonawane.

11. In the report of Tahsildar, Ambegaon dated 13th March, 2020 it was mentioned that two structures which were erected by committing encroachment on the gairan land bearing Gut No. 1/1 were standing in the name of Radhabai Khandge, the mother in law of the petitioner. In contrast, the Block Development Officer, Ambegaon in his report dated 23rd November, 2020 categorically stated that no property was shown to have been registered in the name of the petitioner in the village panchayat record nor had she committed any encroachment. As regards the structures registered

in the village panchayat record at Property No. 218 and 218/1 the Block Development Officer opined that gairan land bearing Gut No. 1 and gairan land bearing Gut No.1/1 were situated abutting each other and the boundaries thereof were not fixed by measurement and therefore it could not be stated with certainty as to whether house properties bearing No. 218 and 218/1 were erected by committing an encroachment over the government land.

12. Mr. Sonawane submitted with a degree of vehemence that the authorities below ought to have dealt with the aforesaid inconsistency and in the absence of material to show that the structures bearing village panchayat property No. 218 and 218/1 were located on gairan land, an elected representative could not have been disqualified.

13. Per contra Ms. Madhubala Kajle, learned counsel for respondent Nos. 1, 2, 5 & 7 would submit that the fact that the mother in law of the petitioner had committed encroachment over the gairan land was established beyond the pale of controversy. The petitioner cannot be permitted to wriggle out of the situation by simply pointing out the alleged inconsistency in the reports of the Tahsildar and Block Development Officer. Attention of the Court was

invited to the Resolution passed by the village panchayat as well as the entries in the encroachment register, to bolster up the aforesaid submission.

14. Ms. Rekha Musale, learned counsel for respondent No. 3 supported the impugned order by canvassing a submission that the instant case is a open and shut case of encroachment over government land by an immediate family member of the petitioner. Moreover, the fact that the petitioner shared the alleged encroached house property with her family member was squarely admitted. Thus, the petition is devoid of substance, submitted Ms. Musale.

15. 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.

16. The above object of prescribing the disqualification for a 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.

17. The import of the provisions contained in section 14(1) (j-3) fell for consideration before the 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

² 2017(1) Mh.L.J. 102.

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).

18. 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.

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.

19. 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 Maharashtra Village Panchayats 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.

20. 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.]

21. 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.

22. 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.

23. In the backdrop of the aforesaid nature of the provisions contained in section 53 and the legislative object in prescribing the disqualification under section 14(1)(j-3) of the Act, 1959, the challenge sought to be mounted to the impugned order by Mr. Sonawane deserves to be appreciated. The alleged inconsistency in the report of Tahsildar, Ambegaon and the Block Development Officer, Ambegaon, if considered in proper perspective, does not constitute an inconsistency of such a degree as to warrant the discarding of the findings of facts recorded by the authorities below. The underlying documents on which the aforesaid reports appear to be based, make the position abundantly clear.

24. The record of right of the land bearing Gut No. 1/1 shows in

clear and explicit terms that it is a gairan land. The fact that Radhabai Khandge, the mother in law of the petitioner, has constructed two houses over the said gairan land is borne out by the encroachment list maintained at the village panchayat wherein it is clearly recorded that Radhabai Khandge has constructed structures admeasuring 20 x 17 fts. and 30 x 27 fts. Both the factum of encroachment as well as the said encroachment being on the gairan land find mention in the encroachment list. The resolution passed in the Gram Sabha in the meeting dated 16th October, 2018, before the petitioner came to be elected as the Sarpanch of village panchayat, Ambegaon further records that a number of encroachments including that of Radhabai Khandge were professed to be regularized thereunder. In the face of this record, the finding arrived at by the authorities below that the mother in law of the petitioner had committed encroachment over the gairan land appears impeccable.

25. It could not be disputed that the petitioner had been residing in the said house constructed by committing encroachment over the gairan land. The extract of the ration card otherwise establishes the said fact.

26. The situation which thus obtains is that the petitioner continues to occupy and enjoy the house property which was built by committing encroachment over the government property. A clear case of conflict of duty and interest arose. The observations of the Supreme Court in the case of **Janabai** (supra) in paragraphs 26, 27 and 29 highlight the mischief sought to be redressed by the provisions contained in section 14(1)(j-3) of the Act, 1959. They 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.

27. The authorities below were thus fully justified in applying the aforesaid propositions to the facts of the case and unseating the petitioner from the post of Sarpanch/ Member of the village panchayat, Devgaon. Resuntantly, no interference is warranted in exercise of extraordinary writ jurisdiction.

Hence, the following order.

ORDER

- 1] The petition stands dismissed.
- 2] Rule discharged.
- 3] No costs.

(N. J. JAMADAR, J.)

28. The learned counsel for the petitioner seeks stay to the order of disqualification passed by the Collector.

29. Since there was no stay to the order impugned in this petition during the pendency of this petition, the oral application for stay stands rejected.

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(N. J. JAMADAR, J.)