

Gitaben Vs. The State of Gujarat Through and Another

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Court : Gujarat

Decided On : Mar-17-2015

Judge : The Honourable Mrs. Justice Abhilasha Kumari

Appeal No. : Special Civil Application No. 18886 of 2014

Appellant : Gitaben

Respondent : The State of Gujarat Through and Another

Judgement :

Cav Judgment:

1. Rule. Mr.Udit D. Mehta, learned Assistant Government Pleader, waives service of notice of Rule for respondent No.1 and Mr.H.S.Munshaw, learned advocate, waives service of notice of Rule for respondent No.2.

2. The challenge in this petition preferred under Articles-226 and 227 of the Constitution of India is to the impugned order dated 18.10.2014, passed by respondent No.2, District Development Officer and the order dated 16.12.2014, passed by respondent No.1, Additional Development Commissioner, whereby the order of respondent No.2, removing the petitioner as Sarpanch of Kadadara Gram Panchayat, has been confirmed.

3. The case of the petitioner, as stated in the petition, is that she was elected as the Sarpanch of Kadadara Gram Panchayat and was performing her duties as

such. A Show Cause Notice dated 26.03.2014 was issued to the petitioner by respondent No.2-District Development Officer, under Section-57(1) of the Gujarat Panchayats Act, 1993 (the Act, for short) to show cause why she should not be removed from the office of Sarpanch, on the ground that she has failed to remove the encroachments on the Gamtal and Gauchar lands of the Panchayat. It is alleged in the said notice that during the term of the petitioner as Sarpanch, encroachments Nos.1 to 17 have been registered in the Encroachment Register of the village. It is further alleged that as per the representation received by respondent No.2, new encroachments have come into existence and though the Sarpanch is duty-bound to remove them under Section- 105 of the Act, no proceedings have been initiated by the petitioner. It is, therefore, alleged that the petitioner is directly responsible for the said encroachments. The petitioner replied to the Show Cause Notice on 09.04.2014. Thereafter, proceedings before respondent No.2 took place from time to time. The petitioner sought time for submitting her reply, but did not attend the hearing on 22.09.2014. After taking into consideration the material on record, including the reply of the petitioner to the Show Cause Notice, respondent No.2 passed the impugned order dated 18.10.2014, under Section-57(1) of the Act, removing the petitioner from the office of Sarpanch. Aggrieved by the said order, the petitioner preferred an appeal before respondent No.1, who rejected it by the impugned order dated 16.12.2014. Aggrieved by the aforementioned orders, the petitioner has approached this Court.

4. Mr.Vijay H. Patel, learned advocate for H.L.Patel Advocates, on behalf of the petitioner, has submitted that the impugned orders passed by respondents Nos.2 and 1 deserve to be quashed and set aside, as the said authorities ought to have taken into consideration that there is a Report of the Circle Inspector of the District Panchayat, Gandhinagar, dated 26.08.2013, stating that the seventeen encroachments that have been registered in the Encroachment Register have been made during different periods of time and are required to be removed. Some of the encroachments have been made during a period of five to ten years, even before the petitioner assumed the office of Sarpanch. Therefore, she alone, cannot be held responsible for them.

5. It is further submitted that in the reply to the Show Cause Notice, the petitioner has stated that out of the seventeen encroachments mentioned in the Encroachment Register, the encroachments at Serial Nos.4, 3, 5 and 9 cannot be considered as encroachments, for reasons stated in the reply. The encroachments at Serial Nos.1, 6 and 7 have been removed. In all, seven encroachments have been removed and for the rest of the nine encroachments at Serial Nos.2, 8, 10, 11, 12, 13, 14, 15 and 17, the constructions have taken place prior to tenure of the petitioner. It has further been stated in the reply that in spite of this, notices have been issued by the petitioner to the encroachers. However, as the Code of Conduct for the general elections was in force, no action could be taken. That, this explanation has not been considered or dealt with by either respondent No.2 or respondent No.1 in the impugned orders and no findings have been recorded thereupon.

6. It is next submitted that as per Section-105 of the Act, the duty to remove the encroachments lies with the village Panchayat as a whole and not with the Sarpanch alone. In the Report of the Taluka Development Officer dated 28.01.2014, as well, it is stated that notices have been sent to the Gram Panchayat, Kadadara, for the removal of encroachments. It cannot, therefore, be said that the petitioner is personally liable or responsible for the said encroachments.

7. The learned advocate for the petitioner has further contended that this Court, in judgment dated 05.05.2000, passed in Special Civil Application No.2073/2000, has held that failure to remove an encroachment can, at best, be said to be inefficiency on the part of the Sarpanch, but it cannot be said to constitute misconduct within the meaning of Section- 57(1) of the Act. It is submitted that this judgment was cited before respondent No.1 and has also been mentioned in the impugned order. In spite of this, respondent No.1 has stated that he does not agree with the contentions raised by the petitioner with regard to the said judgment and has not taken it into consideration, though the judgment of this Court is binding upon him.

8. Learned advocate for the petitioner has also relied upon the judgment in the case of Hansaba Hardevsinh Rana Vs. District Development Officer and another, reported in 2009 (3) GLH 529, wherein it is held that the act of opposing the removal of encroachers does not amount to misconduct, disgraceful conduct, abuse of power or persistent default in the performance of duties, so as to warrant removal from the membership of Panchayat. It is further contended that the case of the petitioner is on a much better footing, as she has never opposed the removal of the encroachments, but has taken action, as has been explained in the reply to the Show Cause Notice, which has not been considered by the respondents.

9. Another judgment relied upon by the learned advocate for the petitioner is Dineshbhai Govabhai Makwana Vs. State of Gujarat and others, reported in 2012 (3) GLR 2285. It is submitted that the power of removal can be invoked only for strong and weighty reasons and the provisions of Section-57(1) of the Act, which confers drastic power to remove a democratically elected Sarpanch from office, ought to be read strictly.

10. Reliance has been placed upon the judgment in the case of Dashrathlal Ishwarlal Patel Vs. State of Gujarat, reported in 2013 (2) GLR 1257, by submitting that the sole responsibility to remove the encroachments did not rest upon the petitioner, therefore, she cannot be made personally liable. If the encroachments are not removed, it would not constitute misconduct under Section-57(1) of the Act.

11. Mr.Udit D. Mehta, learned Assistant Government Pleader appearing for Respondent No.1, has opposed the submissions advanced by the learned advocate for the petitioner and supported the order passed by respondent No.1, by submitting that the said order is a reasoned one, having been passed after taking into consideration the entire material on record. Hence, according to him, no interference is called for, by this Court.

12. Mr.H.S.Munshaw, learned advocate for respondent No.2, has strongly opposed the petition by submitting that the petitioner, being the Sarpanch, is the head of the Gram Panchayat and is, therefore, directly responsible for the failure

to remove the encroachments on the Gamtal and Gauchar lands. That, the petitioner has not produced any document on record to show that she had made any effort to remove the encroachments. It is contended that the petitioner has gained sufficient experience as Sarpanch, as she has occupied the said office for about four years, and ought to have removed the encroachments.

13. It is further submitted on behalf of respondent No.2 that the judgments relied upon by the learned advocate for the petitioner would not be applicable, as nowhere in the said judgments has the Court stated that a Sarpanch ought to be permitted to remain inactive in the performance of his/her duties. It is further submitted that the petitioner has been negligent and irresponsible in the performance of her duties as Sarpanch and her inaction has resulted into continuance of the encroachments upon public property. That there was a complaint from the villagers and on the basis of such complaint, a Show Cause Notice was issued to the petitioner under Section-57(1) of the Act. In spite of the fact that the Taluka Development Officer also issued a notice and instructed the petitioner, on 27.11.2013, to take necessary action for the removal of the encroachments, the petitioner did not take any steps and has tried to shield the encroachers on one ground or the other.

14. Learned advocate for respondent No.2 has referred to the provisions of Section-55 of the Act, which delineates the executive functions of the Sarpanch or Up-Sarpanch, by submitting that it is the duty of the Sarpanch to ensure the removal of encroachments and as the petitioner has failed to perform her duties, she has rightly been removed from the post of Sarpanch.

15. On the above grounds, it is prayed that the petition be dismissed.

16. This Court has heard learned counsel for the respective parties at length, perused the averments made in the petition, contents of the impugned orders and other documents on record.

17. This Court has also accorded thoughtful consideration to the submissions advanced at the Bar.

18. The sole ground on which the petitioner has been removed from the office of Sarpanch is her alleged failure to remove the encroachments on the Gamtal and Gauchar lands. The petitioner has, in her reply to the Show Cause Notice issued by respondent No.2, given her explanation regarding the seventeen encroachments registered in the Encroachment Register, referring to each one of them. A perusal of the impugned order passed by respondent No.2 reveals that after reproducing the reply of the petitioner, the said respondent has failed to deal with the contentions and explanations put forth by the petitioner while passing the impugned order, leave alone to accord them even a minimal consideration.

19. The petitioner has stated in her reply that out of the seventeen encroachments registered in the Encroachment Register, about four encroachments no longer exist. Three encroachments have been removed and nine encroachments have taken place during the tenure of the earlier Sarpanch (and not during her tenure). The petitioner has also stated that notices have been issued to the existing encroachers, but due to the coming into force of the Code of Conduct for the general elections, no further action could be taken. This explanation is merely recorded for the sake of recording in the impugned order, but has not been given any consideration.

20. Respondent No.2 has removed the petitioner on the sole ground that she has failed to remove the encroachments, but has not stated whether such failure would constitute misconduct in the discharge of her duties, disgraceful conduct, abuse of power or persistent default in the performance of duties as Sarpanch under Section-57(1) of the Act. Failure to mention the grounds mentioned in Section 57(1) of the Act on the basis of which the petitioner has been removed, becomes relevant as it is only in those specified contingencies that the power to remove a duly elected Sarpanch, as conferred by the statute, can be exercised. There cannot be an additional ground, not mentioned in the said Section, as that would amount to expanding the scope of Section 57(1) of the Act, which cannot be done by respondent No.2.

21. In light of the above, it would be fruitful to refer to the provisions of Section-57 (1) of the Act, which are reproduced hereinbelow:

57. Removal from office

(1) The competent authority may remove from office any member of the Panchayat, the Sarpanch or, as the case may be, the Upa-Sarpanch, thereof, after giving him an opportunity of being heard and giving due notice in that behalf to the Panchayat and after such inquiry as it deems necessary, if such member, Sarpanch or, as the case may be, Upa-Sarpanch has been guilty of misconduct in the discharge of his duties or of any disgraceful conduct or abuses his powers or makes persistent default in the performance of his duties and functions under this Act or has become incapable of performing his duties and functions under this Act. The Sarpanch or, as the case may be, the Upa-Sarpanch, so removed may at the discretion of the competent authority also be removed from the membership of the Panchayat.

(2) *****

(3) *****

22. Failure to remove encroachments is not one of the grounds mentioned in Section 57(1) of the Act. In the view of this Court, it was incumbent upon respondent No.2 to form a clear opinion whether the alleged inaction of the petitioner, in not removing the encroachments, falls under any of the contingencies mentioned in Section-57(1) of the Act, before exercising the power of removal vested in him. Respondent No.2 has not stated in the impugned order that the petitioner falls under any of the contingencies mentioned in sub-section (1) of Section 57, which are the only grounds for the removal of a Sarpanch. It, therefore, appears that respondent No.2 has exercised the powers vested in him without proper application of mind to the relevant provisions of law and has removed the petitioner on a ground not specified in Section-57(1) of the Act.

23. The petitioner had preferred an appeal against the order of respondent No.2 before respondent No.1, which has been rejected in a mechanical manner, by confirming the order of respondent No.2.

24. In the impugned order passed by respondent No.1, it is stated that the petitioner is directly responsible for her alleged failure to remove the encroachments. In the said order, the reply of the petitioner to the Show Cause Notice has, again, been reproduced at length, including the contention that some of the encroachments were made prior to the tenure of the petitioner. Having recorded the reply of the petitioner, respondent No.1 has failed to consider the explanations advanced by the petitioner and has not dealt with even a single one of them.

25. It is surprising to note that respondent No.1 has stated in the impugned order that he does not agree with the contentions advanced on behalf of the petitioner, regarding the judgment of this Court in Special Civil Application No.2073/2000, dated 05.05.2000. The said judgment has been conveniently brushed aside by respondent No.1 as it may not have matched with the conclusion he wanted to arrive at. The said judgment squarely covers the issues involved in the present petition and the relevant portion thereof is reproduced hereinbelow:

7. ***** So far as charges Nos.3 to 9 are concerned, which relate to the failure on the part of the petitioner to remove unauthorized encroachment, it may straightaway be observed that such allegations may at the most speak of inefficiency, but certainly they do not constitute any misconduct on the part of the petitioner. There are large number of unauthorised encroachments even on the lands which belong to the Government and if the Government functionaries are not able to remove the encroachment for various reasons, including the law and order problems or for other alike reasons, it cannot be said that such functionaries have misconducted themselves. In any case, a difference has to be made between inefficiency and misconduct. I find that it is a case in which there was no material which can be said to be relevant and germane to the grounds of misconduct as mentioned in S.57(1) of the Act and the petitioner, who was an elected representative of the Panchayat functioning as a Sarpanch, has been removed for reasons which are not at all germane to the grounds mentioned in S.57(1) and there was no material to form an opinion against the petitioner with regard to any of the charges for which he was subjected to the show cause notice and for which the impugned orders have been passed. It appears that the authorities charged

with the power under S.57 for the purpose of removing and for considering the appeal against the order of removal have not addressed themselves to the requirements and have misconstrued the case of the petitioner to be a case of misconduct whereas in fact at the most it could be said to be a case of inefficiency on the part of the petitioner if the unauthorised encroachments have not been removed. The task of removing unauthorised encroachment is a general problem which is faced by various local bodies, including Municipal Corporations and the Government itself even when it is armed with court orders and for reasons beyond the control of the concerned functionaries, many times it becomes impossible to remove such unauthorised encroachment without use of force and therefore, in the opinion of this court such a failure, which at the most reflect the level of efficiency, cannot be treated as misconduct or a persistent default in performance for the purpose of removing an elected office bearer. If on such grounds elected representatives are removed from their offices, as if they are Government servants, it would militate against the basic principles of democratic set up and the democratic institutions at the local self Government and it would amount to a direct interference with the functioning of the local bodies contrary to the provisions made by the Legislature. This Court while considering such matters is not sitting in Appeal over the orders passed by the authorities, but what is found in the facts of this case is that the orders have been passed against the petitioner for reasons which are wholly extraneous and not at all germane to the grounds which are mentioned in S.57(1) for the purpose of removal of an elected office bearer like Sarpanch and it is a case of total absence of any material on the basis of which the opinion could be formed against the petitioner for the purpose of holding the charges to be proved-- rather the charges have no nexus to the grounds mentioned in Sec.57(1). (emphasis supplied)

26. The principles of law enunciated by this Court in the above judgment would fully apply to the facts of the present case. It has been contended by the petitioner in the reply to the Show Cause Notice, and has been mentioned in both the impugned orders, that as many as nine encroachments out of seventeen had been made before the tenure of the petitioner as Sarpanch. Regarding the remaining encroachments, the petitioner has given her explanation which has not been taken into consideration at all by the respondent authorities. If it is the case of the

respondents that the petitioner, being the Sarpanch of the Gram Panchayat, is solely responsible for the existence of the encroachments, then this Court fails to understand how the petitioner can be held to be responsible for the encroachments that have taken place prior to her tenure as Sarpanch. In any case, as held by this Court in the above-quoted judgment, failure to remove unauthorized encroachments by the Gram Panchayat can be termed as inefficiency, but it cannot be termed as misconduct. As stated by this Court, the task of removing unauthorized encroachments is a general problem faced by various local bodies, including Municipal Corporations and the Government itself. If the said local bodies or the Government fail to remove the encroachments, it cannot be said that the Officers responsible have committed misconduct.

27. A contention has been raised on behalf of respondent No.2 that the petitioner is the head of the Gram Panchayat and is, therefore, responsible for the removal of encroachments under Section-105 of the Act. A perusal of the provisions of Section-105 states that the Panchayat may remove such obstructions and encroachments, but does not confer exclusive power upon the Sarpanch of the Panchayat or cast any duty solely upon the Sarpanch, individually, to remove such encroachments. In fact, it is the collective duty of the Gram Panchayat and not the sole responsibility of the Sarpanch. Of course, the Sarpanch, by virtue of his/her position, can give impetus to the decision to remove encroachments, but as per Section-105 of the Act, the responsibility, or duty, to do so, vests in the Gram Panchayat as a body and not in the Sarpanch alone.

28. In the Report of the Taluka Development Officer dated 28.01.2014, annexed as Annexure-B to the affidavit-in-reply of respondent No.2, the Taluka Development Officer has stated that notices have been issued to the Kadadara Gram Panchayat for the removal of the encroachments. It is nowhere mentioned that notices have been issued to the petitioner, individually, in her capacity as Sarpanch. The respondents are, therefore, conscious of the fact that it is the collective duty of the Gram Panchayat to remove encroachments upon Government land and not the duty of the Sarpanch alone. If that is so, then the action of respondents Nos.2 and 1 in removing the petitioner as Sarpanch on the ground that she has failed to remove the encroachments and is personally

responsible, is unsustainable in law.

29. In the impugned order passed by respondent No.1, an allegation is made that the petitioner is conniving with the encroachers by not taking action to remove the encroachments. This observation is not based upon any material on record and discloses a predetermined mindset. The non-consideration of the points raised by the petitioner in her reply to the Show Cause Notice and the aspect that several encroachments have occurred prior to her tenure as Sarpanch, goes to the very root of the matter and indicates that the respondents have passed the impugned orders without proper application of mind to the factual and legal position, in their haste to remove the petitioner from the post of Sarpanch.

30. In *Dineshbhai Govabhai Makwana Vs. State of Gujarat and others (Supra)*, this Court has held as below:

20. Normally, the High Court would not be lightly persuaded to enter into the correctness of findings rendered concurrently by two authorities, ostensibly based upon material on record. However, the court is not precluded, under its powers of judicial review, from ensuring that those findings are amply supported by cogent and convincing material, especially in a case where removal of a democratically elected Sarpanch from his office would entail serious civil consequences. Under Article 26 of the Constitution of India, the Court is empowered to examine the matter in order to do complete justice and prevent a miscarriage of justice. The nature of the power of removal under Section 57(1) of the Act and the resultant consequences are such, that it becomes all the more necessary for the Court to ensure that such drastic power is not exercised for minor irregularities in the discharge of duties and functions by a Sarpanch, but for solid and weighty reasons.

21. It may be pertinent, at this stage, to examine certain judicial pronouncements of the Apex Court in this regard.

22. In *Tarlochan Dev Sharma v. State of Punjab*, (2001)6 SCC 260, the Apex Court, while dealing with the removal of a President of the Council under the Punjab Municipal Act, 1911, held as below:

7. In a democracy governed by rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law. That a returned candidate must hold and enjoy the office and discharge the duties related therewith during the term specified by the relevant enactment is a valuable statutory right not only of the returned candidate but also of the constituency or the electoral college which he represents. Removal from such an office is a serious matter. It curtails the statutory term of the holder of the office. A stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held....

(emphasis supplied)

22.1 Further, in paragraph 11 of the reported judgment, the Apex Court has further observed as below:

11. The expression abuse of powers in the context and setting in which it has been used cannot mean use of power which may appear to be simply unreasonable or inappropriate. It implies a willful abuse or an intentional wrong. An honest though erroneous exercise of power or an indecision is not an abuse of power. A decision, action or instruction may be inconvenient or unpalatable to the person affected but it would not be an abuse of power. It must be such an abuse of power which would render a Councilor unworthy of holding the office of President. Inasmuch as an abuse of power would entail adverse civil consequences, the expression has to be narrowly construed. Yet again, the expression employed in Section 22 is abuse of his powers or habitual failure to perform his duties. The use of plural - powers, and the setting of the expression in the framing of Section 22 is not without significance. It is suggestive of legislative intent. The phrase abuse of powers must take colour from the next following expression - or habitual failure to perform duties. A singular or casual aberration or failure in exercise of power is not enough; a course of conduct or plurality of aberration or failure in exercise of power and that too involving dishonesty of intention is abuse of powers within the meaning of Section 22 of the Act. The legislature could not have intended the

occupant of an elective office, seated by popular verdict, to be shown exit for a single innocuous action or error of decision. (emphasis supplied)

23. More recently, in *Sharda Kailash Mittal v. State of M.P.*, AIR 2010 SC 3450, while dealing with a case of removal of President under the Madhya Pradesh Municipalities Act, 1961, under an analogous provision, the Supreme Court has held as below:

18. For taking action under Section 41-A for removal of President, Vice-President or Chairman of any Committee, power is conferred on the State Government with no provision of any appeal. The action of removal casts a serious stigma on the personal and public life of the concerned office-bearer and may result in his/her disqualification to hold such office for the next term. The exercise of power, therefore, has serious civil consequences on the status of an office bearer. There are no sufficient guidelines in the provisions of Section 41-A as to the manner in which the power has to be exercised, except that it requires that reasonable opportunity of hearing has to be afforded to the office bearer proceeded against. Keeping in view the nature of the power and the consequences that flows on its exercise it has to be held that such power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for minor irregularities in discharge of duties by the holder of the elected post. The provision has to be construed in strict manner because the holder of office occupies it by election and he/she is deprived of the office by an executive order in which the electorate has no chance of participation.

19. In the present case, the actions of the appellant, even if proved, only amount to irregularities, and not grave forms of illegalities, which may allow the State Government to invoke its extreme power under Section 41A. (emphasis supplied)

31. As stated by the Supreme Court in *Sharda Kailash Mittal Vs. State of M.P.*, reported in AIR 2010 SC 3450, the power or removal can be invoked only for strong and weighty reasons. A democratically elected Sarpanch ought not to be removed by exercise of powers by the respondent authorities for flimsy reasons, as the power conferred upon the respondents under Section-57(1) of the Act is drastic in nature. The very nature of the power casts an obligation upon the

respondent authorities to exercise it cautiously and with circumspection, and not at the drop of a hat.

32. In the present case, after considering the entirety of the material on record, this Court is of the firm view that the exercise of power of removal of the petitioner from the post of Sarpanch by respondent No.2, as confirmed by respondent No.1, is not in consonance with the provisions of Section-57(1) of the Act. In fact, the charge against the petitioner has no nexus to the grounds mentioned in the aforesaid provision of law.

33. For the aforesaid reasons, the impugned order dated 18.10.2014, passed by respondent No.2 and the order dated 16.12.2014, passed by respondent No.1, are hereby quashed and set aside. Consequently, the petitioner is directed to be reinstated as the Sarpanch of Gram Panchayat Kadadara, forthwith.

34. The petition is allowed, in the above terms. Rule is made absolute, accordingly. There shall be no orders as to costs.

Direct service of this order is permitted.

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