

(2019) 11 MP CK 0267

In the Madhya Pradesh High Court

Case No : Writ Petition No. 17794 Of 2019

Harkunwar Bai W/O Arjun Singh

APPELLANT

Vs

Stae Of Madhya Pradesh And Others

RESPONDENT

Date of Decision : 30-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 14

Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 — Section 40, 40(1), 91, 92

Citation : (2019) 11 MP CK 0267

Hon'ble Judges : Vandana Kasrekar, J

Bench : Single Bench

Advocate : Milind Phadke, Nilesh Jagtap, Ayush Jain

Final Decision : Allowed/Disposed Of

Judgement

1. The petitioner has filed the present petition challenging the order dated 20/08/2019 (Annexure-P/1) passed by the Commissioner, District-Ujjain as well as order dated 24/05/2019 (Annexure-P/2) passed by the Competent Authority and C.E.O., Jila Panchayat, District-Ujjain.

2. Facts necessary for just disposal of the present writ petition are that the petitioner is elected Sarpanch of Gram Panchayat, Jharda, Tehsil-Mahidpur, District-Ujjain and on 04/04/2018 a complaint has been made through C.E.O., Janpad Panchayat, Mahidpur by Smt. Kiran Kishore Mali, Janpad Member and other complainants Govindram Dasheria, Sanjay Thakur, Jagdish Porwal, Mukesh Rathore, Prakash, Shankarlal Mali and all Panch of Gram Panchayat, Jharda regarding corruption in Gram Panchayat, Jharda. Upon inquiry, it was found that financial irregularity to the tune of Rs.25,62,088/- was alleged to had committed by the petitioner and Secretary of Gram Panchayat, Jharda and accordingly proceedings has been initiated under Section 92 of Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (which shall be referred hereinafter as "Act") and also under Section 40 of the Act.

3. Thereafter, on 12/04/2018 a notice under Section 40 of the Act was issued to the petitioner and on 17/04/2018, the petitioner was called to submit her reply. In the said notice charges have been levelled and action under Section 40 of the Act was recommended. That since proceedings under Section 92 of the Act were already initiated against the petitioner, therefore, on the prayer made by the petitioner, the proceedings under Section 40 of the Act were stayed vide order dated 12/06/2018. Before any orders could be passed in the proceedings under Section 92 of the Act, Rs.10,00,000/- was deposited in the account of Panchayat by the petitioner and accordingly a sum of Rs.13,25,393/- was remaining outstanding. Thereafter, vide order dated 30/10/2018 orders of recovery of Rs.13,25,393 was passed by the Competent Authority and C.E.O., Jila Panchayat, District-Ujjain and proportionate sum of Rs.6,62,697/- was directed to be recovered from the petitioner. Since the proceedings under Section 40 of the Act was stayed during the pendency of the proceedings under Section 92 of the Act, after its decision, therefore, these proceedings were revived but since the petitioner and Secretary moved an application and sought time to deposit the amount, in the interest of justice, the application was allowed and the date was fixed for 08/01/2019. On that date also, since the amount was not deposited, charges under Section 40 of the Act were framed. In the meanwhile, operation of the order dated 24/05/2019 was stayed vide order dated 31/05/2019, which was continued, till next date of hearing vide order dated 17/07/2019. The said stay order was continued, till the date of decision of the appeal i.e. 20/08/2019. In the charges, it was alleged that the petitioner had committed financial irregularities during her tenure as Sarpanch and in evidence order dated 30/10/2018 was passed under the provisions of Section 92 of the Act, in which it was mentioned that Rs.4,49,575/- was recoverable from the petitioner. On behalf of the petitioner, it was stated that with regard to the defaulted amount of Rs.8,99,150/- vouchers and bills had been submitted with Janpad Panchayat and the remaining amount of Rs.4,26,243/- was deposited on 25/02/2019, thus, the entire amount has been deposited and nothing remains there to be deposited. It was found that the petitioner had committed financial irregularities and invoking the provisions of Section 40 of the Act vide order dated 24/05/2019 the Competent Authority directed to remove the petitioner from the post of Sarpanch. Against the said order, petitioner has preferred an appeal before the Commissioner, Ujjain under Section 91 of the Act and vide order dated 20/08/2019 has dismissed the said appeal. Being aggrieved by the orders, the petitioner has preferred the present petition.

4. Learned counsel for the petitioner submits that no opportunity of hearing has been afforded to the petitioner while passing the impugned order. He submits that the petitioner alleged of charges has to be given opportunity of cross-examination of the witnesses. He further submits that orders have not been passed within 90 days, the prescribed authority shall inform all facts in writing and request extension of time, which shall not be more than 30 days. It is submitted that the order dated 24/05/2019 passed by the competent authority is

without jurisdiction, therefore, it is prayed that the petition be allowed and impugned orders be set-aside.

5. He further placed reliance on the judgment passed by this Court in the case of Kailash Kumar Dangi vs. State of M.P. and others 2000 (1) M.P.H.T. 143, Babita Lilhare vs. Surendra Rana and others 2004 (1) M.P.L.J. 27, Kailashchandra Jain vs. State of M.P. and others 2003 (3) M.P.L.J. 260 as well as order passed by Division Bench of this Court in case of Chandrakanta Bai vs. State of M.P. 2014 (4) M.P.L.J. 479, Manita Jaiwar vs. State of M.P. and others 2009 (3) M.P.L.J. 370 as well as judgment passed in W.P. No.7799/2019 (s) (Smt. Anita Chouhan vs. Vihit Adhikari Avam Mukhya Katypalan Adhinkari and another dated 23/09/2019).

6. Respondents No.1 and 2 have filed their reply and in the said reply, they have stated that complaint has been received by the C.E.O. i.e. respondent No.2 through member of the Panchayat on 27/02/2018 and 27/04/2018. The complaint reveals that there were allegations of corruption and also misappropriation of huge government fund against the present petitioner and also against Secretary. It is revealed that Gram Panchayat has built 21 shops and 21 shop were disposed of by the process of auction and a sum of Rs.1.50 crore have been received and the same was to be deposited in the accounts of Gram Panchayat but it has not been deposited in the accounts of Gram Panchayat. Thereafter, forged receipt has been given to the shop-keepers and some shop-keepers who have been given Rs.25,000/- has not been given any receipt and it has been further sent to the shop-keepers that their names would be entered in the register and the amount would be adjusted. On the basis of the complaint, a show-cause notice was issued to the petitioner as well as to Secretary, in the meanwhile proceedings of recovery under Section 92 of the Act has been initiated against the present petitioner. The petitioner during pendency of this proceedings, has deposited Rs.10,00,000/-and after final order of recovery proceedings, the present petition was liable to pay Rs.6,62,697/- within 7 days. Thereafter, petitioner and Secretary has deposited Rs.4,26,243/-, out of which the present petitioner's share comes to Rs.2,13,122/-, rest of the amount of Rs.4,49,575/-was still to be paid by the petitioner.

7. In the light of the above, he further submits that there is a clear cut admission on the part of present petitioner regarding all the charges whereby they have deposited the amount recoverable against them in the proceedings without any protest. It is submitted that enough opportunity was given to the petitioner to substantiate her case on merits. The charges were made against the petitioner on the basis of enquiry which was found proved. It has further been stated petitioner has no point of time given any opportunity to cross-examine the witnesses. He relied on the judgment of Himachal Road Transport Corpn. & Anr. vs. Hukum Chand in Civil Appeal No.595/2009 decided on 03/02/2009 and prayed for dismissal of this writ petition.

8. The respondents No.3 to 6 have filed their reply and in the reply they have stated that petitioner is involved and findings of the competent authorities are to

be effect that the charges of embezzlement of money are proved against the petitioner and thus, the petitioner has removed from the post of Sarpanch. He further submits that thereafter an election of Sarpanch post was conducted on 09/09/2019 and after election one Mr. Baleshwar Jaiswal was given interim charge of the post of Sarpanch. In such circumstances, he submits that order is in accordance with law, deserves to be maintained.

9. Heard learned counsel for the parties and perused the record.

10. In the present case, the petitioner was elected Sarpanch of Gram Panchayat, Jharda, Tehsil-Mahidpur, District-Ujjain and on 04/04/2018 some complaints have been made through C.E.O., Janpad Panchayat, Mahidpur regarding corruption in Gram Panchayat, Jharda. Upon inquiry, it was found that financial irregularity to the tune of Rs.25,62,088/- was alleged to had committed by the petitioner and Secretary of Gram Panchayat, Jharda and accordingly proceedings has been initiated under Section 92 of the Act.

11. On 12/04/2018 a notice under Section 40 of the Act was issued to the petitioner. On 17/04/2018, the petitioner was called to submit her reply. In the said notice charges have been levelled and action under Section 40 of the Act was recommended. That since proceedings under Section 92 of the Act were already initiated against the petitioner, therefore, on the prayer made by the petitioner, the proceedings under Section 40 of the Act were stayed vide order dated 12/06/2018. Thereafter, during pendency of proceedings under Section 92 of the Act, petitioner has deposited a sum of Rs.10,00,000/- in the account of Panchayat. Thereafter, on 30/10/2018 order was passed against the petitioner by the Competent Authority for recovery of the amount of Rs.13,25,393/-. Since the proceedings under Section 40 of the Act was stayed during the pendency of the proceedings under Section 92 of the Act, after its decision, therefore, these proceedings were revived. Thereafter, competent authority has passed the order dated 24/05/2019 where removing the petitioner from the post of Sarpanch. Against which an appeal was preferred, which was dismissed, hence this petition.

12. I have gone through the entire record of the case produced by the Government Advocate.

13. From perusal of the record as well as order Annexure-P/2 passed by the competent Authority, it appears that entire enquiry was conducted without giving any opportunity to the petitioner to cross-examine the witnesses. Although, petitioner was present in the enquiry proceedings.

14. In the case of Kailashchandra (supra) in para 4 of the judgment has held as under :-

"4. Shri B.P. Sahu has submitted the preliminary enquiry report. Enquiry was conducted by Shri Sahu in December, 2000. Show-cause notice was issued on 19-2-2001 under Section 40 of the Act. The report which has been submitted by CEO in the instant case after issue of show-cause notice is in favour of the

petitioner. Earlier preliminary enquiry was ex parte enquiry though the statement of the petitioner was recorded. Thus, in my opinion, it was not open to act upon the preliminary enquiry report to remove the petitioner. Bi parte enquiry ought to have been conducted by the SDO giving petitioner opportunity of cross-examination of the witnesses. Nothing of that sort has been done. No semblance of enquiry has been held by the SDO. This Court in Kamal Kishore Krishna Gopal Khandelwal v. Janpad Panchayat, Nalkheda and Ors. MANU/MP/0049/2000, has held that enquiry under Section 40 is not an empty formality. There should be compliance of necessary provisions and person should be punished legally. Person has to be given due opportunity of defending himself by conducting the enquiry in the presence of the Sarpanch who is proposed to be removed. The Sarpanch has to be given opportunity of cross-examination of the witnesses, that opportunity has not been given in the case, if the enquiry report submitted was to be acted upon that is in favour of the petitioner. In case SDO was not to agree with it, further enquiry ought to have been held in presence of the petitioner proper enquiry is required subsequent to issue of show-cause notice. Thus, the order of removal of the petitioner cannot be sustained."

15. Thus, as per the said judgment, a Sarpanch has to be given an opportunity to cross-examine the witness and that opportunity has not been given to the petitioner.

16. Similar view has also been taken by the co-ordinate Bench of this Court in the case of Maya Chowdhary (supra).

17. In the case of Vikram Singh (supra) relying on the judgment passed by the Division Bench in the case of Manita Jaiwar (Smt.) vs. State of M.P. & others: reported in I.L.R. (2009) MP 3067 in para 19 has held as under:-

19. As per the judgment passed by the Division Bench of this Court in the case of Manita Jaiwar (supra), the Division Bench of this Court in para - 5 and 6 has held as under :-

5. After hearing the learned counsel for the parties, it is clear that in the instant case fair procedure has not been adopted. Proceedings under section 40 of the Adhiniyam of 1993 was initiated by issuance of show cause notice dated 16-5-2006 by the SDO. No doubt about it that earlier a complaint was filed on 27-3-2006 in which the enquiry was conducted by the CEO but that was not bipartite and regular enquiry. Statements of certain witnesses were recorded, which have formed the basis of removal of the petitioner from the post of Sarpanch. Admittedly opportunity of cross-examination was not afforded to the petitioner on the witnesses who were examined by the CEO, Janpad Panchayat, Balaghat while conducting the enquiry into the complaint dated 27-3-2006. In the proceedings under section 40 of the Adhiniyam, 1993 none of the witnesses whose statements were recorded by the Enquiry Officer, were examined. Opportunity of cross-examination was also not afforded to the petitioner. Even complainant was not examined. Opportunity to adduce the evidence was also not afforded to the petitioner.

6. This Court in *Kailash Kumar Parmanand Dangi v. State of M.P*, 1999 (2), MPLJ 722 has held that in such matters the enquiry held behind the back of Sarpanch, cannot be relied upon. The following discussion has been made by this Court:-

14. In the present case there was not total violation of the principles of natural justice as a show cause notice was given and the reply of the petitioner obtained. But keeping in view the facts of the case certain facets of natural justice as stated above were not complied with resulting in prejudice to the petitioner. He was not permitted to adduce his own evidence to rebut the material collected against him. The charges were such which could be proved or disproved by evidence in the inquiry. One of the main charges was the distribution of pattas to those who were not landless and a conclusion on this point could be reached after recording evidence and after seeing the list supplied by the Tehsildar or the B.D.O. The prescribed authority in the impugned order has not dealt with this aspect. Similarly the charges regarding negligence in the maintenance of garden, supply of water, drainage and information regarding the meeting of the Gram Sabha could be decided on the basis of evidence and not merely relying upon a preliminary inquiry report. The basic fault in the impugned order is that an inquiry held by the B.D.O, behind the back of the petitioner has been held to be a valid 'inquiry' under section 40 of the Act and he has been packed upon the basis of that inquiry without even supplying a copy of the same to the petitioner, and without affording him an opportunity to lead his own evidence even when he repeatedly asked for the same. This was denial of fair hearing resulting in serious prejudice to the petitioner. The action of removal and disqualification has to be struck down as there has been a failure of justice. The guilty must be punished but the finding of guilt has to be arrived after fair hearing which was denied in this case. In *Ballabhdas v. State of M.P*, 1998 (2) JLJ303, it has been observed by this Court that a full-fledged enquiry is provided under section 40 of the Act. It contemplates 'due enquiry'. As observed in *Delhi Transport Corporation v. DTC Mazdoor Congress*, 1991 Supp (1) SCC 600 : AIR 1991 SC101 right to fair treatment is an essential inbuilt of natural justice which is an integral part of the guarantee of equality assured by Article 14 of the Constitution of India. The concept of reasonableness and non-arbitrariness pervades the entire constitutional spectrum and is a golden thread which runs through the whole fabric of the Constitution.

In *Rajendra Singh Raghuvanshi v. State of M.P*, 2004 (4) MPLJ 6, this Court has laid down that copy of the enquiry report has to be furnished. In *Mango Bai v. State of M.P*, 2003 (2) MPLJ 112, this Court has laid down thus:-

9. Principles of natural justice are required to be observed before ordering removal of Sarpanch under section 40 of Act in *Kailash v. State of M.P*, 1999 (2) MPLJ 722 : 1999 (2) JLJ 280 esteemed brother S.P Khare, J. considered the question and held that removal of Sarpanch under section 40 is a serious matter when he is removed and further disqualified for six years to be elected under the Act. It is not sufficient to give a mere lip-service to the requirement of law. It is

true that it is not specifically provided in section 40 that principles of natural justice should be 'followed while holding' an enquiry but it is implicit in this provision that the office-bearer who is sought to be removed will be Page: 374 given a fair hearing. This Court held that the words "after such inquiry as it may deem fit to make" in the main part of section 40(1) of the Act would mean an inquiry which is held in the presence of the office-bearer and not behind his back. He should be allowed to inspect the documents which are to be relied upon against him and he should have the right to adduce his own evidence. These are the important facets of an inquiry to be held in conformity with the principles of natural justice. It is not the subjective choice of the prescribed authority to get an inquiry held of any kind. It does not envisage a secret enquiry or a preliminary enquiry alone. That is made only for collection of evidence and at that stage there is no participation of the person against whom the action is sought to be taken. The words "as it may deem fit" have to be construed objectively and would mean an inquiry depending upon the facts and circumstances of each case. Some of the facts of the inquiry may be excluded if the facts are not very much in dispute or there are other circumstances to dispense with them. But the office bearer has a right of fair hearing. "You must hear the person who is going to suffer". That is a duty which lies upon every one who decides anything. There is, however, some flexibility depending upon the subject-matter. Similar is the law laid down by this court in *Raja Rai Singh v. State of M.P*, 2001 (4)MPLJ 364 : 2000 (2) JLJ 242.

10. Secret enquiry or preliminary enquiry alone is not enough. Collection of evidence is required and participation of person against whom the action is sought to be taken. Order sheets of the SDO's file indicates that by-parte enquiry was not held at all nor was directed. Panchayat Inspector conducted the ex parte enquiry. Report of which not supplied. Thereafter an incompetent authority, SDM considered the report and recommended the removal and order dated 31-3-1999 mentioned that Prescribed Authority i.e SDO was in agreement with the view of the SDM and has passed the order on 31-3-1999 itself. Whereas it was incumbent upon the SDO to receive the reply and to apply independent mind after holding an enquiry. All these requirements have been flagrantly violated in the instant case. Considering the serious nature of charges levelled against the petitioner she ought to have been given due and proper opportunity."

18. As per this judgment, before removing the Sarpanch from his office, he should be given an opportunity to cross-examine the witness.

19. Thus, in view of the aforesaid details discussions and in the peculiar facts and circumstances of the present case, I deem it proper/appropriate to allow this writ petition. Consequently, petition is hereby allowed. Order dated 20/08/2019 (Annexure-P/1) passed by the Commissioner, District-Ujjain as well as order dated 24/05/2019 (Annexure-P/2) passed by the Competent Authority and C.E.O., Jila Panchayat, District-Ujjain are hereby quashed.

20. With the aforesaid, petition stands disposed of finally. C.C. as per rules.