

(2001) 09 BOM CK 0041
In the Bombay High Court
Case No : Writ Petition No. 3958 of 2000

Nimba Yadav Bhoi

APPELLANT

Vs

President, Standing Committee, Zilla Parishad, Jalgaon and
Others

RESPONDENT

Date of Decision : 27-09-2001

Acts Referred:

Bombay Village Panchayats Act, 1958 — Section 39(1)
Bombay Village Panchayats Act, 1959 — Section 39(1)
Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 — Section 96(1)

Citation : (2002) 3 MhLj 466

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : P.R. Patil, for the Appellant; Vijay Sharma, for Respondents Nos. 1 and 2, G.V. Wani, for respondents Nos. 3 and 4, P.B. Patil (Absent) and S.D. Kaldate, Asstt. Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

R.M.S. Khandeparkar, J.—Heard the learned Advocates for the parties. Perused the record.

2. The petitioner challenges the order dated 20th July, 2000, passed by the respondent No. 1, in exercise of powers u/s 39(1) of the Bombay Village Panchayats Act, 1958 (hereinafter referred to as "the said Act"), and the order dated 28th August 2000, passed by the respondent No. 6 whereby the appeal filed by the petitioner against the said order of the respondent No. 1 was dismissed.

3. Few facts relevant for the decision are that:

(a) The petitioner was elected as Sarpanch of Village Thorgawhan (Taluka : Yawal, District : Jalgaon), on 24th August 1998. A dispute sought to be raised by the respondent No. 3, as regards, the election of the petitioner to the office of Sarpanch which was dismissed by the Additional Collector, Jalgaon, by order

dated 29th December, 1998. A no confidence motion was then moved by the respondent Nos. 3 and 4 against the petitioner. But the same was rejected in the meeting of the Panchayat held on 7th April 1999.

(b) A complaint was received by the Deputy Chief Executive Officer of Zilla Parishad, Jalgaon, against the petitioner. In April 2000, whereupon the respondent No. 1 directed the Deputy Chief Executive Officer to enquire into the matter and to submit a report.

(c) Further by orders dated 29-4-2000 and 3-5-2000, the Chief Executive Officer of Zilla Parishad, Jalgaon, authorised the Block Development Officer of Panchayat Samiti, Yawal, to hold enquiry into the matter and the Block Development Officer, on such enquiry being held, submitted his report on 12th May, 2000.

(d) Based on the said report, the Chief Executive Officer issued a show cause notice to the petitioner, as to why action proposed should not be taken u/s 39(1) of the said Act. Thereupon the petitioner filed his reply on 15th June, 2000. But the same was followed by a resolution by the Standing Committee on 15th July 2000 to the effect that the petitioner should be removed from the office of the Sarpanch. The same was followed by the order dated 20th July, 2000 issued by the respondent No. 1 whereby the petitioner was sought to be removed from the office of Sarpanch of the said village and was further restrained from contesting the election for the membership of the Panchayat for 5 years purportedly in exercise of powers u/s 39(2) of the said Act. The appeal preferred by the petitioner against the same was dismissed on 28th August, 2000. Hence the present petition.

4. While assailing the impugned orders, the learned Advocate for the petitioner submitted that an order by the President of Zilla Parishad, directing the Chief Executive Officer to hold necessary enquiry and consequent enquiry by the Chief Executive Officer, are the prerequisites for an action to be taken u/s 39 of the said Act, and the respondent herein having failed to comply with the said prerequisites, the orders passed by the respondent are bad in law. According to the learned Advocate for the petitioner, the provisions contained in Section 39 are mandatory in nature and they are to be strictly construed as well as complied with by the authorities seeking to take action under the said provision of law, and in the case at hand, the respondent having failed to observe the mandate of the said provisions of law have acted illegally while passing the impugned order, rendering it bad in law. Reliance is sought to be placed on various decisions in support of the contentions raised by the petitioner.

5. On the other hand, the learned Advocate for the respondents have sought to justify the action contending that the Chief Executive Officer is duly empowered to delegate his powers to his subordinate officers and, therefore, no fault can be found with the enquiry conducted by the Block Development Officer who was duly empowered in that behalf by the Chief Executive Officer and hence there is substantial compliance of the provisions of Section 39 of the said Act while

passing the impugned order and, therefore, no interference is called for in writ jurisdiction.

6. Section 39(1) of the said Act which is relevant for the decision in the matter, reads thus :--

"39(1). The Standing Committee may 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 Standing Committee also be removed from the Panchayat:

Provided that, no such person shall be removed from office unless the Chief Executive Officer under the orders of the President of the Zilla Parishad concerned 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 submits his report to the Standing Committee."

7. It cannot be disputed that in case a Sarpanch having been found 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, can be removed from the office in exercise of powers u/s 39(1) of the said Act and on such removal from the office of Sarpanch, he would be ineligible for re-election to the office of Sarpanch during the remainder term of the office, in view of the provisions contained in Section 39(1), and he may be rendered disqualified by virtue of decision of the Standing Committee to contest the election for the membership of the Panchayat for a period of five years from the date of the decision of the Standing Committee in that behalf, in view of Sub-section (2) of Section 39 of the said Act. However, any such action of removal of the Sarpanch is always subject to certain conditions which are specified in the proviso to Section 39(1) quoted herein above.

8. The removal of a person from the office of Sarpanch is to be preceded by an opportunity of being heard in the matter by the authority holding enquiry pursuant to the order issued in that regard by the President of Zilla Parishad. Such authority to enquire into the matter has necessarily to be the Chief Executive Officer of the Zilla Parishad and the decision regarding the removal should be on the basis of the report by the Chief Executive Officer submitted to the Standing Committee. Referring to this proviso to Section 39(1), it has been contended that the expression "shall" therein and the proviso in the negative language discloses the intention of legislature that the pre-conditions which are specified thereunder are to be strictly complied with in order to have a legal sanctity to the order of removal of Sarpanch under the said provision of law.

9. The Apex Court, in the case of Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others, , while considering the issue

regarding the requirement of publication of a notification u/s 6(1) of the Gujarat Agricultural Produce Markets Act, 1964, and the use of expression "shall" pertaining to the publication of notification in Gujarathi newspaper having circulation in concerned area, has held thus :--

"Plainly, "shall" must normally be construed to mean "shall" and not "may" for the distinction between the two is fundamental. Granting the application of mind there is little or no change that one who intends to leave a lee-way will use the language of command in the performance of an act."

10. In the case of *Khub Chand and Ors. v. State of Rajasthan and Ors.* AIR 1967 SC1874 it was observed by the Apex Court, thus:--

"The term "shall" in its ordinary significance is mandatory and the Court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the legislature, to be collected from other parts of the Act."

Undoubtedly, the proviso to Section 39(1) uses the expression "shall" while prescribing restrictions against removal of a person from the office of Sarpanch. Besides, it clearly specifies, "No such person shall be removed....."

11. In the case of *Lachmi Narain and Others Vs. Union of India (UOI) and Others*, , while dealing with the issue of ascertaining as to whether a statutory provision is a mandatory or directory in nature, it was ruled by the Apex Court thus :

"The primary key to the problem whether a statutory provision is mandatory or directory, is the intention of the law-maker as expressed in the law, itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as, the use of must instead of "shall", that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory (Crawford, the Construction of Statutes pp. 523-524).

12. Perusal of proviso to Sub-section (1) of Section 39 of the said Act clearly disclose that the language used therein is not only in negative form but it is also prohibitive. The proviso opens with the expression. "No such person shall be removed from the office unless....." These words apparently disclose the intention of the legislature that the compliance of the directions under the said proviso is a mandatory prerequisite for taking action of removal of a person from the office of Sarpanch. Once the intention of the legislature, as regards, the compliance of prerequisite for an action of removal of a person from the office of Sarpanch being apparent from the very language of the provision contained in proviso to Section 39(1), it cannot be said that any enquiry conducted by any

officer other than the Chief Executive Officer would amount to the enquiry as contemplated under the said provision of law. It is not only necessary for the enquiry to be held by the Chief Executive Officer, but such enquiry has to be preceded with the specific order of Zilla Parishad in that behalf and only consequent to such order, the Chief Executive Officer would be entitled to hold enquiry for the purpose of finding out whether the person occupying the office of Sarpanch is to be removed from the said office or not and before arriving at any conclusion in that regard. It is necessary to give fair opportunity of being heard to the concerned person. The hearing has necessarily to be by the officer specified and designated under the said provision of law and not by any other person. The provisions contained in Section 39 of the said Act are, therefore, to be held as mandatory in nature and require strict compliance thereof.

13. Referring to Section 96 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (hereinafter called as "Samitis Act"), it was sought to be contended that the Chief Executive Officer is duly empowered to delegate his powers to his subordinate officers and in the case at hand, the Chief Executive Officer having exercised such powers and delegated his powers in the matter of enquiry to the Block Development Officer, no fault can be found with the enquiry conducted by the Block Development Officer and on that count, the impugned order cannot be held to be bad in law.

14. Section 96(1) of the Samitis Act reads as under :-- "Any of the powers conferred or duties or functions imposed upon or vested in the Chief Executive Officer by or under this Act, may also be exercised, performed or discharged under the Chief Executive Officers control, and subject to such conditions and limitations, if any, as he may think fit to lay down, by any officer or servant holding office under the Zilla Parishad to whom the Chief Executive Officer generally or specially empowers by order in writing.

15. There is no doubt, that the Chief Executive Officer under the Samitis Act is duly empowered to delegate his powers under certain circumstances. However, the said provision clearly disclose that a delegation of powers can be in relation to the powers or duties or functions which are imposed upon or vested in the Chief Executive Officer by or under the Samitis Act and not under any other Act. The function which has been entrusted to the Chief Executive Officer u/s 39(1) of the said Act is not power or duty or function imposed upon the Chief Executive Officer under the Samitis Act. The enquiry which is contemplated by the Chief Executive Officer under proviso to Section 39(1) is in relation to the conduct of the Sarpanch and the said enquiry has nothing to do with any of the functions or duties of the Chief Executive Officer under the Samitis Act. Besides, it is well established principle of law that any authority bestowed with judicial or quasi judicial powers under a statute cannot delegate his powers except when specifically permitted under the statute. In other words, when the statute prescribes that a particular officer has to exercise the power thereunder, then such powers must be exercised by that officer, and that officer alone, and none

else except and unless the statute by express words or by necessary implication permits delegation of such powers, and in which event such powers may also be exercised by the delegatee if the delegation is in accordance with the terms of the statute and not otherwise.

16. The Apex Court, in the case of *Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others*, , while dealing with the powers of the officers under the Telegraph Act and rules made thereunder, as ruled that :--

"It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden.

17. In the case of *Chandra Kishore Jha Vs. Mahavir Prasad and Others*, , the Apex Court has held that it is well settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. Therein, reference has been made by the Apex Court to its various earlier decisions, namely, AIR 1936 253 (Privy Council); *Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh*, and *State of Uttar Pradesh Vs. Singhara Singh and Others*, .

18. In the case of *M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others*, , while reiterating its earlier decision in the case of *Dr. H.S. Rikhy and Others Vs. The New Delhi Municipal Committee*, , the Apex Court has held that where a statute makes a specific provision that a body corporate has to act in a manner and no other manner, that provision being mandatory and not directory, has to be strictly followed.

19. In the case of *Municipal Council, Khurai and Another Vs. Kamal Kumar and Another*, , while construing Section 78 of the Madhya Pradesh Municipalities Act, 1961, which provided that any powers or duties or executive functions which may be exercised or performed by or on behalf of the Council may, in accordance with the rules made under this Act, be delegated by the Council to the President or Vice-President or to the Chairman of the Standing or other Committees, or to one or more stipendiary or honorary Officers, but without prejudice to any powers that may have been conferred, on the Chief Municipal Officer by or u/s 92, it was held that even assuming that under the said provision the power of the Council of hearing objections could be delegated, the delegation can presumably be only in favour of the persons mentioned in Section 78 of the Act and it cannot be in favour of a Sub-Committee or a Committee. The Apex Court was dealing with the matter pertaining to the power of the municipality and the procedure to be followed in the matter of imposing the liability to pay tax upon the residents in the municipal locality.

20. It is apparent from bare reading of proviso to Sub-section (1) of Section 39 of the said Act, that the enquiry is to be conducted by the Chief Executive Officer pursuant to an order in that behalf by the President of Zilla Parishad and there being no provision for delegation of such power by the Chief Executive Officer in

favour of any other officer of the Parishad or otherwise, the enquiry has necessarily to be conducted by the Chief Executive Officer himself. The provisions contained in Section 96 of the Samitis Act can be of no help to justify any delegation of the powers of the Chief Executive Officer to hold the enquiry in the matter u/s 39(1) of the said Act as Section 96 of the Samitis Act restricts the entitlement of delegation of powers to the extent they relate to the duties and functions under the Samitis Act and not under the said Act.

21. Referring to Section 3(27) of the said Act, it was sought to be contended that though Section 96 of the Samitis Act restricts to the powers, duties and functions of the Chief Executive Officer under the Samitis Act, in view of the fact that the expression "Chief Executive Officer" under the said Act has been given the same meaning as under the Samitis Act, the powers of the Chief Executive Officer, in the matter of delegation of his powers, are to be read in the provisions contained in Section 39 of the said Act. As already stated above, the provisions contained in Section 39 of the said Act are mandatory in nature. The same is in negative form which specifically prohibits removal of a person from the office of Sarpanch unless certain pre-conditions are strictly complied with. On the face of it. Section 39 and proviso thereto nowhere discloses any intention of the legislature which can empower the Chief Executive Officer to delegate his powers under the said provision in favour of any other officer. Besides, the provision contemplates a specific order of the President of the Zilla Parishad for the purpose of conducting enquiry by the Chief Executive Officer himself. In these circumstances, to import the powers of delegation u/s 96 of the Samitis Act, in Section 39(1) of the said Act, would virtually amount to legislate upon the provisions contained in Section 39(1) of the said Act, which jurisdiction this Court does not possess.

22. In this regard, the Apex Court while reiterating its earlier decision in the case of *Shrimati Him Devi and Ors. v. District Board, Shahjahanpur*, 1952 SCR 1122, has ruled in the case of *M/s Gujarat Composite Ltd. and Another Vs. Ranip Nagarpalika and Another*, , that :--

"It is the duty of the Court to try to harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act."

Assuming that there is an omission on the part of Legislature in authorizing the delegation of power of enquiry by the Chief Executive Officer to any other officer, u/s 39(1) of the said Act, certainly it is not for the Court to fill up such omissions in the provision.

23. The Apex Court, in the case of *Gujarat Composite Ltd. and Anr. (supra)*, further referring to its earlier decision, in the case of *Nalinakhya Bysack v. Shyam Sunder Holder and Ors.*, 1953 SCR 533, has held that:--

"It was not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. The Court must proceed on the footing that the

Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature, the Court cannot aid the Legislature's defective phrasing of an Act or add and amend or, by construction, make up deficiencies which are left in the Act."

24. Similar is the decision of the Apex Court, in the case of *Union of India and Anr. v. Deoki Nandan Agarwal*, 1992 Sup (1) SCC 323 wherein it has been ruled that the Court cannot rewrite the legislation for the reason that it had no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature, the Court cannot correct or make up deficiency, Courts have to decide what the law is and not what it should be.

25. In *Vine v. National Dock Labour Board*, (1956) 3 All England Law Reports 939, Lord Somervell of Harrow has said thus :--

"In deciding whether a "person" has power to delegate, one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated, though no one doubted in *Arlidge's* case that the local government board, which consisted of the President, the Lord President of the Council, the Secretaries of State, the Lord Privy Seal and the Chancellor of the Exchequer (Local Government Board Act, 1871), could act by officials duly deputed for the purpose, whether or not the act to be done had judicial ingredients. There are, on the other hand, many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under the Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute, authorise someone else to make the appointment without further reference to him."

26. Considering the provisions contained in Section 39(1) of the said Act, and the law on the subject matter discussed hereinabove, it is apparent that the enquiry u/s 39 of the said Act has necessarily to be conducted by the Chief Executive Officer and none else. Such Enquiry has to be preceded by necessary order directing the Chief Executive Officer to hold the enquiry and such order should be necessarily issued by the President of the Zilla Parishad. Pursuant to such appointment, the Chief Executive Officer himself has to hear the person against whom the enquiry is to be conducted and based on such enquiry, the Chief Executive Officer has to prepare a report and submit the same to the President of the Zilla Parishad. All these requirements are mandatory in nature and any failure in that regard on the part of the authorities, the proceedings u/s 39(1) of the Said Act would be vitiated and any order passed on the basis of such proceedings which are vitiated would be rendered null and void. Reverting to the facts of the case, undisputedly, the order of the removal of the petitioner from the office of Sarpanch was not preceded by any enquiry by the Chief Executive

Officer. There was no order of the President appointing the Chief Executive Officer to enquire into the matter.

27. A faint attempt was made on behalf of the respondent to contend that there was, in fact, order by the President directing the Chief Executive Officer to hold enquiry in the matter pursuant to the complaint against the petitioner, and in that regard, attention was drawn to the endorsement on the margin of the complaint in the original records with the respondents which were produced for perusal in the Court. Undoubtedly, there is a remark in the margin of the complaint which apparently appears to have been made by the President of the Zilla Parishad directing the Chief Executive Officer to enquire into the matter and to submit the report. In spite of such an order being disclosed from the record, there is nothing further disclosed from the record that the Chief Executive Officer, in compliance of the said directions had, in fact, held enquiry in that respect and had submitted any report to the Standing Committee. Being so, some endorsement on the complaint to the effect that the Chief Executive Officer was directed to hold enquiry, that by itself would not validate all other proceedings which are carried out in contravention of the provisions of Section 39 and, therefore, the order without compliance of the mandatory provisions of Section 39 of the said Act, cannot be held to be valid in law.

28. It is made clear that this Court has not expressed any opinion, as regards, the merits of the complaint based on which the order holding enquiry by the President is stated to have been passed directing the Chief Executive Officer to hold the enquiry. Upon realizing the fate of the impugned order, it was sought to be contended that the respondent shall be given liberty to hold enquiry into the matter afresh. There is no question of granting any such liberty by this Court. If the law permits, nothing would prohibit the respondent to act in accordance with the provisions of law or to hold the enquiry pursuant to said order of the President.

29. In the result, therefore, petition succeeds, the impugned order is quashed and set aside. Rule is made absolute in terms of prayer Clauses (C) and (D), with no order as to costs.