

Before A.B. Chaudhari & Harnaresh Singh Gill, JJ.

VIJAY—*Petitioner*

versus

STATE OF HARYANA AND OTHERS—*Respondents*

CWP No. 2431 of 2018

January 11, 2019

Constitution of India, 1950—Art.226— Haryana Panchayati Raj Act, 1994— S.175— Punjab Village Common Lands (Regulation) Act, 1961—Challenge to Election of Sarpanch— Unauthorized possession of panchayati land—Election challenged as elected candidate ineligible/disqualified to contest-in unauthorised possession of panchayati land—Defence of launching proceedings against his family members for encroachment not accepted— Election set aside.

Held that proceedings under Section 7 of the Act of 1961 were launched by respondent No.3-Ajit Singh himself is enough to hold that he filed these proceedings in order to make a show that he was not encroacher but his brother was the encroacher which is factually also incorrect as per Exhibit P5. He launched those proceedings to mislead one and all. However, the trial Court has given benefit thereof to him without finding that respondent No.3-Ajit Singh had taken self-contradictory stand.

(Para 10)

Further held that, the alternate plea taken up respondent No.3-Ajit Singh about the encroachment made by his brother Rajesh and his family members for which he launched proceedings under Section 7 of the Act thus, also must fail.

(Para 18)

V.P. Sangwan, Advocate
for the petitioner.

Vivek Saini, D.A.G. Haryana.

Vikrant Rana, Advocate for respondent No.3.

A.B. CHAUDHARI, J.

(1) By the present petition, the petitioner-Vijay has sought a writ of Certiorari for quashing the judgment dated 27.11.2017 (Annexure P-4) passed by the Civil Judge (Junior Division), Charkhi

Dadri in Election Petition No.36 of 2016 titled as 'Vijay versus Ajit Singh and others' by which the said election petition filed by the petitioner was dismissed.

FACTS

(2) The petitioner-Vijay filed election petition under Section 175 of the Haryana Panchayati Raj Act, 1994 (for short 'Act') for declaring the election of respondent No.3-Ajit Singh son of Dhanpat (respondent No.1 in Election Petition No.36 of 2016) as Sarpanch of Gram Panchayat of village Kari Rupa (Dass) held on 10.01.2016 as illegal and invalid on the ground that he was not eligible to contest the election because he has been in unauthorised possession of land comprising Khasra No.84 Gair MumkinFirmi and Khasra No.111 Gair Mumkin Gali which is under the ownership of Gram Panchayat Kari Rupa. He further stated in his election petition that the Gram Panchayat of the said village Kari Rupa Dass was one but was bifurcated two months before the elections. Respondent No.3-Ajit Singh was in unauthorised occupation of the said land under ownership of Gram Panchayat and therefore, was disqualified to contest the election for the post of Sarpanch.

(3) Respondent No.3-Ajit Singh appeared before the trial Court and opposed the election petition while denying the allegation regarding encroachment or unauthorised occupation as alleged by the petitioner and prayed for dismissal of the said election petition. The trial Court framed six issues and thereafter, recorded the evidence of the parties so also exhibited the documents produced by the parties. Finally, the trial Court held that there was no merit in the election petition and thus, dismissed it. Hence, this petition.

ARGUMENTS

(4) In support of the writ petition, learned counsel for the petitioner invited our attention to the proved documents on record in order to buttress the contention that respondent No.3-Ajit Singh was in unauthorised occupation of land belonging to Gram Panchayat Kari Rupa. He also relied on demarcation report dated 13.04.2016 Exhibit P1 to Exhibit P6, in document Exhibit P5, and submitted that Ajit Singh and his brother Rajesh have been shown in unauthorised occupation of Khasra No.84 and Khasra No.111. He also submitted that Exhibit D4-Copy of Ration Card clearly indicated Ajit Singh residing in House No.265 while Rajesh alias Balwan was residing in House No.266, i.e. in separate house. Learned counsel then submitted that the petitioner by

voluminous documentary evidence proved the factum of Ajit Singh being encroacher on the said piece of land belonging to Gram Panchayat Kari Rupa as per Demarcation report of the competent officer apart from Jamabandi documents filed on record clearly indicating the above fact. Learned counsel then submitted that Ajit Singh being in occupation of said land was not entitled to contest the election for the post of Sarpanch and accordingly, objection was also taken. But the trial Court has relied on a decision in the case of *Smt. Zarina* versus *State of Haryana through Financial Commissioner and another*¹ which decision is not relevant in view of the latest decision of the Apex Court in the case of *Janabai* versus *Additional Commissioner and others*, Civil Appeal No. 6832 of 2018, decided on 19.09.2018. He submitted that the present petition is therefore, liable to be allowed and election of respondent No.3-Ajit Singh to the post of Sarpanch is liable to be set aside with a further direction to hold fresh election for the said post.

(5) *Per contra*, contesting respondent No.3-Ajit Singh vehemently opposed the election petition and filed his written statement and submitted that the petition was not maintainable in the absence of necessary parties etc. and that the petitioner has no locus-standi to file election petition. Respondent No.3-Ajit Singh denied having occupied any land of the village Kari Rupa. Learned counsel for respondent No.3 vehemently opposed the present writ petition and submitted that Ajit Singh had in fact taken action against his family members, who are stated to have been in possession of the said Gram Panchayat land. He could not be held guilty or responsible for making encroachment as it was made by his brother Rajesh against which proceedings under Section 7 of the Punjab Village Common Land (Regulation) Act, 1961 (for short 'Act of 1961') have been filed by Ajit Singh for taking possession of the Gram Panchayat land from him. Thus, stand taken by Ajit Singh was that encroachment was made by his brother Rajesh and not by him and therefore, he could not be held responsible for making encroachment and consequently, it could not be said that Ajit Singh had made any encroachment. Respondent No.3-Ajit Singh has filed on record written statement in this petition along with documents. He submitted that as a matter of fact, petitioner himself had encroached on some Gram Panchayat land and therefore, the petition should be thrown out. The demarcation report made by the authority is not conclusive proof about the alleged illegal possession. The proceedings under

¹ 2004 (3) R.C.R. (Civil) 697

Section 7 of the Act of 1961 were already lodged by respondent No.3 against his brother Rajesh and therefore, the petition was not maintainable or was premature. Learned counsel for respondent No.3 thus, submitted that respondent No.3 cannot be disqualified for the alleged fault of his brother, if he has encroached the Gram Panchayat land. He supported the impugned judgment of the learned trial Court and also relied on the judgment of this Court on the said issue. He therefore, prayed for dismissal of the writ petition.

CONSIDERATION

(6) Heard learned counsel for the rival parties at length and seen the entire record including the document so also the evidence. Section 175(n) of the Act reads thus:-

“**[175]. Disqualifications.**-- ⁴[] No person shall be a Sarpanch, [----] or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who –

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(n) is or has been during the period of one year preceding the date of election, in unauthorized possession of land or other immovable property belonging to the Gram Panchayat, Panchayat Samiti or Zila Parishad; or

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(7) It is clear from the reading of the above provision that the disqualification is provided in sub-section (n) of Section 175 of the Act with the opening words of Section 175 of the Act that “**No Person**” shall be Sarpanch or continue to be as such if he is in unauthorised possession of the land or other immovable property belonging to the Gram Panchayat, Panchayat Samiti or Zila Parishad. The enquiry report dated 07.11.2016 (Annexure P-3) prepared by the authority, namely Sub-Divisional Officer (C) and Enquiry Officer, Loharu is required to be seen carefully. He granted full opportunity to both the sides to produce whatever evidence they wanted to produce. It would be apt to reproduce some of the paragraphs from said enquiry report based on oral as well as documentary evidence including demarcation report, which read thus:-

“Sh. Ved Pal Numberdar resident of Kari Rupa, Tehsil Badhra District Bhiwani had stated that Ajit Singh, Sarpanch of his village had forcefully and illegally constructed house on PHIRNI Kila No.66/84 and common

passage No.111 in Khewat No.104, Khatoni No.161 pertaining to Jamabandi for the year 2010-11, situated at village Kari Rupa. He had constructed house illegally on the common land of village outer passage, Kila No.66/84 and common passage No.111. Relevant record from area Patwari was requisitioned and area was got demarcated. A list of persons, present at Khasra No.66/84, 111 and 119 was prepared. As per demarcation report and map of encroachment, a construction on 16.62 Sq. Yard at Kila No.66/84 of outer passage, 177.68 Sq. Yard at common passage No.111 by Ajit Singh is found. Copy of Demarcation report, list of person present and map of encroachment is attached.

Sh. Dharambir son of Sh. Sheoram resident of Kari Rupa Tehsil Badhra, District Bhiwani had deposed that Ajit Singh, Sarpanch of village Kari Rupa, had constructed house on PHIRNI and common passage, illegally and residing. He had illegally encroached PHIRNI Kila No.66/84 and common passage No.11, at Khewat No.104, Khatoni No.161 pertaining to Jamabandi for the year 2010-11 situated within the revenue estate of village Kari Rupa. He had constructed house by illegally encroaching common land, PHIRNI Kila No.66/84 and common passage No.111. Record from area Patwari was requisitioned and demarcation was done with computer machine. As per report submitted by Tehsildar Badhra, Sh. Ajit Singh had encroached on 16.65 Sq. Yard land of Kila No.66/84 and 177.68 Sq. Yard on common passage No.111 and his illegal construction was found. Copy of demarcation report, notice, map of encroachment and list of persons present are attached.

Sh. Ajit Singh, Sarpanch Kari Rupa, Tehsil Badhra, District Bhiwani had deposed that a demarcation of Khasra No.84, 111, Khewat No.104, 191 Min, Khatoni No.161 Min, pertaining to Jamabandi for the year 2010-11 was carried by Sh. Madan Lal, retired Kanoongo and notice under section 24(1) dated 13.05.2016 is served upon Rajesh son of Sh. Dhanpat, Sh. Sheoram son of Richhpal by caste Jat resident of village Kari Rupa. They were asked to remove their possession vide notice dated 25.05.2016 under section 24(2) but they have not removed the possession

hence an application under section 7 of The Punjab Village Common Lands Act, 1961 was filed on dated 09.06.2016. I have not been called at the time of demarcation, whereas he was Sarpanch of village. My name has been recorded with my brother due to enmity. I am residing separately. My ration card is separate. As far encroachment is concerned, I have filed an application before Assistant Collector for ejectment. No action can be taken before the outcome of judgment from the court of Assistant Collector 1st grade Charkhi Dadri on the above application.....”

(8) Upon perusal of the above report, it is seen that Ved Pal, Numberdar of the village had deposed that Ajit Singh had forcefully and illegally constructed house on PHIRNI Kila No.66/84 and common passage No.111 in khewat No.104, Khatoni No.161 pertaining to Jamabandi for the year 2010-11, situated at village Kari Rupa. He had constructed house illegally on the common land of village outer passage, killa No.66/84 and common passage No.111. Accordingly, area was demarcated. As per demarcation report and map of encroachment, a construction was found made by the Ajit Singh at common passage. Similar statement was made by Dharambir son of Sheoram based on the documentary evidence. Respondent No.3-Ajit Singh was given opportunity and stated that the demarcation report was prepared by Madan Lal, retired Kanoongo and notice under Section 24(1) dated 13.05.2016 was served on Rajesh son of Dhanpat and Sheoram son of Richhpal. They were asked to remove encroachment vide notice under Section 24(2) dated 25.05.2016, but they did not remove possession and therefore, he himself filed petition under Section 7 of the Act of 1961, on 09.06.2016. On the complaint of the complainant, demarcation was conducted by Ratan Singh, retired Kanoongo and his name was entered in the encroachment of 16.6.5 Sq. Yard of his brother. His name was recorded with his brother due to enmity. He is residing separately. He filed the proceedings before the Assistant Collector. The enquiry officer finally stated in his report that since proceedings under Section 7 of the Act of 1961 were pending, he could not take any action and consigned the file.

(9) Learned trial Court recorded the following in Para 10 of its judgment:-

“10. As per demarcation report dated 13.4.2016 (Ex.P1 to Ex.P6), in document **Ex.P5** Ajit and Rajesh son of Dhanpat are shown in unauthorized possession of Khasra No.84 and Khasra No.111. As per **Ex.D4** copy of ration card, Ajit respondent No.1 is residing in house No.265 and as per **Ex.D5** copy of ration card, Rajesh alias Balwan is residing in house No.266. From the documents Ex.D4 and Ex.D5 it appears that Ajit and Rajesh are residing in separate houses. It is not proved that it is actually respondent No.1 who has encroached upon the land of Gram Panchayat and not Rajesh. The possibility of alleged encroachment by Rajesh cannot be ruled out. Moreover, document Ex.D1 copy of application shows that respondent No.1 being Sarpanch of village has initiated proceedings under Section 7 of the Punjab Village Common Land (Regulation) Act, 1961, against said Rajesh. As such, respondent No.1 himself had taken action against his family members who are alleged to be in possession. In these circumstances, respondent No.1 cannot be held responsible for the so-called encroachment of panchayat land by his brother Rajesh. The principle of actual physical possession is being stretch too far by petitioner while asking the Court to presume about the possession of respondent No.1 over the house allegedly constructed on the Panchayat land.”

(10) Perusal of the above finding of the learned trial Court shows that he has held on facts that both respondent No.3 and his brother Rajesh have been shown in unauthorised possession of Khasra No.84 and Khasra No.111 and Ration Card shows that respondent No.3 is residing in House No.265 and thus, they are residing separately. Despite the fact that he recorded the finding about both respondent No.3-Ajit Singh and Rajesh being shown in unauthorised possession, the learned trial Court has recorded a finding which is perverse that it is actually not proved whether respondent No.3-Ajit Singh encroached upon the land of Gram Panchayat or Rajesh had encroached. Thus, we find that the finding on fact is self-contradictory. The second aspect is that respondent No.3 himself stated before the trial Court that he had lodged proceedings under Section 7 of the Act of 1961 against his brother Rajesh and his family members. The trial Court therefore, held that respondent No.3-Ajit Singh was not responsible for so-called encroachment by his brother. There is a clear fallacy in this finding inasmuch as proceedings under Section 7 of the Act of 1961 have been filed for removal of encroachment and therefore, those who are in

unauthorised occupation had to be proceeded with. There is a documentary evidence Exhibit P5 including demarcation report Exhibit P1 to P6 indicating both Ajit Singh and his brother Rajesh in unauthorised possession of Khasra No.84 and Khasra No.111. The fact that proceedings under Section 7 of the Act of 1961 were launched by respondent No.3-Ajit Singh himself is enough to hold that he filed these proceedings in order to make a show that he was not encroacher but his brother was the encroacher which is factually also incorrect as per Exhibit P5. He launched those proceedings to mislead one and all. However, the trial Court has given benefit thereof to him without finding that respondent No.3-Ajit Singh had taken self-contradictory stand.

(11) The finding recorded by the learned trial Court in substance is that it was his brother Rajesh who had made encroachment and therefore, respondent No.3 was not at fault. The encroachment made by his brother should not affect respondent No.3 as he is a different person/individual.

(12) In the light of the documentary evidence Exhibit P1 to P6 and demarcation report dated 13.04.2016 Exhibit P5, we are of the firm opinion that respondent No.3-Ajit Singh continues to occupy the land bearing Khasra No.84 and Khasra No.111 in unauthorised manner along with his brother Rajesh which is proved by documentary evidence. Testing the alternate submission made by respondent No.3 and the finding of the trial Court that encroachment by Rajesh would not affect the case of respondent No.3, we find that the Apex Court has recently pronounced the law vide three-judges Bench overruling the view taken by the Bench of two-Judges restoring the view taken by the Division Bench of the Bombay High Court at Nagpur Bench in the case of *Devidas Surwade* versus *Commissioner, Amravati*² (authored by A.B. Chaudhari, J).

(13) In *Devidas Surwade's* case (supra), the Bombay High Court held thus:-

“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

² 2012 SCC OnLine Bom 2126

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.”

(14) Thus, the crucial word “person” occurring in the relevant provision in the Bombay Village Panchayats (Amendment) Act, 2006 also occurs in Section 175 of the Act.

(15) The two-judges Bench in the Apex Court in the case of *Sagar Pandurang Dhundare* versus *Keshav Aaba Patil and others*³ had overruled the decision of the Division Bench of the Bombay High Court in *Devidas Surwade's* case (supra) by construing the word “person” too narrowly.

(16) The said decision of the two-judges Bench of the Apex Court came up for consideration before the three-judges Bench of the Apex Court in *Janabai's* case (supra). In Paras-24 and 29, Supreme Court interpreted the word “person” after referring to the relevant provisions and also considering the decision in *Devidas Surwade's* case (supra). Paras-24 and 29 in *Janabai's* case (supra) read thus:-

“24. As we understand from the above paragraph, the two-Judge Bench has been guided by the word 'person' as used in Section 14(1) and further influenced by the language employed in Section 53. That apart, the analysis made by the two-Judge Bench, as we notice, has given a restricted meaning to the word 'person' who has encroached upon the government land or public land. It has also ruled that such a person is one who has actually for the first time encroached upon the government or public land. In *Devidas Surwade* (supra), the Division Bench of the Bombay High Court, placing reliance on the Statement of Objects and Reasons and laying stress on the word 'person', noted that the legal heirs of an encroacher who continue to occupy the government land or government property are to be treated as encroachers. It has been held that if such an interpretation is not adopted, the result would be absurd, for the government land would

³ (2018) 1 SCC 340

continue to remain encroached and the legal heirs or the assignees or the transferees remaining on the encroached government land shall claim the right to get elected as a member of a democratically elected body. According to the Division Bench of the Bombay High Court, such an interpretation would defeat the very object of the Bombay Village Panchayat (Amendment) Act, 2006.

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29. We may note here with profit that the word 'person' as used in Section 14 (1) (j-3) is not to be so narrowly construed as a consequence of which the basic issue of "encroachment" in the context of disqualification becomes absolutely redundant. The legislative intendment, as we perceive, is that encroachment or unauthorized occupation has to be viewed very strictly and Section 53, therefore, provides for imposition of daily fine. It is also to be borne in mind that it is the Panchayat that has been conferred with the power to remove the encroachment. It is the statutory obligation on the part of the Panchayat to protect the interest of the properties belonging to it. If a member remains in occupation of an encroached property, he/she has a conflict of interest. If an interpretation is placed that it is the first encroacher or the encroachment made by the person alone who would suffer a disqualification, it would lead to an absurdity. The concept of purposive interpretation would impel us to hold that when a person shares an encroached property by residing there and there is continuance, he/she has to be treated as disqualified. Such an interpretation subserves the real warrant of the provision. Thus analysed, we are of the view that the decision in *Sagar Pandurang Dhundare* (supra) does not lay down the correct position of law and it is, accordingly, overruled."

(17) Thus, the larger Bench overruled the view taken by the two-judges Bench of the Apex Court in *Sagar Pandurang Dhundare's* case (supra) and upheld the decision in *Devidas Surwade's* case (supra).

(18) To sum up, the alternate plea taken by respondent No.3-Ajit Singh about the encroachment made by his brother Rajesh and his family members for which he launched proceedings under Section 7 of the Act of 1961 thus, also must fail in the light of the aforesaid pronouncement of law made by the Apex Court in *Janabai's* case (supra).

(19) The upshot of the above discussion is that the present petition must succeed. In the result, we make the following order:-

ORDER

- (i) CWP No.2431 of 2018 is allowed with costs in the sum of `25,000/- which shall be paid by respondent No.3-Ajit Singh to the present petitioner within a period of 8 weeks from today;
- (ii) The impugned judgment dated 27.11.2017 (Annexure P-4) passed by the Civil Judge (Junior Division), Charkhi Dadri in Election Petition No.36 of 2016 titled as 'Vijay versus Ajit Singh and others' is quashed and set aside;
- (iii) Consequently, Election Petition No.36 of 2016 filed by the petitioner-Vijay is allowed and it is declared that the election of respondent No.3-Ajit Singh as Sarpanch of Gram Panchayat of village Kari Rupa (Dass) is illegal and set aside;
- (iv) The competent authority concerned is directed to conduct election to the post of Sarpanch of Gram Panchayat of village Kari Rupa (Dass) within a period of four weeks from the date of issuance of certified copy of this order to the petitioner;
- (v) The Deputy Commissioner concerned shall remove the unauthorised encroachment/occupation made by the petitioner and his family as found in any case within a period of six months from today after following the due procedure according to law and report compliance to this Court. The Deputy Commissioner concerned shall be personally responsible.

Shubreet Kaur