

(2008) 12 PAT CK 0042
In the Patna High Court
Case No : CWJC No. 16055 of 2008

Akhilesh Kumar Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Bihar Municipal Act, 2007 — Section 137, 18, 18(1), 18(1)(n), 18(2)

Citation : (2009) 4 PLJR 29

Hon'ble Judges : Ramesh Kr. Datta, J

Bench : Single Bench

Advocate : R.S. Pradhan and Rajeev Lochan, Yogesh Chandra Verma and Indradeo Prasad, for the Appellant; R.C.P. Bharti, Ajay Kumar, Aslam Ansari for the State and Mr. Manindra Kumar for the Respondent No. 4, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Kr. Datta, J.—The petitioner has approached this Court for quashing the order dated 15.10.2008 passed by the State Election Commissioner, Bihar in Case No. 30/2008 {Executive Officer, Nagar Panchayat, Bodh Gaya vs. Akhilesh Kumar Singh) by which he has disqualified the petitioner from holding the posts as Ward Councillor of the Bodh Gaya Nagar Panchayat u/s 18(1)(n) of the Bihar Municipal Act, 2007. The short facts of this case are that on 18.7.2008, the Executive Officer, Nagar Panchayat, Bodh Gaya wrote to the petitioner that he had remained absent from the meetings of the Nagar Panchayat on five dates, i.e., 9.12.2007, 14.12.2007, 8.12.2007, 20.2.2008 and 27.2.2008 and only prior to the meeting dated 27.2.2008, his application regarding absence has been received, The petitioner was directed to explain within three days as to why his matter should not be referred to the State Election Commission, Bihar. The petitioner submitted his reply dated 25.7.2008 stating that he has not remained absent without previous information and previous permission from the meeting of the Nagar Panchayat on any date and apart from the written application, he has also informed the Executive Officer on his Mobile Phone and the Executive

Officer had been giving him permission for remaining absent on all the dates. It is further stated that the reason for his remaining absent on the said dates was on account of the fact that the Investigating Officer of Bodh Gaya Police Station Case No. 158/2007 was threatening him that if he would participate in the meeting of the Nagar Panchayat then he would be arrested and therefore he was making attempts to obtain anticipatory bail and ultimately by order dated 26.2.2008 of this Court he has been granted anticipatory bail and after obtaining anticipatory bail he has remained absent only on 27.2.2008 and participated in every other meeting after that date. It is stated that without obtaining anticipatory bail he would have been arrested by the police just as the Chairman of the Nagar Panchayat who is also an accused in Bodh Gaya P.S. Case No. 159/2007 and had been arrested from the meeting of the Nagar Panchayat while presiding over the same.

2. After receipt of the explanation of the petitioner the matter was referred by the Executive Officer to the State Election Commission by his letter dated 8.9.2008 for considering the question of his disqualification under Sections 18(1) and (2) of the Act. Thereafter an opportunity was granted by the State Election Commission to the petitioner and he also appeared before the State Election Commissioner alongwith his Advocate and given opportunity of being heard. After considering the stand of the petitioner and perusing the records of the case the order dated 15.10.2008 was passed in which it was found that the petitioner had remained absent from the meeting of the Nagar Parishad on 9.12.2007, 14.12.2007, 8.2.2008 and 20.2.2008 and his application for remaining absent was available with the record only with respect to the meeting dated 27.2.2008. For the said reasons, the petitioner's claim that he had given the applications for the other days was rejected and he was declared disqualified u/s 18(1)(n) of the Bihar Municipal Act, 2007. Aggrieved by the same, the petitioner has approached this Court.

3. Learned counsel for the petitioner submits that the relevant Section of the Act does not at all require that the permission should be in writing and thus it may even be oral. It is contended that the petitioner had sought permission from the Chairman and the Executive Officer and the Executive Officer has nowhere denied that the permission was not given on mobile by him. It is thus, submitted that it could not be held that the petitioner has remained absent from the meeting of the Nagar Panchayat without obtaining necessary permission and the order to the contrary is accordingly factually wrong.

4. The next submission of learned counsel for the petitioner is that the powers of the State Election Commissioner in this regard are only summary powers and he has no authority to decide the matter which is contested since no mechanism for holding full-fledged enquiry is provided anywhere in the Act or in the Rules framed thereunder. It is argued that in the absence of specific statutory provisions there would be a denial of proper opportunity to the petitioner to defend himself in such a summary proceeding which affects his statutory right to

contest the election of Ward Councillor and also affects the mandate of the people who had elected him on the said post. In support of the said proposition learned counsel relies upon a decision of this Court in the case of *Rekha Kumari vs. The State of Bihar & Ors.* 2006(4) PLJR 634, in para 17 of which it has been held as follows:-

"From a perusal of the aforesaid provision two aspects are quite apparent. Firstly that if the disqualification is from the date prior to the start of election process, such objection should have been raised before the Commission during the election process itself. Secondly that where the matter is with respect to a disputed question of fact, which is contested and contradicted by the concerned person and which requires evidence to decide the matter, the Commission has got no authority or jurisdiction to decide the same specially when the process of election has concluded. In such circumstances, only option left for respondent No. 7 was to file an election petition before the prescribed authority under the provision of Section 137 of the Act, which clearly provides that the election to any office of a Gram Panchayat or a Gram Katchahry shall not be called in question except by an election petition as prescribed."

5. The next submission of the learned counsel is that Section 18(1)(n) does not provide as to who is the appropriate authority for obtaining permission for absence from the meeting of the Nagar Panchayat since no such provision has been made in the Act. In such circumstances, it is the claim of learned counsel that having informed the Chairman and the Executive Officer in this regard it was for the Councillors to have acted upon such request and for their fault the petitioner cannot be penalized.

6. Learned counsel also takes umbrage of the fact that the Executive Officer had proceeded in the matter against the petitioner and reported the same to the State Election Commission without being authorized to do so by the Councillors. It is contended that unless permission is granted by the Councillors and the Nagar Panchayat itself acts on the resolution and decision of the Councillors, in this regard the Executive Officer has no jurisdiction to refer the matter to the State Election Commission and for the said reason also the proceedings are non est and void. In this regard learned counsel refers to Section 58 of the Act which provides for discussion on urgent public matters by the Councillors and action should be taken on the basis of the decision of the Councillor.

7. It is the further submission of learned counsel for the petitioner that the provision of Section 18(1)(n) is not mandatory. According to him, the purpose of the said provision is to see that the Councilors attend the meeting of the Nagar Panchayat regularly and do not spend their time in leisurely manner after they have been elected. In such circumstances, according to learned counsel, if there are good reasons for the absence of any Councillor, even if it is assumed that no prior permission for absence has been taken then a reasonable view should be taken in the matter and the provisions should not be mechanically interpreted so as to treat his absence as unexplained. It is submitted that if the aforesaid

provision is mandatory it will lead to very harsh result in the present matter specially considering the fact that there is provision for grant of permission and therefore, for good reasons, even though permission is not granted, it must be held that the provision will apply as a directory one and not as mandatory. Learned counsel states that the State Election Commissioner is required to apply the provisions regarding disqualification in a reasonable manner and in similar circumstances, he has passed an order in a case of another Ward Councillor of Sherghati Nagar Panchayat by order dated 20.8.2008, as contained in Annexure-14 of the writ petition, in which despite the absence of the said Ward Councillor on as many as four dates he has dismissed the application against her on the ground that she was expecting a child and produced the relevant document with regard to treatment and it was held that her absence is to be ignored for such good reasons.

8. It has also been argued by learned counsel for the petitioner that the meeting dated 8.2.2008 of the Nagar Panchayat has been boycotted by as many as 12 Councillors including the Chairman and the meeting on 20.2.2008 had been adjourned to 27.2.2008 and no business was transacted therein on account of the meeting being adjourned due to the visit of the Prime Minister of Mauritius to Bodh Gaya. It is submitted that in such circumstances, the meetings on 8.2.2008 and 20.2.2008 would not amount to any meeting in the eye of law and thus the petitioner could not be held to be absent on three consecutive meetings or sittings of the Nagar Panchayat.

9. Learned counsel for the State Election Commission, on the other hand, submits that the provision does not talk of any subsequent condonation rather the permission for remaining absent at a particular meeting has to be taken in the previous meeting itself from the Councillors present at the meeting. It is submitted that it is for the Councillors to accord permission and not the Chairman or the Executive Officer and any communication allegedly made on the Mobile Phone in this regard cannot be of any benefit to the petitioner, more so when in the present matter the wife of the petitioner is the Chairman of the concerned Nagar Panchayat and such document showing her signature in token of receipt of applications can be created at any subsequent time and not relied upon even if they are alleged to form part of the official records of the Nagar Panchayat. It is urged that it is the admitted position and finding of the State Election Commission that the petitioner was absent on four days without any application and only on one another date he had filed an application which was available on the record. In such circumstances, according to learned counsel, the State Election Commissioner had no option but to disqualify the petitioner in terms of Section 18(1)(n) of the Act and he has accordingly rightly disqualified the petitioner.

10. On a consideration of the facts and circumstances of the case and the aforesaid submissions of learned counsel for the parties, this Court does not find any force in the submission of learned counsel for the petitioner.

11. Firstly, the submission of learned counsel that the permission need not be in writing and may be oral has no legs to stand in view of the clear mandate as contained in Section 18(1)(n) of the Act which is quoted below:-

"18. Disqualifications.-(1) Notwithstanding anything contained in this Act, a person shall be disqualified for election or after election for holding the post as member of the Municipality if such person.

....

(n) has been absent from three consecutive meetings or sitting of the Municipality without having previously obtained permission from the Councillors at a meeting."

12. It is evident from the aforesaid provisions that the permission has to be obtained previously in order to remain absent at any meeting and the same has to be obtained from the Councillors at a meeting. The use of the expression "from the Councillors at a meeting" indicates that it is not at any and every time that even the Councillors are authorized to grant permission to remain absent to any other Councillor. The said decision must be taken in the meeting of the Councillors of concerned Municipality and since all such meetings are of statutory body which must maintain a minute of its proceedings, therefore, the permission would automatically be in written form being part of the proceedings of the meeting of the Councillors; hence there can be no question of obtaining any oral permission in the matter.

13. Moreover the permission claimed by the petitioner from the Chairman or from the Executive Officer has no relevance in terms of the statutory requirements as the same has not been obtained from the Councillors at a meeting. In the present matter even such permission is firstly not in writing and is claimed to be on Mobile Phone which cannot be considered any authentic permission. Hence, no credence can be given to such claim by the petitioner that he had obtained permission on Mobile Phone from the Chairman or from the Executive Officer.

14. The next submission of learned counsel that the State Election Commissioner has no authority to decide the matter where disputed questions of fact on contest arise, since he acts in exercise of summary powers under the Act is also not acceptable. It is well known that it is open to the Legislature to create any authority under the Statute to exercise powers with respect to any matter which requires to be decided under the said Statute. Where the legislature has clearly provided for a disqualification and has also laid down as to which authority shall decide the issue of disqualification, then the fact that detailed provisions for holding such an enquiry has not been provided under the Act or Rules, cannot have the effect of taking away the powers of the authority, namely, the State Election Commission to act in the matter. Each and every issue may not be decided as though it is a trial being conducted in a Civil Court, and it is for the legislature to decide as to the nature of the proceedings, whether summary or

full-fledged. The only requirement in such situation where detailed provisions for arriving at the decision are not provided under the Act is that the authority concerned must adopt a fair and just procedure which is not violative of the principles of natural justice. Where such a procedure has been adopted, it is not open to any one to challenge the decision arrived at by such an authority on the ground that it does not have full powers as of a Civil Court. From a consideration of sub-section (2) of Section 18 of the Act, it is clear that the State Election Commission is required to decide the matter after affording sufficient opportunity to the affected party of being heard. From the order-sheet produced before this Court it is evident that the petitioner was given sufficient opportunity of being heard in the matter and he was, in fact, represented through an Advocate in the proceedings. It is not, therefore, open to the petitioner to challenge the proceedings merely on the ground that it has not been conducted as though by a Court of law holding a regular trial.

15. In this context reliance by learned counsel for the petitioner on the decision of this Court in Rekha Kumari's case (supra) cannot be of any help in the matter as the observations made in the said case were in the context of a disqualification existing from a date prior to the start of election process, having not been raised before the Commission during the election process but after the election was over, in which context it has been observed that the proper course ought to have been to challenge the same by filing an election petition. The facts of the said case have no relevance to the present matter in which the question of disqualification can only arise subsequent to the election and in terms of the provisions of Section 18 of the Act the matters have to be adjudicated and determined by the State Election Commission.

16. Regarding the submission of learned counsel that the petitioner having informed the Chairman and the Executive Officer regarding his absence, it was for them to have obtained necessary orders of the Councillors and for the fault of the authorities of the Nagar Panchayat and Councillors he cannot be penalized, the same is also not borne out from the provisions of the Act. The Act clearly provides previously obtaining permission from the Councillors at a meeting before a person can absent himself from the said meeting and if such absence is on three consecutive meetings then under the provisions of the Act he would be disqualified. It is evident that permission has to be obtained previously and obtaining permission means that it has to be done by the person who seeks leave of absence. If the proper procedure had not been followed and the permission had not been obtained previously to remain absent from the meeting, then the only option for the petitioner was to have attended the meeting. It was for the petitioner to have made an enquiry in this regard, even if it is accepted that he had sought permission in writing and orally earlier that the said permission had been granted by the councilors before he absented himself from the meeting. If he had not been careful in this regard then no claim can be made by him contrary to the provisions of the Statute.

17. The further submission of learned counsel that the provisions of Section 18(1) (n) is not mandatory but directory has only to be noticed to be rejected. Nothing has been shown by learned counsel that the said provision does not or cannot operate in a mandatory manner. It is evident that the same is a substantive and not a procedural provision and couched in mandatory language which clearly lays down the consequences of remaining absent from three consecutive meetings without prior permission. In such circumstances, such provision has to be held to be mandatory.

18. Regarding the reliance of learned counsel in this regard on another order of the State Election Commission, this Court does not find that the same can be of any assistance to the petitioner. Upon remaining absent on three consecutive dates in the meetings or sittings of the concerned Municipality without having previously obtained permission from the Councillors at a meeting, the said disqualification takes effect by operation of the provisions of the Statute and the function of the State Election Commission as the adjudicating authority is only to arrive at a finding as to whether the person concerned was absent or not from three consecutive meetings or sittings without previously obtaining permission from the Councillors at a meeting. Once such a finding is arrived at, the consequence flows from the statute itself which does not give any discretion to the State Election Commission not to disqualify a Councillor on the ground that he or she had good reasons for remaining absent. Hence no benefit can be derived by the petitioner from any other orders passed by the State Election Commissioner contrary to the statutory mandate, which in any case are not binding upon this Court.

19. The further submission of learned counsel that only Councillors could have resolved to proceed against the petitioner and the Executive Officer on his own has no jurisdiction to refer the matter to the State Election Commission for decision, is also bereft of any force. It is clearly provided in Section 18(2) of the Act that the matter of disqualification may be brought to the notice of the State Election Commission in the form of a complaint, application or information by any person or authority. The provision being couched in such terms, this Court feels that it was duty of the Executive Officer on having come to learn about such facts leading to disqualification of the petitioners, to have brought the same to the notice of the State Election Commission. In such matter he is not bound by the direction of any superior authority as he would be if the matter pertains to the functioning of the Municipality only. As a Public Officer where he finds violation of the provisions of the Act which envisage disqualification, then he must act and send the necessary information to the State Election Commission which alone is the competent authority to take cognizance of the matter and pass the necessary order.

20. This Court does not find any substance in the submission regarding the meeting dated 8.2.2008 being boycotted or the meeting dated 20.2.2008 being adjourned without transacting any business as being liable to be excluded from

consideration. The provision talks of absence from three consecutive meetings or sittings of the Municipality and it does not matter whether business is transacted or not in such a meeting. Mere absence from such meeting is sufficient to attract the provisions for disqualification from holding the post of member of the Municipality. Thus, in the light of the aforesaid discussions, this Court does not find any merit in the writ application and it is accordingly dismissed.