

(2006) 01 MP CK 0037

Madhya Pradesh High Court

Case No: Writ Petition No. 6513 of 2005

Genda Lal

APPELLANT

Vs

State of Madhya Pradesh and
Others

RESPONDENT

Date of Decision: Jan. 17, 2006

Acts Referred:

- Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 - Section 122, 2, 40, 89, 92

Citation: (2006) 2 MPHT 38 : (2006) 2 MPJR 38 : (2006) 3 MPLJ 360

Hon'ble Judges: K.K. Lahoti, J

Bench: Single Bench

Advocate: Adarsh Muni Trivedi and Subodh Kathar, for the Appellant; Aseem Dixit, Government Advocate for the Respondent Nos. 1 and 2 and A.J. Pawar, for the Respondent No. 3, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.K. Lahoti, J.

The petitioner who was elected Sarpanch of Gram Panchayat, Siloda Tehsil Pandhana, District East Nimar, Khandwa has challenged order Annexure P-7, dated 8-7-2005 by Sub Divisional Officer-cum-Prescribed Authority, Pandhana in Case No. 4-C-145-2004-05 by which the authority allowed the election petition filed by respondent No. 3 Kishori Lal u/s 122 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as "Act" for short) and set aside the election of petitioner for the office of Sarpanch, Gram Panchayat, Siloda.

The facts of the case relevant for the decision of this petition are as under:-

That the petitioner was elected as Sarpanch for the period 1995-2000. During this period the petitioner installed a tube well, under the Spot Source Scheme. Under the M.L.A. fund an expenditure of Rs. 1,03,191/- was made by the petitioner for installation of tube well. A complaint was lodged against the petitioner that he is involved in the corruption and misappropriation of funds of Gram Panchayat. On receiving the complaint the Collector directed an inquiry to be conducted by Coordinator Panchayat and Social Education. The said officer submitted his enquiry report Annexure R-3/B in which he found that petitioner had made an excess expenditure of Rs. 2,013/- in installation of tube well. An amount of Rs. 1,00,000/- was received from MLA Fund. The Gram Panchayat approved the expenditure for Rs. 1,00,695/- and completion certificate in respect of aforesaid tube well was issued for Rs. 1,01,088/-. As total expenditure was of Rs. 1,03,191/-, so the officer found that petitioner made an excess expenditure of Rs. 2,013/-. On receiving the aforesaid report a notice Annexure P-1 was issued to the petitioner pointing out aforesaid excess expenditure with a further direction to deposit this amount with Competent Authority, failing which action proposed to be taken against the petitioner, including issuance of R.R.C. The petitioner on receiving notice Annexure P-1 immediately deposited that amount on 25-11-2000, which reflects from the perusal of order sheet dated 27-11-2000 of S.D.O. Khandwa. That after deposit of aforesaid amount no further action was contemplated and the case was closed. But when the petitioner contested and won the election of Sarpanch, Gram Panchayat, Siloda in the year 2004-05 his rival candidate respondent No. 3 Kishorilal filed an election petition u/s 122 of the Act challenging the election of petitioner on the aforesaid ground that an action was taken against the petitioner u/s 92 of the Act, hence under Sub-section (5) of Section 92 the petitioner was disqualified to be a member of Panchayat for the period of 6 years from the date of initiating action against the petitioner. As notice Annexure P-1 was issued against the petitioner on 19-10-2000 the petitioner was disqualified to contest the aforesaid election for a period of 6 years. The petitioner contested the election within the aforesaid period of disqualification so his election may be set aside and respondent be declared as returned candidate.

The S.D.O. cum Competent Authority after holding enquiry in the election petition recorded a finding that against the petitioner an action was taken u/s 92 of the Act and the petitioner was disqualified as on date when he contested the election and recording aforesaid finding the election of petitioner was declared as void and respondent No. 3 was declared as returned candidate of Gram Panchayat. This order is under challenge in this petition.

Learned Counsel for petitioner raised following contentions :-

(i) That no action u/s 92 of the Act was taken against the petitioner. Even if it is assumed that any action was taken against the petitioner, then it was u/s 89 of the Act, which provides recovery of any loss of Panchayat. The petitioner, who was office

bearer was issued such notice and on receiving such notice petitioner deposited aforesaid amount. As the notice was u/s 89, the finding of Election Tribunal that petitioner attained disqualification u/s 92 is without jurisdiction. "

(ii) Even it is assumed that the notice was issued u/s 92 of the Act then Sub-section (4) of Section 92 provides an opportunity of hearing, before taking any action under Sub-section 1,2 or 3 of the Act and in case after issuance of show-cause notice petitioner deposited the amount and no action was taken against the petitioner under Sub-section 1, 2 or 3 the petitioner has not suffered any disqualification under Sub-section (5) of Section 92 of the Act.

(iii) Apart from this it was a case of excess expenditure for installation of tube well in which there was no intention of misappropriation of Panchayat Fund. In fact some excess expenditure occurred on the installation which was paid by the petitioner from the fund of Panchayat. The excess expenditure on behalf of petitioner does not fall within the purview of Section 92 as it contemplates powers to recover records, articles and money belonging to the Panchayat. Any expenditure occurred by the petitioner does not fall within the purview of Section 92 and the provisions of Section 92 is not attracted.

(iv) u/s 92 action is contemplated by the S.D.O., while u/s 89 action is contemplated by the Collector. As per Annexure P-1 notice was issued after the approval of the Collector which shows that action was taken u/s 89 and not u/s 92. In this regard reference is made to the notification issued u/s 2 of the Act dated 5-3-1994. Contending aforesaid it is submitted by the learned Counsel for petitioner that the finding recorded by the Election Tribunal in respect of attaining disqualification by the petitioner u/s 92 (5) is perverse and may be set aside.

Shri A.J. Pawar, learned Counsel appears for respondent No. 3 supported the order. His contentions are as under :-

(i) That the complaint was made against the petitioner by various persons which was duly enquired by the Collector. An enquiry report Annexure R-3 was furnished by the officer who conducted the enquiry and found that the petitioner has made an excess expenditure of Rs. 2,103/- in the installation of tube well.

(ii) As the petitioner was not authorised to make such an excess expenditure it shall be presumed that this amount is with the petitioner and the petitioner either has pocketed the amount or is in unauthorised custody of money belonging to the Panchayat. After issuance of notice though the petitioner has deposited the amount, but action of petitioner falls within subsection (1) of Section 92 and under Sub-section (5) the petitioner has attained disqualification.

(iii) In this case the provisions of Section 92 only attracts. On the date when the notice Annexure P-1 was issued petitioner was not holding any office of Panchayat and provisions of Section 92 may be made applicable. While Section 89 of the Act is

applicable in respect of office bearer, Panch, member or other servant of Panchayat and not in respect of any acts of the office bearers of the Panchayat. Section 89 provides that any loss, waste or misapplication of any money or other property of Panchayat by any office bearer shall be deemed to be misconduct. On recording the finding of misconduct, the action is contemplated u/s 40 of the Act. He further elaborates this position by explaining this fact that u/s 92 disqualification is provided, while u/s 89, there is no disqualification provided, but u/s 89 if misconduct is found against the office bearer action is contemplated u/s 40 while Section 92 (5) itself provides action against any person, as disqualification is contemplated under Sub-section (5).

(iv) It is further submitted by him that even if the amount is deposited by petitioner after receiving show-cause notice under Sub-section (4) of Section 92 the petitioner has accepted his guilt and has deposited the amount. This will fall within the purview of "Unauthorised custody of money belonging to Panchayat" and the provisions of Sub-section (1) are attracted and petitioner has attained disqualification under Sub-section (5). The S.D.O. after recording the aforesaid finding rightly declared the selection of petitioner as void and respondent No. 3 has been rightly declared as returned candidate, which order needs no interference by this Court.

To appreciate the rival contention of the parties firstly it is to be seen which of the provisions is applicable in the case. For ready reference Section 89 and Section 92 are quoted hereunder :-

89. Liability of Panch etc. for loss, misappropriation.- (1) Every Panch, member, office-bearer, officer or servant of Panchayat shall be personally liable for loss, waste or misapplication of any money or other property of the Panchayat to which he has been a party or which has been caused by him by misconduct or gross neglect of his duties. The amount required for reimbursing such loss, waste, or misapplication shall be recovered by the prescribed Authority:

Provided that no recovery shall be made under this section unless the person concerned has been given a reasonable opportunity of being heard.

(2) If the person concerned fails to pay the amount, such amount shall be recovered as arrears of land revenue and credited to the funds of the Panchayat concerned.

Power to recover records articles and money.- (1) Where the prescribed authority is of the opinion that any person has un-authorisedly in his custody any record or article or money belonging to the Panchayat, he may, by a written order, require that the record of article or money be delivered or paid forthwith the Panchayat, in the presence of such officer as may be appointed by the prescribed authority in this behalf.

(2) If any person fails or refuses to deliver the record or article or pay the money as directed under Sub-section (1) the prescribed authority may cause him to be apprehended and may send him with a warrant in such form as may be prescribed, to be confined in a Civil Jail for a period not longer than thirty days.

(3) The prescribed authority may-

(a) for recovery any such money direct that such money be recovered as an arrear of land revenue; and

(b) for recovering any such record or articles issue a search warrant and exercise all such powers with respect thereto as may lawfully be exercised by a Magistrate under the provisions of Chapter VII of the Code of Criminal Procedure, 1973 (No. 2 of 1974).

(4) No action under Sub-section (1) or (2) or (3) shall be taken unless a reasonable opportunity has been given to the person concerned to show cause why such action should not be taken against him,

(5) A person against whom an action is taken under this section shall be disqualified to be member of any Panchayat for a period of (six) years commencing from the initiation of such action.

Section 89 specifically provides an action against an existing office bearer of Panchayat, Le., every Panch, Member, office bearer, officer or servant of Panchayat. After recording finding in respect of such misconduct action is contemplated u/s 40 of the Act which provides that the prescribed authority after such enquiry as it may deem fit may remove the office bearer if he is found guilty of misconduct of discharge of his duty. After reading Section 89 with Section 40 it is apparent that action u/s 89 is contemplated against an existing office bearer, Panch, member and not against any other person, while Section 92 is applicable in respect of any person who is un-authorisedly in custody of any record, article or money belonging to Panchayat. The petitioner who was not holding any office of Panchayat at the time of issuance of notice shall fall within the purview of "any person" and provisions of Section 92 shall be applicable in the matter.

Now the question arises whether the excess amount incurred by the petitioner for installation of tube well may be presumed as unauthorised custody of money belonging to Panchayat. In this regard the entire scheme of Section 92 may be seen. Section 92 provides that where a person who is unauthorisedly in custody any money belonging to Panchayat he may by a written order require to pay forthwith the money to Panchayat in presence of such officer as may be appointed by the prescribed authority in this regard. Sub-section (4) of Section 92 specifically bars any action under Sub-section 1, 2 or. 3, until and unless a reasonable opportunity has been given to the person concerned to show cause why such action shall not be taken against him. But if after issuance of notice the amount is not deposited or

paid then it shall fall within the purview of "Unauthorised custody of money belonging to Panchayat". But from the reading of Sub-section (4) it is necessary that before taking any action under Sub-section (1) a reasonable opportunity by issuance of show- cause notice was necessary. If after issuance of show-cause notice the petitioner has shown cause or duly paid the money, it can not be said that any action was taken against him, or he is in unauthorised possession of money belonging to Panchayat.

In the case, from the perusal of order-sheets of the authority which are on record as Annexure R-3C, it is apparent that on 27-11-2000, after the petitioner deposited Rs. 2,013/- on 25-11-2000 and produced the receipt of it to the Sub Divisional Officer, the Sub Divisional Officer on depositing the aforesaid amount found that no further action is needed and the proceedings were closed. As after issuance of show-cause notice S.D.O, was satisfied that no further action is needed u/s 92 and the proceedings were dropped, In these circumstances, it can very well be presumed that no action was taken against the petitioner it can not be presumed that petitioner has attained disqualification under Sub-section (5) of Section 92. Sub-section (5) specifically provides that a person against whom an action is taken shall be disqualified to be member of any Panchayat for a period of 6 years commencing from the initiation of such action. It is a penal clause. Until and unless it is proved on record that any action was taken against the petitioner u/s 92 (1) it can not be said that petitioner has attained disqualification. Apart from this Sub-section (4) specifically provides that no action under Sub-section (1) shall be taken until and unless a reasonable opportunity is given to the person concerned to show cause why such action should not be taken against him. On receiving notice under Sub-section (4) if the petitioner has immediately deposited the amount and proceedings were dropped, it can not be said that any action was taken against the petitioner under Sub-section (1) of Section 92. Apart from this it is apparent that it is a matter in which the petitioner has made excess expenditure of Rs. 2,013/- in installation of tube well. It is nobody's case that petitioner has pocketed or misappropriated any funds for his personal use, when the petitioner was holding the office of Sarpanch. In the interest of Panchayat if he has made an excess expenditure of Rs. 2,103/- in the installation of tube well, which was for public purpose and on receiving notice petitioner has deposited the aforesaid excess amount, it can not be said that petitioner has in any manner committed any misconduct or misappropriation of funds of the Panchayat. It is a case in which excess amount was paid for which he was not authorised and on knowing petitioner immediately refunded it by depositing the amount and petitioner can not be said to have suffered disqualification under Sub-section (5). There may be cases in which Sarpanch who acting bonafidely in the interest of public or welfare of Gram Panchayat have made little more expenditure in the welfare of public, for which he may not be authorised, but on knowing if he has rectified the mistake and deposited the amount it can not be said that such Sarpanch has attained disqualification.

In view of aforesaid discussion it can very well be gathered that though there was excess expenditure in the installation of tube well, but there is no mens rea or willful default which may be said to be disqualification under Sub-section (5) of the Act. It is apparent that petitioner after depositing the amount on 25-11-2000 before the Sub Divisional Officer, has not attained any disqualification in the matter. Thus the prescribed authority by the impugned order has wrongly recorded finding that petitioner who accepted guilt and deposited the amount before the authority shall be treated as a disqualification for a period of 6 years. This finding can not be sustained under law and the election of petitioner has been wrongly declared as void by the authority.

Consequently, this petition is allowed. The order Annexure P-7 is quashed. The petitioner shall be entitled to continue as Sarpanch of Gram Panchayat, Siloda and for costs of this petition, which is quantified Rs. 1,000/-(Rupees one thousand only) payable by respondent No. 3 to the petitioner.