

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 12390 OF 2017

Vachista Dnyanoba Jadhav and others ...Petitioners

versus

The Collector, Parbhani and others ...Respondents

...
Advocate for Petitioners : Mr. Salunke Sudarshan J.
AGP for Respondent Nos. 1 and 2: Mr. S.P. Tiwari
Advocate for Respondent No.3 : Mr. R.R. Bangar
Advocate for respondent No.4:Mr. A.S. Jadhavar
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CORAM : V. K. JADHAV, J.
DATED : 19th APRIL, 2018

PER COURT:-

1. By consent, heard finally at admission stage.
2. Being aggrieved by the judgment and order dated 21.9.2017 passed by the Collector, Parbhani in File No. E-disnic 102 of 2017, the petitioner has filed this writ petition.
3. Brief facts giving rise to the present writ petition are as follows:-
 - a) The general elections of the Gram Panchayat Mairal-Sawangi, Tq. Gangakhed, district Parbhani were held in the month of August, 2015. The total strength of the members of Gram Panchayat are

seven (07) in numbers. All these 4 petitioners, respondent Nos. 4 and 5 and one Rambhau came to be elected in the said elections. However, said Rambhau died in the month of May, 2017 and resultantly at present there are 6 members, who are eligible to seat and vote in the meeting.

b) On 25.7.2017 out of 6 members, 4 members moved the requisition before the Tahsildar, Gangakhed requesting to call the special meeting to discuss the motion of no confidence against the respondent No.4 Sarpanch. Accordingly, on 29.7.2017 the Tahsildar Gangakhed issued notices of the special meeting prescribing the date, time and venue of the special meeting. The notices of the said special meeting were communicated to the members. However, the notice of respondent No.4 Sarpanch was served by affixing the same to her house.

c) The Special meeting was held on 31.7.2017 and the same was attended by four members. Out of 6, four members have voted in favour of the motion. The Presiding Officer declared that the no confidence motion was carried out by the requisite majority. The respondent No.4 Sarpanch challenged the proceeding of the special meeting passed on 31.07.2017 by filing dispute before respondent No.1 Collector, Parbhani. The Collector, by the impugned order

dated 21.9.2017 allowed the dispute filed by respondent No.4 and quashed and set aside the proceeding of the special meeting dated 31.7.2017. Hence, this writ petition.

4. Learned counsel for the petitioners submits that the notices of special meeting were issued to the members of the Gram Panchayat. In so far as notice of respondent No.4 was concerned, it was duly communicated by affixing the same at the conspicuous part of the house of respondent No.4 in presence of the panchas and the panchnama to that effect was drawn on 29.7.2017. On the day of special meeting i.e. on 31.7.2017, out of 6 members, who were eligible to seat and vote in the meeting, 4 members attended the meeting. The motion of no confidence was discussed, which was proposed and seconded by the members. Despite the service of notice of special meeting, respondent No.4 Sarpanch and one member Anusaya preferred to remain absent. All the four members, who were present in the meeting were voted in favour of the motion and as such the motion was carried out by 2/3rd majority. Learned counsel submits that the Collector failed to appreciate the provisions of the Maharashtra Village Panchayat Act 1958 (hereinafter for short, referred to as "the said Act"). Learned counsel submits that respondent No.4 Sarpanch has lost the confidence of majority of the members and therefore, she has no right to continue as the

Sarpanch. Learned counsel submits that the conduct of respondent No.4 of filing the proceedings before the Collector, challenging the no confidence motion shows that she was well aware about the special meeting dated 31.7.2017. However, the Collector failed to appreciate the Rule of majority and allowed the dispute filed by respondent Nos. 4 on false and vague grounds. Learned counsel submits that there is no illegality in conducting the special meeting as the proper notice was affixed at the conspicuous place of the residential house of respondent No.4. Sarpanch.

5. Learned counsel for the petitioners submits that the provisions of sub-section (3) of Section 44 of the said Act applies to all acts or proceedings of the Panchayat, and is not restricted to the meeting of the Panchayat held when there is a vacancy. The provisions of Section 44(3) of the said Act would also apply to the meeting for passing of a motion of no confidence. Resultantly, the test whether the defect or irregularity affects the merits of the case would come into play. Learned counsel relying upon the judgment of the Full Bench in the case of ***Tatyasaheb Ramchandra Kale vs. Navnath Tukaram Kakde and others, reported in 2014 (6) Mh.L.J. 804*** submits that Rule 17 of the said Bombay Village Panchayats (Meeting) Rules 1959 is directory, however on the touchstone of Section 44(3) of the said Act and having regard to the fact that

resolution has been passed by majority, any defect in the procedure relating to passing of the said resolution can be said to be cured and therefore, on the application of Section 44(3) of the said Act, the resolution cannot be said to be vitiated on account of any infirmity in the proceedings. Learned counsel for the petitioners submits that Rule 17 is part of the subordinate legislation and it cannot impinge upon validity of the motion of no confidence which is passed by fulfilling requirement of Section 35(3) of the said Act.

Learned counsel for the petitioners, in order to substantiate his submissions, placed reliance on the following judgments:-

- i. Tatyasaheb Ramchandra Kale vs. Navnath Tukaram Kakde and others, reported in 2014 (6) Mh.L.J. 804 (Full Bench)
- ii. Nimba Rajaram Mali vs. Collector, Jalgaon and others, reported in 1998 (3) Mh.L.J. 204
- iii. Shaikh Salim Pasha Khaja Pasha vs. Divisional Commissioner, Aurangabad and others, reported in 2012 (4) ALL MR 891.

6. Learned counsel for resonant No.4 has tendered across the bar an affidavit in reply. The same is taken on record. Learned counsel submits that the vacancy which was created on account of death of Rambhau came to be filled in and at present there are 7

members in the Gram Panchayat. Respondent No.4 at present is residing at Gangakhed and not at village Mairal Savangi. The petitioners, instead of moving the requisition for no confidence motion before the Tahsildar, have moved the said requisition before the Naib Tahsildar, which is not permissible. In fact, the notice of no confidence was not affixed on the house of respondent No.4 and therefore, contentions raised are not within the knowledge of respondent No.4. Learned counsel submits that the notice of no confidence was neither communicated nor served on respondent No.4. Even though the notice which was issued was not in the proper format in view of the provisions of the said Act. Learned counsel submits that the notice was allegedly affixed on the house of respondent No.4, was in fact affixed on the house of one Daulat Namdeo Jadhav and therefore, it cannot be said that the notice of special meeting was served on respondent No.4.

7. Learned counsel for respondent No.4 submits that before calling of no confidence motion, respondent No.4 was hospitalized and was taking treatment and by taking undue advantage of the same, the petitioners moved the notice of no confidence motion. Respondent No.4 has worked honestly and with full devotion for carrying out development activities in the village. The service of notice by no confidence motion on the Sarpanch is a crucial aspect,

as because of the service, Sarpanch gets an opportunity to address the house on the issue of no confidence motion. By non service of notice on the Sarpanch, it is denial of the statutory right of the Sarpanch to remain present in the special meeting and also denial of right to speak in the meeting.

Learned counsel for respondent No.4, in order to substantiate his submissions, placed reliance on the following judgments:-

- i. Ashok Krishnakant Mehta vs. State of Maharashtra and others, reported in 2000 (4) Mh.L.J. 197,
- ii. Surekha Eshwar Jadhav vs. Nirmala Madhavrao Jadhav and others, reported in 2013 (5) Mh.L.J. 710;
- iii. Shivkant Haribhau Bangar vs. Gramsevak Mauje Ratnapur and others, reported in 2010 (6) Mh.L.J. 149;
- iv. Order dated 18.01.2018 passed by this Court (Coram: Smt. Roshan Dalvi, J. principal seat at Bombay) in writ petition No. 9819 of 2009, (Govind Nivrutti Hipparkar vs. Tahsildar, Taluka Sangola and others
- v. Order dated 24.10.2008 passed by this Court (Coram: Smt. Nishitha Mhatre, J. principal seat at Bombay,) in writ petition No. 6873 of 2008 (Nivrutti Kashinath Bansode and Anr. vs. Gramsevak, Grampanchayat, Nazara and others).

- vi. Order dated 11.8.2017 passed by this Court (Coram: Ravindra V. Ghuge, Aurangabad Bench) in writ petition No. 8355 of 2017 and with other connected matters (Sunil Panditrao Kugne vs. The State of Maharashtra and others).
- vii. Order dated 11.9.2015 passed by this Court (Coram: Sunil P. Deshmukh, Aurangabad Bench) in writ petition No. 2808 of 2015 (Sau. Surekha Vasant Jadhavar vs. Kisan Pandurang Jadhavar and others).

8. I have also heard learned A.G.P. for respondent Nos. 1 and 2, who supports the impugned order and prays for dismissal of the writ petition

9. On careful perusal of the impugned order passed by the Collector, it appears that the Collector has allowed the petition filed by respondent No.4 on two grounds: Firstly, the members of the Panchayat, who desire to move the motion of no confidence against the Sarpanch failed to give notice thereof to the Tahsildar of the Taluka and instead gave notice thereof to the Naib Tahsildar, which is contrary to the provisions of Rule 2(1) of the Bombay Village Panchayat Sarpanch and Upa-Sarpanch (No Confidence Motion) Rules 1975. Secondly, the notice of said meeting was not duly served on respondent No.4 and in consequence thereof, respondent No.4 had no opportunity to speak or otherwise to take part in the proceedings at the meeting which is in violation of the mandatory

provisions of Section 35(2) of the said Act.

10. So far as the first ground is concerned, I do not find any substance in the same for the reason that though representation submitted by the petitioners to Tahsil Office, Gangakhed on 25.7.2017 bears endorsement of Naib Tahsildar of the same day, however, on the next day i.e. on 26.7.2017, the Tahsildar had signed the said representation. However, I find much substance in the second ground considered by the learned Collector. There is clear evidence on record that the notice of meeting was not duly served on respondent No.4. Admittedly, house number of respondent No.4 is 182 and the concerned Gram Sevak had affixed the notice of meeting on House No. 79 which belongs to one Daulat Dnyandeo Jadhav. It is a part of record that the house of respondent No.4 is in ward No.2 and house on which the notice has been affixed is situated in ward No.1. The panchnama discloses that the copy of notice came to be affixed on the house of respondent No.4. On perusal of the copy of Namuna No.8 of house No.79, which belongs to said Daulat Jadhav, the neighbourers of his house have put their signatures on the panchnama drawn in respect of house No.79. Copy of Namuna No.8 of house of respondent No.4 speaks about some different neighbourers, who are not panch witnesses nor the signatories to the said panchnama. Respondent No.4 at the relevant

time was admitted in the hospital as an indoor patient in one Balaji Hospital, Parbhani and she had also submitted medical certificate and discharge card. The learned Collector has also directed the Sub Divisional Officer, Parbhani to verify the record of the said hospital and submit the report. The Sub Divisional Officer, Parbhani had submitted his report on 29.7.2017 alongwith the photo copy of the original record of the hospital. As per the said report, the respondent No.4, in fact, was admitted in the hospital during the period from 29.7.2017 to 01.08.2017. Thus, there appears to be much substance in the submission made on behalf of respondent No.4 that taking undue advantage of absence of respondent No.4, hurriedly a requisition was submitted and without any due service of notice on respondent No.4, said resolution was passed. It would not be out of place to mention here that considering the involvement of Gramsevak in service of notice of no confidence meeting against respondent No.4, learned Collector, has also directed the Chief Executive Officer, Zilla Parishad, Parbhani to take disciplinary action against the concerned Gram Sevak.

11. In the case of ***Tatyasaheb Ramchandra Kale vs. Navnath Tukaram Kakde and others (supra)*** relied upon by learned counsel for the petitioners, the Full Bench has dealt with the question of applicability of Section 44(3) of the said Act and in para 19 of the

judgment, the Full Bench has made the following observations.

"19. The applicability of Section 44(3) of the Bombay Village Panchayat Act was sought to be questioned on behalf of the Appellant and the State on the ground that the said provision applies only when the proceedings of the Panchayat are conducted when there is a vacancy in the Panchayat and would therefore not apply to a meeting held for passing of a motion of no confidence. In support of the said contention reliance was sought to be placed on the heading of the said Section which is to the following effect; "Vacancy not to affect proceedings of Panchayat".

In so far as headings being used as a tool for interpretation of a provision is concerned. It is well settled that they cannot control the plain words of the provision, they also cannot be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous nor can they be used for cutting down the plain meaning of the words in the provision when only in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision. (See Frick India Ltd. v/s. Union of India AIR 1990 SC 689).

In so far as sub-section 3 of Section 44 of the Bombay Village Panchayat Act is concerned, the said sub-section 3 can be said to be an exception to sub-sections 1 and 2 of Section 44 of the Bombay Village Panchayat Act. The language of sub-section 3 makes it very clear that it applies to all acts or proceedings of the Panchayat, and is not restricted to the meeting of the Panchayat held when there is a vacancy. Since the words are very clear and unambiguous, it is not necessary to take recourse to the heading for interpretation of the said provision. The said provision would therefore apply to a meeting held for passing of a motion of no confidence. Resultantly, the test whether the defect or irregularity affects the merits of the case would come into play.

It is further required to be noted that the provision akin to Section 44(3) of the Bombay Village Panchayat Act has been recognized as a feature of modern legislations. The said provision is inserted to put beyond challenge the defect of constitution of the statutory body and defects of procedure which have not led to any substantial prejudice. The Apex Court has nick-named the said provision as the "Ganga" clause thereby meaning it to be a clause cleansing the proceedings of any defects. An identical clause/section had come up for consideration before the Apex Court in B.K. Srinivasan and another etc. v/s. State of Karnataka and ors. (AIR 1987 SC 1059) and thereafter in Akhil Bharat Goseva Sangh v/s. State of A.P. and Ors. ((2006) 4 SCC 162) . In B K Srinivasan's case the Apex Court was concerned with Section 76J of the Mysore Town and Country Planning Act, 1961. The said Section 76J read thus :-

"76 J. Validation of acts and proceedings--No act done or proceeding taken under this Act shall be questioned on the ground merely of,

(a) the existence of any vacancy in, or any defect in the constitution of the Board or any Planning Authority;

(b) any person having ceased to be a member;

(c) any person associated with the Board or any planning authority under section 4F having voted in contravention of the said section; or

(d) the failure to serve a notice on any person, where no substantial injustice has resulted from such failure; or

(e) any omission, defect or irregularity not affecting the merits of the case."

In the said case Section 13(4) and Rule 33 required publication of Outline Development Plan as approved by the Government in the Official Gazette.

What was published in the Gazette was a notice with Outline

Development Plan as approved by the Government was available for the inspection at the office of the Planning Authority during office hours. The Apex Court held that on a proper construction of section 13(4) the publication complied with its provisions and that even if there was any defect it was cured by Section 76J. The said Section 44(3) therefore cleanses the proceedings of any defect if the same do not affect the merits of the case.

Hence though we have come to a conclusion that Rule 17 of the Meeting Rules is directory however on the touchstone of Section 44(3) of the Bombay Village Panchayat Act and having regard to the fact that the resolution has been passed by a 2/3rd majority, any defect in the procedure relating to passing of the said resolution can be said to be cured, and therefore, on the application of Section 44(3) of the Bombay Village Panchayat Act, the resolution cannot be said to be vitiated on account of any infirmity in the proceedings.”

12. In para 21 of the said judgment, the Full Bench has concluded the issue as follows:-

“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 Panchayat 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 Panchayat 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 Panchayat 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."

13. It thus appears that the Full Bench has considered the requirement of Rule 17 of the Rules of 1959 in the matter to propose and second the motion and further held that it cannot impinge upon validity of the motion of no confidence which is passed by fulfilling requirement of section 35(3) of the said Act. In the instant case, however, the requirements of section 35(2) of the said Act were not complied with. The Full Bench had no occasion to consider the said issue.

14. In terms of sub-Rule (2-B) of Rule 2 of Bombay Village Panchayats Sarpanch and Up-Sarpanch (No Confidence Motion) Rules, 1975, every notice of no confidence motion meeting under sub-Rule (1) of the said Rules, wherever it may be practicable, be served by delivering or tendering it to the Sarpanch or Up-Sarpanch to whom it is addressed or, where such person cannot be found, by delivery or tendering it to any adult member of his family residing with him; and if no such adult member can be found or, where the Sarpanch, Up-Sarpanch or such adult member, as the case may be, refuses to accept the notice, it shall be served by affixing it, in the

presence of two witnesses, on the outer door or some other conspicuous part of the house in which such Sarpanch or Up-sarpanch ordinarily dwells. The notice served in this manner shall be deemed to be served or tendered or delivered to the concerned Sarpanch or Up-Sarpanch.

15. It is thus clear that if the notice is not properly served and in consequence of failure to serve respondent No.4 duly in terms of the aforesaid Rules, respondent No.4 Sarpanch could not exercise his right to speak or otherwise take part in the meeting (including right to vote). It cannot be said that the said requirement is directory in nature and it is mere formality to be complied with. In a democratic set up, a person against whom no confidence motion is proposed and put on the table in the special meeting, shall have right to speak or otherwise take part in the proceeding of the meeting (including right to vote) in terms of sub-section (2) of Section 35 of the said Act. It is not necessary to state that the underlined intention of the legislature behind this requirement would be to provide an opportunity to the person to defend himself or to explain the allegations made against him and as such shall have right to speak and convince the members who have moved the said no confidence motion against him/her.

16. In the catena of judgments, relied upon by the learned counsel for respondent No.4, this Court from time to time, has considered the said requirement of Section 35(2) of the said Act as mandatory requirements and not a mere empty formality. I do not find any fault in the judgment and order passed by the learned Collector, Parbhani. There is no substance in this writ petition. Writ petition is hereby dismissed. No costs.

(V. K. JADHAV, J.)

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