

(2023) 05 BOM CK 0015

In the Bombay High Court

Case No : Writ Petition No.3885 Of 2023

Dnyaneshwar Shridhar Matkar

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 03-05-2023

Acts Referred:

Maharashtra Zilla Parishads District Services (Discipline And Appeal) Rules, 1964 — Rule 4(v), 4(vi), 4(vii)<Maharashtra Village Panchayats Act, 1958 — Section 3(14), 3(34), 3(20), 3(26), 8(1A), 9, 10, 14, 16, 27(1), 39, 39(1), 39(1)(i), 39(1)(ii), 39(3), 45, 55, 60, 60A, 62, 63A, 145, 146, 180

Citation : (2023) 05 BOM CK 0015

Hon'ble Judges : Arun R. Pedneker, J

Bench : Single Bench

Advocate : V. D. Salunke, R. V. Gore, K. B. Jadhavar, A. R. Kawade, V. H. Pathade, S. S. Gangakhedkar, A. P. Piratwad

Final Decision : Dismissed

Judgement

Arun R. Pedneker, J

1. Heard.
2. Rule. Rule made returnable forthwith. With consent of parties, heard finally.
3. By the present writ petition, the petitioner is challenging the order dated 29.03.2023, passed by the Hon'ble Minister in an appeal filed under Section 39(3) of the MaharashtraVillagePanchayatsAct, (hereinafter referred to as "the Act") confirming the order dated 17.01.2023, passed by the Additional Divisional Commissioner, Aurangabad thereby removing the petitioner as Sarpanch under section 39(1) of the Act. The Commissioner has held the petitioner / Sarpanch guilty of misconduct in discharge of his duties. The Commissioner has held that the petitioner has issued succession certificates beyond the authority vested in him.

Brief Facts

4. The petitioner was elected as member of the Grampanchayat Khirdi from the General category in the election held on 15.01.2021. Thereafter, the petitioner was elected as Sarpanch on 08.02.2021. On 28.04.2022, a dispute was raised by respondent no.8 – Sunil Tukaram Ghusale, before respondent no.3 – the Additional Divisional Commissioner, wherein it was alleged that the petitioner has issued succession certificate without any authority and, as such, prayed that a inquiry be conducted under section 39(1) of the Act and the petitioner be removed from the post of Sarpanch. Respondent no.3, thereafter, directed respondent no.4 – the Chief Executive Officer, to inquire into the matter and submit a report. The Chief Executive Officer issued show cause notice under section 39 of the Act for conducting inquiry to the following 3 persons, as under:-

[I] Dnyaneshwar Shridhar Matkar [Petitioner]

[II] Sunil Tukaram Ghusale [Complainant]

[III] Gramsevak Grampanchayat-Khirdi, Taluka – Khultabad

5. Respondent no.4 issued notice to the petitioner, to the complainant, and the gramsevak grampanchayat – Khirdi, Taluka – Khultabad. The petitioner filed his response and submitted that he has not committed any misconduct while discharging his duties as Sarpanch and the complainant is politically motivated. On completion of inquiry a report was submitted by the Chief Executive Officer to the Commissioner and on the basis of the report the Commissioner removed the petitioner for misconduct under section 39(1) of the Act. The petitioner, thereafter, file an appeal before the Hon'ble Minister under Section 39(3) of the Act. The appeal was also dismissed.

6. The petitioner has filed the present petition challenging the orders passed by the Hon'ble Minister so also by the Commissioner.

Submission of Petitioner:-

7. Mr. V. D. Salunke holding for Mr. R. V. Gore, learned counsel for the petitioner submits that the order passed by the Commissioner so also by the Hon'ble Minister is erroneous in law for the following reasons.

8. That the learned Commissioner has not complied with the material provision of Section 39 of the Act and that the notice was not issued to the panchayat. He submits that the proviso to section 39(1) of the Act provides that the inquiry has to be conducted by the Chief Executive Officer only after giving due notice to the panchayat and the person concerned. In the instant case, the notice was only given to the petitioner but no notice was served to the panchayat. He submits that the notice to the gramsevak is not a notice on the panchayat. The learned counsel has taken me through the sections 3(34), 3(20), 3(26), 60, 27(1), 10, 45, 55, 62 and 63A of the Act to contend that the panchayat is distinct from the 'Gramsevak' and notice to 'Gramsevak' is not a notice to panchayat. The learned counsel has further taken me though section 145 and 146 of the Act. The learned counsel submits after taken me through the various provisions of the Act, that

notice to the gramsevak is not the notice to the panchayat.

9. The learned counsel for the petitioner submits that there is distinction between an inquiry conducted under sections 16 and 39 of the Act . In an inquiry under section 16 the notice is given to the individual member concerned, whereas under section 39 of the Act, the notice is given to the panchayat.

10. As regards the merits of the matter the learned counsel submits that the alleged misconduct of issuing succession certificate without authority cannot be interpreted to mean that the petitioner is guilty of misconduct and committed a willful act in character or unlawful in discharge of official duties. That there is no material on record to suggest that, succession certificate issued by the petitioner was with wrongful intention. Further it has not caused any loss to the panchayat. He further submits that there is a distinction between misconduct in discharge of official duties and irregularity in exercise of power. The learned counsel relies upon the judgment of Ankush Achutrao Raut Vs. State of Maharashtra, 2022 (1) Mh.L.J. 202 and the judgment of the Hon'ble Supreme Court in the case of Ravi Yashvant Bhoir Vs. District Collector, Raigad, 2012 (4) SCC 407.

Submission of Respondent No.8:-

11. Per contra, Mr. Gangakhedkar, learned counsel for respondent no.8 submits that section 39(1) of the Act is segregated into two different parts. Part 1 relates to removal of Sarpanch and Upa-sarpanch considering their acts and duties and second aspect relates to submission of requisition by 20% voters requesting removal of the Sarpanch and Upa-sarpanch. The learned counsel submits that in the first contingency the notice is required to be issued to the concern Sarpanch / Upa-sarpanch / member/s and there is reference to that effect in the proviso about person concerned.

12. The learned counsel submits that a notice to the panchayat should be to all the members of the panchayat as contended by the petitioner is not raised before the authorities and is raised for the first time before this court. The learned counsel further submits that notice to the panchayat is contemplated in contingency where removal is sought under section 39(1) (ii) and not under section 39(1)(i) of the Act. Even otherwise, the panchayat is a statutory body constituted under the Act and has its perpetual succession represented through the secretary when it comes to appearance in legal proceedings, nothing more. Therefore, the interpretation at the hands of the petitioner that, notice to panchayat is not issued, either in the inquiry or in the proceeding by respondents no.2 and 3 is practically unsustainable even considering the definition of panchayat under section 3(14) of the Act read with section 10. It is matter of record that, Secretary / Gramsevak was present in the inquiry before respondent no.4 and participated in the process, by making available record of Grampanchayat.

13. The learned counsel further submits that a notice to the panchayat is limited or restricted to the extent of production of record by the office bearer of the

panchayat since the consequences of no notice given to the panchayat is not provided in the Act. Therefore, the intent of the notice is only for the production of the record.

14. On merits the learned counsel submits that there is gross misconduct and negligence at the hands of the petitioner by issuing succession certificate and the duplicate copies of the certificates are not maintained and mutations are taken on the basis of such certificates and this amounts to gross misconduct at the hands of the petitioner and thus the learned counsel for the respondent no.8 submits the petition be dismissed.

Consideration and Conclusion:-

15. Having heard the learned counsel for the parties the question of law that arise for consideration is whether the notice as contemplated in proviso to section 39(1) of the Act for an inquiry by the Chief Executive Officer has to be mandatorily given to "the panchayat" and "the person concerned" and whether the notice to the gramsevak / secretary of the panchayat is sufficient notice to "the panchayat" in terms of the said proviso.

16. Section 39(1)(i), (ii) and proviso of the Act, reads as under:-

"39. Removal from office

(1) The Commissioner may,-

(i) remove from office any member or any Sarpanch or Upa-Sarpanch who has been guilty of misconduct in the discharge of his duties, or of any disgraceful conduct, or of neglect of or incapacity to perform his duty, or is persistently remiss in the discharge thereof. A Sarpanch or an Upa-Sarpanch so removed may at the discretion of the Commissioner also be removed from the panchayat; or

(ii) remove from office the member, Sarpanch or, as the case may be Upa-Sarpanch, if not less than twenty per cent of the total number of voters in the village who have paid all dues of the panchayat regarding taxes on buildings and lands and water charges, make a complaint that the annual accounts and the report of the expenditure incurred by the panchayat on the development activities are not placed before the Gram Sabha; and the information thereof is not displayed on the notice board as required by sub-section (1) or (1A) of section 8:

Provided that, no such person shall be removed from office unless, in case of clause (i), the Chief Executive Officer or in any case of clause (ii), the Deputy Chief Executive Officer as directed by the Chief Executive Officer; under the orders of the Commissioner, holds an inquiry after giving due notice to the panchayat and the person concerned; and the person concerned has been given a reasonable opportunity of being heard and thereafter the Chief Executive Officer or, as the case may be, the Deputy Chief Executive Officer concerned,

through the Chief Executive Officer, submits his report to the Commissioner. The inquiry officer shall submit his report within a period of one month:

... ”

17. The relevant provisions to decide the issue formulated at para 15, are Sections 9, 38(1), 60 and 60A and for the limited purpose of mode of service of notice to the panchayat section 180(2) of the Act is relevant and the provisions reads as under:-

“9. Incorporation of Panchayats

Every Panchayat shall be a body corporate by the name of “the Village Panchayat of.....”, having perpetual succession and a common seal, with power to acquire and hold property, both movable and immovable, whether within or without the limits of the village over which it has authority and may in its corporate name sue and be sued.”

“38. Executive power of panchayat.

Functions of Sarpanch and Upa-Sarpanch

(1) The executive power, for the purpose of carrying out the provisions of this Act and the resolutions passed by a panchayat, vests in the Sarpanch who shall be directly responsible for the due fulfillment of the duties imposed upon the panchayat by or under this Act. In the absence of the Sarpanch, the powers and duties of the Sarpanch shall, save as may be otherwise prescribed by rules, be exercised and performed by the Upa-Sarpanch.”

“60. Secretary of panchayat

(1) There shall be one or more secretaries for every panchayat, or a group of panchayats as the Chief Executive Officer may (having regard to the extent and population of the village and income of the panchayat) by a general or special order, determine.

Provided that, the Secretary shall also function as Secretary to the Gram Sabha of the respective panchayat.

(2) The Chief Executive Officer shall appoint a Secretary (who may bear such other designations as Zilla Parishads may assign to him) from District Service (Class III). The Secretary shall be posted to panchayat but his salary and allowances shall be paid from the district fund.

[***]

Explanation. - In this section the expression “District Fund” and “District Service (Class III)” shall have the meanings respectively assigned to them in the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961.”

“60A. Certain duties of Secretary

(1) In addition to any other duties cast on the Secretary, it shall be the duty of the Secretary to prepare the report of the expenditure incurred by the Panchayat on the development activities to be placed before the Gram Sabha and display the information thereof on the notice board of the Panchayat as required by sub-section (1A) of section 8.

(2) If the Secretary fails to prepare the report of the expenditure incurred on the development activities to be placed before the Gram Sabha and display the information thereof on the notice board as required by sub-section (1), he shall be liable for disciplinary action under clause (v), (vi), or (vii) of rule 4 of the Maharashtra Zilla Parishads District Services (Discipline and Appeal) Rules, 1964."

"180. Bar of action against panchayats etc. and previous notice before institution

(1) ...

(2) no action shall be brought against any panchayat or any member, officer, servant or agent or such panchayat acting under its direction for anything done or purporting to have done by or under this Act, until the expiration of three months next after notice in writing has been left or delivered at the office or the panchayat and also at the residence of the member, officer, servant or agent thereof against whom the action is intended to be brought. The notice shall state the cause of action, the nature or the relief sought, the amount of compensation claimed and the name and place of abode of the person who intends to bring the action."

18. Reading of section 9 of the Act would indicate that the panchayat is a body corporate by the name of "the village panchayat of.....". In the instant case, the concerned village panchayat is of Khirdi and thus the notice to the panchayat has to be in the name of the panchayat i.e. "The Village Panchayat of Khirdi" and it has to be served at the office of the panchayat. However, notice to the panchayat is not required to be served on all the elected members of the panchayat as contended by the petitioner. Notice to the panchayat has to be in the name of the panchayat and served at the office of the panchayat and the same can be inferred from section 180 of the Act.

19. The executive power of the panchayat are vested in the sarpanch. Section 39 of the Act contemplates notice to the panchayat and in an inquiry initiated under section 39 of the Act, the say of the panchayat is taken into consideration. The say of the panchayat cannot be given by the gramsevak. The say of the panchayat is reflected from the resolution of the panchayat. The resolution of the panchayat has to be implemented by the sarpanch or in his absence the up-sarpanch. The gramsevak does some of the administrative work of the panchayat under the Maharashtra Village Panchayats Act. But the say of the panchayat cannot be ascertained by mere production of record by the gramsevak.

20. Section 39 of the Act particularly stipulates that a notice is to be issued to the panchayat. The say of the panchayat is ascertained before the report is

submitted by the Chief Executive Officer. Mere calling of record from the gramsevak is not contemplated under section 39 of the Act . The disqualification under section 39 of the Act is on the basis of misconduct in discharge of the official duties of the Sarpanch / Upa-sarpanchor of any disgraceful conduct or of neglect of or incapacity to perform his duties.

21. Section 60 of the Act provides for "Secretary" of Panchayat that there shall be one or more secretaries for every panchayat, or a group of panchayats as the Chief Executive Officer may by a general or special order, determine. The Chief Executive Officer shall appoint a Secretary who may bear such other designations as Zilla Parishads may assign to him from District Services (Class III). The Secretary shall be posted to panchayat but his salary and allowances shall be paid from the district fund.

Thus, the secretary to a panchayat is the Class-III officer appointed by the Chief Executive Officer and is paid salaries from the district fund.

Under Section 60A the Secretary perform certain duties of the panchayat viz. report of the expenditure of panchayat etc. However, the Secretary is not vested with the executive powers of the panchayat and does not represents the panchayat in any proceedings unless authorized by the panchayat by a resolution to that effect.

22. The legislature has though it fit that the panchayat has to be heard in the matter before the inquiry report is submitted by the Chief Executive Officer under section 39 of the Act . In the instant case, the notice is not issued to the panchayat in it's name but issued to the gramsevak of the village panchayat, by designation. The notice is not issued in the name of the panchayat. Thus the say of the panchayat was not before the chief executive officer before submission of inquiry report under section 39 of the Act.

23. In contra distinction to the removal of the sarpanch or the up-sarpanch under section 39 there is also disqualification provided under section 14 of the Maharashtra Village Panchayats Act of the sarpanch, up-sarpanch as well as the members of the village panchayats. Sections 14 and 16 of the Act, reads as under:-

(1) No person shall be a member of a panchayat continue as such, who-

(a) has, whether before or after the commencement of this Act, been convicted-

(i)..

(ii)..

(a-1)..

Provided that, no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) has been adjudged by a competent Court to be of unsound mind;

- (c) has been adjudicated an insolvent and has not obtained his discharge; or
- (c-1) having held any office under any Government or local authority, has whether before or after the commencement of this Act, been dismissed for misconduct, unless a period of five years has elapsed since his dismissal; or
- (d) has been removed from office sub-section (1) of section 39 and a period of six years has not elapsed from the date of such removal, unless he has, by an order of the State Government notified in the official Gazette, been relieved from the disqualification arising on account of such removal from office; or
- (e) has been disqualified from holding office under sub-section (2) of section 39 and the period for which he was so disqualified has not elapsed; or
- (f) holds any salaried office or place of profit in the gift or disposal of the Panchayat, while holding such office or place; or
- (g) has directly or indirectly, by himself or his partner, any share or interest in any work done by order of the panchayat or in any contract with, by or on behalf of, or employment with or under, the panchayat; or
- (h) fails to pay any tax or fee due to the panchayat for the Zilla Parishad within three months from the date on which the amount of such tax or fee is demanded, and a bill for the purpose is duly served on him; or
- (h-1) fails to pay the amount of surcharge or charge under section 140 or the amount ordered to be paid under section 178 together with interest, if any, within the period provided in that behalf, and where an appeal has been made, then within one month from the date of receipt of the decision rejecting such appeal;
- (i) is a servant of the Government or a servant of any local authority; or
- (j) has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State; or
- (j-1) has more than two children:
- ..
- ..
- (j-2) has been elected as a Councillor of the Zilla Parishad or as a member of the Panchayat Samiti; or
- (j-3) has encroached upon the Government land or public property; or
- (j-4) has been disqualified by the State Election Commission under section 14B; or
- (j-5) fails to submit a certificate of the concerned panchayat, alongwith the resolution of the Gram Sabha or of the Chief Executive Officer or an officer

designated by him; or a self certificate certifying that,-

(i) he resides in a house owned by him and has a toilet in such house and he regularly uses such toilet; or

(ii) he resides in a house not owned by him and has a toilet in such house and he regularly uses the public toilet:

..

..

(k) is disqualified under any other provisions of this Act, and the period for which he was so disqualified has not elapsed.

Explanation 1.-...

Explanation 1A.-...

Explanation 2.-...

Explanation 3.-...

Explanation 4.-...

Explanation 5.-..."

"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 disqualifications 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 disqualified 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 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."

24. For the disqualification under section 14 of the Act a complaint is entertained under section 16 of the Act by the Collector. Under section 16 of the Act, the

collector decides the question of disqualification against any member by giving the opportunity to the member concerned. For a disqualification which is incurred under section 14 of the Act and determined under section

16 of the Act the collector issues notice only to the member against whom the disqualification application is made. The collector while inquiring into the disqualification may even call for the record from the gramsevak of the panchayat. However, there is no notice to the panchayat in an inquiry of disqualification incurred under section 14 of the Act .

25. For removal of a sarpanch or the up-sarpanch under section 39 of the Act notice to the panchayat is contemplated. In the instant case, there is no notice issued to the panchayat. The notice is required to be issued in the name of the panchayat and in the instant case it should be "the Village Panchayat of Khirdi" and served on the office of the village panchayat.

26. The village panchayat has to give its say to the chief executive officer by an appropriate resolution passed by the panchayat authorizing a person to represent the panchayat in the proceedings before the chief executive officer so also indicating its say in the matter. In the instant case, the notice is issued to the secretary / gramsevak, who has produced record available with him of the panchayat before the Chief Executive Officer. The say of the panchayat is not before the chief executive officer. The say of the grampanchayat can only be given after an appropriate resolution by the grampanchayat either through the sarpanch or the up-sarpanch, or any other officer authorized by the panchayat.

27. The submission of the learned counsel for the respondent no.8 that the notice to the panchayat as provided under proviso to section 39 is only applicable in case of an inquiry for removal of the member or a sarpanch or a Upa-sarpanch under section 39(1)(ii) and no notice to the panchayat is contemplated in the event an inquiry for removal of any member or sarpanch or Upa-sarpanch under section 39(1)(i) of the Act is misconceived as the proviso clearly stipulated that no person shall be removed from the office unless in case of clause (i) the Chief Executive Officer holds inquiry after due notice to the panchayat and the person concerned. Thus, notice is contemplated under section 39(1)(i) of the Act is to the person concerned i.e. the person against whom proceedings are initiated and the panchayat.

28. The second submission of the learned counsel for the respondent that the notice to the panchayat is only for the purpose of producing record of the grampanchayat and the same can be done by the gramsevak is also misconceived. The notice to the panchayat is for the say of the panchayat and the gramsevak / secretary of the panchayat who is authorized to do administrative job in terms of section 60A of the Act cannot give the say of the panchayat without the panchayat authorizing him by a resolution and by indicating its say in an appropriate resolution.

29. It is not possible to hold that the notice to the panchayat is an empty

formality and only for obtaining record of the panchayat.

30. In the instant case, the notice is not given by the Chief Executive Officer to the panchayat as contemplated under proviso to section 39(1) of the Act and thus the inquiry report submitted by the Chief Executive Officer is vitiated and the consequent orders passed by the Commissioner and the Hon'ble Minister are also bad in law and, as such, the impugned orders are set aside.

31. Since I have set aside the impugned orders for non compliance of the procedure contemplated under proviso to section 39(1) of the Act, I have not dealt with submissions on merit raised by the parties.

32. Since, the proceeding initiated under section 39(1) of the Act are quashed for non compliance on technical grounds, liberty is reserved to the respondents to initiate fresh proceedings under section 39(1) of the Act and the same to be conducted in compliance of the procedure as indicated in this judgment.

33. Rule is made absolute in above terms.