

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Writ Petition No.6880 of 2016

**(Swapnil Narayan Malke .vs. Additional Commissioner, Nagpur Division,
Nagpur and ors.)**

with

Writ Petition No. 6275 of 2016

**(Devanand Pandurang Malke .vs. The Commissioner, Nagpur Division and
others)**

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders.

Mr. H.N. Potbhare, Advocate for Petitioner in W.P.No. 6880/16
Mr. A.R. Chutke, AGP for Respondent Nos. 1 & 2 in W.P.No.6880/16
Mr. A.R. Fule, Advocate for Respondent No.4 in W.P.No.6880/16
Mr. S.D. Malke, Advocate for Petitioner in W.P.No. 6275/16
Mr. A.R. Chutke, AGP for Respondent Nos. 1 & 2 in W.P.No. 6275/16
Mr. H.N. Potbhare, Advocate for Respondent No.4 in W.P.No. 6275/16

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CORAM : Manish Pitale, J.

DATED : January 28, 2019.

The petitioners in both the writ petitions have challenged impugned order dated 19.10.2016 passed by the respondent- Divisional Commissioner, Nagpur Division, whereby application for condonation of delay filed on behalf of respondent no.4 in Writ Petition No. 6880 of 2016 has been allowed and the very same respondent is petitioner in Writ Petition No. 6275 of 2016 wherein he is aggrieved by that part of the impugned order of the Additional Commissioner whereby prayer for interim stay of his disqualification stood rejected.

2. The facts leading up to filing of these two writ petitions are that the respondent no.4 in Writ Petition No. 6880 of 2016 was elected as member of Gram Panchayat, Doma, tahsil Chimur, district Chandrapur, in

the year 2015. Thereafter he was elected as Up-Sarpanch of the said Gram Panchayat on 15.09.2015. The petitioner in Writ Petition No. 6880 of 2016 filed a complaint against the said respondent no.4 (elected member of Gram Panchayat) claiming that he was liable to be disqualified under Section 14(1)(j-5) of the Maharashtra Village Panchayats Act, 1959, on the ground that he had failed to submit a certificate of the concerned Gram Panchayat along with the resolution of the Gram Sabha certifying that he was residing in a house owned by him which had a toilet and that such toilet was being regularly used. The said complaint of the petitioner was contested by the elected member respondent no.4 in Writ Petition No. 6880 of 2016 and on 14.09.2016 the respondent-Collector passed the order allowing the complaint and holding that the said elected member was disqualified under Section 14(1)(j-5) of the said Act.

3. Aggrieved by the said order, the elected member filed an appeal under Section 16(2) of the said Act along with an application for condonation of delay. The said application was filed for the reason that Section 16(2) of the said Act provides that a person aggrieved by an order of the Collector disqualifying him/her may file an appeal before the Commissioner within a period of 15 days from the date of decision of the Collector. It was stated in the application for condonation of delay that the respondent no.4 (elected member) became aware of the order dated 14.09.2016 passed by the respondent no.2 Collector on 28.09.2016 and that

thereafter he rushed to the office of the Collector to obtain certified copy on 29.09.2016 and that he could file the appeal before the Commissioner under Section 16(2) of the said Act on 06.10.2016 because in the interregnum he had fallen ill suffering from viral fever.

4. A preliminary objection was raised on behalf of the petitioner (complainant) before the Commissioner on the ground that the application for condonation of delay could not be entertained as period of 15 days limitation provided under Section 16(2) of the said Act was to be construed strictly and that Section 5 of the Limitation Act, 1963 did not apply. As a consequence, the Commissioner had no power to entertain the application for condonation of delay and that, therefore, the application as well as the appeal deserved to be dismissed at the threshold. In the said appeal, the respondent no.4 (elected member) had also filed an application for grant of stay of the order of disqualification passed by the Collector.

5. On 19.10.2016, the respondent no.1- Additional Commissioner passed the impugned order whereby he not only entertained the application for condonation of delay, but he found that sufficient ground for condonation of delay was made out on behalf of respondent no.4 and that, therefore, the delay of 6 days deserved to be condoned. Accordingly, by the impugned order dated 14.09.2016, the delay in filing the appeal was condoned, but by the very same order, the Additional Commissioner dismissed the application

for grant of stay moved on behalf of the respondent no.4. As a consequence, both the petitioner and respondent no.4 were aggrieved with the said impugned order resulting in filing of the present two writ petitions.

6. Mr. H.N. Potbhare, learned counsel appearing for the petitioner (complainant) in Writ Petition No. 6880 of 2016, who is arrayed as respondent no.4 in Writ Petition No. 6275 of 2016, submitted that the Additional Commissioner committed a grave error in condoning delay in filing of appeal under Section 16(2) of the said Act, because there was no power available with the Commissioner under the said provision to entertain an appeal filed beyond the period of 15 days from the decision of the Collector. It was submitted that since the present appeal was admittedly filed on 06.10.2016, which was beyond the period of 15 days specified in Section 16(2) of the said Act, the Commissioner had no alternative but to dismiss the applications as well as the appeal filed by respondent no.4 in Writ Petition No. 6880 of 2016. It was submitted that since the provision i.e. Section 16(2) of the said Act specifically provided that the appeal was required to be filed within 15 days of the date of decision of the Collector, the provisions of the Limitation Act, 1963, particularly Section 5 thereof, could not be read into the said provision, as it was part of special law as compared to the general law of limitation i.e. the Limitation Act, 1963. In the absence of power in the Commissioner to condone delay, there was no question of entertaining the application of respondent no.4. On this basis, it was submitted that

the impugned order deserved to be set aside and the application for condonation of delay as well as the appeal filed by respondent no.4 deserved to be dismissed. The learned counsel placed reliance on judgments of this Court in the case of **Umesh Tukaram Kamble and ors. .vs. Shamrao Sakharam Patil - 2008(1) Bom. C.R. 639, Prabhakar Sabaji Kandalkar .vs. Tahsildar, Sangamner - 2002 (1) Mh.L.J. 881 and Kishor Tanaji Kharat .vs. Divisional Commissioner - 2013 (7) Bom.C.R. 865.**

7. On the other hand Mr. S.D. Malke, learned counsel appearing for respondent no.4 in Writ Petition No. 6880 of 2016 and the petitioner in Writ Petition No. 6275 of 2016 i.e. the elected member, submitted that the period of 15 days specified in Section 16(2) of the said Act, had to be interpreted as period of 15 days from the date when person aggrieved by the order of disqualification, acquired knowledge of such order passed by the Collector. It was submitted that in the present case the order of the Collector dated 14.09.2016 was never communicated either to the respondent no.4 i.e. the elected member or the complainant, because the order demonstrates that copy of the same was marked only to the Deputy Chief Executive Officer (Panchayat), Zilla Parishad, Chandrapur, Block Development Officer, Panchayat Samiti, Chimur and the Secretary, Gram Panchayat, Doma. A copy of the order was neither marked to respondent no.4 nor the petitioner. Therefore, the contesting parties were never supplied copy or made

aware of the order dated 14.09.2016 passed by the Collector. In this situation, according to the learned counsel, when the respondent no.4 i.e. the elected member acquired knowledge of the order passed by the Collector on 28.09.2016 that certified copy of the same was immediately applied for and received on 29.09.2016 and appeal was filed on 06.10.2016. In this backdrop, it was submitted that if the period of 15 days is calculated from 28.09.2016, the appeal was filed well within limitation by respondent no.4. The learned counsel placed reliance on judgment of this Court in the case of **Vaijayata Deepak Warke .vs. State Election Commission - 2016 (2) Mh.L.J. 35** and he further submitted that the controversy in the present case was clearly covered by a Division Bench judgment of this Court in the case of **Sangitabai .vs. State of Maharashtra - 2017 (6) Mh.L.J. 841.**

8. In order to decide as to whether the Commissioner in the present case had power to condone delay, it would be necessary to refer to Section 16 of the aforesaid Act, which reads as follows:-

“16. Disability from continuing as member:- (1) *If any member of a Panchayat*

(a) who is elected or appointed as such, was subject to any of the disqualification mentioned in Section 14 at the time of his election or appointment, or

(b) during the term for which he has been elected or appointed incurs any of the disqualifications mentioned in Section 14, he shall be disabled from continuing to be a member, and his

office shall become vacant,

(2) [If any question whether a vacancy has occurred under this Section is raised by the Collector suo motu or on an application made to him by any person in that behalf, the Collector shall decide the question as far as possible within sixty days from the date of receipt of such application. Until the Collector decides the question, the member shall not be disabled under sub-section (1) from continuing to be a member.] Any person aggrieved by the decision of the Collector may, within a period of fifteen days from the date of such decision, appeal to the Commissioner, and the orders passed by the Commissioner in such appeal shall be final.

Provided that no order shall be passed under this sub-section by the Collector against any member without giving him a reasonable opportunity of being heard."

9. Although it appears that the language of the aforesaid provision indicates that appeal by an aggrieved person against an order of the Collector can be filed within 15 days from the date of the decision of the Collector, the question is as to whether the period of limitation would be strictly calculated from the date of the decision of the Collector or, as submitted by the learned counsel for the respondent no.4, from the date when the aggrieved person acquires knowledge of the same.

10. A perusal of the judgments relied upon by the learned counsel for the petitioner in Writ Petition No.

6880 of 2016 shows that while interpreting the question of limitation for filing proceedings under Section 15 of the aforesaid Act, this Court has indeed held that the period of limitation has to be construed strictly and that the authority before whom the appeal lies, cannot have the power to condone delay by applying Section 5 of the Limitation Act, 1963. None of the said decisions have considered an appeal filed under Section 16(2) of the said Act. This distinction assumes significance in the light of the fact that the proceedings filed under Section 15 of the said Act pertain to challenging an election of a person and the fact of a person being elected is clearly within public knowledge on the date on which the result of the election is declared. In the present case, the question of disqualification of an elected member has arisen and by order dated 14.09.2016, the Collector has disqualified respondent no.4 from the position of elected member of Gram Panchayat. In the absence of any specific date on which the Collector pronounced the order in the presence of all the parties and in the absence of the order being marked to the respondent no.4 (aggrieved person), it is difficult to imagine as to how the respondent no.4 would have become aware of the decision to immediately file an appeal within the period of 15 days of the date of the decision, as specified in Section 16(2) of the said Act.

11. Although the judgment in the case of **Vaijayata Deepak Warke .vs. State Election Commission** (supra) relied upon by the learned counsel appearing for the respondent no.4, elected

member, does not indicate as to whether the specific question that arises in the present case was ever considered by this Court, but the Division Bench judgment of this Court in the case of **Sangitabai ,vs. State of Maharashtra** (supra) clearly answers the question that has arisen in the present case. In the said judgment, the Division Bench has relied upon an earlier judgment of the learned Single Judge of this Court to hold that the Commissioner under Section 16(2) of the said Act, indeed has power to condone the delay when appeal is filed beyond the period of 15 days as specified under the said provision. Since it is a judgment of Division Bench of this Court, this Court is bound by the law laid down therein. The relevant portion of the said judgment reads as follows:-

"5. According to the learned Advocate for the petitioner, the respondent no.2 does have a power to take into consideration facts causing delay in preferring appeal and has inherent power to condone it, when he sits in appeal against the orders of the respondent no.2- Additional Collector. Per contra, the learned Advocate for respondent no.4 vehemently submitted that there is no such provision which empowers the respondent no.2 to condone the delay and what has not been expressly provided in the statute cannot be read into it and when the legislature in its wisdom has not provided for any such power, this Court cannot read it into it. In this regard deem it opposite to refer to the judgment rendered by one of us (Coram: S.C. Dharmadhikari, J.) in the case of Maruti Vasant Kashid V/s. The Divisional Commissioner, Pune Division

and Ors. in writ petition no. 1213 of 2011 on 8th and 11th July, 2011. We particularly endorse the observations and conclusions drawn in para 37 and 42 which are as follows:

"37. Resultantly, it will have to be held that the appeal which is to be filed against the decision of the Collector may be filed within fifteen days from the decision but that is not rule of limitation as understood by the Limitation Act and in general. That a limit is prescribed but non adherence to the same is a matter not dealt with by the Legislature at all. It has not been provided by the Legislature that if the appeal is not preferred within fifteen days, that no appeal can be filed thereafter or if filed will not be entertained and heard. The consequences having not been provided by law, it is possible to hold that the appeal even if filed beyond the period of fifteen days can be dealt with and decided by the State Government or its delegate. Ultimately, it is not filing of the appeal but appealing to the State Government is what is stated. It is not filing and institution of any other proceeding but it is an appeal to the State Government by a person aggrieved and that would be the relevant factor. The appeal is not to be made in any prescribed form. The proceedings are styled as an appeal to the State Government and obviously the word "Appeal" has some definite meaning in law. It is a request to the higher forum or authority to correct the errors and defects in the proceedings held at the stage of trial or before an inferior authority. It means opportunity to be heard or to present one's side of a case. An appeal, therefore, means actively or carefully listening to the grievance of the appellants in regard to

the decision of a subordinate Tribunal. It, therefore, postulates rehearing of the grievance on merits. [(See A.I.R. 1996 Rajasthan 119 (FB)]. The power of appeal is being exercised by the State Government. In these circumstances, to hold that the State Government is powerless to entertain and decide an appeal which is filed beyond the period of fifteen days would amount to overlooking and ignoring the intent of the Legislature. The Legislature intends that the appeal can be entertained after this period. However, it must be borne in mind that even if the appeal can be entertained beyond a period of fifteen days, ultimately the State Government is the authority which is to pass a final order in the appeal. It may refuse to do so in a given case because a person has approached it at the fag end of the term of the elected councillor or that it would not be reasonable and appropriate to exercise the said appellate power on account of the time factor. The State Government, depending upon the facts and circumstances of each case, can take a view that the appeal need not be allowed because the Appellant has been unable to explain as to why he approached it belatedly. If the delay is caused deliberately or by utter negligence, total carelessness or in a given case demonstrates lack of bonafides, then, the State Government may refuse to exercise its powers and put an end to the proceedings. However, merely because the appeal has been filed beyond the period of fifteen days is no ground to reject it and particularly by applying the logic that the appellate authority is not a court and, therefore, section 5 of the Limitation Act is inapplicable.

42. In the view that I have taken, it is clear that the Commissioner was in

error in rejecting the appeal preferred by the petitioner. He should have entertained it and the application for condonation of delay ought to have been decided in accordance with law. Rejecting it only on the ground that he is functioning as a statutory authority and not a court and, therefore, Limitation Act is inapplicable is a view which cannot be said to be sustainable in law. In the light of the aforesaid discussion, Rule is made absolute. The order of the Commissioner dated 24th December 2010 is quashed and set aside. However, in the facts and circumstances of this case, there will be no order as to costs."

12. Applying the said position of law to the facts of the present case, it becomes evident that the preliminary objection raised on behalf of the petitioner that the Commissioner had no power to condone delay under Section 16(2) of the said Act, deserves to be rejected. Once it is held that the Commissioner indeed had the power to consider the application for condonation of delay filed on behalf of respondent no.4, it becomes evident that the impugned order passed by the Commissioner while condoning delay can be challenged only on merits to examine the correctness of the reasons given by the Commissioner to condone delay in favor of respondent no.4.

13. A perusal of the impugned order shows that the Commissioner has proceeded on the basis that there was delay of only six days in filing appeal on behalf of the respondent no.4 and that the period of delay was calculated from the date on which the respondent no.4

acquired knowledge of the order dated 14.09.2016 passed by the Collector. As noted above, it is an admitted position that the order of the Collector dated 14.09.2016 was not marked to the respondent no.4 i.e. the aggrieved person and that on the date on which the decision was passed by the respondent no.1 Collector, it could not be said that the respondent no.4 had become aware of the same. In the application for condonation of delay, the respondent no.4 has categorically stated that he became aware of the decision of the Collector on 28.09.2016 and that he applied for and received certified copy of the order on 29.09.2016 and that the appeal was thereafter filed on 06.10.2016. In these circumstances, it cannot be said that the impugned order passed the Commissioner condoning delay in favour of respondent no.4 was erroneous.

14. In view of the above, it is found that the Writ Petition No. 6880 of 2016 filed by the petitioner (original complainant) is devoid of merit and it is dismissed accordingly.

15. Insofar as Writ Petition No. 6275 of 2016 is concerned, it challenges that part of the impugned order dated 19.10.2016 passed by the respondent – Commissioner whereby interim stay of the order of disqualification stood rejected. It is relevant to note that on 24.10.2016, when this Court issued notice in Writ Petition No. 6275 of 2016, the parties were directed to maintain status quo and accordingly the petitioner in Writ Petition No. 6275 of 2016 i.e. the elected member

has continued in that status till today.

16. Considering the aforesaid facts, it would be in the interest of justice that the interim order dated 24.10.2016, passed by this Court to maintain status quo, is continued till the Commissioner decides the appeal filed by the petitioner on merits.

17. In view of the above, Writ Petition No. 6275 of 2016 is disposed of with a direction to respondent no.1 i.e. the Commissioner, Nagpur Division, Nagpur, to decide the appeal filed by the said aggrieved person i.e. the petitioner in Writ Petition No. 6275 of 2016 within a period of six weeks from today and further that the order of status quo dated 24.10.2016 passed by this Court shall continue to operate till the appeal is finally decided within the said period by the respondent-Commissioner.

18. The parties are directed to remain present before the respondent no.1- Commissioner, Nagpur Division, Nagpur, on 04.02.2019.

19. Ordinary copy of this order be supplied to the learned AGP to act upon.

JUDGE