
(2009) 08 MP CK 0030

In the Madhya Pradesh High Court

Case No : Writ Petition No. 3764 of 2008

Baleshwar Dayal Jaiswal

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 25-08-2009

Acts Referred:

Central Provinces and Berar Municipalities Act, 1922 — Section 57(2)
Madhya Pradesh Municipalities Act, 1961 — Section 37, 37(2), 41, 41A, 41A(1)

Citation : (2010) ILR (MP) 111 : (2009) 4 MPLJ 186

Hon'ble Judges : Prakash Shrivastava, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prakash Shrivastava, J.

BY this writ petition, Petitioner has challenged the order dated 6th June, 2008 passed by the Principal Secretary, Department of Urban Administration and Development, Government of Madhya Pradesh, Bhopal in exercise of the powers u/s 41-A of the M.P. Municipalities Act, 1961 (for short "the Act") removing the Petitioner from the post of the President, Municipality Nagda and debarring him from contesting the election for a period of next 5 years.

Petitioner was elected as President of the Municipality Nagda in the election held on 04.11.2005. He was elected as an independent candidate; whereas in the election of councillors for 36 Wards, 27 seats were won by the Bhartiya Janta Party, 7 by Indian National Congress and 2 by independent candidates. On the complaint of some of the Councilors, the Minister, Urban Administration and Development Department had got the enquiry conducted through the Secretary of the Department who submitted the ex-parte Enquiry Report on 5th September, 2005. The State Government issued show-cause notice dated 10th October, 2005 to the Petitioner to remove him from the post of the President u/s 41-A of the Act. Petitioner filed reply to the show-cause notice. Thereafter another notice dated 17.04.2006 was given containing some additional charges for taking action

u/s 41-A of the Act. The Petitioner submitted reply to the additional charges on 04.07.2006. The Respondent No. 1 passed the order dated 29.07.2006 removing the Petitioner from the post of President, Municipal Council, Nagda exercising the powers u/s 41-A of the Act. Petitioner had earlier approached this Court by filing Writ Petition No. 4644 of 2006 challenging the order of removal and the Single Bench of this Court by the order dated 9th October, 2007 allowed the writ petition on reaching to the conclusion that the order of removal was not authored by the Competent Authority himself; the order of removal was based upon the findings recorded in the Preliminary Enquiry Report which was held behind the back of the Petitioner; the order was based upon the non application of mind and that some of the findings in the order were not based upon any evidence. Learned Single Judge set-aside the order dated 29.07.2006 and directed reinstatement of the Petitioner as President, Municipal Council, Nagda for the rest of his term. The Writ Appeal No. 605 of 2007 filed by the Respondents was dismissed by the learned Division Bench by observing that any expression contained in the order of the learned Single Judge on merits of the case will not preclude any party from taking resort to the provisions of the Act.

It is relevant to mention here that when the Petitioner was removed from the post of the President by order dated 29.07.2006, to fill up the casual vacancy, initially one Mr. Raj Narayan was appointed u/s 37(2) of the Act and thereafter election was held and the Court at that stage had made explicit that the Election Commission shall inform all the contesting candidates that the election will be subject to the result of the writ petition. In the election one Gopal Yadav was elected. The issue of the status of Gopal Yadav came up before the Division Bench in Writ Appeal No. 605 of 2007 and the Division Bench held that once the order u/s 41-A of the Act is quashed, the parties would be relegated to the position obtaining on the date of the order and the incumbent who had suffered the order u/s 41-A of the Act becomes entitled to restoration of his Office/Post after the order of removing was struck down. Consequently the Petitioner was restored back to the Office of the President, Municipal Council, Nagda, and election of Gopal Yadav being conditional, no right accrued in his favour.

The Petitioner was thereafter served with a fresh show-cause notice dated 26.12.2007 for removal from the post of President u/s 41-A of the Act. The Petitioner submitted reply (Annexure P/16). Since some of the charges were the same which were contained in the earlier show-cause notice, therefore, the Petitioner instead of repeating the reply for those charges relied upon his earlier reply submitted on 11.04.2006 (Annexure P/5) and 04.06.2006 (Annexure P/7). Petitioner was given an opportunity of personal hearing and the impugned order dated 6th June, 2008 was passed u/s 41-A of the Act removing the Petitioner from the post of President, Municipal Council, Nagda. Aggrieved with this order, the Petitioner has filed present writ petition before this Court.

Pending this writ petition, no election to the post of President has been held and the vacancy was filled up temporarily in terms of Section 37 of the Act. The

matter stands thus when it came up for hearing before this Court.

Learned Counsel appearing for the Petitioner submitted that the impugned order dated 06.06.2008 is a cryptic and non-speaking order which does not contain any reasoning and straightway findings have been recorded. He further submitted that the charges only relate to procedural irregularities and there is no charge of financial gain to the Petitioner. He submitted that while passing the impugned order, the reply of the Petitioner contained in Annexure P/16 read with Annexures P/5 and P/7 has not been taken into account and that the guidelines which were given by the learned Single Judge in the order dated 09.10 2007 while allowing the Writ Petition No. 4644 of 2006 have been ignored.

Learned Counsel appearing for the Respondents No. 1 to 3 - State submitted that the impugned order being an administrative order, does not require to contain reasons. Relying upon Rule 5(2) of the Madhya Pradesh Municipalities (The Conduct of Business of the Mayor-in-Council/President-in-Council and the Powers and Functions of the Authorities) Rules, 1998, he submitted that the President-in-Council is vested with the financial powers not exceeding rupees two lacs and in the case in hand the item in question was divided in pieces to bring it within the financial limit. He submitted that the impugned order has been passed in accordance with the requirement of law, therefore, no interference is required.

Counsel for the Municipal Council submitted that this Court has limited scope of interference in writ jurisdiction since judicial review is not of the order itself but it is of the decision making process. He submitted that by the order of the Division Bench in Writ Appeal No. 592 of 2007 liberty was given to take fresh action and accordingly after giving notice to the Petitioner, fresh action was taken and the impugned order has been passed.

The proposed intervenor Gopal Yadav who was elected after the removal of the Petitioner in the first round, has also opposed the writ petition.

I have heard learned Counsel for the parties and perused the record of the case.

On perusal of the impugned order dated 06.06.2008 passed by the State Government, I find that in the impugned order though the findings have been recorded against the Petitioner but there is discussion about the material on the basis of which findings have been recorded. The impugned removal order does not show that while passing the order the concerned Respondent applied his mind to the explanation given by the Petitioner in the reply to the show-cause notice. State has also not produced any material before this Court to show that the reply filed by the Petitioner was considered before passing of the impugned order, or findings recorded in the impugned order were based upon the same reasons which were separately recorded.

Since the learned Counsel for the State has raised the argument that an order passed u/s 41-A of the Act need not be a reasoned order, therefore, this Court is required to examine the nature of order passed u/s 41-A, and to see if while

exercising this power State can non seat a democratically elected President by passing a non speaking order which contains only the finding without mentioning the reasoning and the material on the basis of which those findings are arrived at.

Section 41-A of the Act gives powers to the State Government to remove President on the grounds mentioned in the section. Section 41-A of the Act provides that:

41-A. Removal of President or Chairman of a Committee.-

(1) The State Government may, at any time, remove a President, Vice President or a Chairman of any Committee, if his continuance as such is not, in the opinion of the State Government desirable in public interest or in the interest of the Council or if it is found that he is incapable of performing his duties or is working against the provisions of the Act or any rules made thereunder.

(2) The State Government may, while ordering the removal under Sub-section (1), also order that such President, Vice President or Chairman of any Committee shall be disqualified to hold such post for the next term:

Provided that no such order under this Section shall be passed unless a reasonable opportunity of being heard is given.

Under Section 41-A of the Act, the State Government has the power to remove a President on following grounds:

(i) If State Government forms an opinion that his continuance as such is not, in public interest or in the interest of the Council.

(ii) If it is found that he is incapable of performing his duties.

(iii) If he is working against the provisions of the Act or any rules made thereunder.

A perusal of Section 41-A makes it clear that before removing the President under the Section State Government is required to form an opinion, or reach to the finding about existence of reason enumerated in the Section. "Opinion or finding" of the State Government formed or recorded under the Section must be based upon some cogent material which should be adequate to form such an opinion or reach to the conclusion as required by the Section and such a material in order to maintain the transparency should be reflected in the order of removal or produced before the Court when such an order is challenged.

This Court while examining the correctness of the order can go into the sufficiency, adequacy and correctness of the reasons, and can also look into the sufficiency, adequacy and relevance of the material on the basis of which the opinion is formed by the State Government or conclusion is reached in respect of existence of ground to take an action u/s 41-A and if the material is adequate to come to the conclusion that the continuance of the elected Office bearer is not in public interest or in the interest of council. The language of the section itself

gives a clue that while examining the correctness of the order under the Section the Court can go into the sufficiency, adequacy and relevancy of the material on the basis of which action under the Section was taken.

It is the settled position in law that the action of the Government has to be reasonable and it cannot be held that Section 41-A gives arbitrary unbridled and discretionary power to the State to remove the elected president on trumped up charges not adequately proved or unreasonably accepted. The State is required to form an opinion in respect of the misconduct or incapacity objectively. Since the exercise of power u/s 41-A has serious consequence, therefore, it can be invoked only for very strong and weighty reasons and the material on the basis of which such action taken must justify such a serious action. It cannot be ignored that by exercising this power, the State removes a democratically elected President, therefore, such a power cannot be exercised for trivial reasons or the material which is inadequate for taking the action.

The aforesaid view taken by this Court is supported by the earlier judgment of this Court in the matter of Kaushalya Bai v. State of M.P. reported in 1991 [1] MPLJ 368, where this Court while examining the scope of power u/s 41-A has held that:

4. From the provision quoted above it is noteworthy that it confers an extraordinary and overriding power on the State Government to remove an elected office bearer of a local authority or committee under it on formation of an opinion that continuance of such office bearer is "not desirable in public interest" or "in the interest of the council" or that "he is incapable of performing his duties or is working against the provisions of the Act or any Rules" made thereunder. Similar power of removal of a councilor is vested in the Collector u/s 41 of the Act against which there is an appeal provided. For taking action u/s 41-A of removal of President, Vice President or Chairman of any Committee, power is conferred on the State Government with no provision of any appeal. The action of removal casts a serious stigma on the personal and public life of the concerned office bearer and may result in his disqualification to hold such office for the next term. The exercise of power, therefore, has serious civil consequences on the status of an office bearer. The nature of power is such that it has to be exercised on an opinion objectively formed by the State Government. The misconduct or incapacity of the office bearer should be of such magnitude as to make his continuance undesirable in the "interest of council" or "in public interest". There are no sufficient guidelines in the provisions of Section 41-A as to the manner in which the power has to be exercised except that it requires that reasonable opportunity of hearing has to be afforded to the office bearer proceeded against. Keeping in view the nature of the power and the consequences that flow on its exercise it has to be held that such power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for some trivial or minor irregularities in discharge of duties by the holder of the elected post. The material or grounds on which the action is taken

should be such as to justify the exercise of drastic power of removal of the office bearer with consequence of his disqualification for another term. The provision has to be construed in a strict manner because the holder of office occupies it by election and he is deprived of the office by an executive order in which the electorate has no chance of participation.

The same issue relating to the nature of power which is exercised u/s 41-A of the Act came up before this Court in the matter of *Rajiv Sharma v. State of Madhya Pradesh and Ors.*, in Writ Petition No. 2809 of 2002 and this Court by order dated 13.05.2003 held that:

13. That being so, it is not a case where the general principles governing review of the administrative decision will be applicable. Judicial review in the present case has to be undertaken keeping in view the fact that the power u/s 41-A of the Act of 1961, is to be exercised by the State Government for removing an elected office bearer from his office. Meaning thereby that the State Government is acting against the wishes and mandate of the people who have elected the incumbent into office. Accordingly, the opinion with regard to feasibility of keeping such a person in office or the desirability of removing him in public interest has to be viewed objectively and the irregularities or allegations alleged should be of such serious nature and of such magnitude that continuation of such a person is undesirable. As indicated by this Court in the case of *Jaushalya Bai (Smt.) (Supra)*, the consequence of exercise of power which is to be invoked by the State Government has serious civil consequence not only on the status of the person concerned but of his future prospects also and as no sufficient guidelines have been prescribed, State Government has to invoke the power only if strong and cogent reasons are available. It has been emphasised by this Court, in the aforesaid case of *Kaushalya Bai (Smt.) (Supra)*, power cannot be exercised on some trivial or minor irregularities in the discharge of duties by the holder of the office. As indicated in the aforesaid case, the materials or the grounds on which the allegations are founded and the reasons for removal of the office bearer should justify the exercise of such a drastic power of removal. Keeping in view the aforesaid, the scope of judicial review in such matters is to be considered. That being the legal position, the contention of Shri Jain that this Court cannot sit over the decision of the State Government as an appellate authority has to be scrutinised keeping the aforesaid in view. There is no dispute that this Court cannot sit over the decision of the State Government as an appellate forum and scrutinise the action as if it is deciding an appeal against the order of the State Government, but in the backdrop of the legal principle enumerated hereinabove, in matter concerning removal of democratically elected people, this Court can very well look into the matter to find out whether the removal is based on cogent and compelling reasons, whether interest of the public interest of the Council have been properly considered, whether material on the basis of which action has been taken is of such a nature that the persons can be held to be responsible for having misused his office to such an extent that retaining him in the office will have serious and far reaching consequences in the interest of the Council and

ultimately the public at large. This Court can always look into the matter to find out whether conditions and circumstances extraneous to the main purpose of the statute are being achieved by exercise of its power. In case after appreciating the material on record, this Court comes to a conclusion that the irregularities or misconduct alleged are nothing but some discrepancies or irregularities which cannot be contemplated to and directly attributable to the persons certainly power of judicial review can be exercised. It is in the aforesaid background that the allegations and the material to substantiate the same is to be examined by this Court, to consider the fact as to whether the allegations and the irregularities complained of are so serious in nature that the person has to be unseated from his office. This power of review is approved by this Court in the case of Kaushalya Bai (Smt.) (Supra), and therefore, it cannot be said that merely because opportunity of hearing has been given and there is no violation of any, statutory provision, the decision of the Government has to be upheld and this Court cannot interfere in the matter. The judgments referred to by learned senior counsel are with regard to scope of judicial review mainly in matters concerning disciplinary action against employee's and the Full Bench judgment in the case of Natwar Singh (Rana) (Supra) is with regard to the requirement of passing speaking order in such matters and therefore, are not much relevant for decision in the present case.

This Court in the matter of Rajiv Sharma (Supra) relied upon the earlier judgment dated 21.02.2003 passed in Writ Petition No. 1976 of 2002 Daulat Ram Gupta v. The State of M.P. and Anr. wherein it was held:

9. Section 41A of the Municipalities Act, 1961 empowers the State Govt. at any time to remove the President, Vice President or Chairman of any Council if a opinion is formed by the State Govt. that continuance of such a person is not desirable in public interest or in the interest of the council or it is found that he is incapable of performing his duties or he is working against the provisions of the Act or any rule made thereunder. From the aforesaid it is clear that the State Govt. has to form a opinion with regard to the desirability, interest of the public, interest of the council and the capacity of the person to perform his duties and then take action for removal under the aforesaid provision. However, proviso to section contemplates giving reasonable opportunity of being heard to the person concerned before action is taken.

President of the Council is elected by direct voting in a democratic Manner. That being so, while exercising power of removing such a elected Office bearer the State Govt. is duty bound to take extra care and caution and power u/s 41A cannot be exercised until and unless strong and cogent reasons are available for taking such an action.

The issue relating to the nature of power which is exercised while superseding the Municipal Committee or removing the President came up before the Full Bench of this Court in the matter of Municipal Commissioner, Kareli v. State reported in 1958 J.L.J. 589, wherein the Full Bench of this Court while examining

the issue on supersession of Kareli Municipality u/s 57(2) of the Central Provinces and Berar Municipalities Act, 1922, held that:

9. The short question is that where charges have been framed and the explanation of the municipal committee is in, whether the reasons given for superseding the committee can be examined by the Court. We agree with the learned Judges of the earlier Division Bench that the Court may in its writ jurisdiction interfere if the order is mala fide, arbitrary, without jurisdiction, or in utter violation of the principles of law or natural justice. We are, however, not satisfied that the Court is incompetent to consider the sufficiency or adequacy of the material upon which the charges were regarded as proved. We would like to restate this part of the law again. The learned Judges of the earlier Division Bench quite correctly gave the four reasons on which the Court may interfere, but they, however, took away the effect of much that they had said before by observing as follows:

We, therefore, decline to consider the sufficiency or adequacy of the material upon which the charges were regarded as proved.

In our opinion, this dictum takes away the power of examining the reasons which may be entirely unrelated to the facts proved, and it is too wide and needs to be restated.

The Central Provinces and Berar Municipalities Act, 1922 requires that supersession of a Municipal Committee may be done when one or more of the conditions laid down in Sub-section (2) of Section 57 of the Act are found to exist. The reasons must have relation to those conditions and must be sufficient for the exercise of the power conferred on the Government. The Court will not examine the reason as in an appeal, but will certainly examine them with advertence to their reasonableness and sufficiency for the legitimate exercise of the power granted to the Government. Whenever action has to be reasonable and the reasons for the action to be recorded, the test is not entirely subjective unless the law says that it should be so: See *Nakkuda Ali v. M.F.De S. Jayaratne* 1951 A.C.C 66. The learned Counsel for the Municipal Committee cited *Vishvanath v. The State of Madhya Bharat* 1954 M.B.L.J. 1, but that case also goes too far on the other side. We do not agree with all that has been said in the *Madhya Bharat* case. The issue of supersession is, of course, not to be tried as a law suit with a right of appeal to the High Court. At the same time, the action of the Government has to be reasonable and the reasons for the action have to be stated, and the exercise of power can be examined to see whether in the circumstances under which it has been exercised the necessary power under the Act flows to the Government.

In a democratic society it is of the essence that democratic institutions are allowed to function and not, superseded on trumped up charges inadequately brought home or unreasonably accepted. The courts will be vigilant to see that such over reaching powers are kept within the four corners of the statute

granting them. We think that the fact that a reasonable opportunity to show cause has been made a condition precedent to the exercise of the power and that reasons for the supersession have to be notified to the electorate shows that there is not to be a subjective appraisal but that the reasons must be sufficient under the Act and an objective test is indicated. The requirements of the law are not satisfied by accepting insufficient or inadequate reasons for supersession. We think that the courts are at liberty to examine the reasons for this limited purpose in addition to the purposes which the learned Judges of the earlier Division Bench (Mangalmurti and Mudholkar JJ.) have already indicated in their order.

Learned Counsel appearing for the Respondent placing reliance upon the full Bench judgment of this Court in the matter of Natwar Singh (Rana) v. State of M.P. and Ors. reported in 1986 J.L.J. 69, has submitted that the order passed u/s 41 -A is an administrative order, therefore, it need not be a speaking order. The court in the matter of Rajiv Sharma (Supra) has already distinguished the judgment in the matter of Natwar Singh by holding that the said judgment is not relevant for decision in the case since it deals with the requirement of passing speaking order in service matter. The judgment in the matter of Natwar Singh is on the action taken u/s 41 of the Act; whereas in the present case action is u/s 41-A of the Act and this Court in the matter of Kaushalya Bai (Supra) has noted the difference between these two provisions. Therefore, the arguments of the Counsel for the Petitioner cannot be accepted.

It is worth noting that even in the matter of Natwar Singh (Supra), the Full Bench of this Court had taken the view that when the order of removal passed by the State Government is challenged in a Court of law, the State Government is required to indicate the reasons for forming the opinion and place before the Court the necessary material which was taken into consideration in forming its opinion. In the present case the State has failed to do that.

The Supreme Court in the matter of A.K. Kraipak and Others Vs. Union of India (UOI) and Others, had noted as far back as in 1970 that the concept of judicial review was undergoing a radical change and what was considered as an administrative power some years back was then considered as quasi-judicial power. In the matter of S.L. Kapoor Vs. Jagmohan and Others, , the Supreme Court held that action of Supersession of a municipality is administrative action which entails civil consequences. In *Organo Chemical Industries v. Union of India* AIR 1979 S.C. 1803, the Supreme Court has taken the view that the power to affect citizen's rights, especially by way of punitive action imposed or damages for wrong doing is quasi-judicial in character even if exercised by executive echelons. The Supreme Court held that:

The power to affect citizen's rights, especially by way of punitive impost or damages for wrong doing, is quasi-judicial in character even if exercised by executive echelons. This Court has underscored the importance of injecting the norms of natural justice when statutory functionaries affect the rights of a

person. The most recent of the cases which lay bare the elements of this branch of jurisprudence are: (1) Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India 1976 Supp SCR 489; (2) Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, ; (3) Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, .

The Bombay High Court in the matter of Baburao Vishwanath Mathpati and etc. Vs. State of Maharashtra and others etc., , while considering the case of removal of president of Municipal Council, Parbhani u/s 55-A of the Maharashtra Municipal Councils Act, 1965 has held such an action to be quasi judicial action.

On examining the impugned order dated 06.06.2008 in the light of the aforesaid position in law, I find that in the impugned order at first charges contained in the show-cause notice have been noted, thereafter Petitioner's reply dated 25.02.2008 has been noted in short without taking note of the explanation given by the Petitioner in replies dated 11.04.2006 and 04.06.2006 relating to additional charges. Thereafter straightway findings have been given in a cryptic manner stating that charges are proved. No reasoning has been given for holding the charges as proved and no material has been discussed on the basis of which charges are held proved. The reliance of the counsel for the State on Rule 5(2) of the Rules of 1998 is misplaced since the application of the Rules can be seen only in the factual background of the material gathered against the Petitioner. Even if the charge relating to misuse of Rule 5(2) is accepted, than also such a charge is of procedural irregularity which alone does not show any financial gain to the Petitioner or acting against the interest of municipality or public. It is a case where there is flaw in the decision making process itself, therefore, judicial review is permissible. Therefore, for the reasons stated above the impugned order of removal dated 06.06.2008 passed u/s 41-A of the Act cannot be sustained.

So far as intervention by Gopal Yadav is concerned, his fate is already sealed by judgment of the Division Bench in Writ Appeal No. 605 of 2007.

In view of the aforesaid analysis, the writ petition is allowed and the impugned order dated 06.06.2008 is set-aside. No order as to costs.