

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 4255 OF 2018

SAYED ALIMUDDIN FAKIRSAB

VERSUS

M. KHAYUM PATEL M. HANIF AND OTHERS

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Advocate for the Petitioner : Shri Vilas Sawant h/f.

Shri A. D. Hande

AGP for Respondent Nos.2 and 3 : Shri S. R. Yadav

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 24th OCTOBER, 2018.

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PER COURT :

1. The learned AGP has filed the affidavit in reply of Mr. Vikram Mahajan Rajput, who is presently working as a Tahsildar of Taluka Biloli, District Nanded. It is pointed from paragraph 3 that the Tahsildar has tendered an unconditional apology. He is present in the Court. It is, however, pointed out that he joined Biloli as a Tahsildar on 01/09/2018 and therefore, he was obviously not aware about the order dated 26/04/2018 and the order dated 21/09/2018, since both these orders were not brought to his notice immediately after service by the concerned clerk with

the Tahsil Office, Biloli. Disciplinary proceedings are contemplated against the said clerk.

2. As such, the explanation tendered by Mr. Rajput is accepted.

3. The petitioner is aggrieved by the passing of the 'no confidence motion' on 23/08/2017, by which, the motion was carried by six votes in favour and none against. Three persons, inclusive of the petitioner, had remained absent. He is also aggrieved by the order of the District Collector, Nanded dated 31/03/2018, by which, his Appeal was dismissed and his ouster as a Sarpanch has been sustained.

4. The learned Advocate for the petitioner has submitted the following grounds while assailing the no confidence motion and the order of the District Collector, Nanded dated 31/03/2018 :

(a) The notice of the special meeting was not properly served on the petitioner by the office of the Tahsildar.

(b) Flimsy grounds have been mentioned in the requisition motion, by which, the no confidence motion was moved.

(c) There was no proposer or seconder to the motion in the special meeting.

5. The learned AGP has placed before the Court the record and proceedings in the matter. He points out from the Appeal memo filed by this petitioner on 24/08/2017 wherein the petitioner has mentioned below ground No.2 as under :-

*"The notice of the appellant was given in the house of the appellant, no personal service is made to the appellant, this has been contested and objected before respondent No.2".
(reproduced verbatim).*

6. The learned AGP then points out from the notice for convening the special meeting dated 18/08/2017, which bears the thumb impression of the wife of the petitioner.

7. I do not find from the proceedings, either that

the petitioner has denied that any adult member of the family was served with the notice, which is permissible under Rule 35(3B) of the Bombay Village Panchayats Sarpanch and Upa Sarpanch (No confidence Motion) Rules 1975 or that the petitioner claims that the thumb impression is not of his wife. In fact, his Appeal memo indicates that the notice from the office of the Tahsildar was served in his house, which means on an adult member of his family. Rule 2(1) permits the service of such notice on the person concerned or any adult member of his family and if the person concerned or the adult member of the family refuses to accept the notice, it has to be affixed on the outer door or a conspicuous part of the house in which the person concerned resides.

8. In the light of this position, the first ground raised by the petitioner fails.

9. The petitioner contends that flimsy allegations have been made against him and as such, the motion

though passed, will have to be quashed and set aside. He is, however, unable to point out any law or provision under the Act which provides for ignoring the passing of no confidence motion if the allegations levelled against the person are not grave or serious.

10. As such, the second ground also fails.

11. The petitioner has raised a third ground that if the special meeting began on 23/08/2017, there was no proposer or seconder to the motion of no confidence. This issue has been dealt with by the learned Full Bench of this Court in the matter of ***Tatyasaheb Ramchandra Kale Vs. Navnath Tukaram Kakde and others, [2014(6) Mh.L.J.,804]***, wherein it is concluded that the proposer or seconder of such a motion is not mandatorily required. The relevant observations read as under :-

"13. Now coming to the Meeting Rules, they have been framed in exercise of the powers conferred by section 176 of the Bombay Village Panchayats Act. In Rule 2(c) the term "motion" is defined which means a proposal

made to evoke action on the part of the panchayat and includes an amendment of a motion. The notice issued under section 35(1) is therefore referable to a proposal as contemplated in Rule 2(c) of the Meeting Rules. Rule 17 of the Meeting Rules, which is at the centre of the debate insofar as the present proceedings are concerned, postulates the manner in which the motion is to be moved and the lapsing thereof. Pertinently the said Rule does not contain the consequences for the non-compliance of proposing or seconding of a motion of no confidence. Obviously the same could not have been provided for in view of the fact that they are the general rules applicable to all meetings of the Panchayat.

Then Rule 39 posits that no motion shall be discussed or noted in the minute book unless and until it has been properly proposed and seconded and contemplates that a motion by the person presiding need not be seconded. Reliance was sought to be placed on the said Rule 39 on behalf of the Appellant to contend that since Rule 39 provides that motion could only be entered into if it is only proposed or seconded. The motion of no confidence which is sought to be moved has therefore to be proposed and seconded otherwise it is invalid. Hence it is section 35 which is the substantive provision which prescribes the prerequisite for a valid motion of no confidence i.e a requisition to be made by $\frac{1}{3}$ rd members who are entitled to sit and vote, and that the motion is

carried by $\frac{2}{3}$ rd of the members who are entitled to sit and vote. However, insofar as the starting point for passing of a motion of no confidence is concerned, it is the requisition which is made to the Tahsildar on the basis of which the Tahasildar acts. Though the Full Bench in Vishwas Pandurang Mokal has held that motion is to be moved in the meeting, the fact that the requisition by $\frac{1}{3}$ rd members is the cause for the meeting cannot be lost sight of. In fact the moving of the requisition can be said to be a part of the right to move the no confidence motion, which is given by the statute. The Meeting Rules as indicated above are the general rules applicable to all the meetings of the panchayat. In respect of the other business of the Panchayat, may be the resolutions are required to be proposed and seconded, however, in so far as motion of no confidence is concerned, a special meeting is convened by the Tahasildar, only for the said purpose, and the prerequisite for the same is $\frac{1}{3}$ rd members requisitioning the said meeting. Hence in our view, the requirements of section 35(1) and (3) of the Bombay Village Panchayats Act, therefore, can be said to dent the requirement of the strict compliance of Rule 17 in the matter of the motion of no confidence being proposed and seconded. It is also required to be noted that the No Confidence Motion Rules do not provide for any such requirement of the motion being proposed or seconded. Hence when the special rules do not provide for the same, a strict compliance of the general rules, for

meetings is not expected. In so observing, we are not, for a moment, questioning the applicability of the Meeting Rules, but we are only answering the question as to what effect the non compliance of Rule 17 in the matter of proposing and seconding the motion has on the validity of the no confidence motion. Hence it is not necessary to draw parallels between how the business is conducted in Parliament, by the Companies registered under the Companies Act and the meeting of the panchayat held for passing of a no confidence motion.

The tools or canons for interpretation as also the indices insofar as to whether a provision is directory or mandatory are well settled over a long period of time. To put it simply a provision is said to be directory if the act complained of is valid though may result in some penal consequences but is mandatory if an act done in breach thereof is termed as invalid. The leading case on the said aspect is Rani Drigraj Kuer v. Raja Sri Amar Krishna Narain Singh, AIR 1960 SC 444. However, it is well settled insofar as mandatory provisions are concerned which result in nullification of the act if not complied with, there are exceptions to the same. Even in respect of provisions which can be said to be directory, there are exceptions namely that even if the directory provision is not complied at all, the same would not affect the validity of the Act. However the test whether the acts committed in breach of the provisions are valid or invalid also

depends upon the intent of the legislature and not only upon the language of the enactment.

15. It is in the context of the test laid down by the Apex Court in K. Narasimhiah's case that the instant case would have to be considered. As indicated above, the object of the Bombay Village Panchayats Act is to establish village panchayats so that they function as units of local self-government. The Act can be said to reflect the policy of the State insofar as decentralization of powers and vesting them in the local self-governments is concerned. The Sarpanch and Upa-Sarpanch can be said to be pivotal to the functioning of the Gram Panchayat, as the executive power is vested in the Sarpanch who is made directly responsible for the due fulfillment of the duties imposed upon the Panchayat by or under the Act. It is considering the pre-eminent position that the Sarpanch and Upa-Sarpanch are said to occupy that the provisions have been made as regards their election, resignation, vacation of the office of the Sarpanch and Upa-Sarpanch by a motion of no confidence passed by the Panchayat. The idea as indicated above is to lend stability to the office of the Sarpanch and Upa-Sarpanch so that the administration at the village level does not suffer. However, if the Sarpanch or Upa-Sarpanch has lost the mandate of the house, his removal is circumscribed by the requirement of the motion of no confidence being moved by $\frac{1}{3}$ rd of the members and passed by $\frac{2}{3}$ rd of the

members, then as a democratic practice he would have to vacate the office. Hence if on account of a formal defect viz that the motion is not proposed or seconded though passed by $\frac{2}{3}$ rd majority, if the motion is to be termed as invalid, the same would result in nullifying and defeating provision in the Bombay Village Panchayats Act which provides the manner in which a Sarpanch can be removed. The effect of such invalidation would be that the smooth functioning of the elected body would be affected. The consequence would be that though the requirements of the Act have been fulfilled, the proceedings would be held to be invalid on account of the non compliance of Rule 17, which is part of subordinate legislation, in the matter of proposing and seconding of the motion. A provision contained in a subordinate legislation cannot prevail, if the requirement of the main enactment i.e the Act has been fulfilled. In such an eventuality the requirement of the subordinate legislation would have to give way to the Act and hence the requirement of Rule 17 in the matter of proposing and seconding the motion can only be said to be directory. For the same reason Rule 39 which is part of the same Meeting Rules would have no impact on the conclusion that Rule 17 is directory and not mandatory.

Insofar as the judgment in Sadashiv H. Patil's case (supra) is concerned, in the said case, the Apex Court was concerned with the disqualification of a Municipal

Councillor under the Maharashtra Local Authority Member's Disqualification Act, 1986. The scheme of the said Act stands apart from the provisions as contained in the Bombay Village Panchayats Act. Under the said Act an application for disqualification is contemplated. The said application can be filed if a Councillor is alleged to have incurred a disqualification under section 3 of the said Act. The application has to be adjudicated in terms of section 7 of the said Act and since the result of the disqualification if allowed is drastic, i.e the Councillor ceases to be a Councillor, the Apex Court held that the provisions have to be strictly complied with. In our view, the said judgment would have no application as the scheme of the said Act stands apart from the provisions of the Bombay Village Panchayats Act. Moreover, the Sarpanch against whom a motion of no confidence is passed, ceases to be a Sarpanch, but however continues to be a member of the Gram Panchayat.

21. *Finally to put the matter in perspective, the requirement of Rule 17 in the matter of proposing and seconding the motion cannot impinge upon the validity of the motion of no confidence which has otherwise been passed by fulfilling the requirement of section 35(3) of the Bombay Village Panchayats Act, 1958. The infraction that has occurred on account of the motion not being formally proposed and seconded cannot invalidate the motion if the same has been passed by fulfilling the*

requirements of section 35(3) of the Bombay Village Panchayats Act, as the said infraction does not affect the merits of the case. Hence we hold that Rule 17 is directory, and the test laid down in section 44(3) of the Bombay Village Panchayats Act namely whether the defect affects the merits of the case, would have to be applied, if a challenge is raised to such a motion. We accordingly answer the reference and remit the matter back to the Division Bench for the above Letters Patent Appeal being decided on merits.

Reference answered accordingly."

Thus, Rule 17 providing for such a proposer or a seconder is directory in nature.

12. Considering the above, this petition, being devoid of merit is, therefore, dismissed.

13. The record and proceedings are returned forthwith to the learned AGP.

(RAVINDRA V. GHUGE, J.)

shp/-