
(2013) 10 BOM CK 0238

In the Bombay High Court

Case No : Writ Petition No. 9311 of 2012

Vishal Shrikirishna Hole

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 08-10-2013

Acts Referred:

Citation : (2014) 1 BomCR 466

Hon'ble Judges : Bhatkar Mridula, J

Bench : Single Bench

Advocate : V.D. Salunke, for the Appellant; V.G. Shelke, A.G.P. for Respondent Nos. 1 to 3 and 5, S.B. Talekar for Respondent Nos. 6, 7, 9 and 10 and Shoyab Shaikh, for the Respondent

Judgement

Bhatkar Mridula, J.—Petition is directed against the order dated 7th November, 2012 passed by Additional Collector, Osmanabad declaring that the resolution dated 12th October, 2012 of no confidence passed against the petitioner in the meeting is valid and the Sarpanch i.e. the petitioner is disqualified to hold the post of Sarpanch. The petitioner is elected member of Village Panchayat of Khamkarwadi. He is elected for a tenure of 2010 to 2015 and he is holding the post of Sarpanch. Village Panchayat of Khamkarwadi constitutes 7 members. On 8th October, 2012 there was a requisition demanding meeting for motion of no confidence against the Sarpanch. On 9th October, 2012 Tahsildar issued notice pursuant to the requisition informing all the 7 members of the Village Panchayat that the meeting was scheduled on 12th October, 2012. Accordingly, the notices were served on 5 members of the Village Panchayat. As per the case of the petitioner, it was not served on him and on the one member of the Panchayat. While arguing it was submitted that petitioner restricts his case to, that there was no proper service of the notice under the Act on him and he does not press case of non-service of notice on the other member. Thus, the meeting was conducted on 12th October, 2012 and the 5 members of the Village Panchayat, who were present, unanimously passed a resolution of no confidence against the Sarpanch. The said resolution was challenged by the present petitioner by filing a

dispute u/s 35 (3-B) of Bombay Village Panchayats Act, 1958 before Additional Collector, Osmanabad, on the ground that the notice of the meeting was not served on the petitioner. After considering the submissions and documentary evidence of both the parties, the said dispute was dismissed. Learned Counsel for the petitioner submitted that a notice in respect of meeting on the point of no confidence motion is to be served on the person concerned i.e. the Sarpanch. It is mandatory u/s 35 of the Act. He submitted that section 35(2) gives right to the person concerned Sarpanch/Upa Sarpanch to not only attend the meeting but he has a right to speak and vote in the meeting. Notice is required to be served under Rule 2(2) of the Village Panchayat Rules of 1975. Similarly, under Rule 7 of Bombay Village Panchayat (Meetings) Rules, the notice is to be served personally on Sarpanch if he is not present then on an adult male member of the family and if it is not served on the adult male member then it can be served by affixing at the conspicuous place of the house in the presence of two witnesses and Panchanama to that effect accordingly be drawn. Learned Counsel submitted that the notice was allegedly served on Sarpanch by a Panchanama dated 10th October, 2012. However, said Panchanama discloses that Tahsildar did not follow proper steps under Rule 7 of the Rules and the Panchanama was false. He submitted that the Panchas were taken to serve the notice on Sarpanch with presumption that the petitioner/Sarpanch would not be available in the house. He submitted that the strict compliance u/s 35 is required. In support of his submission he relied on following judgments of this Court:

- (1) Bhika Narayan Gangurde and Others Vs. State of Maharashtra and Others, .
- (2) Shivkant Bangar Vs. The Gramsevak, Grampanchayat Office and Others, .
- (3) Indubai Vedu Khairnar Vs. State of Maharashtra and Others, .
- (4) Indubai Vedu Khairnar Vs. State of Maharashtra and Others, .

He prays that the order passed by the Collector is thus bad in law and is liable to be quashed and set aside.

2. In reply, learned Counsel for the respondent supported the impugned order passed by the Additional Collector, Osmanabad. It was argued that the service of notice was done properly in the presence of two witnesses by affixing the said notice at the conspicuous place of the house of the petitioner. He submitted that in the said Panchanama it was mentioned by Tahsildar in the presence of Panchas that the petitioner was not found in the house and, therefore, it was affixed on the conspicuous place of the house of the petitioner. Therefore, the said Panchanama was rightly believed and relied upon by the authority. Learned Counsel submitted that the petitioner cannot raise any ground that there was no proper service personally on him or any adult male member of the family as he has not taken that point before the Additional Collector in his appeal memo. Learned Counsel submitted that it is necessary for the petitioner to state that he or an adult male member was present in the house and no notice was served on them during that period, however, in the absence of such specific averment in

the memo of appeal, this contention cannot be considered in the writ jurisdiction. He submitted that a person, who claims that there is no proper service of notice under the Act it is his responsibility to discharge initial burden by stating that though he or a male adult member in his family was available and yet no notice was served on either of them. The submissions of learned Counsel are entirely based on the ratio of judgment of learned Single Judge of this Court at Nagpur Bench, in the case of (Subhash S/o Rambhau Doifode and others Vs. The Additional Commissioner, Amravati Division, Amravati and others), 2009 (Supp.) Bom. C.R. 770 (N.B.), Writ Petition No. 2209 of 2008 decided on 13th August, 2008.

3. In the present petition it is admitted by both the parties that notice was not served either personally or on adult male member in the family. Service of notice of the meeting of no confidence motion on Sarpanch is required as per section 35 of the Village Panchayat Act. As per section 35 of the Act, the Sarpanch has a right to attend the meeting and also he has right to speak. Thus, the Sarpanch can address the Members of the Panchayat in the meeting on the issue of no confidence motion. He has also right to vote. These rights presuppose proper intimation to Sarpanch for his attendance that a meeting of no confidence motion is convened by Tahsildar. Thus, Rule 7 of Bombay Village Panchayat (Meetings) Rules, is a relevant rule supplemental to section 35 of the Village Panchayat Act. As issue of proper service of notice on Sarpanch u/s 35 of the said Act and Rule 7 of the said Rules, is not a res integra in view of the judgments relied by the learned Counsel for the petitioner. In the judgment, especially in the case of Bhika Narayan Gangurde and others (Supra), it was held that the service of the notice should be in accordance with Rule 7 of the Meetings Rules. Rule 7 of the said Rules reads as follows:

Every notice under these rules shall, if practicable, be served personally by delivering or tendering it to the member to whom it is addressed or such person is not found, by giving or tendering it to an adult male member of his family who is residing with him. If there is no such person to whom notice can be given or tendered or where the member, or as the case may be, in his absence such adult male member, is present but refuses to accept the notice, it shall be served by affixing it, in the presence of two witnesses, on the outer door or some other conspicuous part of the house in which the member ordinarily resides. If none of the aforesaid modes of serving notice is feasible, the notice shall be affixed, in the presence of two witnesses, on some conspicuous part of the house in which the member is known to have last resided or carried on business or personally worked for gain.

4. Thus, it contemplates following methods for service. It is to be served personally on the Sarpanch. Secondly, if he is not found, then on the adult male member of the family and if the adult member of the family is not found or refuses then it is to be affixed on the conspicuous portion of his house in the presence of witnesses. It is mentioned that if none of these modes are feasible

then notice can be fixed at the conspicuous place of his house. The phrase used in Rule 7 if none of the aforesaid modes of serving notice is feasible unambiguously expresses that it is obligatory on the Tahsildar to adopt first two modes to serve on the member as per Rule 7 of the said Rules. If the notice is served by affixing the notice on the conspicuous place without following the two modes of personal service and serve on male adult member of the family, then jumping on a third mode directly is deviation from Rule 7 of the said Act. This clause "none of the aforesaid modes of serving notice is feasible" cannot be considered redundant but it specifically indicates a sequence which is to be adopted by Tahsildar in serving notice on the member.

5. In the case of Subhash S/o Rambhau Doifode and others Vs. The Additional Commissioner, Amravati Division, Amravati and others (supra) relied upon by learned Counsel for the respondent, it is held that initial burden to prove that either member himself or male adult member in the family, though was available, a notice was not served on them; is on the said member and unless that initial burden is discharged by the petitioner or the said member, the service of notice is to be considered as a good service and if there are inadequate and inappropriate pleadings and if vague ground is taken then no relief of setting aside the motion can be granted. It was observed that, it is a dispute u/s 35 of the Act, at the most minimum required adequate and appropriate facts ought to be pleaded in support of the dispute. On perusal of the said judgment, it appears that the Disputant in that matter has taken a stand before the Collector that there was no proper service of notice on him and Panch Witnesses also supported his case, that in their presence a notice was not affixed on the door. It was a case of the Disputant that concerned Talathi did not attempt to show that the notice was served on the petitioner or adult member in the family and no report to that effect was produced. In that case the Disputant did not plead anywhere that adult member from the house of the Disputant was present in the house and there was no attempt to tender notice to such adult male member. It was hence rightly observed by the Court that there was no pleading or explanation on record as to where Disputant had gone for five days i.e. from the date of the requisition till the date of the meeting (11th July, 2007 to 17th July, 2007). It was observed that it was not a case of the Sarpanch that such notice was not at all pasted on his house.

6. On pleadings, the present case is distinguishable as my attention is drawn by learned Counsel for the petitioner in paragraph 6 of the appeal memo wherein the present petitioner has mentioned that the notice date 8th October, 2012 was never served on the appellant in person nor to his family member and false Panchanama was prepared by the concerned Talathi in collusion with respondent Nos. 4 to 8. In Ground No. VIII of the petition it is specifically mentioned that the Panchanama does not show that notice was tried to be served on adult male member of the family as his father was available at the home for the whole day and nobody approached him nor requested to accept notice on behalf of the petitioner, nor the signature of his father was obtained on the alleged

Panchanama. It is further pointed out, in Ground No. IX of the petition, it is specifically contended by the petitioner that in Panchanama there is no mention that either petitioner or his father has refused to accept the notice and the male employee namely Sidheshwar Sarjerao Kokate was present for whole day on 10th October, 2012. Thus, there is pleading that notice was not served on the male adult member of the family. Moreover, in the Panchanama dated 10th October, 2012 it is mentioned that Talathi, with the Panchas, went to the house of the Sarpanch to serve him, however, he was not present at the house and, therefore, the said notice was affixed on the house in the presence of Panchas and accordingly Panchanama was drawn. If in the Panchanama there is specific mention that Sarpanch was not present in the house, it was also necessary to mention that no other male adult member of the family was present in the house. Rule 7 of the Rules under the Act provides that, in the absence of member notice is to be served on the male adult member of the family. The Panchanama itself speaks that no attempt was made by the Talathi to serve the notice on male adult member of the family and, thereafter, directly adopted a third mode of serving notice by affixing it on the conspicuous place of the house. Had there been a mention of presence or absence of male member of the family in the Panchanama then irrespective of the contention of non-service of the notice Panchanama could have been believed as a good service and submission of learned Counsel Mr. Talekar would have been accepted.

7. In the beginning of Rule 7 phrase "if practicable" is used. It means if it is "not" practicable to follow a mode of service then some allowance can be given. Phrase "if practicable" is further controlled by phrase "if none of the aforesaid modes of serving notice is feasible". A sequence of the modes of service is purposive. It can be demonstrated by taking example of Order 5, Rule 9, 9A and 10 of CPC in which a procedure to serve summons is laid down. If defendant refuses to accept service or could not be found then, the procedure is laid down under Rule 17 and if the Court is satisfied that the defendant is deliberately avoiding service or for any other reasons the summons cannot be served, then the order of substituted service under Rule 20 of Order 5 C.P.C. is passed. Thus, mode of service mentioned in Rule 7 of the Rules, made under The Bombay Village Panchayats Act, is analogous to Order 5 of the C.P.C. The purpose of service is to make aware the person concerned about the proceedings against him. He should have knowledge about the same to enable him to come and defend himself. Thus, a thread of principles of natural justice runs throughout the process of service of notice or summons. By personal service knowledge of the proceedings is given to him directly. This is suppose to be the best service. However, if a person is not found, then, as per Rule 7 of the said rules, it is to be served on an adult male member of the family. Personal service is always an authentic proof of service as the person's acknowledgment is obtained on the copy of the notice. Thus, defence of "no service" is not available to the Sarpanch.

8. It is to be noted that in the rule deliberately words "any adult member of the family" are not mentioned but specifically word "Male" is mentioned, which

obviously excludes service on "adult female member" in the family. The Bombay Village Panchayats (Meetings) Rules were framed in the year 1959 under the Bombay Village Panchayats Act when the women were not educated and were not socially active. Unfortunately the Rule is not amended till today. Rule 7 was added in the year 1960. Therefore, service on adult female member in the family was considered as a bad service as it was assumed that if service made on an adult female member in the family, that female member being unconnected socially either will not understand the importance of the notice or she may forget to mention this to the person concerned. This indicates that a purpose of service of notice was that the person concerned should get the clear intimation about the meeting and the proceedings against him in advance. Service by affixing notice on the conspicuous part of the house, in the presence of Panchas is also prescribed mode under the rules. However, notice served on adult male member is considered a second best service if the person concerned is not found. Mode of service of notice by affixing on the conspicuous place of the house is not given first or second priority obviously for the reason that a person may not be residing at the relevant time in his house or after affixing the notice, there is a possibility that he may not see it or if at all he remains in the house and may not come out from the house, then also, he may not have a knowledge of the notice. The Legislature has considered all these eventualities and, therefore, a notice is to be served as per the sequence provided under the Rule.

9. It is contended that no bias against the Tahsildar is pleaded by the petitioner. It may not be a bias in all the cases but it may be inadvertence or ignorance about the procedure. However, failure to follow the procedure defeats the purpose of service which is contemplated u/s 35 of the said Act. Opportunity to speak in the meeting of no confidence is a valuable right of Sarpanch. It is true that a Gram Panchayat is essentially a democratic institution and it must be run on democratic principles and, therefore, rule of majority always prevails. A leadership or membership of Gram panchayat totally depends on the consensus of the majority. By assuring the right to speak in the meeting of no confidence, the section 35 in fact takes care of the democratic principles which honours a right of a person to defend himself and to pursue the people to change their mind by putting his case before them. Opinion of the majority is not an opinion of mob but it is an opinion of peoples' representatives and, therefore, the right to speak and the right to vote are conferred u/s 35 of the Village Panchayats Act.

10. While appreciating this provision, a Court has to be cautious that the provision should not be abused only by raising technical flaws. Mere denial that notice was not served should not be believed unless a sufficient reason to disbelieve statement of Talathi regarding proper service of notice is pointed out by the petitioner. A petitioner/Sarpanch can be pretentious and lie to save his interest.

11. The right to speak in the meeting of no confidence is valuable as it involves formation of opinion of the representatives of the people so a Sarpanch should

have knowledge of the said meeting and, therefore, he is to be served as per Rule 7 of the said rules.

12. In the present case, Panchanama itself dislodges the case of the respondent of the proper service as no attempt was made to serve on an adult male member of the family and especially when it is contended that the father of the petitioner was present at the relevant time. Thus, considering these circumstances, the petitioner has discharged his initial burden by pleading that neither he nor adult male member of the family, was served personally though male member was available. The procedure laid down is required to be followed as the consequences of no confidence motion are serious against an elected representative of people. Hence, for the aforesaid reasons, the petition succeeds. In the result, the writ petition is allowed. The impugned resolution dated 12th October, 2012 passed in the Special Meeting of Village Panchayat Khamkarwadi, Taluka Washi, District Osmanabad and the judgment and order passed by the Additional Collector, Osmanabad dated 7th November, 2012 in File No. 12/ZB/Desk/I/VPN/K1/CR91 are quashed and set aside.