

# SUPREME COURT OF INDIA

Sagar Pandurang Dhundare

Vs.

Keshav Aaba Patil

C.A.No.2306-2307 of 2017

(Kurian Joseph and R.Banumathi,JJ.,)

13.11.2017

## JUDGMENT

### **Kurian Joseph,J.,**

1. The crucial question to be decided is whether a family member of the original encroacher can be disqualified, under the Maharashtra Village Panchayats Act, 1958 (for short "the Act"). The enabling provision, as introduced by an amendment in 2006, reads as follows:

"14.Disqualifications.-(1) No person shall be a member of a Panchayat, or continue as such, who (j-3) has encroached upon the Government land or public property; or ..."

2. On the undisputed facts of these cases, there is no allegation that the appellants are encroachers themselves, in the sense that they themselves first encroached upon the Government property and they continue to occupy the same. The allegation is that their father/grandfather are encroachers and they are the beneficiaries of the encroachment. According to the State and the contesting respondent, the beneficiary of an encroachment is also an encroacher.

3. The question that arises before us has been dealt with by several judgments of the High Court of Bombay. However there appears to be a conflict between the various decisions of the High Court. In *Ganesh Arun Chavan v. State of Maharashtra and others*<sup>1</sup>, decided on 24.09.2012, the incumbent was sought to be disqualified on the ground of encroachment. The defense was that the encroachment was by his father and the house was constructed with the income of his father. The High Court made the following observations:

"10. There is nothing in the Act by which the concept of family or joint residence could be imported as far as the subject of disqualification is concerned. The said provision contemplates encroachment upon the Government land or public property by a person, as in this case, who is a Member of the Panchayat. Therefore, the encroachment must be by the person who is a member and not any third party.

12. The Legislature has taken care and wherever the concept of family or joint residence has to be applied, specific provision in that behalf has been made either substantively or by way of an Explanation. For illustration, if the disqualification is under section 14(1)(h) for failure to pay any tax or fee due to the panchayat or the Zilla Parishad, then, by virtue of Explanation 2, what the Legislature has done is to provide that failure to pay any tax or fee due to the panchayat or Zilla Parishad by a member of HUF or by person belonging to a group, then, that shall be deemed to disqualify all members of such family or as the case may be of the group or unit. Equally in case of clause 14(1)(g) where a person is said to be disqualified for having any interest either by himself directly or indirectly through or his partner, any share or interest in any work done by order of the panchayat or in any contract with by or on behalf of or employment with or under the panchayat, the Legislature by Explanation IA has clarified that a person shall not be disqualified under clause (g) by reason of only such person having a share or interest in any newspaper in which any advertisement relating to the affairs of the panchayat is inserted; or having a share or interest in the occasional sale to the panchayat of any article in which he regularly trades and having an occasional share or interest in the letting out or on hire to the panchayat of any article and equally having any share, interest in any lease for a period not exceeding ten years of any immovable property. Therefore, once the Legislature itself has 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. It is the act of the person seeking to contest election or functioning as a member which alone will attract the provision in question."

4. In *Yallubai Kamble v. State of Maharashtra and others*<sup>2</sup>, decided on 05-10-2012, the petitioner was elected as the Sarpanch of the Gram Panchayat. The allegation against the petitioner was that her husband and brother-in-law made an encroachment on gairan land and constructed a house thereon. She denied the allegation and said that she cannot be disqualified if the encroachment was by her husband and not by her. The High Court relied on the decision in Ganesh Chavan (supra) and finally held as follows:

"14. However, when it comes to encroachment upon Government Land or Public Property, the Legislature is aware that ordinarily and normally such act "is gaining upon the rights or possession of another". That may be an individual or a concerted act. Thus, it envisages acting either by himself or herself or jointly with others. Therefore, the extent of participation and the role of a person therein assumes importance and significance. It may amount to entering upon a land and remaining there, occupying and possessing it or construction thereon. Equally, it may mean not just possessing a land but a Structure, Building, House thereon or a part thereof. Hence, which act, when committed, by whom are all relevant matters together with the time factor, namely, prior to or after Petitioner's marriage. Hence, in its wisdom if the Legislature disqualifies a person or a member only if the act is committed by

him, then, it is not for this Court to probe it further. It is for the Legislature to Writ Petition No. 8497 of 2012 take remedial steps if this is providing an escape route to wrongdoers and lawbreakers. This Court cannot legislate nor can it step in to fill up an alleged lacuna or defect in law. It has been recognized by the Hon'ble Supreme Court that if a matter, provision for which may have been desirable, has not been really provided for by the Legislature, the omission or defect is of the nature which cannot be cured or supplied by a mode of construction which amounts to ironing out the creases. (See AIR 1989 SC 501, Petron Engineering Construction Co. Pvt. Ltd. vs. Central Board of Direct Taxes). True it is that the character and conduct of the representative of the people should be exemplary and setting a high standard. He will not be a true representative of the people if he indulges in acts which are immoral, illegal and wrongful but the grievance should be raised before some other forum."

5. A few days later, in *Kanchan Shivaji Atigre v. Mahadev Baban Ranjagane and others*<sup>3</sup> decided on 12.10.2012, the disqualification was also on the ground of encroachment. It was the case of the petitioner that the wording of the provision makes it clear that it is the act of the person who is elected, which alone, is relevant. The Court held as follows.

"13. ... Therefore, it is the act of the person contesting the poll as a candidate or the act of elected member himself as the case may be, that (sic) would disqualify them. It cannot be that somebody else commits an act of encroachment even if he is a Member of the same family but the consequences are visited on an elected representative or a person desiring to contest the election to Gram Panchayat. Even if such person is a Member of that family by marriage or otherwise, still, it will not be permissible to disqualify him or her as 2013(1) Mh. L.J. 455 that would create a vacancy in the Gram Panchayat. It would not be possible to give broad based, wide and comprehensive representation of the public in a unit of local self government. The Gram Panchayat is envisaged to be a unit of local self-government in terms of Part IX of the Constitution of India. Therefore, the provisions with regard to disqualification will have to be construed in a manner so as not to create a vacuum or make it impossible for the villagers to choose their representative and constitute a Gram Panchayat. That will then create difficulties and obstacles in constituting a Panchayat. If that is equally not intended by the Statute in question, then, by interpretative process, I cannot do so and import or insert something in the provision, which is not there. That would amount to legislation and which act a Court cannot perform or rather not permitted to perform. That is a function which has to be performed by the legislature alone and if there is any difficulty or lacuna in the legislation, it is for the legislature to step in and not for me to re-write the section or provision in question."

6. The other string of decisions interprets the impugned provision to include encroachment by a member of the family of the elected person. In *Devidas s/o Matiramji Surwade v. Additional Commissioner, Amravati and others*<sup>4</sup> decided on 31.07.2012, a division bench of the High Court of Bombay held as follows:

"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.."

7. The contention put forth by the respondent in the case of *Parvatabai @ Shobha d/o Kisan Kande v. Additional Commissioner, Nagpur and others*<sup>5</sup> was that she was merely residing in the house of her father and as she was not responsible for said encroachment, she was not liable to be disqualified. The High Court considered the decisions in Ganesh Chavan (supra) and Devidas Surwade (supra) and held as follows:

"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 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 reasons, the submissions made on behalf of the petitioner cannot be accepted."

The Special Leave Petition in this case was dismissed at the threshold.

8. In *Sandip Ganpatrao Bhadade v. Additional Commissioner, Amravati and others*<sup>6</sup>, the finding of both the authorities below was that the petitioners were residing in or occupying the property, which is an encroachment over the Government land. The Court analysed the scheme of the Act and held as follows:

"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 sub-sections (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 analyzed and interpreted.

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."

9. The High Court in, *Anita Laxman lunghare v. Additional Commissioner. Amravati Division and others*<sup>7</sup> made an attempt to reconcile the different streams of thought.

"6. The views expressed both by the learned Single Judge in the case of *Kanchan Atigre* (supra) and the Division Bench in the case of *Devidas Surwade* (supra) can certainly be reconciled. There is no conflict between the two. For attracting disqualification under section 14(1) (j-3), in a case like this, the crucial question to be answered is: Does the legal representative or member of the original encroacher's family continue to occupy the government land or property. If he does, he attracts the disqualification under Section 14(1)(j-3). It is not an answer then for such person that the original encroachment was by his predecessor or family member and not by himself. If that encroachment is continued by him, he attracts the disqualification. That was the case in *Devidas Surwade*. The original encroachment may have been by the petitioner's father, but after the death of his father, he continued to occupy the property and thereby attracted the disqualification of section 14(1) (j-3). On the other hand, in *Kanchan's* case, it was the petitioner's father-in-law, who was the encroacher; she had nothing to do with it. It was not the case of the State that she continued to occupy the property either as a legal heir of her father-in-law or as a member of her husband's family. The emphasis is really on the continued encroachment and not so much on the original act of encroachment. Encroachment, after all, is not a one-time act. It is a continuous act. If someone's encroachment is continued by another, that other is equally an encroacher, as much as the original encroacher."

10. The case before us is of a post election scenario, wherein the Collector has taken steps to disqualify an elected member on the petition filed by certain individuals much after the election. It is the contention of the learned Counsel for the respondents that the incumbent being a member of the Panchayat and the Panchayat being the primary authority to go into the question of encroachment and take steps for the eviction of encroachers, the participation of an interested member in the Panchayat would be detrimental to the object of the statute and it would be against the larger public interest. In this context Section 53(1), (2) and (2A) of the Act are relevant:

"53. Obstructions and encroachments upon public streets and open sites.-(1) Whoever, within the limits 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 en-croachment or obstruction, or

(b) deposits, or causes to be placed or de-positied, 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 ru-pees, 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 officer authorised 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.

[(2A) If any Panchayat fails to take action under sub-section (2), the Collector suo motu or on an application made in this behalf, may take action as [provided in that sub-section, 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 unauthorized cultivation of the crop and shall be recoverable from such person as an arrear of land revenue."

(Emphasis supplied)

11. Thus, under the statutory scheme, an encroacher is liable to be evicted by the Panchayat and if the Panchayat fails, the Collector has to take action. The encroacher is also liable to be

prosecuted. Encroachment is certainly to be condemned, the encroacher evicted and punished. Desirably, there should not be a member in the Panchayat with conflicting interest. But once a person is elected by the people, he can be unseated only in the manner provided under law. Even with the best of intention, if there is no statutory expression of the intention, the court cannot supply words for the sake of achieving the alleged intention of the law maker. It is entirely within the realm of the law maker to express clearly what they intend. No doubt, there is a limited extent to which the court can interpret a provision so as to achieve the legislative intent. That is in a situation where such an interpretation is permissible, otherwise feasible, when it is absolutely necessary, and where the intention is clear but the words used are either inadequate or ambiguous. That is not the situation here. In the Act, wherever the law-makers wanted to specify family, they have done so. As noted by some of the judgments of the High Court, in Explanation 2 for Section 14(1)(h), the failure to pay any tax or fee due to the Panchayat or Zila Parishad by a member of a Hindu Undivided Family (HUF) or by a person belonging to a group has been expressly mentioned as a disqualification on others in the family or group. It is, therefore, evident that when the intent of the legislature was to disqualify a member for the act of his family, it has specifically done so. The Court, in the process of interpretation, cannot lay down what is desirable in its own opinion, if from the words used, the legislative intention is otherwise discernible.

12. *Abhiram Singh v. C.D. Commachen (D) By Lrs. and others*<sup>8</sup> is a recent Constitution Bench judgment of this Court dealing with corrupt practices. Appeal on the grounds of religion, race, caste, community, language, etc. of the candidates and the electorate, and canvassing votes accordingly, has been held to be a corrupt practice. The Court, to hold so, adopted a purposive interpretative process declaring that the Representation of the People Act, 1951 should be interpreted in that context to be electorate centric rather than candidate centric. That is not the situation in the present case. The appellants were elected by the people to the Panchayat. There is no case that they are original encroachers on the public property. And this is not the case where the alleged act of encroachment has (2017) 2 SCC 629 influenced the will of the people in which case, going by *Abhiram Singh* (supra), the court would have been justified in attempting a purposive interpretation to achieve a laudable object.

13. The respondents have placed reliance on *Hari Ram v. lyoti Prasad and another*<sup>9</sup> to say that an encroachment is a continuing wrong. While there is no quarrel with the aforesaid position, this case does not further the point made by the respondents. It is a case where there was an allegation of encroachment upon a substantial part of a street by the appellant which was causing inconvenience to the users of the street. *Hari Ram* (supra) does not relate to interpretation of a statute dealing with election to a public office or disqualification on the ground of encroachment. Furthermore, it does not deal with the question of whether a legal heir can be considered an encroacher. Thus, the reliance on *Hari Ram* (supra) is misplaced in the light of the present case.

14. As we have already noted above, the duty of the court is not to lay down what is desirable in its own opinion. Its duty is to state what is discernible from expressions used in the statute. The court can also traverse to an extent to see what is decipherable but not to the

extent of laying down something desirable according to the court if the legislative intent is otherwise not discernible. What is desirable is the jurisdiction of the law-maker and only what is discernible is that of the court.

15. From the Statements of Objects and Reasons for the amendment introduced in 2006, it is seen that the purpose was "to disqualify the person who has encroached upon the Government land or public property, from becoming member of the Panchayat or to continue as such". The person, who has encroached upon the Government land or public property, as the law now stands, for the purpose of disqualification, can only be the person, who has actually, for the first time, made the encroachment. However, in view of Section 53(1) of the Act, in case a member has been punished for encroachment, he shall be dismissed. Similarly, a member against whom there is a final order of eviction under Section 53(2) or (2A), shall also not be entitled to continue as a member.

16. In case, the appellants suffer from any of the three situations indicated above, they shall be unseated. The rest is for the State to clarify by way of a proper amendment in case they really and truly want to achieve the laudable object of preventing persons with conflicting interest from becoming or continuing as members of the Panchayat. The extent of conflicting interest is also for the Legislature to specify.

17. The impugned judgments are set aside and the appeals are disposed of as above.

18. There shall be no order as to costs.

Judgment Referred.

<sup>1</sup>(2013) 2 Mh. L.J. 0955

<sup>2</sup>WP.No. 8497 of 2012

<sup>3</sup>(2013) 1 Mh. L.J. 0455

<sup>4</sup>(2017) 1Mh. L.J.0102

<sup>5</sup>(2015) 5 Mh. L.J. 0238

<sup>6</sup>(2017) 1 Mh.L.J.0079

<sup>7</sup>WP No.1660 of 2017

<sup>8</sup>(2017) 2 SCC 0629

<sup>9</sup>(2011) 2 SCC 0682