
(1977) 01 MP CK 0025

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 39 of 1976 with Miscellaneous Petition No. 40 of 1976

Basantilal Gorishankar Sharma

APPELLANT

Vs

District Magistrate, Mandsaur and others

RESPONDENT

Date of Decision : 21-01-1977

Acts Referred:

Constitution of India, 1950 — Article 226

Madhya Pradesh Municipalities Act, 1961 — Section 345, 35, 36, 36(1), 38

Citation : (1977) JLJ 253

Hon'ble Judges : C. Kondaiah, J; B.R. Dubey, J

Bench : Division Bench

Advocate : S.D. Sanghi, for the Appellant; G.S. Solanki, Dy. Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

C. Kondaiah, J.—The petitioners were duly elected as councillors of the Municipal Council, Mandsaur in January 1975 for a term of four years. They were detained by the District Magistrate, Mandsaur under MISA on 27-6-1975. Consequently, they did not attend the meetings of the Municipal Council held on 13-7-1975, 1-8-1975, 5-8-1975, 12-8-1975, 4-9-1975, 20-9-1975, 17-10-1975, 21-10-1975 and 25-10-1975. The request of the petitioners to the District Magistrate on 6-8-1975 and 22-9-1975 for permission to attend the meetings of the Municipal Council was not acceded to. Their application to the President of the Municipal Council on 22-9-1975 for permission to remain absent, as they were under detention and they were not permitted by the District Magistrate to attend the meetings was not fruitful. The State Government of Madhya Pradesh initiated proceedings before the District Collector, Mandsaur under the Section 38(2) of the M.P. Municipalities Act (hereinafter called the Act) on the ground that the petitioners by absenting themselves from the meetings of the Council during three consecutive months from the meeting of the Council from 13-7-1975 had incurred disqualification u/s 38(1)(b) of the Act. Thereupon the District Collector

issued show cause notices dated 14-11-1975 to the petitioners requiring them to appear before him on 19-11-1975 to submit their replies and defend themselves. The show cause notices were served on the petitioners in the Central Jail, Indore at about 6 P.M. on 15-11-1975. On 17-11-1975, telegrams were sent by the petitioners to the District Collector to the effect that they are sending their replies. In fact the petitioners sent replies on 17-11-1975 to the show cause notices to the Collector from jail by registered post, but they were returned as refused. The copies of the reply were despatched by the petitioners again with a covering letter dated 23-11-1975. The District Collector by his order dated 23-12-1975 declared the seats of the petitioners in the Municipal Council, Mandsaur as vacant u/s 38(1)(b) of the Act from the date of notification by the State Government, as they did not attend the meetings of the Municipal Council for over three months nor have they obtained any exemption under the Act. Aggrieved by the decision of the Collector, the petitioners filed the writ petitions under Article 226 of the Constitution of India to quash the impugned Orders on the ground that they did not absent themselves within the meaning of section 38(1)(b) of the Act and, therefore, they are illegal, improper and without Jurisdiction and for a declaration that they are entitled to continue as members of the Council till the expiry of the term of membership. The respondents filed Return contending inter alia that the petitions are liable to be dismissed in limine on the short ground that the alternative statutory remedy of appeal to the Commissioner u/s 38(3) of the Act has not been availed of: that the District Magistrate did not allow the petitioners to attend the meetings as the very purpose of detention under MISA would be defeated if the permission sought for was granted, that the President of the Council was only appraised of their inability to attend but no specific permission or exemption was sought for by the petitioners and that the impugned orders are competent and valid and there is no merit in these writ petitions.

2. The sum and substance of the contention of Shri S.D. Sanghi, learned counsel for the petitioners that the impugned orders must be quashed is two-fold:--

(i) that the petitioners did not absent themselves during three consecutive months from the meetings of the council, as they were confined in jail under MISA and the provisions of Section 38(1)(b) can be applied only to cases where the members of their own volition and free will or due to negligence or any other fault, absent themselves from attending the meetings and (ii) the impugned orders are also violative the principles of the natural justice, as so reasonable opportunity of being heard as provided under the Act is afforded to them. This claim of the petitioners is opposed by Shri G.S. Solanki, learned Deputy Government Advocate contending inter alia that Section 38(1)(b) is attracted to every case of absence by a member during three consecutive months irrespective of the reason of cause for such absence, that the petitioners must be held responsible for their illegal acts, which resulted in their detention under MISA and, therefore, the natural consequence of their absence is to forfeit their right to continue as members of the Municipal Council and that the impugned

orders are valid and proper but not violative of any rule of natural justice or statutory provisions and that the petitions are liable to be dismissed in limine on the ground that the petitioners have failed to avail the statutory remedy of appeal against the impugned orders. Shri Sanghi replied that the preliminary objection about the maintainability of writ petitions raised by the respondents should not be sustained in view of the fact that no useful purpose would be served by preferring an appeal to the State Government, the statutory appellate authority or its delegated authority as the very proceedings which resulted in the impugned orders, have been initiated in these cases by the State Government and further the writs have been admitted by a Division Bench of this Court and the time for preferring appeals has expired long ago.

3. Upon the respective contentions advanced on behalf of the parties, the following questions arise for decision:--

(1) Whether the writ petitions are liable to be dismissed on the preliminary objection of not availing the remedy of appeal provided under the Act?

(2) Whether the impugned orders are violative of the rules of natural justice?

(3) Whether on the facts and in the circumstances the petitioners have ceased to be the councillors of the Municipal Council, Mandsaur and their seats have become vacant with effect from the date notified by the State Government within the meaning of section 38(1) of the Act or the impugned Orders are invalid, improper and without Jurisdiction?

4. We shall first take up the question No. (1) relating to preliminary objection about the maintainability of the writ petitions. True, as contended by the respondent, a right of appeal against the decision of the Collector u/s 38 (1) and (2) is provided to the State Government u/s 38(3) which reads thus:--

38 (3). Any person aggrieved by the decision of the prescribed authority under Sub-section (2) may within thirty days from the date of the communication to him of such decision appeal to the State Government. The order passed by the prescribed authority shall, subject to the decision of the State Government in appeal, be final.

In exercise of the powers vested in the State Government under Sub-section (1) and (3) of section 345 of the Act, it has appointed the Collector as the prescribed authority to exercise the power under Sub-sections (1) and (2) of section 38 and has delegated its power and authority to hear and dispose of the appeal against the decision of the Collector u/s 38(3) to the concerned Commissioner under notification published in Madhya Pradesh Rajpatra Part II dated 16-2-1962. By virtue of the aforesaid power of delegation, the District Collector, Mandsaur has passed the impugned Orders. An appeal by the petitioners to the concerned Commissioner within 30 days from the date of the orders has been provided. The Commissioner is only a delegated appellate authority, The statutory appellate authority is the State Government.

5. The prescribed authority empowered to declare a councillor, who incurs any of the disabilities indicated in clauses (a) to (e) of Sub-section (1) of section 38 subsequent to his election as a councillor has to declare that such councillor has ceased to be a councillor and his seat will become vacant with effect from a date to be notified by the State Government. This power can be exercised by such authority on its own motion or on an application made to it by any person in that behalf. In the present case, the prescribed authority has not initiated the proceeding suo motu on its own motion, but this proceeding has been initiated at the instance of the State Government. The words "any person" in section 38(2) are wide enough to take in the State Government also. On the application of the State Government to the prescribed authority, the District Collector herein, the impugned orders declaring the petitioners having incurred the disqualification on the ground that they absented themselves during three consecutive months from the meetings of the council have been passed and such decision has been communicated to the petitioners. The proviso no doubt requires the prescribed authority to offer reasonable opportunity of being heard to the concerned councillor against whom the proceeding u/s 38(1) has been initiated. In the circumstances, could it be said that the remedy of appeal available to the petitioners, to the commissioner who is functioning as a delegated authority under the Government would be an effective and efficacious remedy that should have been availed of by the petitioners before approaching this Court invoking its extraordinary Jurisdiction under Article 226 of the Constitution of India. On a careful consideration of the entire facts and circumstances we have no hesitation to hold that the remedy of appeal to the Commissioner, who is exercising his delegated powers of the State Government, which has initiated the present proceedings against the petitioners would be a mere formality and not an effective and efficacious one. It is pertinent to notice that the period of 30 days limitation provided u/s 38(3) for preferring an appeal against the impugned orders has already expired long ago and the petitioners cannot now avail the remedy of statutory appeal, as we do not find any provision in the Act even to condone the delay in filing the appeal. Hence the petitioners are deprived of their right to prefer the appeals if the writ petitions are rejected at the stage of final hearing up-holding the preliminary objection. The petitioners in such a case would be put to irreparable loss and injury. That apart, the writ petitions have been admitted by a Division Bench of this Court and in fact they have been fully argued before us on the questions of jurisdiction and law. One of the questions that arise for consideration is whether the impugned orders are incompetent and without jurisdiction. Where the attack is that the impugned orders are vitiated by total lack of jurisdiction, this Court may entertain writ petitions in appropriate cases and that too when the facts are admitted and number of similar cases have arisen on the same point. We, therefore, overrule this preliminary objection and answer the question No. (1) in the negative and in favour of the petitioner and proceed to determine the questions of Jurisdiction and law at issue.

6. We shall now advert to the question No. (2) pertaining to the principles of

natural justice. According to the petitioners the impugned orders are violative of rules of natural justice. It admits of no doubt that the show cause notices u/s 38(1)(b) issued by the Collector have been served on them. The Collector has also given them opportunity of being heard in person on a particular date. The petitioners could not make personal representations, as they were not given permission from the jail authorities in that regard. In fact, the copy of the written representations have been sent to the District Collector. The District Collector has passed the impugned orders only after taking into account the written-representations made by the petitioners. The Submission of the petitioners' counsel, Shri Sanghi that the prescribed authority u/s 38 must pass the order against the member only after giving him a reasonable opportunity of being heard and as there is no personal hearing the impugned order is illegal and void, cannot be acceded to. The proviso to Sub-section (2) to Section 38 does not provide for personal hearing. It only affords a reasonable opportunity of being heard. The expression "opportunity of being heard" cannot be equated to "personal hearing". The insistence on personal hearing by the prescribed authority u/s 38 is not contemplated. Such construction would lead to hardship and inconvenience in the exercise of the power of the prescribed authority under the section. The prescribed authority is only exercising its jurisdiction in accordance with the rules of natural justice. Rule of natural justice does not require that there should be personal hearing in each and every case. In the present case, it is also not possible for the Collector to give a personal hearing to the petitioners who have been detained in jail; under MISA. In the circumstances of the case, we have no hesitation to hold that the District Collector in the present cases has given a reasonable opportunity of being heard within the meaning of section 38(2) of the Act.

7. This brings us to examine the further submission of Shri Sanghi that the President of the Municipal Council has not considered the request of his clients for granting them the requisite permission to remain absent from the meetings of the council as they were detained in jail under MISA and, therefore, could not attend the meetings. The President or the Vice-President of the council has not been made party to the writ petitions nor is there any satisfactory proof of the petitions being sent by them to the President in time and what President has done. There is no adequate material for this Court to pass any appropriate orders on this request.

8. That apart, it is not the case of the petitioners that the leave of this council has been obtained for their absence. When once the leave or permission as required u/s 38(1)(b) has not been granted or obtained, it is not material for us for deciding the central point in these writ petitions to enquire into the reasons for not passing any orders by the President on the application sent by the petitioners or what exactly happened to those petitions. Hence we prefer not to express any opinion on this Submission of the petitioners as it is not material and relevant for the purpose of determining the material point at issue in these writ petitions. Suffice it to hold that the impugned orders are not violative of the rules

of natural justice. For the above reasons, we must answer question No. (2) in the negative and against the petitioners holding that the impugned orders are not violative of any rule of natural justice.

9. This brings us to examine the third question relating to the validity of the impugned orders on merits and the jurisdiction of the Collector to pass the same. The answer to this question turns upon the scope and application of the provisions of section 38(1)(b) to the facts of the present case. The pertinent point that requires to be considered is whether the petitioners have absented themselves from attending the meetings of the council consecutively for a period of three months to enable the collector to proceed to take action against them u/s 38 (1) and (2) of the Act. In order to understand the scope and meaning of the expression "absents himself" employed in section 38(1)(b), it is not only profitable but necessary to read the provisions of section 38 and its scheme and intendment. Section 38 reads thus:--

Effect of subsequent disabilities.--(1) If any councillor:

(a) becomes subject to any of the disqualifications specified in section 35 and such disqualification is not removable or being removable is not removed, or

(b) absents himself during three consecutive months from the meetings of the council, except with the leave of the council, or

(c) becomes incapable of acting, or

(d) acts as a councillor in any matter

(i) in which he has directly or indirectly by himself or his partner, any share or interest, as is described in clause (i) of section 35 or

(ii) in which he is professionally interested on behalf of the client, principal or other person, or

(e) fails to pay any arrears of any kind due by him to the Council on a demand made therefor u/s 53 within the period specified therein, he shall subject to the provision of sub-section (2) cease to be a Councillor and his seat shall become vacant with effect from a date to be notified by the State Government.

(2) No Councillor shall cease to be a Councillor under sub-section (1) until the prescribed authority on its own motion or on an application made to it by any person in this behalf decides that such a councillor has incurred the disqualification on any of the grounds specified therein and communicates the decision in relation thereto to such Councillor:

Provided that no order shall be passed by the prescribed authority under this Sub-section against any Councillor without giving him a reasonable opportunity of being heard.

10. Section 38 deals with the effect of subsequent disabilities of the Municipal Councillors, who have become members of the Council in accordance with the

provisions of the Act and the rules made thereunder. If any candidate was not qualified to be a member of the Municipal Council, such person is barred from becoming a councillor. When once a person becomes a member of the Municipal Council, he shall continue to be so for a period of four years as Section 36(1) prescribes a period of four years for every Municipal Council from the date appointed under Sub-section (2) of Section 55 for its first meeting. The subsequent disabilities are enumerated in Clauses (a) to (c) of Section 38(1) of the Act. The disabilities specified in Clauses (a), (c), (d) and (e) pertain to cases where the councillor incurred disabilities on account of some act of omission or commission on his part. The disability specified in Clause (b) of sub-Section (1) to Section 38 also must be construed to be one which comes into play on the councillor himself by his volition or free-will absents during three consecutive months from the meetings of the council. It is also pertinent to note the specific use of the word absents himself. This expression cannot be equated to "not present" or "remained absent" or "involuntary absence", irrespective of the cause or reason for his absence. The expression "absents himself" has not been defined anywhere under the Act or the Rules made thereunder. We may usefully take the aid and assistance of its meaning from the dictionaries and see what its ordinary etymological meaning is. The term "absents" may be used as an adjective and also a verb. We have to look to the context and set up in which this word "absents" is inserted in order to determine its true meaning, purport and nature. In Section 38(1)(b), we may notice that the word "absents" has been used as a verb but not as an adjective. The word "absent" is meant by the Webster Universal Dictionary thus:--

absent" vb. To remain away, withdraw (oneself) intentionally, to absent oneself from a meeting."

"absent" as an adjective. 1. Not present, being away in another place, absent friends.

2. Mentally abstracted, inattentive to what is going on around one, preoccupied, having the mind withdrawn from what is passing, absent minded, an absent air.

Each one of the three meanings given in Webster's Universal Dictionary for the term "absents" used as a verb indicates and presupposes voluntary absence of a person but does not take in a case of involuntary absence. These meanings are, in our considered opinion, applicable to understand the scope and meaning of the word "absents" used in Section 38(1)(b). The meanings enunciated in respect of the same word "absents" when used as an adjective cannot be applied here. The stand taken by the State and the respondents is similar. They want us to read the word "absents" as not present irrespective of the reason or cause for absence. By mere use of this word "absents" as a verb in section 38(1)(b) is indicative of the mind and object of the Legislature. That apart, the Legislature took a further precaution and care to add "himself" to "absents" and deliberately inserted the phrase "absents himself" with a view to eliminate the possibility of another construction. We may in this context usefully refer to the meaning of this

expression "absents himself as given by Stroud's Judicial Dictionary, Fourth Edition, Volume I page 10 as under:--

"absent himself" from his service within section 3 Masters and Servants Act, 1823 c. 34) meant absent himself without lawful excuse (Re Turner, 9 QB 80, and knowing he had no such excuse. Generally, a workman who refuses to avail himself of the convenient access to his work as time and in the manner required by his employer "absents" himself from his work, and gives his employer a Claim for damages for breach of contract.

Where a workman refused to work at the time and place and in the manner required by his employer such worker must be held to have absented himself from his work and thereby give rise to a claim accruing to the employer for damages for breach of contract. In short, in order to hold that a person absents himself there must be absence without lawful excuse and it must be for his refusal or failure to attend to the meeting or work as the case may be. This phrase eliminates cases where a person did not attend the meeting or to his work due to lawful excuses or for no fault of his.

11. The ordinary dictionary meaning of the words "absents himself" indicates that the concerned person must be physically and mentally in a Position to attend the meeting and his absence at the meeting must be on account of his free will, negligence, or act of commission or omission and it does not take any excuse where a person is physically confined to a place be at jail or any other place either under law or forcibly. Where a person is prevented either by law or by force and threat from attending the meeting, it cannot be said that he absented himself from attending the meeting. He must also be aware of the fact that there was a meeting and that he must be in a position physically and mentally to attend the same, if he desired to do so. If inspite of his violation and desire and effort to attend the meeting he could not do so on account of his disability of being detained in prison under MISA. It cannot be said by any stretch of reasoning that he had a choice and option to attend the meeting and failed to do so on account of his negligence, unwillingness and failure to attend the same. In other words, he is not only prevented from attending the meeting but also he is incapable of attending the same, as he has been detained for reason beyond his control under MISA. The words "absents" himself cannot be equated to "remain absent" or "absents" irrespective of the reason or cause for such absence.

12. The Legislature must, in its wisdom be deemed to have used this expression purposely and intentionally so as to cover cases of absence of the members by their own volition, negligence, unwillingness or failure for any act of omission or commission on their part. In our considered opinion, the Legislature would not have intended to punish councillors, who are not responsible for their absence from the meeting of the council for three consecutive months. This expression "absents himself" pre-supposes deliberations and some positive act of omission or commission in the attitude of the member whose conduct in not being present

at the meeting is the subject of consideration. Unless it is established that there was some kind of useful act of omission or commission on the part of the councillor or any culpable negligence in keeping himself away from the meeting which could be attributed to him, it cannot, by any stretch of reasoning, be held that such a councillor has absented himself from the meeting within the meaning of section 38(1)(b) of the Act. It has to be presumed that the Legislature has used the words "absents himself" with a definite purpose behind it nor can it be said that these statutory words have been introduced to mean nothing or surplusage as observed by the Supreme Court in *Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another*, thus:--

It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute.

These words must be construed not in a pedantic sense but in a beneficial and harmonious way. The construction sought to be placed by the learned Deputy Government Advocate, if accepted, would lead to not only anomalies but hardship to the councillors, who are elected representatives of the people, although they did not by volition or intentionally commit any wrong or do any act of commission or omission so as to disentitle themselves from continuing to be the members of the Municipal Council and they cannot be punished for no fault of theirs and only for reasons beyond their control and power. We are, therefore, of the firm view that the councillor must have done some act of Omission or commission by negligence, failure, unwillingness, intentional absence to bring himself within the mischief of "absents himself" inserted in section 38(1)(b) of the Act. This provision in section 38(1)(b) is a penal one as it provides for punishment of vacating the membership of the Municipal Council on account of the disability. Such provision being penal in character must be strictly construed. Even if two plausible views are permissible the one favourable to the Citizen and the councillor must be preferred to the other. Where the councillor has been prevented either by force or any legal detention from attending the meeting, it cannot be said that he has committed the breach of absenting himself to incur the disability resulting in the vacation of his seat in the Municipal Council u/s 38(1) of the Act.

13. The submission of Shri G.S. Solanki is that the petitioners by their acts and omission and commission have brought upon themselves the result of confinement in jail under MISA and they cannot complain for the consequential result of their absence to the meeting of the council. The mere fact that the councillor was absent for three consecutive months would be sufficient to attract this disqualification and disability resulting in the forfeiture of the membership of the councillor and this expression has wide import so as to take in all cases of absence irrespective of the reason or ground for such absence. We are unable to agree with the learned Deputy Government Advocate that the petitioners must be held responsible for their absence at the meetings even though they are

detained in jail in MISA as the petitioners on account of their own activities are responsible for their detention. This problem may be approached from another angle, which we shall presently indicate. Applying the aforesaid principle, we hold that the opinion expressed by an Advisory Board approving the detention of a detainee cannot be equated to a judgment of a criminal Court. In *Calcutta Dock Labour Board Vs. Jaffar Imam and Others*, , it was held that the termination of service of the respondents employees therein solely on the basis of their preventive detention for alleged violent and riotuous behaviour is violative of rules of natural justice and illegal as preventive detention is equivalent to conviction by a criminal Court. Suffice it to refer on this aspect to a recent judgment of the Supreme Court in *Khudiram Das Vs. The State of West Bengal and Others*, . The learned judge Bhagwati J. Speaking for the Court ruled at page 556 thus:--

The power of detention clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community. Since every preventive measure is based on the principle that a person should be prevented from doing something which, if left free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof.

The detention of the petitioners under the MISA or under the Preventive Detention Act is only preventive in nature but not punitive nor can it be said to be a kind of punishment. The very action under MISA is initiated by way of caution and precaution and, therefore, preventive detention would not result in punishment. The petitioners, therefore, cannot be punished u/s 38(1)(b) for not attending the meetings of the Council consecutively for three months as they were detained under MISA. We must reject the plea of the Deputy Government Advocate that the petitioners have by their acts of omission and commission brought upon themselves the disqualification u/s 38(1)(b) and they cannot complain for the action taken by the prescribed authority u/s 38. This Submission advanced on behalf of the State is devoid of any merit and the petitioners have not committed any acts of commission and omission warranting the passing of the impugned orders, nor can it be said that they have incurred disqualification as a punishment consequential to their detention in jail under MISA. The purpose and object of detention under MISA is not a valid and justifiable ground for passing the impugned orders. The prescribed authority has a statutory duty and Obligation to act in accordance with the provisions of Section 38 and the impugned orders must be held to be not only illegal but without jurisdiction as they have not incurred the disqualification u/s 38(1)(b) as, in our considered opinion, they did not absent themselves to attend the meetings of the council for three consecutive months within the meaning of that provision.

14. This view of ours is fortified by the decided cases, which we shall presently refer to. The earliest case on the point is that of the Queen's Bench Division in

Bowes and Partners Ltd. v. Press (1894) 1 Q B 202, therein the question that fell for consideration was whether the workmen absented themselves from the employers' service and thereby making them liable for damages. On appraisal of the fact it was found that the workers refused to work according to the contract after a preconcerted course of action. The learned Lord Justice Lindley, L.J. observed at page 208 thus:--

Now, having regard to the fact that this was preconcerted course of action, it appears to me that the real solution of the problem presented to us is this--that the mea did "absent themselves" not that I attach much importance to that particular expression, but they did refuse to go to their place of work for three days in accordance with the rules and terms of their contract.

We may also notice the following passage in the judgment of Lord Justice Davey, L.J. at page 212:--

Whether that is properly described as "absenting himself" I do not know, but it is substantially the same thing. It is a refusal to work in accordance with the contract: not an absolute refusal to work, but a refusal to work in accordance with the contract. That being so, I am of opinion that we must answer this question by saying that the defendant did "absent himself from his employers's service" in the sense which, as I have said, I put upon these word?

According to this decision, the refusal to work or intention or absence to work on the part of the employee only brings the employee within the meaning of the phrase "absenting himself" from service. If the employee or worker was actually prevented by any lawful ground for which he was not at fault, he could not be held to have absented himself from work.

15. The next case which is more apt and apposite to the case in hand is the decision of the Chancery Division in *In re London and Northern Bank* (1901) 1 Ch. 728. wherein it fell for decision as to the scope and meaning of the expression "absents himself" used in Clause 97 (e) of the Articles of the London and Northern Bank Ltd. To appreciate the point, we may notice the provisions of Clause 97(3) to the extent necessary and material for our purpose. Clause 97(e) reads thus:--

97. The office of a director shall ipso facto be vacated.....

(e) if he absents himself from the meetings of the directors during a period of three calendar months without special leave of absence from the directors.....

The learned Judge, Wright J. while considering this aspect, observed at page 731:--

I am satisfied that in this case there was nothing which in point of law could be considered as an "involuntary absence" on the part of the applicant. In the construction of an article like clause 97 of the articles of this bank it has been held that the expression "absents himself" means something more than the

expression "is absent". In my judgment there was not anything which prevented Sir Robert Mc Connel from attending the meetings. I come to the conclusion that he physically and medically had an option to attend or not. If he was afraid that it might be injurious to his health to stay in this country, that did not oblige him to go abroad, and under those circumstances, if he preferred his health and preferred to be certain of his health and to go abroad, I do not think it can be said that he was "compulsorily absented". I should say that in circumstances of that kind he absented himself.

This is an authority for the proposition that the phrase "absents himself" would take in only voluntary absence, such as intention, negligent, unwilling or any other act of volition but excludes involuntary absence for which the concerned party is not responsible. The party must have physical and mental option to attend or not to attend the meeting. Where he prefers his health and is afraid of going to the meeting due to health grounds or fear complexion, it cannot be said that he was compulsorily absented or prevented from attending the meeting and in such a case he must be held to have absented himself from attending the meeting.

16. There appears to be no decision of the Supreme Court or that of this Court on this point. We, therefore, consider the decision of other High Courts arising under similar circumstances. A Division Bench of the Nagpur High Court in an unreported decision of Wamanrao v. The Corporation of the City of Nagpur M. P. No. 322 of 1955 decided on 2-1-1956. had to consider the meaning of the phrase "absented himself" in Section 36 of the City of Nagpur Corporation Act, 1950. The phrase "absented himself" in Section 36 of the City of Nagpur Corporation Act has been used in similar circumstances as in the case in hand. That is a case of the membership of the Standing Committee in the Municipal Corporation, whereas we are concerned with the membership of the council. It was held that the phrase "absented himself" cannot be equated to himself remained "absent" or "was not present" but connotes deliberations something positive in the attitude whose conduct in not being present is a subject of consideration.

17. The same view has been reiterated by a recent decision of the Division Bench of the Nagpur Bench of the Bombay High Court in Bhaskar Atmaram Joshi Vs. State of Maharashtra and Others, . Therein the writ petitioner, the member of the Municipal Corporation Nagpur and also a member of the Standing Committee did not attend the meetings of the Standing Committee during two consecutive months commencing from 26-6-1975 to 29-8-1975 as he was detained in prison under MISA. The petitioner was, therefore, held to have incurred a disqualification as he absented himself from attending the meetings either voluntarily or otherwise and his seat was declared to be vacant after service of show cause notice to the petitioner. The petitioner challenged the correctness of the impugned order on the ground that he did not absent himself voluntarily or on account of his own free will but was actually prevented from attending the meetings as he was detained in jail under MISA. It was held that there was no

lapse on the part of the petitioner in attending the meetings or he had no intention to attend the meetings inspite of the knowledge of the notice but he could not attend the meetings as he was prevented from attending the same by the order of the Police Commissioner under MISA. In those circumstances, the learned judges held that mere absence from the meetings by the member of the Standing Committee is not enough and it should be further shown that he remained absent of his own volition or some act of Omission on his part to incur any disqualification u/s 36 of the Act. It is further observed by the learned Judge, who spoke for the Court at page 209 thus:--

Unless it is shown that the petitioner has remained absent by his own conduct, it cannot be held that he has absented himself from any of the meetings of the Standing Committee,

The learned Judges opined that there is much substance in the contention of the petitioner's counsel. It was found that the petitioner therein has done everything within his power to attend the meeting, but it was not possible for him inspite of his desire to attend the meetings on account of his detention under MISA. Therefore, he did not absent himself from the meetings within the meaning of Section 36 and allowed the writ petition, This decision of the Bombay High Court is on all fours with the case in hand. We respectfully agree with the view expressed by the learned Judges on all aspects.

18. For all the reasons stated, our answer to question No. (3) must be and is in favour of the writ petitioners holding that they did not absent for three consecutive months from the meetings of the Municipal Council within the meaning of section 38(1)(b) of the Act and, therefore, they are entitled to continue and are deemed to continue in the eye of law as members of the Municipal Council till the expiry of the period of four years permissible u/s 36(1) of the Act and consequently the impugned orders are declared to be invalid, inoperative, unenforceable and void as the District Collector has no Jurisdiction to pass the same.

19. In view of our decision in favour the petitioners on questions Nos. (1) and (3), the writ petitions must be and are hereby allowed quashing the impugned orders and declaring them to continue to be members of the Municipal Council till the expiry of the period of 4 years in accordance with the provisions of section 36(1) of the Act. The petitioners shall have their costs. Counsel's fee Rs. 200 in each of the petitions, if certified.