

sbw

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9150 OF 2013

Kailas Mahadeo Karande

...Petitioner

V/s.

Additional Divisional Commissioner,
Pune and Ors.

...Respondents

.....

Mr. Dilip Bodke for the Petitioner.

Mrs. V. S. Nimbalkar, AGP, for Respondent nos.1 and 2.

Respondent nos.3,4 & 5 absent.

.....

CORAM : A. K. MENON, J.

DATE : 16TH OCTOBER, 2015.

ORAL JUDGMENT:

Rule. Rule made returnable forthwith. By consent, taken up for final hearing.

2] By this petition, the petitioner has challenged the order dated 24th September, 2012 passed by the Collector, Solapur in Disqualification Proceeding No.1315 of 2012 and the impugned order dated 31st August, 2013 passed by the Incharge Additional Divisional Commissioner, Pune. The petitioner is a resident of Kavhe, Taluka Madha, District Solapur, Maharashtra. He had contested the election for the Gram Panchayat, Kavhe which was held on 23rd October, 2010 and he was declared elected

from ward no.1. He was also elected as Sarpanch of village Kavhe for 5 years from October 2005 to October 2010. Respondent no.5 had also contested the election but unsuccessfully. It is the petitioner's case that the respondent no.5 has challenged the election by filing the Election Petition No.3 of 2010 which is still pending for adjudication. He contended that on 19th January, 2012 a meeting was convened of the Gramsabha but it was adjourned for want of quorum and it was reconvened at 3.45 p.m. Under Section 14(1)(J-5) of the Maharashtra Village Panchayat Act, 1958 it was incumbent upon the Gram Panchayat to maintain a list of families who have their own toilets and were regularly uses such toilets in their homes. On or about dated 17th January, 2012 the Block Development Officer, Kavhe had issued a list of the families in the village who were using individual toilets in their home. The list featured about 93 members which included the name of the petitioner at item no.93. The petitioner's name was appearing on the said list which according to the petitioner was embodied in a Resolution dated 19th January, 2012, copy of which appears at as part of Exhibit A to this Petition. He submits that his name, although appearing at item 93 and on the last page of the Resolution was deleted by altering the document by applying a whitener. This petitioner has affirmed that this fact has been personally verified by him by inspecting the proceedings at the Gramsabha and by obtaining the certified copy thereof. It is submitted by the petitioner that on 21st January, 2012 the

then Gramsabha had forwarded a report to the Block Development Officer, Class I, Panchayat Samiti, Kurduwadi stating that on 19th January, 2012 the Gramsabha was adjourned for want of quorum and thereafter was reconvened at 3.45 p.m. and the names of the family members who were constructed and were using toilets were listed therein.

3] It is further recorded that although the Gramsevak had included various names he was forced to remove the name of the petitioner and omit to mention names of certain families who had complied with the requirements of building and using their own toilets. The petitioner has further contended that upon learning of the fact that Resolution of 19th January, 2012 had been altered to his disadvantage, he filed a written complaint to the Block Development Officer setting out that his family has a separate toilet which is been used and that his name has been deleted on the false contention that toilet was not constructed and not used. He attributes these false complaints to respondent no.5. In fact the petitioner has since relied upon the certificate dated 29th December, 2011 issued by the Gramsevak, Gram Panchayat, Kavhe, Taluka Madha, District Solapur to the effect that the petitioner had constructed and regularly used toilet in his home. Despite this the Respondent no.5 having filed the Disqualification Application before the District Collector, Solapur the Collector by its order dated 24th September, 2012 held that the

petitioner was disqualified without verifying that no notice of the said hearing have been served upon the petitioner. While passing the aforesaid order it is recorded that notices were issued on 3rd July, 2012 and subsequently punchanama was prepared on 21st July, 2012.

4] Being aggrieved by the order of the Collector the petitioner applied for the certified copy only on 24th November, 2012 because the petitioner was then unaware of the order earlier since he was not served. He then approached the Block Development Officer to obtain a copy of the order and applied for certified copies on 24th November, 2012 after which an Appeal came to be filed before the Divisional Commissioner wherein he applied for stay on or about 7th December, 2012. He contended that while passing the order dated 24th September, 2012 Collector had incorrectly recorded that notice had been served upon the petitioner. The petitioner has challenged the impugned orders on the basis that he has not been heard in the matter and the impugned orders violate the principles of natural justice. Thereafter it appears that the Sarpanch of Village Kavhe has filed an affidavit on 2nd January, 2013 in the aforesaid Appeal before the Additional Divisional Commissioner and stated that the petitioner does have toilet constructed in his home which is regularly being used. She has confirmed that the petitioner's name did appear at serial no.93 which was thereafter scored out and sought to be concealed by using a whitener

which was allegedly applied by one Dhanyakumr Vishwanath Chopade by threatening the then Gramsevak. Political rivalry is alluded to for the aforesaid conduct. After hearing the Appeal, the learned Additional Divisional Commissioner dismissed the Appeal thereby confirming the order passed by the Collector Solapur disqualifying the petitioner. Being aggrieved by the above said order the petitioner has approached this Court by way of the present Petition under Article 226 and 227.

5] I have heard the learned counsel for the petitioner at length and so also the learned AGP. On the last occasion when the matter was taken up for hearing on 14th October, 2015 the learned AGP has produced the record from which she relied upon two extracts which according to her one notice dated 3rd July, 2012 and a panchnama dated 21st July, 2012. At that time the Court had directed to her to file an affidavit in support of their contentions. Accordingly, the affidavit-in-reply has been filed by one Arjun Shankar Chavan, Resident Naib Tahsildar, Taluka Madha, District Solapur on behalf of the Additional Commissioner, Pune and the Collector of Solapur. In the said affidavit the deponent has stated that having gone through the Writ Petition and the record maintained at the office the petitioner's case is not correct and that notice of hearing of 3rd July, 2015 was sought to be served upon the petitioner personally by visiting his residence but at that time the petitioner refused to accept the

same. The deponent further stated that concerned Talathi, Village Kavhe had then prepared a panchanama with signature of witnesses to record the aforesaid refusal to accept the notice. The copy of the notice and panchanama are annexed to this affidavit. However, what is thereafter stated in the said paragraph is of considerable importance. The affidavit states that Collector's office also issued notices of hearing bearing no.1101/2012 dated 1st August, 2012 and 1231/2012 dated 21st August, 2012 and that it is not true that the notices were not served. It is the case of the deponent that the petitioner did not remain present despite notice and as such the matter was closed for orders on 2nd December, 2012 by the Additional Commissioner Pune.

6] After considering the Appeal filed since no written argument or oral submissions made before the Commissioner the deponent of the affidavit has further stated that in accordance with section 14(1)(J-5) of the Maharashtra Village Panchayat Act, 1958 which was mandatory to produce a certificate of having constructed and used of the toilet in one's residence along with the Resolution of the Gram Panchayat to that effect. The petitioner had not submitted any such certificate along with Resolution and, therefore, the Collector had correctly upheld the disqualification and the additional Divisional Commissioner had correctly dismissed the Appeal.

7] Being faced with this contention and deposition, the learned counsel for the petitioner has pointed out that both these contentions i.e. service of notice and the fact that no Resolution was provided, are incorrect. He submitted that the notices dated 3rd July, 2012 were not served upon him and that in any case assuming that he had refused to accept the notices, the Collector could not have proceeded to hear and dispose of the application without having served the notices in accordance with law if not by personal service at least by affixing the same on the last known address of the petitioner. He submitted that this had not been done but the panchnama merely recorded that the petitioner had refused to accept the notice dated 3rd July, 2012. He then pointed out that as far as the notices dated 1st August, 2012 and 21st August, 2012 which forms basis of the order of the Collector dated 24th September, 2012 no such notice was served upon him and that the Collector has incorrectly relied upon the said two notices in the subject line of the letter and in the body of the order. He pointed out that Collector has in terms of the letters which is purported of the list of documents perused by the Collector while passing the order and has relied upon the said notices especially since the petitioner had questioned service of notice and put the respondent to strict proof thereof.

8] Even otherwise I find that in the affidavit of Arjun Shankar Chavan in paragraph 2 the deponent merely stated that the Collector's office had issued "notice of hearing on 1st August, 2012 and 21st August, 2012" There is no averment to the effect that such notices were duly served upon the petitioner. In the circumstances, I am inclined to accept the petitioner's case that there has been no opportunity to showing cause representing his case before the Collector and the Appellate Authority . Mr. Bodake also pointed out in support of this contention, that upon learning of the reliance upon these notices he had made an application to the Collector's office on 24th November, 2012 seeking a copy of the acknowledgment said to have been obtained from him. He also relied upon the receipt dated 26th November, 2012 issued by the Clerk of the Tahsildar's office acknowledging receipt of his application for a copy of the acknowledgment but till date no such acknowledgement copy was furnished to him.

9] The affidavit-in-reply does not deal with any of these aspects and in my view, the failure to deal with these contentions is a telling factor against the respondent and in favour of the petitioners. Prima facie being satisfied with the petitioners case this Court had issued notice on 30th September, 2013 and ordered status quo. The petitioners term is since likely to expire and the learned counsel for the petitioners states that he

also likely to contest forthcoming elections.

10] Mrs. Nimbalkar the learned AGP has pointed out that the petitioner has not produced the original certificate dated 29th December, 2012 long with Resolution before the Commissioner. To this submission, the learned counsel for the petitioner has pointed out that in the list of document filed before the Additional Divisional Commissioner in the Appeal the petitioner has himself furnished 11 documents on 7th December, 2012 in which the certified copy issued by the Gramsevak, Sarpanch of Gram Panchayat, Kavhe has mentioned at item no.10. Thus, according to him, the documents were all before the lower authority before passing of the order.

11] In the circumstances, I am of the view that the petitioner has made out a strong case that he was in use of a toilet within his residence as required by section 14(1)(J-5) of the Maharashtra Village Panchayat Act, 1958 and that the petitioner's name was struck off from the list in the Resolution dated 19th January, 2012. I have perused the copy of the Resolution from it does appear that the last entry after item no.92 has been struck out. The original records in this respect are that of the Gram Panchyant-respondent no.3 however, respondent no.3 has not appeared despite notice being served upon them. In the circumstances, the

petitioner has made out a case for grant of reliefs in present Petition and I pass the following order:-

- (i) Rule is made absolute in terms of prayer clause (d).
- (ii) The impugned orders dated 24th September, 2012 passed by the Collector Solapur in Disqualification Application No. 1315 of 2012 and passed by the Additional Divisional Commissioner on 31st August, 2013 in Appeal No.110 of 2012 are hereby quashed and set aside.
- (iii) There will be no orders as to costs.
- (iv) Parties to act upon a copy of this order authenticated by the Sheristedar of this Court.

(A. K. MENON, J.)