

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 12678 OF 2018

Sou. Ashwini Rajendra Kanchan

...Petitioner

Versus

The State of Maharashtra
and others

...Respondents

....

Mr. R.A. Thorat, Senior Advocate i/b. Ganesh Bhujbal, Advocate for the petitioner.

Mr. S.D. Rayrikar, A.G.P. for Respondents No.1 to 3-State.

Mr. Shailendra S. Kanetkar, Advocate for Respondent No.5 & 7 to 20.

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CORAM : R. G. KETKAR, J.

DATE : 06th DECEMBER, 2018

P.C.

1. Heard Mr.R.A. Thorat, learned Senior Counsel for the petitioner, Mr. S.D. Rayrikar, learned A.G.P. for respondents No.1, 2 & 3-State and Mr. Shailendra S. Kanetkar, learned counsel for respondents No.5 & 7 to 20, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 24.10.2018 passed by the Collector, Pune whereby the application made by the petitioner under Section 165 of the Indian Evidence Act, 1872 (for short, 'Evidence Act') was rejected. By the final order dated 31.10.2018, the respondent

No.12 Collector, Pune dismissed the Dispute Application filed by the petitioner challenging passing of no-confidence motion against her in the meeting of Grampanchayat Urulikanchan, Taluka – Haveli, District – Pune (for short, 'Grampanchayat') on 15.9.2018.

3. In support of this Petition, Mr. Thorat submitted that the petitioner has challenged the proceedings of meeting of no-confidence motion convened on 15.9.2018 by filing dispute under Section 35 of the Maharashtra Village Panchayats Act (for short, 'Act'). Pending that dispute, she filed an application under Section 165 of the Evidence Act on the ground that Section 35 of the Act requires serving of notice of no-confidence motion on Tahsildar and not Naib Tahsildar. Naib Tahsildar had accepted the notice without any authority. It is, therefore, necessary to direct the Naib Tahsildar Shri Sunil Shelke to file affidavit as also permit the petitioner to cross-examine the Naib Tahsildar. By order dated 24.10.2018, the Collector rejected the application. He submitted that basically Section 10 of the Maharashtra Land Revenue Code, 1966 and in particular clause (b) thereof lays down that if a Collector or Tahsildar is disabled from performing his duties or for any reason vacates his office or leaves his jurisdiction or dies, the Additional Tahsildar, and if there be no Additional Tahsildar, the Naib Tahsildar or the senior-most Subordinate Revenue Officer in the Taluka, unless other

provision has been made by the State Government, succeeds temporarily to the office of the Collector, as the case may be, of the Tahsildar. He submitted that if Tahsildar is disabled in performing duties, Additional Tahsildar succeeds temporarily to the office of the Tahsildar. The notice of no confidence ought to have served on the Additional Tahsildar in the absence of Tahsildar. He submitted that in order to bring on record whether Naib Tahsildar Sunil Shelke was authorized to accept the notice and whether on that day the Tahsildar was on leave or not, it is necessary to direct the Naib Tahsildar Sunil Shelke to file affidavit and permit the petitioner to cross-examine the said witness. The Collector was, therefore, not justified in rejecting the application made by the petitioner under Section 165 of the Evidence Act.

4. On merits, he submitted that the petitioner was hospitalized and this fact is borne out from the application dated 14.9.2018 made by respondent No.6 Sunil S. Kanchan to the Village Development Officer of the Grampanchayat. Said letter sets out that the election of Upa-Sarpanch was scheduled on 14.9.2018 and as the petitioner was not well and was hospitalized in Pune, she will not be in a position to attend the meeting. The prayer was, therefor, made to postpone the election of Upa-Sarpanch scheduled on 14.9.2018. He submitted that

meeting for election of Upa-Sarpanch was convened in the office of Grampanchayat on 14.9.2018. The cognizance of the application dated 14.9.2018 was taken and the election of Upa-Sarpanch was postponed. Thus the fact that the petitioner was unwell and was hospitalized in Pune was accepted while postponing the election of Upa-Sarpanch. However, as far as the meeting of 15.9.2018 for considering no-confidence motion is concerned, the respondents proceeded with the meeting and did not postpone the meeting though they were fully aware of the health condition of the petitioner and the fact that she was not in a position to attend the meeting as she was hospitalized in Pune.

5. Mr. Thorat invited my attention to the panchnama drawn on 12.9.2018. The panchnama recorded that the notice of convening meeting on 15.9.2018 was sought to be served at the residence of the petitioner. The panchnama records that despite the door-bell being rung on 3-4 occasions nobody came out and in the presence of panchas the notice was affixed on the door of the residence of the petitioner. He heavily relied upon Rule 2(2-B) of the Bombay Village Panchayats Sarpanch and Up-Sarpanch (No Confidence Motion) Rules, 1975 (for short, 'No-Confidence Motion Rules') as also the decision of this Court in **Bhika Narayan Gangurde and others Vs. State of Maharashtra and others**, 2002(1) Bom. C.R. 186 and in particular paragraphs-10 and 11

thereof. He relied upon the decision of this Court in **Vishal Shrikrishna Hole v. State of Maharashtra & Ors., 2014(1) Bom.C.R. 466**. He submitted that as the notice of meeting of 15.9.2018 is not served on the petitioner the proceedings of that meeting are vitiated. The Collector, therefore, ought to have allowed the dispute.

6. Mr. Thorat submitted that the petitioner is entitled to attend the motion of meeting convened for considering the motion of no-confidence and has a right to speak and address the members present in the meeting. The law requires giving the Sarpanch or Upa-Sarpanch, as the case may be, an opportunity of being heard before the members vote upon the resolution of no-confidence. The object of permitting the members of village panchayat to address the meeting of the Grampanchayat has a genesis which is distinct from the opportunity of being heard. He submitted that the fact that the majority members were in favour of passing of no-confidence motion against the petitioner is not an answer to a fundamental defect where the petitioner was deprived of an opportunity of speaking in the meeting. In support of this submission, he relied upon the decision of this Court in **Ashok Krishnakant Mehta vs. State of Maharashtra and others, 2000(4) Mh.L.J. 197**.

7. On the other hand, Mr. Kanetkar supported the impugned order. He submitted that the notice of no-confidence motion was served on Naib Tahsildar on 10.9.2018 as the Tahsildar was not available. The Tahsildar had come to Mumbai for attending the proceedings in this Court. For village Urulikanchan, there is no post of Additional Tahsildar. He invited my attention to the findings recorded by the Collector at page-75 of the Writ Petition compilation.

8. He submitted that in view of Section 10 of the Code, Naib Tahsildar was authorized to accept the service. In pursuance thereof, notice of meeting of 15.9.2018 was sought to be served at the residence of the petitioner on 12.9.2018. He submitted that after ensuring that service personally on the petitioner could not be effected as also no member was available, the notice was affixed on the outer door of the petitioner's residence. Reliance placed on the application dated 14.9.2018 made by the sixth respondent and the fact that the election of Upa-Sarpanch was deferred is of no-consequence. For conducting the election of Upa-Sarpanch, the Presiding Officer is Sarpanch. Insofar as the meeting convened for considering no-confidence motion against Sarpanch is concerned, the Tahsildar is the Presiding Officer. In any case, the service was already effected on 12.9.2018 on the petitioner.

9. He submitted that the Collector, Pune after considering the panchnama recorded a finding that the notice is served in accordance with law and, therefore, no fault can be found. He submitted that in all there are 17 members in the village panchayat. Out of 17 members, 15 members served notice on Naib Tahsildar. In pursuance thereof, meeting was convened on 15.9.2018. Sixteen members were present. The motion was carried out by fifteen versus one. He submitted that no case is made out for interfering with the impugned order.

10. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Insofar as the challenge to the order dated 24.10.2018 is concerned, a perusal of the finding recorded by the Collector in the impugned order shows that there is no post of Additional Tahsildar in respect of village Urulikanchan. The Collector also noted that this objection was raised for the first time on the date of hearing of 26.10.2018. The Collector considered the provisions of Section 10 of the Code which empowers the Naib Tahsildar to discharge the functions in the absence of Tahsildar.

11. A perusal of the affidavit filed on behalf of the State shows that as per the G.R. dated 8.2.2013, the post of Additional Tahsildar has

been created for Taluka Haveli and the jurisdiction of Additional Tahsildar in respect of three revenue circles i.e. Chinchwad, Moshi and Bhosari for Pimpri Chinchawad has been fixed. The jurisdiction of Additional Tahsildar, Pimpri Chinchwad, Haveli and the office of Tahsildar Haveli are totally different. It is also set out that the Tahsildar, Haveli was present before this Court on 10.9.2018 in Second Appeal No.669/2014 and this Court also recorded the presence of Tahsildar, Haveli in the order. Thus on the day of service of motion of no-confidence, Naib Tahsildar was authorized to accept the service. In view thereof, I do not find that the Collector committed any error while dismissing the application filed by the petitioner under Section 165 of the Evidence Act.

12. This brings me to the submission of Mr. Thorat that the notice of no-confidence was not served on the petitioner as she was not available and was hospitalized in Pune. A perusal of the panchnama dated 12.9.2018 shows that the notice was tried to be served on the petitioner personally at her residence. Despite the door-bell being rung on 3-4 occasions nobody came out and in the presence of Panchas notice was affixed on the outer door of the petitioner's residence. Said panchnama is also signed by the four panchas in presence of Kamgar Talathi. After perusing the panchnama, the Collector held that the

notice is duly served on the petitioner.

13. Mr. Thorat relied upon Rule 2(2-B) of the no-confidence motion rules. Rule 2(2-B) reads thus:

“**2.(2-B)** Every notice under sub-rule (1), wherever it may be practicable, be served by delivering or tendering it to the Sarpanch or Upa-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, Upa-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 Upa-Sarpanch ordinarily dwells. The notice served in this manner shall be deemed to the served or tendered or delivered to the concerned Sarpanch or Upa-Sarpanch.”

14. Mr. Thorat relied upon the decision of this Court in **Bhika Gangurde** (supra) and in particular paragraphs-10 and 11 thereof. In paragraph-10, it was noted that the contention was advanced before the Additional Commissioner that the notice was not served upon respondent No.6 and he was not in the village at relevant time and that the Talathi had not made any efforts to serve the notice on any of the adult male member in the house of respondent No.6. Considering the records, the Additional Commissioner recorded a finding that in fact no efforts were made to serve the notice on adult male member

Considering the fact that there is no provision in the Act or Rules made thereunder that the motion of no-confidence cannot be moved against the Sarpanch when he is on leave or out of station, the Additional Commissioner refused to entertain the contention regarding non service of the notice.

15. In paragraph-11 it was observed thus :

“11. Rule 7 of the Meeting Rules provides that every notice under those Rules shall, if practicable, be served personally by delivering or tendering it to the member to whom it is addressed or if such person is not found, by giving or tendering it to an adult male member of his family who is residing with him. It further provides that if there is no such person to whom notice can be given or tendered, or where the member, or, as the case may be, in his absence, such adult male member, is present but 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 the member ordinarily resides. The said Rule further provides that if none of the aforesaid modes of serving notice is feasible, the notice shall be affixed, in the presence of two witnesses, on some conspicuous part of the house in which the member is known to have last resided or carried on business or personally worked for gain. Referring to the last part of the provision under Rule 7, it was sought to be contended on behalf of the petitioners that considering the fact that the notice had already been affixed in presence of two witnesses, as is revealed from the panchanama drawn by the Talathi, there is no substance in the contention regarding non service of notice. However, Rule 7 clearly provides that resort to affixation of notice on the door can be

taken only when the other modes of service prescribed under the said rule are not feasible. Undisputedly, the other modes are first by delivering or tendering the notice to the member to whom the notice is addressed and in case, he is not found, by delivering or tendering the notice to the adult male member of his family residing with him in the house. It is only when the person on whom the notice is given or tendered and where the member or adult male member of his family refuses to accept the notice, the question of affixation of the notice on the door can arise. Undisputedly, there is no finding arrived at either by the Additional Collector or the Additional Commissioner regarding any attempt being made by the Talathi to tender the notice to the respondent No. 6 or any male adult member of the family of the respondent No. 6 before affixation of the said notice on the door of the house of the respondent No. 6. The learned Advocate for the petitioners would be justified in contending that there was no occasion for the Talathi to approach the respondent No. 6 as he was not available in the house and this is an undisputed fact. However, there is nothing on record either in the order of the Additional Collector or that of the Commissioner to show that an attempt was made by the Talathi to serve the notice on any of the adult male member of the family of the respondent No. 6. Even the panchanama, copy of which is produced in the course of hearing by the learned Advocate for the petitioners, does not disclose any such attempt on the part of the Talathi. Undoubtedly, in the panchanama there is a reference to the statement by the panchas to the effect that they were informed by the Talathi that the respondent No. 6 had refused to accept the notice when tendered to him as well as the family members of respondent No. 6 refused the notice when tendered to them. However, this is purely a hearsay evidence apparently disclosed from the panchanama. The panchanama does not disclose any such attempt to serve the notice by the Talathi in the presence of the panchas. On the contrary, the

panchanama discloses that the Talathi had affixed the notice directly to the door of the house of the respondent No. 6 in presence of the panchas without following the procedure of attempting to tender the same to any male adult member of the family of the respondent No. 6 before such affixation of the notice on the door of the house. Being so, the records clearly disclose that the basic requirements of Rule 7 of the Meeting Rules were not complied with prior to affixation of the notice on the door of the house of the respondent No. 6.

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16. In my opinion, the facts obtaining in the present case are different than the facts in the case of **Bhika Gangurde's** case (supra). After perusing the panchnama, I am satisfied that attempts were made in terms of Rule 2(2-B) of motion of No-confidence Motion Rules and only upon exhausting other modes prescribed under the Rule, copy was affixed on the outer door of petitioner's house.

17. Mr. Thorat also relied upon the decision of this Court in **Vishal Hole's** case (supra). In that case, the panch witness stated that the notice was not affixed in the presence of the witnesses. That is also not the case here. In view thereof, the reliance placed on the question of service of notice of no-confidence do not advance the petitioner's case.

18. Mr. Thorat relied upon the decision of this Court in **Ashok Mehta's** case (supra). In that case, the Tahsildar declined the

permission to the members to speak and address the meeting, on the view that under the provisions of Section 35(2) of the Act it was only the person against whom the motion is sought to be moved who could be permitted to speak at the meeting. It is in that context, the Division Bench of this Court observed that the object of permitting the members of village panchayat to address the meeting of panchayat is far more fundamental and that goes to the root or the essence of democratic functioning. The weight of numbers is not an answer to a fundamental defect and the Court ought not to countenance a suppression of the right to speak by a supposed justification on the basis of the number who cast their lot in support of a resolution. The exclusion of members from addressing the Village Panchayat was a fundamental flaw in the proceedings which would invalidate the resolution of no confidence.

19. In the present case, the service was sought to be effected on the petitioner personally on 12.9.2018. The notice was affixed on the outer door of the petitioner's house. Thus, service was duly effected on the petitioner. Despite service, she did not attend the meeting. As mentioned earlier, out of 17 members, 16 members were present. Out of 16 members present, 15 members voted in favour of no-confidence motion. In view thereof, I do not find that the Collector committed any error in dismissing the dispute filed by the petitioner. Hence, the

petition fails and the same is dismissed.

20. At this stage, Mr. Thorat orally applies for continuation of the ad-interim order dated 2.11.2018 by which the Collector, Pune was directed not to declare the election programme. Mr. Kanetkar opposes this on the ground that even till date the election of Upa-sarpanch is not conducted. In the absence of Sarpanch as also Upa-Sarpanch, the authorized officer under the second proviso to sub-section (3) of Section 35 is appointed. In view thereof, oral application made by Mr. Thorat is rejected. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)