
(2016) 10 BOM CK 0139
In the Bombay High Court
Case No : Writ Petition No. 431 of 2016

Sandip Ganpatrao Bhadade	Vs	APPELLANT
The Additional Commissioner		RESPONDENT

Date of Decision : 17-10-2016

Acts Referred:

Bombay Village Panchayats Act, 1959 — Section 14(1)(j-3), Section 14(1)(j-3),
Section 184
Penal Code, 1860 (IPC) — Section 21

Citation : (2017) 1 AIRBomR 213 : (2017) 1 ALLMR 277 : (2017) 1 MhLJ 79

Hon'ble Judges : R.K Deshpande, J.

Bench : Single Bench

Advocate : Shri B.M. Lonare, Assistant Government Pleader, for the Respondent Nos. 1, 2 and 6; Shri N.A. Gawande, Advocate, for the Respondent Nos. 3 and 4; Shri A.S. Kilor, Advocate, for the Petitioner

Final Decision : Dismissed

Judgement

R.K Deshpande, J. - Heard the learned counsels appearing for the parties. Rule. Taken up for final disposal.

2. In both these matters, the petitioners were elected as a Member of a Panchayat in the election held on 22-4-2015. By common order dated 8-12-2015, both the petitioners were disqualified under Section 14(1)(j-3) of the Maharashtra Village Panchayats Act, 1958 (for short, "the said Act"), and the said order has been confirmed by the Additional Commissioner, Amravati Division, Amravati in an appeal preferred under Section 16(2) of the said Act.

3. The authorities below have held that petitioner-Sandip Ganpatrao Bhadade in Writ Petition No. 431 of 2016 is residing on the property admeasuring area 37.50 sq. mtrs. of Plot No.957 owned by Tukaram Karnaji Bhadade, which is an encroachment over the land owned by the Public Works Department. In respect of petitioner Sau. Sangita Vijay Choudhary in Writ Petition No.514 of 2016, the finding is recorded that she is residing on Plot No.77, which is the property

owned by the Government, as shown in the city survey record, and the name of one Maroti Natthuji Choudhary, the father-in-law is shown as illegal occupant. Thus, the finding of both the authorities below in respect of the petitioners is that though the petitioners are neither owners of the property nor have themselves made an encroachment over the Government land or the public property, they are residing or occupying the property, which is an encroachment over the Government land.

4. The question involved in these matters is whether a member of a Panchayat occupying the property, which is an encroachment upon the Government land or public property, is liable to be disqualified under Section 14(1)(j-3) of the said Act.

5. In order to consider the aforesaid question, certain provisions of the Maharashtra Village Panchayats Act, 1959 need to be considered. Section 9 therein makes every Panchayat to be a corporate by its name having perpetual succession and common seal with a power to acquire and hold the property and can sue and be sued in its own name. Chapter III under the said Act deals with the administrative powers and duties of Panchayats, as are prescribed under Sections 45 to 54.

6. Section 53 under Chapter III deals with the obstructions and encroachments upon public streets and open sites. Subsections (1), (2), (2A), (3) and (4) being relevant, are reproduced below :

"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 Panchayats, 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 or upon any open drains, gutter, sewer or adueduct in such street or place, or contravenes any conditions subject to which any permission as aforesaid is given or the provisions of any bye-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 unauthorised 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 unauthorised 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 office authorised by him in this behalf shall have first been obtained. The expense of such removal shall be paid by the person who has caused the said obstruction or encroachment and shall be recovered 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.

(2A) If any Panchayat fails to take action under subsection (2), the Collector suo motu or on an application made in this behalf, may take action as provided in that subsection, and submit the report thereof to the Commissioner. The expense of such removal shall be paid by the person who has caused the said obstruction or encroachment or unauthorised cultivation of the crop and shall be recoverable from such person as an arrear of land revenue.

(3) The power under subsection (2) or subsection (2A) may be exercised in respect of any obstruction, encroachment or unauthorised cultivation of any crop referred to therein whether or not such obstruction, encroachment or unauthorised cultivation of any crop has been made before or after the village is declared as such under this Act, or before or after the property is vested in the Panchayat.

(4) Whoever, not being duly authorised in that behalf removes earth, sand and other material from, or makes any encroachment in or upon an open site which is not private property, shall, on conviction, be punished with fine which may extend to fifty rupees, and in the case of an encroachment, with further fine, which may extend to five rupees for every day in which the encroachment continues after the date of first conviction."

A Panchayat is conferred with the power under subsection (2) to remove any obstruction or encroachment and to remove any crop unauthorisedly cultivated on the grazing land or any other land and open sites not being a private property, whether such site is vested in the Panchayat or not. If the site is vested in the Government, the permission of the Collector or any officer authorised by him in that behalf should have been first obtained before occupying the property. It is the duty of the Panchayat to remove obstruction or encroachment immediately after it is noticed or it is brought to its notice. The power to remove such obstruction or encroachment extends to those made before or after the village is declared as such under the Act or before or after the property is vested in the Panchayat.

7. Any person committing an act of obstruction or encroachment upon public street or place or unauthorisedly uses the same or continues to commit such act, commits an offence, which is punishable with fine of Rs.50/under subsection (1) of Section 53 of the said Act. Under subsection (4) therein, whoever, not being duly authorised, makes any encroachment in or upon an open site, which is not private property, or continues to commit such an act, commits an offence, which is made punishable with fine of Rs.50/.

8. Section 10 of the said Act deals with the constitution of Panchayat, which consists of members elected under Section 11 therein, from different constituencies. Being a constituent of Panchayat, every individual member, jointly with others and severally is dutybound to remove any obstruction or encroachment upon any land, which is not a private property, but the Government land or public property and to prosecute the persons creating such obstruction or encroachment.

9. Section 184 of the said Act deals with members, etc., of Panchayats to be public servants, and it runs as under :

"184. Members, etc., of Panchayats to be public servants. - Every member of a Panchayat and every office and servant maintained by or employed under a Panchayat shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code."

In terms of the aforesaid provision, a member of Panchayat is deemed to be a public servant, as defined under Section 21 of the Indian Penal Code.

10. Section 180 of the said Act deals with the bar of action against Panchayats, etc., and previous notice before institution. The said provision is reproduced below :

"180. Bar of action against Panchayats, etc., and previous notice before institution. - (1) No action shall lie against any member, officer, servant or agent of a Panchayat acting under its direction, in respect of anything in good faith done under this Act or any rule or bye-law.

(2) No action shall be brought against any Panchayat or any member, officer, servant or agent of such Panchayat acting under its direction for anything done or purporting to have done by or under this Act, until the expiration of three months next after notice in writing has been left or delivered at the office of the Panchayat and also at the residence of the member, officer, servant or agent thereof against whom the action is intended to be brought. The notice shall state the cause of action, the nature of the relief sought, the amount of compensation claimed and the name and place of abode of the person who intends to bring the action.

(3) Every such action shall be commenced within six months after the accrual of the cause of action, and not afterwards.

(4) If any Panchayat or person to whom a notice under sub-section (2) is given shall, before an action is brought, tender sufficient amends to the plaintiff and pay into Court the amount so tendered, the plaintiff shall not recover more than the amount so tendered. The plaintiff shall also pay all costs incurred by the defendant after such tender."

Sub-section (1) of Section 180 protects a member of a Panchayat from any action taken in good faith under the provisions of the Act or any rule or bye-law. Subsection (2) is couched in the negative language and states that no action shall be brought against any member for anything done or purporting to have done by or under the Act, until the expiration of three months next after notice in writing has been left or delivered at the office of the Panchayat and also at the residence of the member, against whom the action is intended to be brought.

11. It is in the background of the aforesaid provisions of law, that the provisions of qualifications and disqualifications to vote, contest the election and being continued as a member of Panchayat, are required to be considered. Section 13 of the said Act deals with the persons qualified to vote and be elected. The persons incurring any disqualification under the provisions of the said Act are neither qualified to vote nor to be elected as a member of a Panchayat. Section 14 deals with different kinds of disqualifications, as stipulated in clauses (a) to (k) under subsection (1), which operate against two kinds of persons (i) who proposes to become a member of a Panchayat, and (ii) who has become a member of a Panchayat. If a person has incurred any one or more disqualifications, then he is prohibited from becoming a member of a Panchayat, and if he becomes a member of a Panchayat, then he is not entitled to continue as such. The disqualification under Section 14 is in respect of the acts, events, deeds, misdeeds, transactions, etc, which have been done, happened or occurred before entering into the office as a member of a Panchayat as well as those which take place during continuance as a member of a Panchayat.

12. The provision of Section 14(1)(j-3) of the said Act, which is required to be considered, is reproduced below :

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

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

The aforesaid provision states that no person shall be a member of a Panchayat continue as such, who has encroached upon the Government land or public property. The encroachment contemplated is by a person, who proposes to become a member of a Panchayat and the person, who has become a member of a Panchayat. It covers an act of encroachment committed by such person before becoming a member as well as after becoming a member. Thus, an encroacher upon the Government land or public property is disqualified for being a member of a Panchayat.

13. The very object of introducing the provision of disqualification under Section 14(1)(j-3) of the said Act is to avoid the conflict of interest by prohibiting the persons, who are the encroachers upon the Government land or public property to get elected or continued as a member of the Panchayat, which is a democratically elected body of the villagers. It is beyond comprehension to assume that a person under statutory obligation or a duty to protect the Government land or public property from encroachment, commits an act of such encroachment. To permit a person, who proposes to become a member or becomes a member of the Panchayat to be the encroacher upon the Government land or public property, would be anathematic, acting in breach of statutory duty, exposing himself to prosecution under subsections (1) and (4) of Section 53, resulting ultimately in losing the protection under Section 180 read with Section 184 of the said Act. It is in this context that the text of disqualification under Section 14(1)(j-3) of the said Act is required to be analysed and interpreted.

14. The word "encroach" is a verb, which is defined in Black's Law Dictionary as under :

"encroach, vb. 1. To enter by gradual steps or stealth into the possessions or rights of another; to trespass or intrude. 2. To gain or intrude unlawfully upon another's lands, property, or authority."

Similarly, it is defined in Advanced Law Lexicon as under :

"Encroach. To intrude usurpingly; make gain upon, occupy, or use the land, right, or authority of another; to gain unlawfully lands, property or authority of another."

The word "encroachment" is a noun, and it is defined in Black's Law Dictionary as under :

"encroachment, n. 1. An infringement of another's rights. 2. An interference with or intrusion onto another's property."

Similarly, in Advanced Law Lexicon, it is defined as under :

"Encroachment - Is "an unlawful gaining upon the right or possession of another man", a gradual entering on and taking possession by one of what is not his own; the gaining upon the rights or possession of another. The action of encroaching i.e. intruding usurpingly (on others' territory, rights etc.)"

15. "To encroach" means to enter, intrude, infringe gradually upon the rights of others by unlawfully and without authority taking possession of the property, which is not of his own. Upon completion of such act, it becomes an "encroachment". The further act of continuing or remaining in such occupation or possession of the property with an intention or object of beneficial enjoyment would mean that the person committing encroachment has "encroached" upon the property. An encroacher is a person, who encroaches.

16. In view of the aforesaid meaning of the terminologies " to encroach",

"encroachment", "encroacher" and "encroached", whoever resides in the property or any portion thereof, which is an encroachment upon the Government land or public property, can be said to have "encroached" upon it and becomes an "encroacher". Whether such an encroachment is jointly with others and/or individually, either at one time or at different times remains hardly of any significance" as he becomes liable to be removed and prosecuted under Section 53 of the said Act. Whether a person has become liable to be removed and/or prosecuted under Section 53 of the said Act from the Government land or public property, becomes a real test of attracting disqualification under Section 14(1)(j-3) of the said Act. If the answer is in the affirmative, the disqualification is incurred.

17. In view of the aforesaid position, the provision of Section 14(1)(j-3) of the said Act is attracted even in a case where a member of a Panchayat resides in the property or any portion thereof, which is an encroachment upon the Government land or public property. The question as to whether any other person or a member of a family has already made an encroachment, loses its significance and as soon as a member or proposed member joins such act, he cannot escape from the clutches of disqualification under Section 14(1)(j-3) of the said Act. The question framed, is answered accordingly.

18. If an intention of the Legislature is to prevent an encroachment upon the Government land or public property by a person, who is deemed to be a "public servant" under Section 184 entitled to enjoy all privileges attached to it under Section 180 of the said Act, can it be said that such an intention of the Legislature be defeated by adopting circuitous way of occupying the property, which is an encroachment on the Government land or public property. The answer would obviously be in the negative, for two main reasons - (i) the act, which is prohibited directly, cannot be promoted or encouraged indirectly to defeat the object and purpose of such prohibition, and (ii) it would amount to promoting or encouraging the conflicting interest, necessarily resulting in the disqualification under Section 14(1)(j-3) of the said Act.

19. The first decision cited on the provision of Section 14(1)(j-3) of the Maharashtra Village Panchayats Act, 1958 is that of the Division Bench delivered in Letters Patent Appeal No.305 of 2012 in Writ Petition No.2078 of 2012(D) [Shri Devidas s/o Matiramji Surwade v. Additional Commissioner, Amravati Division, Amravati, and others 2017(1) Mh.L.J. 102. It was a case where the petitioner was disqualified for occupying the house constructed on Plot No.168, which was admittedly an encroachment committed by his father in the year 1966. The petitioner did not himself commit an act of encroachment. This Court maintained the disqualification of the petitioner under Section 14(1)(j-3) of the said Act. Para 6 of the said decision, being relevant, is reproduced below :

"6. 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."

This Court has taken a view that the term "person" employed under subsection (1) of Section 14 of the said Act 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, as the case may be. This Court holds that if such an interpretation is not made, then 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 land shall claim the right to get elected as a member of democratically elected body, which would defeat the very object of the Bombay Village Panchayats (Amendment) Act, 2006.

20. In the decision of this Court delivered by the learned Single Judge in the case of Ganesh Arun Chavan v. State of Maharashtra and others, reported in 2013(2) Mh.L.J. 955, it was a case where the property belonged to one Arun K. Chavan, the father of the petitioner, who was elected as a member of the Panchayat. There was construction of a shop made over the said property in the year 1994 and the gram-panchayat taxes and property taxes were paid by father Arun K. Chavan. The Court records the finding that the petitioner did not make an encroachment, but it was the father of the petitioner, who made an encroachment. The Courts holds that the Legislature has not imported anything by which one can presume that if the encroachment is made by the spouse, relative of the member of Gram Panchayat, residing jointly with the member, on the public property, then together with the members of such family, he is also deemed to be guilty of the act of encroachment. The Court holds that if that was the legislative intent, it would have been clearly expressed in the provision. It holds that if the act is committed by somebody other than the elected person, then the provision of Section 14(1)(j-3) of the said Act is not attracted. It holds that once the Legislature itself clarified that an act of the member alone incurs or invites disqualification, then, by interpretative process it will not be possible to include in Section 14(1)(j-3), the act of encroachment by members of his family and for that purpose, disqualify the elected representative. The same view is expressed by the learned Single Judge in the case of Kanchan Shivaji Atigre v. Mahadev Baban Ranjagane and others, reported in 2013(1) Mh.L.J. 455, which has been followed later on by another learned Single Judge in the case of

Sandhya Hemant Salunke v. State of Maharashtra and others, reported in 2014(5) Mh.L.J. 946.

21. In the decision in the case of Sheela Dilip Daberao v. State of Maharashtra and others, reported in 2015(3) Mh.L.J. 231, which I have delivered, it was a case where both the authorities below held that one Shri Dilip Ramrao Daberao, the husband of the petitioner, who was the owner of Plot No.73, committed an encroachment over the Government land attached to the said property to the extent of 17 x 17 sq.ft. and the petitioner was residing along with her husband in such a house. In para 3, it has been held as under :

"(3) The disqualification alleged against the petitioner is under section 14(1)(j-3) of the said Act, which is reproduced below:

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

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

Clause (j-3) of section 14(1) of the said Act, which is reproduced above, covers the cases where a member of a Panchayat resides in a portion encroached upon the Government land or public property. It will not be necessary in such a situation to establish that such member is the owner of the property adjacent to the encroached portion. The question as to whether any other member of the family has made an encroachment, loses its significance. In the facts and circumstances of this case, it was not be necessary for the respondents to establish that it is the petitioner herself has encroached upon the Government land. The decision of the learned Single Judge of this Court in the case of Kanchan Shivaji Atigre v. Mahadev Baban Ranjagane and others, 2013(1) Mh.L.J. 455, relied upon by the learned counsel for the petitioner, would not, therefore, be applicable in the facts of the present case."

The view taken is that clause (j-3) of Section 14(1) of the said Act covers the cases where a member of a Panchayat resides in a portion encroached upon the Government land or public property and in such situation it will not be necessary to establish that such a member is the owner of the property adjacent to the encroached portion and the question as to whether any member of the family has made an encroachment, loses its significance. It is held that it would not be necessary in such facts and circumstances to establish that it is the petitioner herself who has encroached upon the Government land. It is, therefore, held that the decision of the learned Single Judge in the case of Kanchan Atigre, cited supra, would not be applicable.

22. In another decision of the learned Single Judge of this Court in the case of Parvatabai @ Shobha d/o Kisan Kakde v. Additional Commissioner, Nagpur and others, reported in 2015(5) Mh.L.J. 238, it was a case where the petitioner was residing along with her father and other family members in house bearing No.134, standing in the name of her father. The Additional Collector recorded the

finding that there was an encroachment committed in respect of house No.134 and though it was the case of the petitioner that the house property belonged to her father, in view of the Division Bench decision in the case of Devidas Matiramji Surwade, cited supra, the petitioner was liable to be disqualified under Section 14(1)(j-3) of the said Act. The learned Single Judge has considered the decisions of the Division Bench in the case of Devidas Surwade, and also the decision delivered by the learned Single Judge in Ganesh Chavan, Yallubai Kamble and Kanchan Atigre. It has been held in paras 10 and 11 as under:

"10. The judgment of the Division Bench in Devidas Surwade (supra) was delivered on 31-7-2012 and prior to the judgments of learned Single Judge in Ganesh Chavan (supra) dated 24-9-2012, Yallubai Kamble (supra) dated 5-10-2012, Kanchan Atigre (supra) dated 12-10-2012. The judgment of the Division Bench was not brought to the notice of learned Single Judge when said decisions were rendered.

Moreover, the judgment of the Division Bench in Devidas Surwade (supra) on which reliance has been placed by the learned Counsel for the respondents indicates that the Statement of Objects and Reasons have been taken into consideration after which it has been observed that the term "person" in the amended provisions would have to be interpreted to bring legal heirs of a person who has encroached and continues to occupy Government land within its purview. The reasons for interpreting said provisions have thereafter been stated in para 5. The contention raised on behalf of the petitioner that instead of the judgment of the Division Bench in Devidas Surwade (supra), the view as taken by the learned Single Judge in Yallubai Kamble and Kanchan Atigre (supra) which interprets the expression "person" in a narrow sense should be preferred cannot be accepted. The judgment of the Division Bench binds this Court this Court the same will have to be followed. The reliance sought to be placed on the ratio of judgment of the Special Bench is misplaced. The decision in Devidas Surwade (supra) being that of the Division Bench and the expression "person" having been duly considered, it is not permissible for this Court to go into the question as to whether the ratio of judgments of learned Single Judge should be followed instead of the view taken by the Division Bench. The ratio of the judgment of the Division Bench will have to be respectfully followed. Hence, for aforesaid reason, the submissions made on behalf of the petitioner cannot be accepted."

"11. As the impugned orders have been passed on the basis of judgment of the Division Bench in Devidas Surwade (supra), no fault can be found with the impugned orders. The writ petition is, therefore, dismissed. Rule stands discharged with no order as to costs."

It has been held that the earlier decision of the Division Bench was not brought to the notice of the learned Single Judges deciding the cases of Ganesh Chavan, Yallubai Kamble and Kanchan Atigre. It has been held that the judgment of the Division Bench binds this Court and the same will have to be followed. It holds that the decision in Devidas Surwade being that of the Division Bench and the

expression "person" having been duly considered, it is not permissible for this Court to go into the question as to whether the ratio of the judgments of the learned Single Judge should be followed instead of the view taken by the Division Bench. The learned Single Judge has dismissed the petition, maintaining the decision of the disqualification given by the authorities below.

23. The decision of the Division Bench in the case of Devidas Matiramji Surwade, and the decisions of the learned Single Judges in the cases of Ganesh Arun Chavan, Kanchan Shivaji Atigre and Sandhya Hemant Salunke, cited supra, are based upon the similar facts. The ratio of the Division Bench in the case of Devidas Matiramji Surwade is that the term "person" employed under subsection (1) of Section 14 of the said Act has to be interpreted to mean the legal heirs of such person, who has encroached and continues to occupy the Government land or the public property, his agent, assignee or transferee or as the case may be, was not brought to the notice of the learned Single Judges, who decided the afore stated cases. The law laid down by the learned Single Judges in the cases of Ganesh Arun Chavan, Kanchan Shivaji Atigre and Sandhya Hemant Salunke to the effect that if the legislative intent was to cover the cases of encroachment made by the spouse, relative of the member of Gram Panchayat, residing jointly with the member, on the public property, then it would have been clearly expressed in the provision, runs contrary to the decision of the Division Bench in the case of Devidas Matiramji Surwade. The learned Single Judge in the case of Parvatabai @ Shobha d/o Kisan Kakde, cited supra, has held that the ratio of the decision of the Division Bench needs to be followed instead of the view taken by the learned Single Judge. It is, therefore, not necessary for this Court to refer the matter to a Larger Bench for decision, as has been urged by Shri Kilor, the learned counsel for the petitioner.

24. In the result, both these petitions are dismissed, maintaining the orders passed by the authorities below, disqualifying the petitioner under Section 14(1) (j-3) of the Maharashtra Village Panchayats Act. Rule stands discharged. No order as to costs.