

(2012) 09 BOM CK 0161

In the Bombay High Court

Case No : Writ Petition No. 3241 of 2012

Shantaram Narayan Raut

APPELLANT

Vs

The Additional Collector, Nashik and Others

RESPONDENT

Date of Decision : 04-09-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2012) 6 ALLMR 527 : (2013) 2 BomCR 341 : (2012) 6 MhLj 790

Hon'ble Judges : S.C. Dharmadhikari, J

Bench : Single Bench

Advocate : S.M. Sabrad assisted with Mr. Yuwraj Patil, for the Appellant; P.S. Cardozo, AGP, for the Respondent Nos. 1 and 2/State and Mr. P.N. Joshi for the Respondent Nos. 3 and 4, for the Respondent

Judgement

S.C. Dharmadhikari, J.—Rule. Respondents waive service. By consent of parties, heard finally. By this Writ Petition under Articles 226 and 227 of the Constitution of India, the Petitioner is challenging the order passed by the Additional Collector, Nashik District, Nashik dated 05.03.2012 on the Dispute Application No. 2/2012 which order is confirmed by the Additional Divisional Commissioner, Nashik Division, Nashik by his order 28.03.2012 in Appeal No. 44/2012.

2. The Respondent Nos. 2 and 3 to this Writ Petition filed an application bearing Dispute Application No. 2/2012 against the Petitioner invoking the jurisdiction and authority of the Additional Collector, Nashik u/s 16(1) and (2) of the Bombay Village Panchayats Act, 1958 (for short "the Act").

3. The allegation contained in this application briefly is that by virtue of Section 16 of the Act, the elected member can be held to be disabled from continuing as such if at the time of his election or appointment he was subjected to any of the disqualifications mentioned in Section 14 of the Act or during the term for which he has been elected or appointed he has incurred any disqualification mentioned in Section 14. Once he is so disabled, there is vacancy in the office as it is held to be vacant after disability. Whether, any vacancy has occurred or not is the

question which has been raised and which in terms of the statutory provision is required to be answered by the Collector. The allegation was that the Petitioner was disqualified in terms of Section 14(1)(j-3) as he has encroached upon the Government land or public property.

4. The case of the Respondent Nos. 3 and 4 in that application is that the Gram Panchayat, Vinchur, Taluka Niphad, District : Nashik is the Gram Panchayat for which elections were held in the year 2010. There are 17 members of this Gram Panchayat. The election results were declared on 27.06.2010. One of the persons who has been elected is the Petitioner. Thereafter, on 14.09.2011 the Petitioner came to be elected as Sarpanch. However, it was expected of the Petitioner to carry on affairs of the Gram Panchayat by taking everybody into confidence and carry out welfare works. To the disappointment of the Respondent Nos. 3 and 4, it was discovered that there is property belonging to the Petitioner bearing Gat No. 626/2. There is a layout which was presented to the Planning Authority and which has approved the same. The total area is 2700 sq.mtrs. However, there is open space in this layout in which the Petitioner has unauthorizedly and illegally constructed tin-sheds. There is unauthorized Mutton Market which has been put up in these sheds and the Petitioner has gone to the extent of carving out Galas and Tenements therein and such Galas have been let out by him and once such construction has been found in the open space on the Government land or public property, then, it attracts disqualification as per the aforementioned statutory provision.

5. Taking cognizance of such complaint, what appears to have been done thereafter is to seek a report from the Circle Officer, Lasalgaon after spot inspection. The Circle Officer after the spot inspection has reported that the encroachment is on private open space. However, the encroachment is in a open space which open space belongs to the Gram Panchayat, therefore, the encroachment is liable to be removed and that responsibility is of the Gram Panchayat.

6. There is also letter of the Tahasildar, Niphad dated 16.11.2010 to the Sarpanch of Gram Panchayat wherein it was intimated that in Gat No. 626 there is an illegal and unauthorized encroachment and that is by the Petitioner. Therefore, Section 14(1)(j-3) is applicable.

7. Then reliance was placed on the report of the Director of Town Planning in which it has been clarified that the open spaces in approved layout and within the Gram Panchayat limits are not permitted to be utilized or used by the owners or residents of the village. Therefore, the construction of Mutton Market made by the Petitioner thereon could not have been permitted by the Gram Panchayat. What has been then relied upon is a further report/ letter dated 18.06.2010 of the Assistant Director, Town Planning, Nashik which states that the open spaces in such layout can be handed over for management and safeguarding by the Gram Panchayat. No person can give such portions to anybody for commercial use. In open spaces 10% area is capable of being used and permitted to be used

as Balak Mandir, Library, Club House, etc. In such circumstances what the Petitioner has done is to make or permit a construction in such open space and which construction has been occupied by several persons. The Petitioner recommended that the occupation of the Gala occupiers be regularized and that is the request made by him in writing. For all these reasons, the Petitioner invites and incurs disqualification.

8. On such application, the Petitioner was called upon to submit his explanation and in the reply, the Petitioner has denied that he has committed any encroachment on the Government land or public property. The Petitioner has stated that the portion admeasuring 2700 sq.mtrs. belongs to him whereas the balance is owned by Suvarna Kailas Sonwane and others. In the revenue record, there is no entry that this land is owned by the Government or is public property. The open space is not the Government land or public property. The application is, thus, not maintainable. There are various contentions raised and particularly with regard to the pendency of some civil suit and what has been then stated is that the Petitioner has not carried out any construction and the Mutton Market is existing from 15 to 20 years. The persons who are carrying on business in the Galas have no privity of contract with the Petitioner. On the strength of the letter dated 26.04.2010 addressed to the Sarpanch/ Gramsevak, it cannot be held that the Petitioner has encroached on the Government land or public property. For all these reasons, it was submitted that the application filed by the Respondent Nos. 3 and 4 be dismissed.

9. On such material, the Additional Collector heard both sides and even considered the contents of the documents produced which included the reports of the statutory authorities. What the Additional Collector has, in the order passed on 05.03.2012, concluded is that Gat No. 626/2 is owned by the Petitioner and others. Their names are entered in the revenue record dated 14.12.2011. This land is non agriculture in nature. The Petitioner owns the portion of 2700 sq.mtrs. The plan would denote that a portion of the land held by the Petitioner has been shown as open space. In the letter dated 26.04.2010 addressed to the Sarpanch of the Gram Panchayat, the Petitioner has stated that in Gat Nos. 626/2 and 626/3 in the open space there is Mutton Market and the Petitioner has no objection if the names of the Gala holders are entered in the record of rights. Equally, what the Additional Collector refers to is a notice dated 12.05.2010 of the Gramvikas Adhikari of Gram Panchayat and Sarpanch that Gat No. 626/2 and 626/3 has open space and in that open space there are Tin Sheds and this amounts to encroachment on the public property. That notice has been forwarded to the Block Development Officer and equally the complaint which was made by the Respondent No. 3 to the Tahasildar on 22.09.2010.

10. It appears that the Additional Collector has heavily relied upon the report of the Circle Officer dated 30.10.2010 and in which it is indicated that the open space belongs to the Gram Panchayat and any encroachment therein can be removed by the Gram Panchayat. Equally, there is reliance placed on the report

of the Director of Town Planning. On the basis of all this and by relying on certain provisions of the Maharashtra Regional Town Planning Act, 1966 what has been held by the Additional Collector is that the complaint alleges that the Petitioner has not got a layout sanctioned in respect of Gat No. 626/2 admeasuring 2700 sq.mtrs. from the competent officer. That layout has been approved by the Architect of the Petitioner himself. The Petitioner in his reply controverted this position and has contended that he has got the layout approved in terms of the provisions of the Maharashtra Regional Town Planning Act, 1966. However, the Additional Collector holds that the Petitioner failed to produce any document from the competent authority approving such layout. All that the Additional Collector then relies upon are the contents of the reports which have been forwarded by the statutory authorities and concluded that in Vinchur village there is Mutton & Chicken Market. These are nothing but Galas constructed in open space in Gat No. 626. If such is the position with regard to the open space and as clarified in the reports of the statutory bodies, then, there is no substance in the contentions raised on behalf of the Petitioner. The Petitioner is, therefore, clearly disqualified and when he has permitted the persons to set up the tin sheds in the open space and carry on business as Mutton Market. The Petitioner is, therefore, liable to be disqualified.

11. The Additional Collector has relied upon some payments which have been made for usage of the open space/ tin sheds by one Pandurang Shirsath and the litigation between the Petitioner and the said Pandurang Shirsath. However, that is not material for the purpose of the present Writ Petition. It is on these findings that the final order was passed by the Additional Collector which has been confirmed by the Additional Commissioner by identical conclusions. The whole emphasis is on the letter dated 26.04.2010 addressed by the Petitioner to the Sarpanch/ Gramsevak setting out his no objection to the names of Gala owners or users being recorded or entered in the record of rights of the Gram Panchayat record. Based on this letter and the Circle Officer's report that the Additional Commissioner agrees with the Additional Collector in disqualifying the Petitioner.

12. These concurrent orders are under challenge before me.

13. Mr. Sabrad, Learned Counsel appearing for the Petitioner, submits that the proceedings were not maintainable inasmuch as the Petitioner could not have been disqualified. The Petitioner was not subjected to any disqualification mentioned in Section 14 at the time of his election or during the term for which he has been elected, either. Reliance placed on Section 14(1)(j-3) is misplaced because that is a disqualification on account of encroachment on the Government land or public property. Survey No. 626/2 or 626 as a whole is a private property. That certain portion therein has been earmarked or kept aside as open space, cannot mean that same is the Government land or public property. For the Petitioner to be disqualified there has to be encroachment on the Government land or public property. If the encroachment is on portion of the private land, then, such portion being earmarked or designated as open space and therefore,

capable of being acquired or utilized for the public, does not make it either the Government land or public property. That would mean stretching the language of Section 14(1)(j-3) too far. The words therein are "has encroached upon the Government land or public property". There ought not be any dispute about the encroachment on the Government land or public property. If there is encroachment, but which is not on the Government land or public property, then, there is no disqualification. On this short ground alone the petition deserves to succeed, is the submission of Mr. Sabrad.

14. Mr. Sabrad has invited my attention to the orders passed by the Additional Commissioner and the Additional Collector and contents of the letter dated 26.04.2010. Equally he has also invited my attention to the Map of the layout, copy of which is annexed to the Writ Petition at Annexure-H. He has submitted that none of the reports including that of the Circle Officer can be said to be conclusive. In such circumstances the Writ Petition should be allowed. Mr. Sabrad has also submitted that there are affidavits filed in support of the Petitioner's case by two individuals who are carrying on business in tin sheds (kiosks/taparais) on Survey No. 626/3 which would indicate that the tin sheds have not been constructed by the Petitioner. For all these reasons, he submits that the impugned orders be set aside.

15. On the other hand, Mr. Cardozo, the learned AGP for the State and Mr. Joshi, Learned Counsel appearing for the Respondent Nos. 3 and 4, would submit that the concurrent orders require no interference in writ jurisdiction. Mr. Joshi submits that this is a clear case where the Court should construe the words "has encroached upon the Government land or public property" liberally so as to include the act which has been committed in the present case. If elected members allow construction in open spaces and which spaces are required to keep open to sky, then, they would escape the consequences and will hold public office without any interruption or objection. If the intent of the legislature is to prevent a person guilty of a wrongful act or whose character is doubtful, from holding a public office, then, this Court should construe the provision not strictly but liberally so as to sub-serve this object or purpose. Mr. Joshi submits that in this case what the reports on record have indicated is that such open spaces are held by the persons like the Petitioner who are owners of the private lands and properties as trustees for public. Mr. Joshi submits that the encroachment on the Government land or public property would take within its fold any land or property which is capable of being utilized by public. It may not be owned by the Government, but if the lands or properties are to be utilized by public and the members of public have free access thereto and can claim so, then, any encroachment thereon must come within the ambit and scope of this legal provision or else its object and purpose would be defeated completely. He, therefore, submits that based on the reports that were forwarded to the authorities, their conclusion that there is encroachment in open space. It is justified and requires no interference in writ jurisdiction. Consequently, the Writ Petition be dismissed.

16. It is a common ground that in this case the application was made u/s 16 of the Act that deals with disability from continuing as a member. That enables the Collector to suo motu or on an application made to him by any person, to decide whether any vacancy has occurred. That vacancy may occur if any member of the Village Panchayat was subject to any of the disqualifications mentioned in Section 14 at the time of his election or appointment or during the term for which he has been elected or appointed, he incurs any of the disqualifications mentioned in Section 14. In that event he shall be disabled from continuing as a member and his office shall become vacant.

17. In the instant case, disability is on account of Section 14(1)(j-3) which states that no person shall be a member of the Village Panchayat or continue as such who has encroached upon the Government land or public property.

18. While it is true that both these terms are not defined in the Act and they take their colour from ordinary and common parlance, yet these have legal connotations. They have some purpose and meaning. Their definite legal impact has always been understood and if one is required to refer to their meaning in a Statute or law, a reference can usefully be made to the Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition Reprint 2007, in which the term "Government land" has been defined to mean the land belonging to the Government i.e. the land of which the Government is the proprietor and does not include the land in which the proprietary rights in the soil vest in a private individual, whether or not it be subject to payment of assessment to the Government.

19. The term "public land" has also been defined in this very work to mean such lands vesting in the Government and which are subject to sale or other disposal under the general laws. The terms "public lands" or "public domain" are habitually used to describe such as are vested in the State and which are subject to sale or other disposal under the general laws. There is no statutory definition of the words "public land" and their meaning may vary for different purposes and they should be given such meaning in each case as comforts with the intention of the parties using the lands. However, the work also clarifies the land or land interest held by the Government without regard to how the Government acquired ownership; unappropriated land belonging to the federal or State Government is also termed as public land and its other meaning is the Government land and public ground.

20. Equally, the term "public property" has been always understood to mean the property owned by the Government or local bodies on behalf of the community in general. The "public property" means any property belonging to the Government or any local authority. The Prevention of Damage to Public Property Act, 1984 defines the term "public property" as under:-

Section 2. Definitions:

(b) "public property" means any property, whether immovable or movable (including any machinery) which is owned by, or in the possession of, or under

the control of-

- (i) the Central Government; or
- (ii) any State Government; or
- (iii) any local authority; or
- (iv) any corporation established by, or under, a Central, Provincial or State Act; or
- (v) any company as defined in Sec. 617 of the Companies Act, 1956; or
- (vi) any institution, concern or undertaking which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government shall not specify any institution, concern or undertaking under this sub-clause unless such institution, concern or undertaking is financed wholly or substantially by funds provided directly or indirectly by the Central Government or by one or more State Governments, or partly by the Central Government and partly by one or more State Governments.

21. It is clear that the Bombay Village Panchayats Act, 1958, specifies encroachment on Government land or public property. Encroachment means an act which is wrongful and illegal or not permissible in law. That is how encroachment upon Government land or public property is understood. The term "public property" is also used in the provision, so also, "Government land". The encroachment on the Government land or public property which includes public land, is an act which invites disqualification. However, when there is disqualification from being elected or continuing as a member for having committed encroachment on the Government land or public property, then, the concept has to be understood in the context of what can be described as Government land or public property. The words have not been used in the sense that a land or property capable of being used by the Government or public will come within the legal provision in question. The land or property must be a Government land or public property and that can only be as set out above. It cannot be a vague or indefinite concept or else that would create confusion and chaos. Ultimately, the words find their place in the Bombay Village Panchayats Act, 1958 which is an Act to provide for constitution and administration of the Village Panchayats.

22. That Act is to amend and consolidate the law relating to the constitution and administration of the Village Panchayats and for certain other matters. What the Act seeks to achieve is establishment of a Village Panchayat for every village or group of villages and invest them with such powers and authority as may be necessary to enable them to function as units of local self-government and to carry out development activities in rural areas. It is no doubt true that persons manning such institutions or incharge of such affairs, need to possess high moral character and they should not have indulged in acts which can be termed as illegal, unauthorized or immoral. What the Legislature intends to achieve while

providing for disqualification not only at the time of election, but post election as well, is to ensure clean, smooth, proper and efficient administration of the Panchayat. These are institutions which are invested with powers and authority so as to enable them to function as units of local self-government. There should not be uncertainty even after elections and if the authorities are to deal with a complaint or application of the present nature, then, the least that is expected is that there are specific allegations of wrongful acts and that there is adequate and complete material in that behalf. In other words, after the Panchayat is constituted and becomes functional, there should not be any unnecessary hurdles and obstacles. In order to undertake development activities at the rural level, the Panchayat must work and just as disqualified members should not continue and complete their term, equally, frequent and unending disputes must not disturb or disrupt its working. This can be achieved only if genuine grievances and complaints are entertained.

23. In the instant case, what one finds is that the allegation is that Survey No. 626 is a private land. That certain portion therein has been earmarked as open space. Pertinently such earmarking is in a layout which is stated to be either prepared or submitted for sanction or approval or approved or sanctioned. Nonetheless it relates to a private property. It is equally true that the planning laws relied upon in this case or otherwise, mandate the keeping of certain spaces as open and unbuilt so as to ensure free and smooth flow of air and ventilation. That by itself does not mean that such spaces, which may be also utilized for recreation purposes, can be termed as belonging to the Government or local authority or are public properties straightway.

24. The public property is one to which the members of public have free and unrestricted access. That place or land or property may not be owned by the Government or local authority, but if it belongs to or is donated or granted or allotted for use of the members of public, then, it is broadly understood as public property. The open space in the village meant for use by the public or members of public or villagers is certainly a public property, but if that concept is to be extended to spaces which are earmarked as open but in a private land that would mean that the earmarking or designation makes it a public property. It is a public property and can be termed as such without any acquisition by the Government or the local authority. That would mean that by mere earmarking or designation such properties vest straightway in the State.

25. Way back in 1994 and to be precise while dealing with Civil Appeal No. 319/1976 decided on 26.10.1994 (Pt. Chet Ram Vashist (Dead) by Lrs. Vs. Municipal Corporation of Delhi,), a Two Judge Bench of the Hon"ble Supreme Court held that designation, earmarking, reservation of spaces for public purposes is permissible in cases of lands and layouts, which are private. What the Hon"ble Supreme Court holds is that "reserving any site for any street, open space, park, school etc. in a layout plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The

effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in the nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned layout plan. But, the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any provision in the Act or on any principle of law. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general. But the right to manage as a local body is not the same thing as to claim transfer of the property to itself. The effect of transfer of the property is that the transferor ceases to be owner of it and the ownership stands transferred in the person in whose favour it is transferred. The resolution of the Committee to transfer land in the colony for parks and school was an order for transfer without there being any sanction for the same in law. Thus, by a mere resolution these lands could not be transferred and there has to be sanction for the same in law." (see para 6 on page 435).

26. If the concept is understood thus, it would become at once clear that any open spaces, being carved out in a private layout, are meant to be kept open by the owners and that cannot be built upon. It has to be kept open and may be utilised for recreational or such other activities. For such spaces to be termed as public properties, something more needs to be done in law so as to vest them in State for the use and benefit of public. That requires a sanction in law. If one were to straightway assume based on the contents of the report of the Circle Officer or the Town Planner that even such spaces in a private layout are not meant to be utilized by the private owners and therefore, are capable of being taken over by the local authority or local body, then, that would introduce an element of uncertainty and in a given case, disqualify persons who are duly elected members not for any unlawful act on their part. In these circumstances to hold on the basis of the reports submitted by the officers in this case that there is encroachment on the Government land or public property, would be extremely risky and hazardous. That is certainly not the intention of the Legislature in providing for disqualification of persons for being elected as members of the Village Panchayat or to continue as members upon election. If that had been the intent, that would have been specified clearly and unequivocally. If the term Government land or public property is understood in common parlance and in the context referred to above, then, it is clear that the Petitioner who is allegedly guilty of having encroached on open space in a private layout by permitting construction of tin sheds thereon, cannot be disqualified for having encroached on a Government land or public property. The wrongful acts committed by the Petitioner on his private land and property can be dealt with

under other laws. The wrongful acts, if any, committed can be sternly and strictly dealt with in accordance with law. All that is meant is that even an elected member is answerable to law and if he has committed any unauthorised or illegal act even in a private property, he can be either prosecuted or penalised. In the circumstances afore stated, the orders under challenge cannot be upheld and deserve to be quashed and set aside on the ground that the authorities had no power to disqualify the Petitioner for the acts attributed to him. If he could not have been proceeded on the complaint as it stands and on undisputed facts, then, the authorities have exceeded their power in disqualifying the Petitioner. Their orders are ex-facie illegal, erroneous and deserve to be quashed and set aside. They are, accordingly, quashed and set aside. Rule is made absolute in the above terms, but without any orders as to costs.