

(2002) 11 BOM CK 0015

In the Bombay High Court

Case No : Writ Petition No. 5804 of 2002

Arjun Sambhaji Khade and Others

APPELLANT

Vs

Mangal Ankush Kharmate and Others

RESPONDENT

Date of Decision : 26-11-2002

Acts Referred:

Bombay Village Panchayats Act, 1959 — Section 35

Citation : (2003) 1 ALLMR 986 : (2003) 2 MhLj 295

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Dilip Bodake, for the Appellant; P.B. Shah and A.B. Avhad for respondent No. 1 and M.H. Solkar, AGP, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Rule, made returnable forthwith. Respondents waive service. By consent, taken up for hearing and final disposal.

2. In these proceedings an order passed by the Divisional Commissioner, Pune on 5th April, 2002 rejecting an appeal against an order passed by the Additional Collector, Satara on 5th October, 2001 is called into question.

3. A resolution of no confidence that had been passed by 8 out of 9 members of a Grampanchayat against the first respondent was set aside by the Collector and the order of the Collector has been affirmed in appeal. The order of the appellate authority has been challenged in these proceedings. The seven petitioners and the first respondent are elected members of the Village Panchayat of Enkur. Elections took place in the year 2000 and the tenure of the elected body was until 2005. The first respondent was elected as Sarpanch of the Grampanchayat. On 23rd August, 2001, 8 members of the Grampanchayat moved an application before the Tahsildar recording that they wanted to move a resolution of no confidence against the first respondent, on the ground that the first respondent had been carrying on the business of the Grampanchayat in accordance with his

own whims and fancies without taking the members of the Grampanchayat into confidence and on the ground that the first respondent had been allotting work without proper resolutions. On this application, the Tahsildar by his notice dated 24th August, 2001 convened a special general meeting of the Grampanchayat on 30th August, 2001. There is no dispute about the fact that the special notice was forwarded to all the members of the Grampanchayat including the first respondent. The Application moved by the petitioners before the Tahsildar was annexed to the notice. Similarly, there is no dispute about the fact that at the meeting of the Grampanchayat that was held on 30th August, 2001, the resolution of no confidence was passed by a majority of 8:1 the sole dissenter being the first respondent.

4. The first respondent challenged the resolution by filing an application before the Additional Collector, Satara. The Additional Collector allowed the appeal on the ground that copies of the requisition which have been submitted for the holding of the special general meeting had not been submitted in seven sets to the Tahsildar and that the notice was not in the prescribed form. The order of the Tahsildar has been affirmed by the Divisional Commissioner, Pune.

5. The learned counsel appearing on behalf of the petitioners has urged that the requirement of furnishing seven copies of the notice to the Tahsildar is not mandatory, but is directory and so long as copies of the notice have been circulated to the Sarpanch who was sought to be removed and to all the members of the Grampanchayat, following which a resolution has been passed as required by the law, it was not open to the Collector to interfere with the said resolution. Moreover, it was sought to be urged that the form of the notice which is prescribed by the rules, to which a reference would be made hereafter, is not mandatory and so long as the notice contained the statement that the members sought to move resolution of no confidence and the reasons therefore, that was sufficient compliance with the requirement of the rules.

6. On the other hand, it was urged on behalf of the respondents that it was necessary that seven copies of the notice should be sent to the Tahsildar since, the Tahsildar is required to submit the notice to the Zilla Parishad, Panchayat Samiti, Collector and the Commissioner as well as to the Secretary. The learned counsel submits that these authorities have a controlling power u/s 142 of the Bombay Village Panchayats Act, 1958 and having regard to the aforesaid statutory provision, it was necessary that a notice should be filed in seven copies.

7. The power to remove a Sarpanch or Upa-Sarpanch by moving a resolution of no confidence is contained in Section 35 of the Bombay Village Panchayats Act, 1958. Section 35 provides that a motion of no confidence be moved by not less than two thirds of the total number of members who are for the time being entitled to sit and vote at any meeting. Section 35 also makes a provision for the convening of a meeting of the Panchayat by the Tahsildar : for offering to the Sarpanch or as the case may be the Upa-Sarpanch an opportunity to participate in the proceedings of the meeting and the requirement that the motion has to be

carried out by a majority of not less than two thirds. There is no dispute about the fact that all these formalities were complied with and that the motion was carried by the requisite majority. The motion was moved by the requisite number of members of the Grampanchayat, it was heard and debated with the participation of the first respondent and was duly carried with the requisite statutory majority.

8. In exercise of powers conferred by Section 176 of the Act, rules have been framed, called Bombay Village Panchayats Sarpanch and Upa-Sarpanch (No Confidence Motion) Rules, 1975. Rules 2 and 3 provide as follows:

"2(1) The members of the Panchayat who desire to move a motion of no confidence against the Sarpanch or Upa-Sarpanch shall give notice thereof in the form appended hereto to the Tahsildar of the taluka in which such Panchayat is functioning. Where the members desire to move the motion of no confidence against the Sarpanch as well as the Upa-Sarpanch, they shall give two separate notices.

(2) The notice under Sub-rule (1) shall be accompanied by seven additional copies thereof, and the Tahsildar shall send one copy to the Sarpanch, one copy to the Upa-Sarpanch and one each to the Zilla Parishad, Panchayat Samiti, the Collector and the Commissioner. One copy shall also be given to the Secretary.

(3) The Tahsildar shall, immediately on receipt of notice under Sub-rule (1), satisfy himself that the notice has been given by not less than one third of the total number of members who are for the time being entitled to sit and vote at any meeting of the Panchayat and then convene a special meeting for the purpose within seven days from the date of receipt of such notice."

"3. Immediately after the meeting, the Tahsildar shall communicate to the Zilla Parishad, the Panchayat Samiti, the Collector and the Commissioner, the names of all the members of the Panchayat who were present at the meeting, the decision taken on motion, and the Number of votes in favour of, or against the motion."

9. Section 35(1) of the Act to which a reference has already been made earlier requires that a motion of no confidence can be moved by not less than the stipulated number of members of the Panchayat after giving notice as prescribed to the Tahsildar. Sub-rule (2) of Rule 2 provides that the notice shall be accompanied by seven additional copies thereof. The Tahsildar is then required to send one copy to the Sarpanch, one to the Upa-Sarpanch and one each to the Zilla Parishad, Panchayat Samiti, the Collector, the Commissioner and the Secretary. The furnishing of the copies to the Sarpanch or as the case may be to the Upa-Sarpanch, who is sought to be removed is mandatory, because the elected member of the Grampanchayat who is sought to be removed, by the passing of a no confidence resolution must have an adequate opportunity of defending himself or herself. That must comprehend an adequate notice of the proposed resolution and the grounds thereof. In the present case, the notice

which was furnished contained the grounds on which the removal of the Sarpanch was sought. The Form appended to the rules requires the due recital of the grounds or basis of the notice. That was admittedly done, by setting out the reasons why the Motion of no confidence was moved. What is mandatory by Section 35 and by Rule 2 is the furnishing of a notice to the Tahsildar of the intention of the members of the Grampanchayat to move a motion of no confidence. Furnishing of the notice to the Tahsildar is mandatory because it is on the basis of that notice that the Tahsildar has to convene a special general meeting of the Grampanchayat. Sub-rule (2) of rule 2 provides that the notice shall be accompanied by seven additional copies. The sub-rule, therefore, clearly makes a distinction between the notice and the seven additional copies thereof. The furnishing of the notice is mandatory. Thereafter rules 3 postulates that after the meeting is held, the Tahsildar shall communicate to the Zilla Parishad, Panchayat Samiti, the Collector and the Commissioner the name of all the members of the Panchayat who were present at the meeting, the decision taken on the motion and the number of votes in favour of or against the motion. The rule of the Zilla Parishad, Panchayat Samiti, the Collector and the Commissioner, if any, is after the resolution is passed. The Zilla Parishad and the Panchayat Samiti, Collector and Commissioner have to be intimated by the Tahsildar in terms of Rule 3 of all the names of the members of the Panchayat, who were present, the decision taken and the number of votes in favour of or against the motion. Insofar as the Collector and the Commissioner are concerned, they have adjudicatory powers thereafter. u/s 35(3)(b), the Sarpanch or Upa-Sarpanch can raise a dispute before the Collector. Under Sub-section (3)(c) of Section 35, a person aggrieved by the decision of the Collector can file an appeal before the Commissioner. These are adjudicatory powers. Therefore, the learned counsel appearing on behalf of the respondents is not correct in relying upon the provisions of Section 142 of the Bombay Village Panchayats Act, 1958 to support his submission that the controlling power of the standing committee would be affected by a failure to give an additional copy of the notice which has to be forwarded to the standing committee. Therefore, the failure to furnish additional copies of the notice does not vitiate the process or render the Motion of no confidence unlawful. Rule 2(2) states that the notice shall be accompanied by seven additional copies. However, that requirement is not mandatory and a defect in supplying additional copies is only an irregularity which does not vitiate the proceeding.

10. The Concise Oxford Dictionary defines the expression "shall", as "to form statements or questions involving notions of command and future or conditional duty, obligation, etc...." Black's law dictionary states that "In common or ordinary parlance and in its, ordinary significance, the term "shall" is a word of command and one which has always or which must be given a compulsory meaning as denoting obligation. The word in ordinary usage means must and is inconsistent with a concept of discretion." Black's dictionary, however, posits that the word can be merely permissive or directory (as equivalent to may) to carry

out the legislative intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense and where no public or private right is impaired by its interpretation in the other sense.

11. Thus though the expression "shall" ordinarily implies a mandate the statute has to be looked at having regard to the legislative intent and purpose. Thus the interpretation has to be in the light of the context, circumstance, consequence, purpose and object sought to be achieved. I

12. In *Sainik Motors, Jodhpur and Others Vs. The State of Rajasthan*, Mr. Justice Hidayatullah, J. (as the Learned Chief Justice then was) held that ordinarily the expression "shall" is mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands. Mr. Justice Subbarao, (as the Learned Chief Justice then was), while delivering the judgment of the Supreme Court in *State of U.P. v. Babu Ram Upadhyaya*, AIR 1961 SC 757 similarly held that though the word "shall" is prima facie mandatory, the Court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. Justice G. P. Singh in his *Principles of Statutory Interpretation* (Seventh Edition, Reprint 2000) points out that there are numerous cases where word "shall" has been construed as merely directory (Footnote 66 at page 299).

13. Having regard to the underlying object of and the context in which the provision has been made in the Rules for furnishing additional copies, and the provisions of the Act, I am of the view that a motion of no confidence cannot stand vitiated by a mere defect in furnishing or a failure to furnish additional copies of the motion of no confidence.

14. In a matter such as the present, the Court must be guided by the fact that the resolution has been passed by an overwhelming majority of the elected members of the Grampanchayat. A motion of no confidence u/s 35 stands on a different footing from the removal of a Sarpanch u/s 39 for misconduct, negligence or incapacity in the performance of his duty. Section 39 contemplates an enquiry to be pursued by the Chief Executive Officer under the order of the President of the Zilla Parishad. This is in contradistinction to a motion for no confidence. A Division Bench of this Court in *Nimba Rajaram Mali Vs. Collector, Jalgaon and others*, thus held following the judgment of the Supreme Court in *Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot and Others*, that the essential connotation of a No Confidence Motion is that a party against whom such a motion is passed has ceased to enjoy the confidence of the requisite majority of members. In that case, it was held that a lapse on the part of the Tahsildar in sending copies of the motion of no confidence to some of the authorities would not invalidate the motion of no confidence and in holding thus the Division Bench observed that in a democratic institution such as a Grampanchayat, the will of the majority is of paramount importance. In my view, there was substantial compliance with the requirement of the rules. The motion of no confidence was proposed and carried by the requisite majority as required by Section 35 of the Act. Both the authorities below were palpably in error in

interfering with the decision reflected in the overwhelmingly large majority of the Grampanchayat.

15. In the circumstances, the petitioners are entitled to succeed. The Petition is made absolute as prayed by quashing and setting aside the orders dated 5th October, 2001 of the Additional Collector, Satara and of 5th April, 2002 passed by the Divisional Commissioner, Pune. The application filed by the first respondents questioning the resolution of no confidence passed by the Grampanchayat shall in the circumstances stand dismissed, the Writ Petition is allowed in the aforesaid terms. There shall no order as to costs.

Parties to act on a copy of that order duly authenticated by Sheristedar/P.A. of this Court.