

(2010) 01 PAT CK 0006
In the Patna High Court

Smt. Shamshad Khatun

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 21-01-2010

Acts Referred:

Citation : (2010) 01 PAT CK 0006

Judgement

Dipak Misra, C.J.—Questioning the soundness of the order dated 7-1-2010 passed by the learned single Judge in CWJC No. 18104 of 2009 the appellant has invoked the appellate jurisdiction of this Court under Clause 10 of the Letters Patent.

2. The factual matrix, as have been unfolded in the writ petition as well as in this appeal, are the appellant was elected as Pramukh of Fatuha Block under the provisions of Bihar Panchayat Raj Act, 2006 (for brevity "the Act"). While she was functioning as the Pramukh, the members of the Panchayat Samiti sent a requisition on 5-12-2009 for convening a special meeting for No Confidence Motion against her. On the basis of the said requisition, the Block Development Officer-cum-Executive Officer issued notice for convening a special meeting on 12-12-2009. On the date fixed, a No Confidence Motion after being mooted was passed against the appellant. The appellant, as is evident, participated in the No Confidence Motion, which was passed against her and she became unseated. After the post fell vacant, the State Election Commission communicated to the District Magistrate-cum-Election Officer, Patna fixing 11-1-2010 for the date of election of new Pramukh.

3. Being dissatisfied with the aforesaid action, the appellant invoked the jurisdiction of this Court under Article 226 of the Constitution of India contending, inter alia, that the notice that was issued by the Block Development Officer-cum-Executive Officer of the Panchayat Samiti fixing the meeting on 12-12-2009 does not meet the requirement as postulated u/s 46(4) of the Act as the said provision provides that there must be a clear seven days notice for convening a special meeting for consideration of No Confidence Motion.

Structuring the said stand it was urged that the date the notice was issued, that is, 5-12-2009, was to be included and the day of meeting, that is, 12-12-2009, has to be excluded and on such exclusion, the notice period would stand reduced to six days which vitiates the mandatory provision as engrafted u/s 46(4) of the Act, and therefore, the vote of No Confidence passed against her is null and void and, therefore, in the ultimate, eventuate, the Notification issued by the State Election Commission to fill up the post treating the same to be vacant is unsustainable.

4. The learned single Judge took note of the statutory provisions, the pleadings in paragraph 6 of the writ petition by which the appellant had fixed the date for convening the meeting in the Register of Panchayat Samiti and her participation in the special meeting wherein the vote of No Confidence was passed and the result of the meeting to the effect that out of 16 elected Members, three votes were found unmarked, one was found invalid and 12 Members voted against her and the conduct of the appellant which invited the wrath of the principle of approbate and reprobate expressed the view that the resolution passed against the appellant did not deserve to be interfered with. It is apt to note the learned single Judge has also referred to the concept of democratic process of adult franchise and the concept of loss of confidence of the House to bolster his view.

5. Mr. Shambhu Prasad Singh, learned Counsel appearing for the appellant assailing the pregnability of the order of the learned single Judge has raised the following contentions:

(a) The order passed by the learned single Judge is totally indefensible inasmuch as after recording a finding there has been no seven clear days notice, he has declined to interfere with the resolution passed by the Panchayat Samiti by which the appellant was unseated.

(b) The learned single Judge has erroneously applied the principle of approbate and reprobate which is not applicable to the case at hand and the reliance placed by him on the decision Sanjay Singh Som Vs. The State of Bihar and Others is absolutely misplaced and thereby the order passed by him becomes vulnerable.

(c) When the meeting itself is illegal because of violation of the mandatory provisions of the Act, the result of meeting would not rectify the defect and attracting the concept pf democratic process and the loss of confidence of the House in an elected candidate is wholly unwarranted inasmuch as an act unless done in accord with the requirement of the statute is fundamentally null and void.

(d) If the order of the learned single Judge is appositely scrutinized it would be clear as day that he has not adverted to the statutory spectrum in proper perspective and has entered into the realm of adult franchise to incorporate a new concept which only the legislature can do. In essentiality, the learned single Judge has entered into the realm of legislation which is impermissible in law.

(e) The learned single Judge should have been guided by the decision rendered

in Jai Lal Yadav and Another Vs. State of Bihar and Others which is a binding precedent in the field of notice and the resultant concomitant and should not have opined that the appellant is precluded to challenge her own action.

Mr. Singh, learned Counsel for the appellant, to buttress his submissions has placed reliance on Ahmed Hussain Khan Vs. State of Andhra Pradesh, ; National Insurance Co. Ltd. Vs. Swaran Singh and Others, and Joginder Singh Sodhi Vs. Amar Kaur, .

6. Mr. R. Ravish, learned Counsel for the State supported the order passed by the learned single Judge. He has commended us to the decision rendered in Babulal Badriprasad Varma Vs. Surat Municipal Corporation and Others, .

7. Mr. Mrigank Mauli, learned Counsel appearing for the 3rd respondent resisting the aforesaid submissions of the learned Counsel for the appellant has canvassed the following proponentements:

(i) The order passed by the learned single Judge is impeccable since the appellant on her own showing had fixed the date of the meeting to 12-12-2009 and taken a chance to participate in the meeting, she cannot take a summersault to challenge the same.

(ii) The decision rendered in Jai Lal Yadav and Another Vs. State of Bihar and Others is not applicable to the factual scenario and is distinguishable,

(iii) Though there is mandatory requirement for giving seven clear days notice, yet the appellant by her own conduct has waived the same and, hence, the order passed by the learned single Judge withstands studied scrutiny.

Mr. Mauli, learned Counsel, to bolster his submissions, has placed reliance on the decision in Bibi Amna Khatun and Others Vs. Zahir Hussain and Another, .

8. To appreciate the rival submissions raised at the Bar it is seemly to refer to Section 44 of the Act. The said provision deals with resignation and removal of Pramukh and Up Pramukh. Sub-section (3) of Section 44 which is relevant for the present purpose is reproduced as under:

44(3)(i) A Pramukh/Up-Pramukh of the Panchayat Samiti shall be deemed to have vacated his office forthwith if a resolution expressing want of confidence in him is passed by a majority of the total number of elected members of the Panchayat Samiti at a meeting specially converted for the purpose.

The requisition for such a special meeting shall be presented to the Pramukh in writing with a copy to the Executive Officer of the Panchayat Samiti, by not less than one third of the total number of members elected directly from the territorial constituencies of the Panchayat Samiti. The Executive Officer shall immediately bring the requisition to the notice of the Pramukh, The Pramukh shall convene such meeting on a date falling within 15 days of such requisition. If the Pramukh fails to call the special meeting, the Up-Pramukh or one third of the total number of directly elected members may fix a date for such meeting and

require the Executive Officer to give notice to the members and to take such action as may be necessary to convene the meeting. The Executive Officer shall necessarily issue such notice in time and convene the meeting. No such meeting shall be postponed once the notice for the same has been issued. No quorum shall be required for the special meeting convened to discuss no confidence motion.

(ii) No confidence motion shall not be moved against the Pramukh or the Up-Pramukh within the first two year period of their tenure.

(iii) If the motion of no confidence brought against the Pramukh or the Up-Pramukh or both is once rejected, no fresh motion of no confidence against the Pramukh or the Up-Pramukh or both, as the case may be shall be brought before the Panchayat Samiti within a period of one year from the date of such rejection of the motion.

(iv) No confidence motion against the Pramukh or Up-Pramukh or both, as the case may be, shall not be brought during the last six months of the term of the Panchayat Samiti as mentioned in Section 39(1) of this Act.

(v) Such reasons/charges, on the basis of which no confidence motion has to be moved against the Pramukh or Up-Pramukh, shall be clearly mentioned in the notice of meeting called to consider the no confidence motion.

(vi) As soon as the meeting called under this section begins, the presiding member of this meeting shall read out the motion on which the meeting has been called to consider before the members present and declare it open for discussion. Any discussion on the motion shall not be adjourned.

(viii) During discussion, opportunity shall be given to the Pramukh/Up-Pramukh against whom no confidence motion has been moved for his defence before the Panchayat Samiti. The motion shall be put to vote on the same day after discussion and shall take place by secret ballot in the prescribed manner.

(viii) In case of no confidence motion against a Pramukh, the meeting shall be presided by the Up-Pramukh; in case of motion against Up-Pramukh by the Pramukh and in case of motion against both Pramukh and Up-Pramukh, by any member elected from among the members of the Panchayat Samiti present in the meeting.

In case of the post of Up-Pramukh being vacant or his absence from the meeting convened for discussion on no confidence motion against the Pramukh or the post of Pramukh being vacant or his absence from the meeting convened for discussion on no confidence motion against the Up-Pramukh as the case may be shall be presided over by any member elected from amongst the directly elected members from the territorial constituency of the Panchayat Samiti present in the meeting.

9. Section 46 of the Act deals with convening of meeting of Panchayat Samiti.

Sub-section (4) of Section 46 of the Act being relevant for the present purpose is reproduced below:

46(4) Ten clear days" notice of an ordinary meeting and seven clear days" notice of a special meeting specifying the time at which such meeting is to be held and the business to be transacted thereat shall be sent to the members and affixed at the office of the Panchayat Samiti. Such notice shall include in case of a special meeting any motion or proposition mentioned in the written request made for such meeting.

10. On a reading of the aforesaid provision there can be no scintilla of doubt that the said provision is mandatory. There has to be notice of seven clear days.

11. The fulcrum of the matter is whether the appellant by her own conduct has waived the mandatory requirement commanded by the Statute. Before we dwell upon the factual arena we may refer to the citations upon which reliance has been placed by Mr. Singh. Learned Counsel has drawn inspiration from paragraph 22 of the decision rendered in Ahmed Hussain Khan Vs. State of Andhra Pradesh, . In the said case, their Lordships were dealing with the right to receive pension under the Pension Rules and, in that context, their Lordships expressed the view that the right to receive pension in the facts of the said case had not been waived as the same having not been established. Thus, the said decision does not render any assistance to the proposition put forth by Mr. Singh.

12. In National Insurance Co. Ltd. Vs. Swaran Singh and Others, , their Lordships have held to construe a statute, the scheme of the Act has been taken into consideration and, for the said purpose, it has to be read as a whole and then chapter by chapter, section by section and word by word. In the present case we are concerned with the proposition whether a mandatory provision can be waived. Therefore, we are disposed to think the said decision does not aid or assist the stand put forth by Mr. Singh.

13. In Joginder Singh Sodhi Vs. Amar Kaur, , a two-Judge Bench of the Apex Court was dealing with the stand taken as regards waiver on the part of the landlady by her own conduct. Their Lordships expressed the view that waiver is a question of fact which must be expressly pleaded, clearly proved and no such plea had been raised by the tenant or by the subtenant. Their Lordships further held a bald plea of waiver cannot defeat statutory provision made in larger interest. In that context their Lordships referred to the earlier decisions rendered in Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others, and Pulin Behari Lal Vs. Mahadeb Dutta and Others, . In Shalimar Tar Product Ltd. (supra) the Apex Court has expressed the views as follows:

13. Everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his individual capacity. We are, however, in this case unable to agree. Firstly, in this case there was no case of waiver. Waiver is a question of fact which has to be tested by facts and evidence. There was no conscious relinquishment of the advantage of

any statute. No Court has gone into this fact. It does not seem to have been urged before the High Court also. Apart from this, in this requirement of the statute which is in the public interest there cannot be any question of waiver of a right, dealing with the rights of the tenants or the landlord....

In Pulin Behari Lal (supra) it has been held as follows:

6. ...Waiver is a question of fact which depends on the facts and circumstances of each case. In the case of waiver of any provisions of the statute it is necessary to prove that there was conscious relinquishment of the advantage of such provisions of the statute....

14. In this regard we may fruitfully refer to the decision in Bibi Amna Khatun and Others Vs. Zahir Hussain and Another, wherein the majority speaking through Hari Lal Agrawal, J. (as his Lordship then was), expressed the view as under:

8. In my opinion, simply because the second part of Section 11A is mandatory in nature, will not rule out the application of the principle of "waiver", if once the correct scope of this maxim is appreciated and understood. Although the desired assistance was not rendered at the Bar, I have taken some pains to examine the proposition in its true perspective with reference to the facts of the present case.

9. The essence of waiver is "estoppel" and where there is no "estoppel", there can be no "waiver", the connection between "estoppel" and "waiver" being very close. But in spite of that, there is an essential and fundamental difference between the two and that is that whereas estoppel is a rule of evidence, waiver is a rule of conduct. The accepted connotation of "waiver" is that to constitute waiver there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of an existing legal right and a conduct which warrants an inference of the relinquishment of a known right or a privilege (see Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another,).

There is, however, a tendency to mix up "waiver" and "estoppel", as a single idea, although the one has apparently reference to a man's conduct and the other to the legal consequence of that conduct. The principle underlying both these maxims is the same, namely, that a party will not be permitted to approbate and reprobate or, in other words, to blow hot and cold, in respect of the same matter. This is the underlying principle beyond the maxim "waiver".

I may now refer to a few authorities where the application of waiver has been considered, in order to bring home my point of view. The principle that has been decided by those authorities, if I may briefly put it here, is that where a right or privilege guaranteed by law rests in the individual and is primarily intended for his benefit and does not infringe the right of others, it can be waived provided such waiver is not forbidden by law and does not contravene any public policy. This principle was recognized by this Court also in the case of Sashi Bhusan Prasad Singh Vs. Dalip Narain Singh and Others, and then again in the case of

Jogendra Missir Vs. Ramnandan Singh, . The Supreme Court also in the case of Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, made a similar observation. Maxwell in his Interpretation of Statutes, 11th Edition (1962) at page 376, has also enunciated the same principle for applying this principle of estoppel.

15. In this context we may profitably refer to Krishna Bahadur Vs. Purna Theatre and Others, , wherein it has been held as follows:

9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

16. In Babulal Badriprasad Varma v. Surat Municipal Corporation (2008) 12 SCC 401 : AIR 2008 SC 2919, the Apex Court has held in paragraphs 28 and 29 as follows:

28. We would, however, assume that it was obligatory on the part of the State to serve a special notice upon the appellant. The question, however, would be what would be the consequence of non-compliance therewith vis-a-vis the conduct of the appellant himself?

29. A person may waive a right either expressly or by necessary implication. He may in a given case disentitle himself from obtaining an equitable relief particularly when he allows a thing to come to an irreversible situation.

17. In Jaswant Singh Mathurasingh and another Vs. Ahmedabad Municipal Corporation and others, , a three Judge Bench of the Apex Court while dealing with the principle of the waiver has expressed thus:

14. The principle of waiver connotes issuance of notice and non-response thereto. Everyone has a right to waive an advantage or protection which law seeks to give him/her. Undoubtedly, if a notice is issued and no representation was made by either the owner, tenant or a sub-tenant, it would amount to waive the opportunity and such person cannot be permitted to turn round, after the scheme reaches finality, to say that there is non-compliance of Sub-rules (3) and (4) of Rule 21. It would amount to putting premium on dilatory and dishonest conduct.

18. In Krishan Lal Vs. State of Jammu & Kashmir, , the Apex Court after referring

to the earlier decisions rendered in *Vellayan Chettiar v. Government of the Province of Madras* AIR 1947 PC 197 ; AIR 1927 176 (Privy Council); *Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others*, ; *Shri Lachoo Mal Vs. Shri Radhey Shyam*, has expressed the view as follows:

20. Having seen the pronouncements of judicial fora, we can now inform ourselves as to the view of the reputed authors on interpretation of statutes as well as administrative law. We may start with what has been stated in Maxwell's *The Interpretation of Statutes*. This aspect has been dealt at pages 328-330 (12th Edn.) and it has been stated that if the benefit be for the protection of an individual in his private capacity the same can be waived. To illustrate, reference has been made about waiver of the benefit of the Limitation Act. This is on the maxim of law "*Quilibet potest renunciare juri pro se introducto*", meaning "an individual may renounce a law made for his special benefit". Maxwell then says that if the benefit be one which has been imposed in public interest there can be no waiver of the same."

21. Craies in his *Statute Law* has opined the same, as would appear from what has been stated at page 269 of 7th Edn. By drawing attention to the aforesaid maxim, it has been observed that if the object of a statute is "not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered as being indispensable". To illustrate this principle, it has been stated that if the statutory condition be imposed simply for the security or the benefit of the parties to the action themselves, such condition will not be considered as indispensable and either party may waive it.

22. Crawford in his *Interpretation of Laws* takes the same view as would appear from pages 540-542 (1989 Reprint). The learned author while quoting the aforesaid maxim states at page 542 that requirement like giving of notice may be waived as the same is intended for the benefit of the person concerned.

23. We may also refer to the views expressed by Francis Bennion in his *Statutory Interpretation* (1984), wherein this aspect has been dealt with at pages 27 et seq and it has been stated that if the performance of statutory duty be one which would come within the aforesaid maxim, the person entitled to the performance can effectively waive performance of the duty by the person bound. As an illustration mention has been made (at page 29) of decisions in *Toronto Corporation V. Russell and Stylo Shoes Ltd. v. Prices Tailors Ltd.* wherein it was held that a duty to give notice of certain matters can be waived by the person entitled to notice, if there is no express or implied indication that absence of notice would be fatal.

24. H.W.R. Wade's name is well known in the world of administrative law. He has dealt with this aspect at page 267 of the 6th Edn. of his treatise wherein he has quoted what Lord Denning, MR said in *Wells v. Minister of Housing and Local*

Government which is as below:

I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid.

19. In this context we may refer with profit the decision in Indira Bai Vs. Nand Kishore, wherein the Apex Court while drawing a distinction between private and public interest has expressed thus:

5. ...The test to determine the nature of interest, namely, private or public is whether the right which is renounced is the right to party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct....

(Emphasis supplied)

20. The present factual expose has to be appreciated on the touchstone and anvil of aforesaid pronouncements. As is demonstrable, the petitioner in paragraph 6 of the writ petition has stated as follows:

6. That the petitioner has fixed the date for convening the meeting for consideration of no confidence against her in the Register of the Panchayat Samiti for issuing the notice by the Executive Officer for 12-12-2009.

From the aforesaid it is perceived that she herself had fixed the date of meeting. The meeting as fixed was held on 12-12-2009. She participated in the meeting and took a chance. Thus, fixing of the meeting by the appellant and participation in the meeting would tantamount to waiver by express conduct. If the provisions contained in Section 44 and 46(4) of the Act are read appositely there can be no shadow of doubt that they provide a protective umbrella to the elected Pramukh. Thus, the same does not contravene any public policy. It does not involve any public interest. As we perceive the scheme and anatomy of the provisions of the Act, it is, in fact, basically a protection to the elected candidate. In this regard a Full Bench decision of the High Court of Madhya Pradesh in Smt. Bhulin Dewangan Vs. State of M.P. and Others, , is apposite to refer. The Full Bench while dealing with the validity of notice calling a meeting of no confidence under M.P. Panchayat (Gram Panchayat Ke Sarpanch Tatha Up-Sarpanch, Janpad Panchayat Tatha Zila Panchayat Ke President Tatha Vice President Ke Virudh Avishwar Prastav) Niyam, 1994 speaking through D.M. Dharmadhikari, J. (as His Lordship then was) held as follows:

15. The general rule is that non-compliance of mandatory requirement results in nullification of the Act. There are, however, several exceptions to the same. If certain requirements or conditions are provided by statute in the interest of a particular person, the requirements or conditions, although mandatory, may be waived by him if no public interests are involved and in such a case the act done

will be valid even if the requirements or conditions have not been performed. This appears to be the reason for learned C.K. Prasad, J. in *Dhumadhandin v. State of M.P.* 1997 (1) Vidhi Bhasvar 49 which was followed by R.S. Garg, J. in *Mahavir Saket v. Collector Rewa* 1998 (1) J.L.J. 113 for holding that mere non-compliance of first part of the rule in fixing a meeting beyond the prescribed days of the motion of no-confidence would not invalidate the whole proceedings. In case of *Dhumadhandin* (supra), the Sarpanch did not question the validity of the notice calling the meeting of no-confidence and in fact had taken chance by facing the motion. R.S. Garg, J. in *Mahavir Saket* (supra) placed reliance on the decision of C.K. Prasad, J. in *Dhumadhandin* (supra) to uphold the passing of the no-confidence motion in the adjourned meeting as in the meeting called within the prescribed fifteen days the Presiding Officer was not available. Sub-section (4) of Section 21 permits reference of a dispute to the Collector by Sarpanch or Up-Sarpanch against whom a notice of no confidence motion had been passed. The proceedings of the no-confidence motion or other proceedings under the Act are also assailable in this Court as Constitutional Court under Article 227 of the Constitution of India. As has been construed by us, even though second part of the rule requiring dispatch of notice of the meeting to the member is mandatory, yet in every case of challenge to the proceeding of no-confidence motion either before the Collector or this Court, it would still be open to the Collector or his Court to find out whether in a given case non-compliance of any part of the rule has in fact resulted in any failure of justice or has caused any serious prejudice to any of the parties. The general rule is that a mandatory provision of law requires strict compliance and the directory one only substantial. But even where the provisions is mandatory, every non-compliance of the same need not necessarily result in nullification of the whole action. In a given situation even for non-fulfillment of mandatory requirement, the authority empowered to take a decision may refuse to nullify the action on the ground that no substantial prejudice had been caused to the party affected or to any other party which would have any other substantial interest in the proceedings. This Court under Article 227 of the Constitution has also a discretion not to interfere even though a mandatory requirement of law has not been strictly complied with as thereby no serious prejudice or failure of justice has been caused. This is how various single Bench decisions in which even after finding some infraction of the second part of Rule 3(3) of the Rules of 1994, the resolution of no-confidence motion passed was not invalidated on the ground that no substantial prejudice thereby was caused to the affected parties. The intention of the legislature has to be gathered from the provisions contained in Section 21 and the Rule 3(3) framed thereunder. The provisions do evince an intention that a meeting of the no-confidence motion be called within a reasonable period of not later than 15 days and every member has to be informed of the same seven days in advance. A notice of no-confidence motion is required to be moved by not less than 1/3rd of the total number of elected members as required by first Proviso to Sub-rule (1) of Rule 3 and can be lawfully carried by a resolution passed by majority of not less than 3/4th of the Panchas present and voting and such majority has to be

more than 2/3rd of the total number of Panchas constituting the Panchayat in accordance with Sub-section (1) of Section 21 of the Act. This being the substance of the provisions under the Act and the rules, a mere non-compliance of second part of Sub-rule (3) would not in every case invalidate the action unless the Collector while deciding the dispute under Sub-section (4) of Section 21 or this Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution comes to the conclusion that such non-compliance has caused serious prejudice to the affected office bearer or has otherwise resulted in failure of justice.

16. We get some support in our conclusion on the construction of the provisions contained in the Rule from statutory construction by Francis J. Mc. Caffrey, 1953 Edition, Article 52, Page 110 where it stated:

Where a statute regulates the time at or within which an act is to be done by a public officer or body, it is generally construed to be permissive only as to the time, for the reason "that the public interests are not to suffer by the laches of any public officer" (Looney v. Hughes 26 N.Y. 514). While the Courts are inclined to hold such provisions to be directory only as to time, they will be read as mandatory if the nature of the act to be performed or the phraseology of the statute indicates an intention on the part of the legislature to exact a literal compliance with the requirement of time. The Courts seek to achieve a just result in not ascribing an invalidating effect to the failure of public officers to observe the time provisions of statutes, a contrary rule would operate unfairly in prejudicing the rights of persons who have no control over the conduct of the public officer.

(Emphasis supplied)

and from the following passage in Statutory Interpretation by Francis Bennion, Second Edition, Part I Section 10 page 34:

Even where the duty is mandatory, the Court will not now-a-days hold it to be contravened because of a purely formal or technical defect. This may be described as a defect that does not materially impair the remedy intended to be provided by the enactment for the mischief to which it is directed.

21. Applying the aforesaid principle to the facts of the present case there can be no room for doubt that the right could be waived by the elected candidate and she has done so by her express conduct. Quite apart from the above this Court cannot be oblivious of the fact that the appellant had participated in the meeting by taking a chance and 12 members voted against her. It is also apt to note all the members had been served and they had participated. The requisite majority had voted against her. Ergo, there is no justification or warrant to interfere in the proceeding of No Confidence Motion in exercise of the extraordinary and equitable jurisdiction of this Court under Articles 226 and 227 of the Constitution of India.

22. We will be failing in our duty if we do not deal with the decision rendered in *Jai Lal Yadav and Another Vs. State of Bihar and Others* as strong reliance has been placed on it by Mr. Singh. In the said case the Secretary of the Panchayat Samiti had issued notice about the meeting which was scheduled prior to the statutory period. The learned single Judge in paragraph 4 has held as follows:

4. Learned Counsel appearing on behalf of the petitioners has raised several points to assail the notice and ultimate resolution carrying out the no-confidence motion but as the writ application is to succeed on a very short point. I do not consider it expedient either to incorporate or answer the same. Undisputedly the Executive Officer had issued the notice on 5-12-2001 and the date of the meeting fixed is 12-12-2001. The meeting to consider the no-confidence motion has to be considered in a special meeting. Section 44(4) of the Bihar Panchayat Raj Act clearly stipulates that seven clear days notice of a special meeting has to be given. In the present case seven clear days notice of the special meeting has not been given and thus the notice is vitiated on account of infraction of Section 44(4) of the Bihar Panchayat Act. Consequently the resolution passed on such an illegal notice cannot be allowed to stand. The view which I have taken finds support from an unreported decision of this Court dated 20-11-2003 passed in C.W.J.C. No. 5326 of 2003 *Arun Kumar Singh Vs. The State of Bihar and Others*, wherein this Court has held as follows:

Having answered this, the next question which falls for determination is as to how the period of seven clear days notice is to be calculated. It is well settled that when a statute provides for stated period of notice to be given, this requirement must be met, otherwise the meeting will be invalid. In the present case, Section 44(4) of the Act had in no uncertain term provided for seven clear days notice, which would obviously mean that the notice should be exclusive of the day on which it is issued and of the meeting. Applying the aforesaid principle, I am of the opinion that the notice to hold the meeting is invalid in the eye of law as seven clear days notice was not given.

23. The legal proposition enunciated therein cannot be doubted but, a significant one, the factual matrix has to be scanned. In the said case the petitioner had filed the writ for quashment of notice whereby date and time to consider the No Confidence Motion against him was placed. The matter was subject to result of the writ petition. The said decision does not show that the petitioner himself had issued the notice or had participated in the election process without any protest. Thus, while agreeing with the proposition of law set out therein we distinguish the said decision on facts.

24. In view of the aforesaid premises the appeal, being sans substratum, has to pave the path of dismissal and, accordingly, we so direct. However, in the facts and circumstances of the case there shall be no order as to costs.

Shiva Kirti Singh, J.

25. I agree.