

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7211 OF 2021

Sangita Pandurang Bankar and Ors.

.. Petitioners

Versus

Additional Commissioner, Pune Division, Pune
and Ors.

.. Respondents

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- Mr. Anil Anturkar, Senior Advocate a/w. Mr. Yatin Malvankar, Advocates for Petitioners.
- Mrs. M. S. Srivastava, AGP for the State.
- Mr. S. M. Gorwadkar, Senior Advocate i./by Mr. Niranjana Mogre a/w. Mr. Ritvik Joshi, Mr. Akshay Karlekar and Mr. Shashikand Sonawane, Advocates for Respondent Nos.6 to 13.

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CORAM : MILIND N. JADHAV, J.

RESERVED ON : JANUARY 17, 2023

PRONOUNCED ON : JUNE 05, 2023

JUDGMENT:

1. Heard Mr. Anturkar, learned Senior Advocate for Petitioners, Mrs. Srivastava, learned AGP for the State and Mr. S. M. Gorwadkar, learned Senior Advocate for Respondent Nos. 6 to 13.

2. Petitioners are elected members of Gram Panchayat - Chimbli, Taluka – Khed, District – Pune. Petitioner No. 1 is elected as Sarpanch of Gram Panchayat in its meeting held on 24.02.2021. Petitioner No. 4 is elected as Upa-Sarpanch i.e. Deputy Sarpanch in the said meeting. Petitioners (4 in number) alongwith Respondent Nos. 6 to 13 (eight in number) were elected as members of the Gram Panchayat on 18.01.2021 being successful candidates in the election.

3. Respondent No.4 – Tahsildar appointed Respondent No. 3 Presiding Officer vide order dated 18.02.2021 to conduct election of Sarpanch and Deputy Sarpanch. Respondent No. 3 prepared the schedule of election and accordingly intimated the elected members. Notice was issued and election of members of Panchayat was scheduled on 24.02.2021. All elected members of Gram Panchayat were present. Respondent No. 3 invited nomination for posts of Sarpanch and Deputy Sarpanch. Petitioner No. 1 and Respondent No. 6 submitted their respective nomination for post of Sarpanch. Since there was no unanimity and three members demanded that election be conducted by secret ballot, in terms of Rule 10(2) of the Maharashtra Village Panchayats (Sarpanch and Upa-Sarpanch) Election Rules, 1964 (for short '**the said Rules**'), Respondent No. 3 conducted the election of Sarpanch by secret ballot method. After the election Respondent No. 3 counted the votes cast and declared Petitioner No. 1 having received seven votes and declared her elected as Sarpanch. On the same date, Respondent No. 3 conducted election of Deputy Sarpanch. Petitioner No. 3 and Respondent No. 7 filed their nominations for the post of Deputy Sarpanch respectively. However before the election could be conducted Respondent No. 12 left the meeting hall thereby leaving only 12 members to cast their votes by secret ballot. After the elections Respondent No. 3 declared that seven votes were cast in favour of Petitioner No. 3 and five votes were cast in favour of

Respondent No. 7 and declared Petitioner No. 3 elected as Deputy Sarpanch.

4. Being aggrieved Respondent Nos. 6 to 12 filed dispute Application No. 18 of 2022 dated 26.02.2021 before the Respondent No. 2 – Collector, Pune against Respondent Nos. 3 to 5 under the provisions of Section 33(5) of the Maharashtra Village Panchayats Act, 1959 (for short '**the said Act**') and challenged the election of Sapranch of Gram Panchyat.

5. Respondent No. 13 was impleaded in the dispute Application subsequently. Petitioners and Respondent No. 13 opposed the dispute Application by filing their written statement. At the same time, Respondent No. 11 filed a separate dispute Application No. 19 of 2021 dated 01.03.2021 before the Respondent No.2 – Collector, Pune against Respondent Nos. 3 to 5 to challenge the election of the Deputy Sarpanch of the Gram Panchayat. Incidentally, it needs to be noted that Petitioner No. 3 (elected as Deputy Sarpanch) was not made a party to the dispute Application filed by Respondent No. 11.

6. Respondent No. 2 – Collector, Pune by common order dated 29.07.2021 allowed both the dispute Applications and set aside the elections of the Sarpanch and Deputy Sarpanch. Being aggrieved Petitioners and Respondent No. 13 filed Gram Panchayat Appeal No. 10 of 2021 dated 05.08.2021 before the Respondent No. 1 –

Additional Commissioner, Pune Division, Pune under the provisions of Section 33(5) of the said Act. Respondent No. 1 – Additional Commissioner, Pune Division, Pune rejected the Petitioners' Application for stay of Respondent No.2 – Collector's order by his order dated 31.08.2021 and subsequently by order dated 14.10.2021 rejected the Petitioners' statutory Appeal and confirmed the order dated 29.07.2021 passed by the Collector, Pune. Being aggrieved by the two concurrent orders, Petitioners are before this Court.

7. Mr. Anturkar, learned Senior Advocate appearing on behalf of the Petitioners would submit that the impugned orders are relying upon the provisions of Rule 10(2) of the said Rules and Respondent Nos. 1 and 2, while passing the said orders have failed to take into consideration the said Rules. He would submit that Rule 10(2) of the said Rules is not attracted in the instant case at all. There is a clear distinction between the following two categories, viz. (a) Where without asking any member the Election Officer himself takes the decision to conduct the Election by secret ballot and not by a show of hands; and (b) Where the Election Officer himself does not take a decision but merely informs the members as to what is the position of law and thereafter some member make the demand that the Election should be conducted by secret ballot.

7.1. He would submit that in the present case allegation in the

Application before the learned Collector is of category (b) and not (a). The finding which has been given by the Collector clearly shows that all that has been done by the Election Officer is that he has given the information that option (b) is available to the members and thereafter three members have exercised that option.

7.2. It is submitted that this would therefore not attract the provisions of Rule 10. He would submit that it is only in the eventuality contemplated by category (a) above that it can be said that Rule 10(2) is violated.

7.3. He would submit that merely making some over writing or incorrect writing of the minutes of the meeting is insignificant and that cannot be the ground for setting aside the election.

7.4. That election can be set aside only on the grounds which have been specified in the statute and not on account of non-compliance of some other expectation which is not reflected in the statute book. This submission is made by him without prejudice to the fact that the so-called addition of the two lines on page 2 and one line on page 3 is not correct. In this regard he places reliance on two decisions of this Court viz. decisions in case of *Sanjay S/o Pandurang Chavan and Ors. V/s. State of Maharashtra*¹ and in case of *Jabin Akhtar Shirgonkar Vs. Samshad Iqbal Mukadam*².

1 2003 (3) Mh.LJ 596

2 2006 (2) Mh.LJ 555

7.5. In so far as the alleged act of overwriting is concerned, the Election Officer has given a clear explanation and in the order passed by the Collector, the said explanation is not disbelieved by him.

7.6. That the Election Officer has recorded the demand for election by secret ballot by the three members specifically and their names have come on record. However despite this there is no affidavit and no enquiry of those persons conducted.

7.7. That as per Rule 13, the minutes are required to be read out and thereafter signed by the Presiding Officer and thereafter there is a deeming provision that the minutes are deemed to have been confirmed. That in the present case the minutes have been read out and thereafter have been signed not only by the Presiding Officer but also by all members including the contesting complainants and therefore the deeming provision of confirmation of minutes contemplated by Rule 13 would prevail.

7.8. That Section 33 of the said Act provides that a dispute with respect to the validity of the election of Sarpanch or Upa-Sarpanch may be raised by any member within 15 days from the date of election. That the Application before the learned Collector was filed on 26.02.2021 viz. within two days from date of election, however no issue with regards to overwriting in the Proceedings Book was raised by the Respondents therein. That subsequently, an amendment to the

Application was carried out on 15.03.2021 viz after 19 days from the date of Election and the issue of overwriting in the Proceedings Book was raised. Thus, not only the said issue was raised beyond the prescribed time of 14 days but was also raised as and by way of a complete afterthought.

7.9. He would urge the Court to therefore reconsider the reasons given in the impugned orders and on the strength of his submissions set them aside.

8. Mr. Gorwadkar, learned Senior Advocate appearing on behalf of Respondent Nos. 6 to 9, 11 and 12 has drawn my attention to Affidavit-in-Reply filed dated 06.12.2021 filed by Respondent No. 6 for himself and on their behalf and at the outset would submit that following facts need to be considered by this Court in the present case:-

8.1. that election of members of Gram Panchayat, Chimbli, Taluka Khed, District Pune was scheduled on 15.01.2021 and result of election was declared on 18.01.2021. That total strength of Gram Panchayat, Chimbli is 13. In the said election 13 members were elected. Out of the said 13 members, 7 members belonged to Bhairavnath Padmavati Sahakar Panel. That present Respondents (6 to 13) are the majority elected members who belong to Bhairavnath Padmavati Sahakar Panel.

8.2. Accordingly, meeting was scheduled on 24.02.2021 in the office of Gram Panchayat Chimbli. In the said meeting all 13 members were present. As per the election schedule, Petitioner No. 1 filed her nomination for the post of Sarpanch at 11.00 a.m. on 24.02.2021 and Respondent No. 6 filed her nomination at 11:28 a.m. for the post of Sarpanch. Similarly, Petitioner No. 3 filed nomination for the post of Upa-Sarpanch at 11:02 a.m. whereas the Respondent No. 7 filed nomination for the post of Upa-Sarpanch at 11:28 a.m. All nominations were found to be valid.

8.3. However in the said meeting, the Presiding Officer i.e. Respondent No.3 on his own directed that the election shall be held by way of secret ballot, despite the fact that he had no such discretion under the statute to hold elections under secret ballot on his own volition.

8.4. In the said election, Petitioner No. 1 allegedly secured 7 votes and Respondent No. 6 secured 6 votes. This is despite the fact that the Respondent No. 6 was member of the Bhairavnath Padmavati Sahakar Panel who had 7 members out of the said 13 members.

8.5. In the said election Petitioner No. 3 allegedly secured 7 votes and the Respondent No. 7 allegedly secured 5 votes. This is despite the fact that the Respondent No. 7 was member of the Bhairavanath Padmavati Sahakar Panel who had 7 members out of the

said 13 members.

8.6. Answering Respondents took strong objection to the manner in which the said meeting being conducted in a very suspicious manner.

8.7. That admittedly there are two minutes of the proceedings of the meeting dated, 24.02.2021 brought on record by the Presiding Officer, one with interpolation and other without interpolation.

8.8. In one of the minutes of the proceedings, the running page two of the minutes is submitted twice. In one of the running page No. 2, Presiding Officer does not mention anything about voting by secret ballot. In the other running page No. 2 of the said minutes, there is interpolation in writing by addition of three lines in the minutes of the said proceedings. This interpolation is admittedly made by the Presiding Officer himself subsequently to overcome his action of holding election by secret ballot. Minutes of the meeting are submitted by the Presiding Officer himself in the office of Tahsildar, Khed, Pune and therefore its authenticity cannot be doubted and it is an accepted position.

8.9. That in the minutes of the meeting at page No. 2 in the third last line it is stated by the Presiding Officer that election for the post of Sarpanch and Upa-Sarpanch started at 2 p.m. and the below mentioned duly elected members were present for the said meeting. On the next page there are signatures of 13 members who were

present in the said meeting. However, in the last two lines of page 2 and first line of page 3, the Presiding Officer has subsequently inserted the following:

“On asking the members whether the voting should be held by show of hands or secret ballot, some of the members indicated voting by show of hands whereas three members demanded voting by secret ballot. Secret ballot election declared.”

8.10. That the insertion added by the Presiding Officer subsequently is highly suspicious and the same was not the part of record of the original minutes of the meeting prepared in presence of members. This is proved when one reads last but third line of page No. 2 ending with the following members are present in the meeting; however, the next two lines thereafter are completely out of context which suddenly speak about the election procedure for conduct of election. Further the first line on page No. 3 is also used to its optimum to end the sentence abruptly as from the second line onwards the details of members present for voting and their signatures begin. That the first line of the Proceedings Book is kept blank by the Presiding Officer in the earlier two pages; however, on the page No. 3 the Presiding Officer has used the first line by interpolation in writing.

8.11. In the copy of the proceedings submitted by the Presiding Officer himself to the Tahasildar Office, Khed, Pune, the last sentence on page No. 2 is however conspicuously missing.

8.12. Similarly, the election to the post of Upa-Sarpanch in the proceeding book is mentioned after the election to the post of Sarpanch is completed i.e. from running page No. 4 onwards. Here also an attempt is made to exploit the last line of page No. 4 and first line of page No. 5 wherein it is inserted as follows:-

“This election also is conducted by way of secret ballot.”

8.13. Further, on running page No. 5 of the said minutes of proceedings, after declaration of result of the election of the Upa-Sarpanch, the concluding two paras reads as under:

“Accordingly since Chetan Tanaji Barge secured 7 votes out of 12 votes in the Gram Panchayat Chimbali Upa-Sarpanch Elections and secured two extra votes for the post of Upa-Sarpanch Gram Panchayat, he is declared as elected by the Presiding Officer.

Thereafter the Presiding Officer congratulates the Sarpanch and Upa-Sarpanch and thanks all members present in the meeting and declares that the meeting stands concluded.”

This is followed by the signature of the Presiding Officer in the Proceedings Book.

However shockingly thereafter on running page No. 5 it has been added by the Presiding Officer that (1) Lokhande Sheetal Dattatray (2) Jaid Rajeshri Sanjay (3) Jaid Jyoti Tanaji (4) Chavan Ra Baban (5) Kad Sharmila Dnyaneshwar (6) Sonawane Ganesh Kaluram (7) Kad Shobha Balasaheb left the hall and therefore the signature of remaining members are taken.

8.14. That in first para of the running page No. 5 of the

Proceedings Book, it has been mentioned by the Presiding Officer himself that out of the thirteen members, twelve members have participated in the elections and Ganesh Kaluram Sonawane left the hall without casting his vote. When Ganesh Kaluram Sonawane had already left before the voting of the election of Upa-Sarpanch, there was no question of him remaining present during and after the election thereafter. However, his name appears with other 6 members who allegedly left the election hall after the election from Upa-Sarpanch was declared. Hence the minutes are highly unreliable and clearly doctored according to him.

8.15. Based on the aforesaid factual submissions he has invited my attention to the minutes in the Proceedings Book which has been produced before the Court in the sealed cover pursuant to order dated 07.06.2022 passed by this Court and has persuaded me to peruse the same. He would submit that minutes in the Proceedings Book written by Respondent No. 3 – Presiding Officer and more specifically page No. 2 thereof been submitted twice, one with clear interpolation and the other which does not include the last two lines which determined the election process having been conducted by secret ballot on the demand of the three members. He would submit that the last page of the minutes in the Proceedings Book does not contain the signature of the Presiding Officer in the original record of the Gram Panchayat. He

has next drawn my attention to the order dated 29.07.2021 passed by Respondent No.2 – Collector who has returned the finding that there were clear contradictions with respect to the issue relating to conduct of elections by secret ballot given by the Presiding Officer, the Gram Sevak and the parties. He has drawn my attention to the categorical findings returned by the Collector in respect of his observations that the last two lines on running page No. 2 and first three lines of running page No. 3 are completely out of context and incongruous with the proceedings i.e. prior and subsequent paragraphs. Next he would submit that in the impugned order dated 14.10.2021, the Additional Commissioner has also returned a categorical finding that there appears to be no continuity in the Minutes recorded by the Presiding Officer and on some pages appear to be re-written with insertions and thus he has concluded that the Presiding Officer has interfered with the election process. He would submit that provisions of Rule 10(2) do not empower the Presiding Officer to hold elections through secret ballot on his own accord despite which elections were held by secret ballot without keeping absolute transparency in respect of elections. He would submit that Petitioners have not denied nor dealt with the issue of interpolation of the minutes of meetings recorded by the Presiding Officer which have been raised by the answering Respondent which infact go to the root of the matter. He would submit that Petitioners were duly heard by the statutory

authorities and the impugned orders were passed only thereafter. Finally he would submit that Petitioners hope to succeed on the basis of technicalities when the basic factual allegation of interpolation of minutes of meetings by the Presiding Officer has remained unanswered by the Petitioners and which stands proven on the face of record when one reads the same. In that view of the matter, he has sought dismissal of the present Writ Petition with costs.

9. Mrs. Srivastava, learned AGP has argued on behalf of Respondent Nos. 1 to 4 and has drawn my attention to the Affidavit-in-Reply dated 22.02.2022 by the Tahsildar. She would submit that the Affidavit-in-Reply filed by the Tahsildar clearly brings about the issue of interpolation as considered by Respondent No. 2 – Collector and Respondent No. 1 – Additional Commissioner. On perusal of the original record of the case in that regard my attention is drawn to paragraph No. 6 of the Affidavit-in-Reply, which reads thus:-

“6. I say that, the Respondent No.2 considered all the documents, written statements as well as the proceeding books placed before him in the last three lines of the second page from the proceeding book it has been mentioned that, “When it has been asked whether voting should be by raising hand or by secret ballot at that time some members demanded for secret ballot vote hence it has been decided to conduct the voting process by secret ballot.” However before that sentence, “Election process of Sarpanch and Deputy Sarpanch has been started under the Chairmanship of Presiding officer.” After this sentence the aforesaid lines are there and after the lines there were names of members and their signatures. Actually after the sentence, “following members are present” names of members and their signatures were accepted to write. But there is a difference between these lines and it has been revealed that there is a overwriting.”

9.1. Next she would submit that there is no such provision in the Rules calling upon the Presiding Officer to ask elected members about the method of voting. That Rule 10(2) provides that Presiding Officer shall proceed to elect the Sarpanch or the Upa-Sarpanch by show of hands, and if any member demands voting then it shall be by ballot. Thus, the Presiding Officer ought to have started the voting process by show of hands. Thus, there is a clear breach of Provision of Rule 10(2) of the said Rules when the Presiding Officer on his own volition asks the members about the procedure for conduct of election.

9.2. Next she would submit that on perusing the minutes, there is a clear indication that the last two lines on page No. 2 of the minutes and the first line on the page No. 3 do not have any reference to the prior and subsequent paragraphs. Further she would inform the Court that in the minutes submitted to the Tahsil office, page No. 2 has been attached twice, in one copy the last two lines are blank whereas in the other copy the last two lines are added. From the above, it is clear that the last two lines on page No. 2 of the Proceedings Book have been subsequently added by the Presiding Officer.

9.3. Next she would submit that in the present matter it is clear that the Presiding Officer has not conducted the election proceedings of Sarpanch and Upa-Sarpanch in accordance with law and the same have been conducted in breach of Rule 10(2). That the

Petitioner challenged the order passed by Respondent No. 2 before the Respondent No. 1, however Respondent No. 1 rejected Petitioners' appeal and confirmed the orders passed by the Respondent No. 2 with reasons. Respondent No. 1 in paragraph No. 7.4 of his order has observed that Rule 13 of the said Rules provides that at the conclusion of the meeting, the proceedings shall be read out and signed by the Presiding Officer and thereupon they shall be deemed to be conducted. The Presiding Officer is not expected to make any further noting in the proceedings sheet. However, it appears that the Presiding Officer has made noting in his own handwriting even after conclusion of the proceedings. Thus there is a clear breach of Rule 13 also in the present case.

9.4. The learned AGP has therefore sought dismissal of the Petition.

10. I have considered the submissions made by respective parties and pleadings in the present case. I have also perused the minutes of the proceedings held on 24.02.2021 from the Register supplied to the Court in a sealed cover. I have also asked the learned Advocates to inspect the same before proceeding with the final hearing of arguments in the present Petition.

11. At the outset the question as to whether the Presiding Officer has conducted himself in accordance with the provisions of the

said Act and Rules is required to be seen on the basis of the material placed before the Court. For this provisions of Rule 10 (2) of the said Rules assume significance which reads thus:-

“10(2) – If more than one candidate has been so nominated, the Presiding officer shall proceed to elect the Sarpanch or the case may be, Upsarpanch. The voting at such election shall be by show of hands. If however any member present at the meeting so demands the voting shall by the ballot. The candidate who obtains the highest number of votes shall be declared to have been duly elected of valid votes is found to exist between any two or more candidates and the addition of one vote will entitle any of them to be declared as Sarpanch or, as the case may be, Upa-Sarpanh, the determination of the candidate to whom such additional vote shall be deemed to have been given shall be made by lot to be drawn by the Presiding Officer in such manner as he shall determine.”

12. On bare perusal of Rule 10 (2) stated herein above it is seen that if election has to be held, voting at such election shall be by show of hands, however, if any member so demands then the voting shall be by ballot. Hence the general Rule is that voting has to be by show of hands and exception to that is that if demanded by any member/s it shall be by ballot.

13. The next material provision of law which is relevant in the present case is Section 33 of the said Act which provides for procedure of election of Sarpanch and Upa-Sarpanch. Section 33 of the said Act reads as under:-

“33. Procedure for election of Sarpanch and Upa-Sarpanch – (1) On the establishment of panchayat for the first time under this Act, or on its reconstitution or establishment under Sections 145 and 146, or on the expiry of the term of a panchayat a meeting shall be called on the date fixed under sub-section (1) of section 28 by the (Collector), for the election of the Sarpanch and Upa-Sarpanch. In the case where the

offices of both the Sarpanch and Upa-sarpanch become vacant simultaneously, a meeting shall be called on the date fixed by the (Collector), for the election of the Sarpanch and Upa-Sarpanch.

(2) The meeting called under sub-section (1) shall be presided over by such officer as the (Collector) may by order appoint in this behalf. The officer aforesaid shall, when presiding over such meeting, have the powers and follow the procedure prescribed, but shall not have the right to vote.

(3) No business other than the election of Sarpanch and Upa-Sarpanch shall be transacted at such meeting.

(4) If in the election of the Sarpanch or Upa-Sarpanch there is an equality of votes, the result of the election shall be decided by lot drawn in the presence of the officer presiding in such manner as he may determine.

(5) In the event of a dispute arising as to validity of the election of a Sarpanch or Upa-Sarpanch under sub-section (1) (the Officer presiding over such meeting or any member may, within fifteen days from the date of election, refer the dispute to the Collector for decision. An appeal against the decision of the Collector may within fifteen days from the date of such decision, be filed before the Commissioner, whose decision shall be final. The Collector or Commissioner shall give his decision as far as possible within sixty days of the receipt of the reference, or as the case may be, appeal.”

14. Section 33 (5) states that in the event if any dispute arises, the Presiding Officer or any member may within 15 days from the date of election refer the dispute to Collector and that Collector shall give his decision as far as possible from receipt of reference within 60 days, as the case may be. In the facts of the present case, provisions of Section 33(5) will have to be read alongwith Rule 10(2) and applied to the facts. Record indicates that Respondent No. 12 has also filed a separate Appeal being Gram Panchyat Appeal No. 19 of 2021 for seeking cancellation and re-election for post of Sarpanch and Upa-Sarpanch since despite he remaining present, he was marked as absent in the meeting during election of Upa-Sarpanch by the Presiding

Officer. Record further indicates that in the Proceedings Book submitted by the Presiding Officer with the office of the Tahsildar there are two different pages of running Page No. 2 of the Minutes of meeting dated 24.02.2021. On one of the page it is observed that last two lines of Page No. 2 which reads as follows:-

*“ मतदान गुप्त की हात वर करुन घ्यावे याची विचारणा केली असता
काही सदस्यांनी हात वर करुन व तिघांनी गुप्त मतदान व्हावे अशी मागणी
केल्याने गुप्त मतदान ठरले.”*

However on the other page, this sentence is missing.

15. It is further seen that the Collector has returned a categorical finding that the Presiding Officer has himself asked the members about the conduct of elections when he has no such power to do so under the said Act. The Rule for conduct of election as seen on perusal of Rule 10(2) is by show of hands and only if a demand is made by any member/s it shall be by ballot. Though it is brought on record by Petitioners that three members demanded that election be conducted by secret ballot, still at the outset there was no reason for the Presiding Officer to firstly ask the members about the choice for conduct of elections and thereafter submit two different pages of running page No. 2 of the Minutes of meeting dated 24.02.2021 to the Office of Tahsildar. In the Affidavit-in-Reply filed by the Tahsildar which is placed on record the written statement of the Presiding Officer has been annexed as Exhibit H1 at page No.110 to 113. I have perused

the same. In paragraph No. 6 on Page No. 112 it is confirmed and admitted by the Presiding Officer that he has himself asked as to how was the election to be conducted, namely by show of hands or by secret ballot. He further admits on Page No. 113 that he has himself handed over two different copies of the scanned minutes of the meeting to the Tahsildar's office from his custody.

16. In the present case, it is seen that the mandatory provisions of Rule 10(2) of the said Rules was required to be followed and elections ought to have been conducted thereunder. Rule 10 of the said Rules provides the regulatory condition for achieving fair and clear election as held by this Court in the case of ***Maruti Bandu Patil V. Village Panchayat, Sidhanerli and Ors.***³ decided on 18.11.1980. This Court in paragraph Nos. 5 to 9 has held as under :-

“5.

10. Procedure for election – (1) If only one candidate has been duly nominated for the office of the Sarpanch or Upa-Sarpanch he shall be declared to have been duly elected as Sarpanch or, as the case may be, Upa-Sarpanch.

(2) If more than one candidate have been so nominated, the Presiding Officer shall proceed to elect the Sarpanch or as the case may, Upa-Sarpanch. The voting at such election shall be by show of hands. If, however, any members present at the meeting so demands the voting shall be by ballot. The candidate who obtains the highest number of votes shall be declared to have been duly elected as Sarpanch or, as the case may be, Upa-Sarpanch. When an equality of valid votes is found to exist between any two or more candidates and the addition of one vote will entitle any of them to be declared as Sarpanch or, as the case may be, Upa-Sarpanch, the determination of the candidate to whom such additional vote shall be deemed to have been given shall be made by lot to be drawn by the Presiding Officer in such manner as he shall determine.”

3 AIR 1981 BOMBAY 378 : : (1981) BOM CR 405

*The words “any member present at the meeting so demands” were substituted in the year 1966 for the words “majority of the members present at the meeting so demand”. Therefore the provision as to voting by ballot which was dependent upon the demand by the majority of the members present at the meeting was given a go-by and now by amended Rule a duty is cast upon the Presiding Officer to hold election by a ballot if any member present at the meeting so demands. The word used is “shall” which is obviously peremptory in nature. Normally an election is an expression of popular will. Therefore, obviously it will have to be so conducted that the will of the voter is properly expressed. The purpose of voting by ballot is to keep voting secret so that it may not be known from the ballot paper itself as to who has voted for whom. This assurance against the disclosure “of identity of the voter enables him to exercise his franchise in a free and fearless manner. This eliminates the chances of any evil consequences, at the instance of rival candidate for whom the voter may not have voted. To keep the election process free and fair the mode of poll by secret ballot has been introduced in all civilised societies and nations. Secrecy of vote is the fundamental principle of election in all democratic forms of local Governments. This also helps to maintain purity of elections. This is the object behind the provision as made in Sub-rule (2) of Rule 10. Apprehending that the election may not be free and fair if it is held by show of hands any member present at the meeting can make a demand that voting should be by ballot. If such a demand is made then an obligation is cast upon the Presiding Officer to hold the election by ballot alone and not by show of hands. It is no doubt true that only because the word “shall” is used, it cannot be held that a particular provision is ipso facto mandatory. Construction of the said expression depends on the provisions of a particular Act or the Rules as well as the setting in which the said expression appears, the object for which the said provisions is made and the consequences that would follow from the infringement of the direction and such other considerations. The question as to whether the provision is mandatory or directory depends upon the intention of legislature. For determining the question whether the said expression is mandatory or directory the subject matter, the importance of the provisions, the object intended to be secured by the Act are all relevant, (See *Govindlal v. Agricultural Produce Market Committee*, AIR 1976 SC 263).*

6. *Rule 10 provides a regulatory procedure for achieving fair and free election. Therefore, interpretative process must advance the basic postulate of free and fair election. Secrecy of ballot is undoubtedly an indispensable adjunct of free and fair election. The election by ballot is to be held when demanded, as to statutorily assure the voter that his identity will not be disclosed so that the voter may vote without fear or favour and is also free from apprehensions. This rule subserves a very vital principle that a voter should be absolutely free to exercise his franchise untrammelled by any constraint. The provision of holding election by ballot is made in the rules to help voters to vote free from any inhibition, fear or apprehension of being subjected to some sort of calamity. Thus the*

provision goes to the very root of the matter, namely, of holding free and fair election of the office bearers of the Village Panchayat. To hold otherwise is to perpetuate the very mischief which is sought to be suppressed. The word used namely “shall” has an inbuilt element of compulsion. If the provisions of Rule 10 are construed in this background, in our opinion, it is quite obvious that the word used viz. “shall” clearly indicates that the provision is mandatory, and non-compliance of the said provision must result in certain consequences.

7. It is equally well settled that such a mandatory rule has to be followed scrupulously as non-observance of such rule might affect the fairness and purity of election itself. Therefore, challenge in such cases is not only based on the ground of mere error but also on the ground that as a result of such non-observance the whole election process has been rendered impure, which might result in the election not being free and fair. In this context a reference could usefully be made to a decision of this Court in *Madhavrao Tatayasaheb Ghatge v. Collector, District Kolhapur*, **AIR 1965 Bom 217**. The provision I Rule 10 is made for securing free and fair election. Therefore, it cannot be said that this is merely a technical breach. As the said rule goes to the very root of the matter and ensures a free and fair election, which is the essence of purity of election, the non-observance of the said mandatory provision must vitiate the election as a whole.

8. However, it is contended by Shri Jahagirdar, learned counsel appearing for the respondents that the said provision is impossible of compliance as no procedure has been laid down in the Rules, in case an election is to be held by a secret ballot. He further contended that it is nowhere laid down in the Rules as to what procedure the Presiding Officer should follow if the voters are illiterate when an election is to be held by a secret ballot. Therefore, according to the learned counsel, if the provision made in the Rules in that behalf is wholly unenforceable in the absence of procedure to be followed then the Presiding Officer was right in rejecting the said demand when he found that four of the voters were illiterate. It is not possible for us to accept this contention for the obvious reasons. It is not correct to say that the said provision is impossible of observance. It is well established principle of interpretation of statutes that if a statute is passed for the purpose of enabling something to be done, but omits to mention some details which are necessary for the proper and effectual performance of the said work or duty, then the Courts are at liberty to infer that the statute by implication confers all necessary powers without which the said duty cannot be performed. This is what is popularly known as doctrine of implied power. Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means as are essentially necessary for its execution. If the Presiding Officer is obliged to hold election by following the process of voting by ballot, then by necessary implication, he has ample powers to achieve the said object by following the necessary procedure. What should be that procedure must depend upon the facts and circumstances of each case. Guidelines in this behalf are not lacking in the enactment or the Rules. General elections to elect members to the village Panchayat are held by following the procedure of secret ballot. Detailed

procedure in that behalf is laid down by the Act and the Rules. The Rules called Bombay Nyaya Panchayat (Conduct of Election) Rules, 1959 also provide for the procedure the Presiding Officer is expected to follow for holding the election by ballot. Therefore, it is not possible for us to come to the conclusion that the observance of the said Rule was wholly impossible in this case only because four voters were illiterate. It is common knowledge that in general elections even an illiterate voter is in a position to exercise his right of franchise.

9. Therefore, it is quite clear to us that as the provision made in Rule 10 is mandatory and goes to the very root of the matter, its non-observance will vitiate the whole election. This being the position, the elections held in the present case without following the said mandatory procedure are obviously illegal and are liable to be set aside.”

17. Perusal of the Minutes of the proceedings written in the Book would clearly show that the Presiding Officer has himself on his own volition asked for the procedure to be conducted for the election in the present case. This is contrary to provisions of Rule 10 of the said Rules. This action on the part of Presiding Officer of whether the election has to be conducted by show of hands or by secret ballot and asking the same to the elected members clearly revolts against the Petitioners' case. The Presiding Officer admits the same in his explanation given to the Tahsildar. Perusal of the original minutes Book clearly show that on page No. 2 in the last four lines it has been recorded that the election process for election of Sarpanch and Deputy-Sarpanch commenced at 02.00 p.m. under the authority of the Presiding Officer, that the elected members and the newly elected members were present whose names appear thereafter. The names of the newly elected 13 members however do not appear immediately

thereafter and appear on page No.3 over leaf.

18. *Prima facie* perusal of the minutes should show that the names of the 13 members ought to have appeared after the above recording. However there is addition before the names of the 13 members begin on the next page No. 3 which reads as to whether the election has to be conducted by show of hands or secret ballot having been asked by the Presiding Officer himself to those present and in response to the same, some of the members suggested that it should be by show of hands whereas three members suggested that it should be by secret ballot. Immediately thereafter it is recorded that election by secret ballot has been finalised. Assuming for the sake of arguments that this recording was even correct, then the names of the three members ought to have been reflected in the minutes there itself who had desired to have election by secret ballot. However perusal of the same clearly indicates one and only one thing and i.e. the Presiding Officer himself has asked whether the election has to be held by show of hands or by secret ballot. This is however not the position in law. Voting by secret ballot cannot be permitted unless the demand is made in that behalf by any member present in that meeting. Perusal of Rule 10 (2) of the said Rules would clearly suggest one thing and i.e. the Presiding Officer cannot ask as to how the election has to be conducted i.e. whether it has to be conducted by show of hands or by

secret ballot. There is no choice or liberty of procedure given to the Presiding Officer to have the Sarpanch or Upa-Sarpanch elected in a manner different than that indicated under the provisions in Rule 10(2) of the said Rules. Rule 10(2) of the said Rules makes it incumbent upon the Presiding Officer to proceed to elect the Sarpanch or Upa-Sarpanch as the case may be by show of hands unless there is a demand by any member present at the meeting to proceed with the election by having recourse to voting by secret ballot. In this context, Rule 13 of the said Rules is also relevant which deserves attention. Rule 13 reads thus:-

“13. Minutes: The proceedings of the meeting shall be recorded in the minute book maintained by the Panchayat under Rule 40 of the Bombay Village Panchayats Meetings Rules, 1959. The names of the members present at the meeting and when the voting is by show of hands, the names of members voting for or against any candidate for election and the names of members who remain neutral shall be entered therein. At the conclusion of the meeting, the proceedings shall be read out and signed by the Presiding Officer and thereupon they shall be deemed to be confirmed. A copy of the proceeding shall be submitted to the Chairman of the Panchayat Samiti, the Cheif Executive Officer of the Zilla Parishad and also to the Collector through the Mamlatdar, Tahsildar, Mahalkari, Naib Tahsildar concerned within seven days of the meeting. The proceedings shall be open to inspection, at all reasonable times by any member of the Panchayat.”

19. Under Rule 13 it is seen that the Presiding Officer cannot call upon the members present in the meeting to vote by secret ballot in favour of the contesting candidates unless the demand is made in that behalf by any member so present. In the present case the last two lines on page No. 2 and first line appearing on Page No. 3, if assumed

to be correct, then in that context the names of three members ought to have been also mentioned. As noted above the last two lines on page No. 2 and first line of page No. 3 following which the names of 13 members have been listed when read in juxtaposition and continuation with the statement recorded on running page No. 4 clearly shows that there is a clear interpolation / insertion of the last two lines on page No. 2 and first line on page No. 3 to overcome the manner in which the election were conducted.

20. Another aspect which deserves consideration is that in the absence of names of the three members in the minutes who have sought the election by secret ballot it cannot be inferred that there was a demand by the three members to conduct election by secret ballot. That apart, it is seen in the present case the Presiding Officer has not followed the election procedure which is required to be followed under Rule 10 and Rule 13 of the said Rules. In his written submission given by the Presiding Officer to the Additional Commissioner, the Presiding Officer has clearly admitted that despite having been directed to submit the minutes of meetings to Tahsil Office, he inadvertently and in a great hurry filed incomplete minutes of page Nos. 1 and 2 from the scanned copies available with him to the Tahsil Office and only subsequently filed the final complete minutes of meetings. Thus the Presiding Officer has himself admitted to this lapse

which clearly shows dereliction in duty and non following the procedure established under Rule 10 read with Rule 13 of the said Rules. It is clear from the pleadings that on Page No. 2 of the Minutes, the names of 13 members ought to have been reflected which were infact reflected on page No. 3 and the continuity of the minutes recorded at the end of page No. 2 is completely incongruous and it is therefore concluded that the last two lines have been clearly interpolated and added subsequently by the Presiding Officer thereby derailing the transparency of the election process. Such finding has been clearly returned by the Respondent No.1 - Additional Commissioner in the impugned order.

21. In view of the above observations and findings in the present case, it is clear that the last two lines on page No. 2 and first line on page No. 3 have been subsequently inserted / added / interpolated. It is clear that Rule 10(2) of the said Rules has not been followed by the Presiding Officer which specifies the method for proceeding with the election process. Having regard to the requirement of the provisions which clearly provide as to how the Presiding Officer has to proceed to elect the Sarpanch or Upa-Sarpanch as the case may be, it is clear that the Presiding Officer does not have the choice or liberty of suggesting or asking the members to proceed with election in any manner different from that which is indicated in Rule 10(2) of the said Rules.

Reading the provisions of Rule 10(2) alongwith Rule 13 of the said Rules, it is amply clear that the Presiding Officer cannot call upon the members present in the meeting to vote by secret ballot in favour of the contesting candidates unless a demand in that behalf is made by any member so present. However having held that the last two lines and first line appearing on page Nos. 2 and 3 have been added subsequently which is not only clear to the naked eye but also does not maintain any continuity whatsoever the present Petition fails. Both orders dated 29.07.2021 passed by the Collector and 14.10.2021 passed by the Additional Commissioner are upheld.

22. In view of the above findings, I am of the opinion that the present Petition deserves to be dismissed with exemplary costs. Petition stands dismissed. Petitioners are directed to pay costs of Rs.20,000/- to the Kirtikar Law Library, High Court, Mumbai. Costs shall be paid within a period of two weeks from today and receipt of payment shall be placed before the Registrar for compliance.

[MILIND N. JADHAV, J.]

23. After the judgment/order is pronounced, Mr. Malvankar, learned Advocate for the Petitioners would submit that stay has been in operation since 8th November, 2021. He would submit that the same be extended to enable the Petitioner to approach the Supreme Court.

In view of the gross facts in the present case and the conduct of the Petitioners, the oral Application for stay stands rejected.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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by AJAY
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