

(2019) 01 BOM CK 0145
In the Bombay High Court
Case No : Writ Petition No. 13073 Of 2018

Sanjay Kantilal Thakare

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 28-01-2019

Acts Referred:

Maharashtra Village Panchayat Act, 1958 — Section 14(1)(j3)

Citation : (2019) 01 BOM CK 0145

Hon'ble Judges : Ravindra V. Ghuge, J

Bench : Single Bench

Advocate : D.S. Bagul, N. T. Bhagat, S.P. Brahme, A.S. Savale, R. S. Wani, Lalitkumar S. Mahajan, Vishnu B. Madan

Final Decision : Dismissed

Judgement

Ravindra V. Ghuge, J.

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is an elected member of the Grampanchayat Akkalkuwa, who is aggrieved by the judgment of the Additional Commissioner Nashik Division, Nashik, dated 12/06/2018, by which, Appeal No. 14/2018 filed by the petitioner and Respondent No. 6 has been dismissed. The judgment of the District Collector, Nandurbar dated 23/02/2018 dismissing Dispute Application No. 19/2017 seeking disqualification of respondent No.5, has been sustained. As such, the petitioner is aggrieved even by the decision of the District Collector, dated 23/02/2018 refusing to disqualify respondent No. 5 Sarpanch under Section 14(1)(j-3) of the Maharashtra Village Panchayat Act on the ground of encroachment.

3. The learned Advocate for the petitioner has contended that respondent No. 5 has mentioned the name of her husband and her address in her nomination form. As per requirement of law, a declaration is also tendered indicating that the

said respondent is using a toilet from a public toilet set-up created in the said village. While tendering the said declaration, the house number is also mentioned.

4. Respondent No.5 was elected directly as a sarpanch of the said village. She is residing with her husband and occupying house bearing Nos. 1066 and 1067 in CTS No. 375 in the said village.

5. The petitioner alongwith respondent No. 6 raised a grievance that the sarpanch is enjoying the house property which is constructed by encroaching on the government land and, therefore, she needs to be disqualified under Section 14(1)(j-3). A dispute was raised before the Collector which has suffered rejection on the ground that the Honourable Apex Court has delivered its judgment in Sagar Pandurang Dhundare Vs. Keshav Aaba Patil and Ors. 2017 (6) ALL MR 970 (S.C.) and, therefore, unless a person has actually caused the encroachment and is held guilty of such encroachment by following the due procedure of law, such person cannot be held to be guilty of encroachment. The Additional Divisional Commissioner has followed the same judgment cited and has rejected the Grampanchayat Appeal filed by the petitioner.

6. It is pointed out by the petitioner that respondent No. 5 - sarpanch has clearly admitted in her written reply to the dispute before the Collector that her husband has encroached upon the government land. In 1997, he has applied for regularization. It is further pointed out that respondent No. 5 has consistently taken the same stand before both the authorities that the encroachment stands in the name of her husband and she is not having blood relations with her husband. The learned Advocate then points out the judgment delivered by the Honourable Apex Court on 19/09/2018 in the matter of Janabai Versus Additional Commissioner and others, Civil Appeal No. 6832/2018 : 2018 (5) Mh.L.J.921, by which, it is now concluded that the decision in Sagar Pandurang Dhundare does not lay down the correct position of law and, therefore, stands over-ruled.

7. Further reliance is placed upon the following judgments :-

(1) W.P. No. 209/2018, Anuja Kalyan Gore Vs.State of Maharashtra and others, decided on 06/03/2018

(2) W.P. No. 182/2018, Kashinath Shambhusing Patil Vs. The State of Maharashtra and others, dated 06/10/2018

(3) W. P. No. 4534/2018, Aruna J. Wahurwagh vs. State of Maharashtra and others, decided on 09/08/2018

(4) W. P. No. 6022/2018, Shahid Ali Ahmed Ali vs. Ravindra Baliram Dhengle and others, decided on 14/09/2018.

(5) W.P. No. 1572/2018, Bhagwat Ganpat Gawali Vs. The Divisional Commissioner, Amravati Division, Amravati and others, decided on 03/12/2018.

(6) Shrikrishna Wasudeo Dhage vs. Shivcharan s/o Trimbakrao Kalne and others, 2010 (3) Mh.L.J, dated 27/01/2019.

8. The learned Advocate appearing on behalf of respondent No.5 - sarpanch does not shy away from the stand taken by her before all the authorities. He indicates from paragraph Nos. 3 and 5 of the affidavit in reply filed by sarpanch on 11/01/2019 in this petition that the name of her husband appears as an encroacher and if there is any act of encroachment, the same is committed by her husband and not by her in her personal capacity.

9. It is further pointed out that after her husband applied for regularization of the encroached portion in 1997, he started paying taxes for the property said to have been encroached upon by him, from 2001 onwards. The grampanchayat has accepted the taxes so paid and in fact, has moved a resolution in March-2011 so as to regularize the encroachments of all the encroachers in the said village. The Government Resolution dated 16/02/2018 is cited, by which, a committee has to be formed by the State Government which would consider each case for regularization. It is, therefore, canvassed that there is every possibility that the encroachment at the behest of the husband of the sarpanch is likely to be regularized.

10. Insofar as the position in law is concerned, the learned Advocate for the sarpanch submits that there can be no argument against the law laid down by the Honourable Apex Court. He, however, invokes the doctrine of prospective over ruling to contend that if the decision in Janabai (supra) delivered on 19/09/2018 leads to the over-ruling of the judgment delivered in Sagar Dhundare (supra), it has to be treated as being prospective over-ruling. Reliance is placed upon the judgment delivered by the Honourable Apex Court in the matter of Ashok Kumar Gupta and another Vs. State of U.P. and others, (1997) 4 Supreme 450 and especially paragraph No. 55 which reads as under :-

"It is settled principle right from Golak Nath ratio that prospective over-ruling is a part of the principles of constitutional canon of interpretation. Though Golak Nath ratio of unamendability of fundamental rights under Article 368 of the Constitution was over-ruled in Dr. Jai Shanker (Lunatic) through Vijay Shanker Brother Guardian Vs. State of Himachal Pradesh, the doctrine of prospective over-ruling was upheld and followed in several decisions. This Court negated the contention in Gokal Nath's case that prospective over-ruling amounts to judicial legislation. Explaining the Blackstonian theory of law i.e., Judge discovers law and does not make law, and the efficacy of prospective overruling at page 808 placitum D to H, this Court by a Bench of eleven Judges had held that the doctrine of prospective over-ruling is a modern doctrine and is suitable for a fast moving society. It does not do away with the doctrine of state decisis but confines it to past transactions. While in strict theory, it may be said that the doctrine involves the making of law, what a Court really does is to declare the law, but refuses to give retrospectively to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that Court finds law and that it does not make the law. It finds the law but restricts its operation to the future. It enables the Courts to bring about a smooth transition by correcting the errors

without disturbing the impact of those errors on past transactions. By implication of this doctrine, the past may be preserved and the future protected. The Constitution does not expressly or by necessary implication speak against the doctrine of prospective over-ruling. Articles 32(4) and 142 are designed with words of width to enable this Court to declare the law and to give such directed or pass such orders as are necessary to do complete justice. Declaration of law under Article 141 is wider than words found or made. The law declared by this Court is the law of the land. So, there is no acceptable reason as to why the Court in dealing with the law in supersession of the law declared by it earlier could not restrict of the operation of law, as declared, to the future and save the transactions, whether statutory or otherwise, that were effected on the basis of the earlier law. This Court is, therefore, not impotent to adjust the completing rights of parties by prospective over-ruling of the previous decision in Rangachari ratio. The decision in Mandal's case postponing the operation for five years from the date of the judgment is an instance of, and an extension to the principle of prospective over-ruling following the principle evolved in Golak Nath Case. In Managing Director ECIL, Hyderabad, Vs. Karunakar, etc.etc., a Constitution Bench of this Court, while over-ruling Union of India and others Vs. Mohd. Ramzan Khan, had held that benefit of the decisions would be given only to the parties to the cases pending before the authorities from the date of the judgment but not to the actions already taken by the date of that judgment. In that behalf in separate but partly dissenting judgment to a limited extent, on the issue of the need to give benefit to the party that approaches the Court in that case, one of us, K. Ramaswamy, J. had held that as a matter of constitutional law retrospective operation of an overruling decision is neither required nor prohibited by the Constitution; It is a matter of Judicial attitude depending on the facts and circumstances in each case; the nature and purpose the particular over-ruling decision seeks to serve are required to be taken into consideration. The Court would look into the justifiable reliance on the over-ruled case by the administration. All the factors viz., ability to effectuate the new rule adopted in the over-ruling case, without doing injustice and whether the likelihood of its operation substantially burdens the administration or retards the purpose, are to be taken into account, while over-ruling the earlier decision or laying down a new principle. Equally, no distinction could be made between claims involving constitutional rights, statutory right or common law right. The Court is required to adjust the competing rights taking into consideration the prior history of rule in question, its purpose and effect and to find out whether retrospective operation will accelerate or retard its operation. Therefore, evolving of the appropriate rule to give effect to the decision of the Court over-ruling its previous precedent, is one of judicial craftsmanship with pragmatism and judicial statesmanship as a useful outline to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law operated prior to the date of the judgment over-ruling the previous law."

11. The learned Advocate for the sarpanch, therefore, contends that the dispute

with regard to the encroachment caused by her husband has been put to rest by the impugned judgment of the Additional Divisional Commissioner, dated 19/06/2018. The said judgment needs to be treated as rendering finality to the dispute as regards the encroachment. This Court, therefore, cannot apply the judgment delivered in Janabai (supra), retrospectively and set aside the judgment of the Additional Divisional Commissioner.

12. It is further argued that applying Janabai's judgment with retrospective effect would amount to substantially burdening the administration as similar cases would now be dug out, there would be a flood of litigation and disqualification of candidates on the basis of Janabai's case would lead to new elections which would create direct or indirect financial burden upon the State Government. It is, therefore, contended that this Court should refrain from interfering with the impugned orders and at the most, the matter could be remanded back to the District Collector to commence an enquiry as to whether, the sarpanch could be held guilty of encroachment.

13. The learned AGP submits that the law laid down in Dhundare case (supra) was made applicable for a brief period in 2018 after it was delivered on 13/11/2017. He, therefore, submits that considering Dhundare's judgment, the District Collector and the Additional Divisional Commissioner had no option but to act strictly in accordance with the law laid down by the Honourable Apex Court. Now, he submits that, since the Honourable Apex Court has over-ruled Dhundare's case (supra) and has laid down the law in Janabai's case (supra), the State shall follow the law laid down in the case of Janabai (supra).

14. I find from the record that the sarpanch in the instant case has boldly taken a stand that her husband has encroached upon the government land, he has applied for regularization, he is paying taxes with regard to the encroached land and he has every hope of the encroachment being regularized pursuant to the G.R. dated 16/02/2018. It is not disputed that after marriage the sarpanch has been living with her husband in the same premises which are constructed on government land and which is the encroachment at issue.

15. At times, I find it quite intriguing that when politicians cause encroachment on their own motherland, the State Government brings out a G.R. to regularize such encroachment. In the instant case, the husband of the Sarpanch has moved the State to regularize such encroachment. I hope that the State Government would ensure that a clean and fair atmosphere is maintained and all those causing encroachment be dealt with, with an iron hand. If not, I find that policies promoting regularization of encroachments would be counter productive and would embolden such people since they would be under the impression that they could resort to encroachment and subsequently influence the policy makers to get such encroachments regularized.

16. The submissions on behalf of the sarpanch have to fail for reasons, more than one. In Janabai (supra), the Honourable Apex Court has not recorded that

the view taken in Dhundare (supra) would stand over-ruled prospectively. So also, even if it is to be accepted that the case of this sarpanch would be covered by Sagar Dhundare's judgment, the facts in the Dhundare's case (supra) would reveal that the issue of an elected representative inheriting encroached property of her spouse and enjoying the said property before elections and after elections, was not before the Honourable Apex Court.

17. The contention of the sarpanch is that her case has attained finality after the Additional Commissioner delivered the impugned verdict on 19/06/2018. This submission needs to be rejected instantaneously since the impugned judgment is now being subjected to judicial review of this Court in its supervisory, as well as, revisionary jurisdiction. The impugned judgment, if one such argument is to be accepted, can be said to be sustainable as on the date on which it was delivered. However, the law which became the foundation of the impugned judgment having been held to be bad, would remove such foundation and as such, in this continuing litigation, the law laid down in Janabai's case would be applicable at this moment.

18. The contention of the sarpanch then is that undue burden would be created on the State Government if Janabai (supra), is to be made applicable to such pending cases in which the Additional Commissioner has already delivered a verdict. In my view, it cannot be over-looked that though the administration would be burdened by holding elections on such posts which have fallen vacant due to such disqualification, such burden would not be over so whelming that the purpose and the object for which Section 14(1)(j-3) was introduced, could be ignored. It has to be kept in mind that the duty of the legislature, the administration and even the courts is to uphold the rule of law and to ensure that such law is effectuated by resorting to such executive action that would be a lesson to elected representatives from encroaching upon and robbing their motherland. It cannot be tolerated that elected representatives would get a right to resort to encroachment.

19. The sarpanch in this case has inherited the encroachment made by her husband. She has boldly accepted the encroachment and has also conceded that she is enjoying the encroached property. In such circumstances, if the law laid down in Janabai (supra) would not be made applicable, such elected representative would mock at the law and would gleefully believe that he/she has succeeded in hood-winking the law.

20. In Ashok kumar Gupta (Supra), the Honourable Apex Court has observed that it has to be assessed whether, retrospective operation of over-ruling and the earlier law would accelerate or retard the law meant to protect the rights of the people.

21. In view of the above and since in Sagar Dhundare's case, (supra) such case of a sarpanch inheriting encroached property and enjoying the said property during the elected term, was not being considered, I find that the impugned

orders deserve to be quashed and set aside in view of the law laid down in Janabai (supra).

22. As such, this petition is allowed. The impugned order of the District Collector dated 23/02/2018 and the impugned order of the Additional Divisional Commissioner dated 12/06/2018 stand quashed and set aside. Respondent No.5 stands disqualified as a sarpanch/member in view of Section 14(1)(j-3).

23. Needless to state, it is open to the statutory authorities to initiate steps insofar as the effects of the encroachment are concerned. It is, however, made clear that this Court has not expressed a view insofar as the pending proposals before the Committee for regularization are concerned.

24. The learned Advocate for the sarpanch prays that the operation of this order be stayed for a period of three weeks. The learned Advocates for the petitioners, Respondent No.6 and the learned AGP, have opposed the same contending that the law in Janabai (supra) is now well settled and is being scrupulously made applicable to all such cases in the State of Maharashtra.

25. The learned AGP submits that insofar as the representation of the husband of the sarpanch for regularization is concerned, the State has not taken any decision in this case.

26. In view of the above and upon considering the observations made in this order, I find that the law applicable should be made effective in letter and spirit and hence the request of respondent No.5 is rejected.

27. Rule is made absolute accordingly.