

**Shiv Kumar Vs. Collector and ors.**

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**Court :** Madhya Pradesh

**Decided On :** Apr-09-2001

**Reported in :** 2001(5)MPHT619; 2001(2)MPLJ464

**Judge :** Dipak Misra, J.

**Acts :** Madhya Pradesh Panchayat Adhiniyam, 1993 - Sections 17, 17(1), 19, 26, 33, 36, 37, 38, 92, 98 and 122; Madhya Pradesh Nirvachan Niyam, 1995 - Rules 81, 83 and 90; Madhya Pradesh Panchayats (Election Petitions, Corrupt Practices and Disqualification of Membership) Rules, 1995 - Rule 2

**Appeal No. :** Writ Petition No. 593/2001

**Appellant :** Shiv Kumar

**Respondent :** Collector and ors.

**Advocate for Def. :** O.P. Namdeo, Adv. for the Respondent No. 3

**Advocate for Pet/Ap. :** Sanjay Patel, Adv.

**Disposition :** Petition dismissed

**Judgement :**

ORDER

**Dipak Misra, J.**

1. Election for the post of Sarpanch of Gram Panchayat Kheri was held in accordance with the provisions enshrined under Madhya Pradesh Panchayat Adhiniyam, 1993 (hereinafter referred to as 'the Act') and one Rajesh Mohan Jhikram was elected as Sarpanch. For some reason he resigned from the post of Sarpanch as a result of which the said post fell vacant. To fill up the vacancy the Secretary of Gram Panchayat called a special meeting of the Panchs. Three members namely, Shiv Kumar, the present petitioner, Durga Prasad, the respondent No. 3 and Gyani, the respondent No. 4 contested for the said post which was to be filled up as a temporary measure. Twenty members participated in the voting and presiding officer after counting the votes declared the respondent No. 3 to be successful. As the petitioner had a grievance he filed an application under Section 122 of the Act before the Sub Divisional Officer. The said, authority entertaining the application under Section 122 of the Act recounted the votes and declared the petitioner to have been duly elected. Feeling aggrieved the respondent No. 3 filed, a revision. The petitioner raised; an objection with regard to the maintainability of the revision. The revisional authority, the Collector, Mandla did not accept; the objection raised by the petitioner and came to hold that the application preferred under Section 122 of the Act was not maintainable and accordingly set aside the order passed by the original authority. The said order dated 29-1-2001 has been brought on record as Annexure P-5.

2. It is urged in the petition that there is no provision for filing of revision and, hence, the Collector could not have set aside the order passed by the Sub Divisional Officer. It is further putforth that the respondent No. 3 had not raised any objection with regard to maintainability of the election petition and, hence, the Election Tribunal has rightly decided the lis in accordance with law. That apart, justification has been given in support of the order passed by the Sub-Divisional Officer highlighting that the petitioner had obtained more votes than the respondent No. 3. With these averments prayer has been made for quashment of the order contained in Annexure P-5.

3. A return has been filed by the answering respondent No. 3 contending, inter alia, that when the vacancy is filled up under Section 38 of the Act an application under Section 122 of the Act does not lie. It has been further putforth that as an

arbitrary order was passed by the Sub-Divisional Officer who had no jurisdiction the respondent No. 3 was compelled to file the revision before the revisional authority and the same has been rightly entertained. It is also putforth that after passing of the order by the Collector the petitioner had approached the Collector on 12-2-2001 on the same ground but suppressed this fact and obtained an interim order. It has been further putforth that the respondent No. 3 had been rightly elected and there was no illegality in the same.

4. I have heard Mr. Sanjay Patel, learned counsel for the petitioner and Mr. O.P. Namdeo, learned counsel for the respondent No. 3.

5. It is contended by Mr. Patel that it has been the consistent view of this Court that an order passed under Section 122 of the Act is neither appealable nor revisionable and, therefore, the Collector could not have invoked the power of revision to set aside the order passed by the specified officer. It is also urged by him that the order passed by the Sub-Divisional Officer was just and proper in the facts and circumstances of the case and, therefore, the Collector has erred in law in interfering with the order passed by the said authority.

Combatting the aforesaid submissions it is urged by Mr. Namdeo, learned counsel for the respondent No. 3 that when the proceeding before the specified officer was not maintainable the same cannot be treated to be an order under M.P. Panchayat (Upsarpanch, President and Vice President) Nirvachan Niyam, 1995 (hereinafter referred to as the 'Rules') and, therefore, the Collector has rightly exercised the power of revision.

6. To appreciate the rival submissions raised at the Bar it is apposite to refer to various provisions of the Act. Section 17 (1) of the Act deals with the election of Sarpanch and Up-Sarpanch. The said provision reads as under :--

'17. Election of Sarpanch and Up-Sarpanch- (1) In every Gram Panchayat there shall be a Sarpanch and an Up-Sarpanch. A person who -

(i) is qualified to be elected as panch;

(ii) is not a member of either House of Parliament or member of State Legislative Assembly; and

(iii) is not Chairman or Vice-Chairman of Co-operative Society; shall be elected as a Sarpanch, subject to provisions of Sub-sections (2), (3) and (4), by persons whose names are included in the list of voters of the Gram Panchayat are in such manner as may be prescribed.'

Section 36 provides for disqualification of an office bearer of Panchayat. Section 37 deals with resignation by office bearer of Panchayat. Sub-section (2) of the said Section provides manner in which a Sarpanch of Gram Panchayat can resign from his office. Section 38 deals with filling up of vacancies. Section 38 being relevant for the present purpose is reproduced below :

'38. Filling up of vacancies- (1) b (a) In the event of death, resignation, no confidence motion, or removal of an office bearer of a Panchayat or on his becoming a member of State legislative Assembly or a member of either House of Parliament before ; the expiry of his term, a casual vacancy shall be deemed to have occurred in his office and such vacancy shall be filled as soon as may be by the election in accordance with the provision of the Act and the rules made thereunder.

(b) in the event of occurrence of a casual vacancy in the office of the Sarpanch of a Gram Panchayat, the Secretary of the Gram Panchayat as the case may be, shall cause to be called a special meeting of the Panchayat immediately, but not later than fifteen days from the date of receipt of information from the prescribed authority regarding the vacancy and the; members shall elect from amongst themselves a person to hold the office temporarily till a new Sarpanch, as the case may be, is elected in accordance with the provisions of this Act and the rules made thereunder and such officiating Sarpanch, as the case may be, shall perform all the duties and exercise all the powers of Sarpanch, during the pendency of election:

Provided that if the office of the Sarpanch is reserved for the member of Scheduled Castes or Scheduled Tribes or other Backward Classes or for a

woman, the officiating Sarpanch shall be elected from amongst the members belonging to the same category:

Provided further that where the office of Sarpanch is reserved for woman belonging to Scheduled Castes or Scheduled Tribes or other Backward Classes, and there is no other woman belonging to that category who can be elected to officiate as Sarpanch, any woman belonging to the other reserved categories may be elected to officiate as Sarpanch during the casual vacancy.

(c) if the out going office bearer fails to hand over any record, article, money or property of the Panchayat forthwith to his successor the prescribed authority may by order in writing direct him to do so and on his failure to comply with such direction; the prescribed authority may proceed against him in accordance with Section 92 and take necessary steps to prosecute him under Section 98.'

On a perusal of aforesaid provision it is crystal clear that members are required to elect from amongst themselves the person to hold the office temporarily till the new Sarpanch is elected in accordance with the provisions of the Act and the Rules made thereunder and such officiating Sarpanch shall perform all the duties and exercise all powers to Sarpanch during the pendency of the election. Thus the arrangement is absolutely temporary and the Sarpanch is an officiating Sarpanch.

7. As per Section 17 of the Act the post of Sarpanch has to be filled up by direct election. In Madhya Pradesh Nirvachan Niyam, 1995 Chapter IV deals with the preparation of the voters' list, its publication, claims and objections and finalisation of the voters list. Chapter VI deals with the conduct of election. Rule 81 provides for declaration of result. Rule 83 is for grant of certificate of election to the returned candidate. Rule 90 (a) stipulates notifying the result of election of a Sarpanch. All these procedures are to be taken recourse to when the regular election is to be held for filling up the post of Sarpanch. Section 38 only provides for making a temporary arrangement. The core question that falls for consideration is if a person is elected to hold the office of the Sarpanch under Section 38 of the Act whether his election can be challenged before the specified officer. In this context I may profitably refer to Section 122 of the Act. It reads as under :

'Section 122. Election Petition - (1) An election petition under this Act shall be called in question only by a petition presented in the prescribed manner :-

(i) in case of Gram Panchayat to the Sub-Divisional Officer (Revenue);

(ii) in case of Janapad Panchayat to the Collector: and

(iii) in case of Zila Panchayat to the Divisional Commissioner and not otherwise,

(2) No such petition shall be admitted unless it is presented within thirty days from the date on which the election in question was notified.

(3) Such petition shall be enquired into or disposed of according to such procedures as may be prescribed.'

On a bare reading of the aforesaid provision it is crystal clear that no election petition shall be admitted unless it is presented within 30 days from the date on which the election in question is notified. When a direct election is held the question of notification under Rule 90 arises. It cannot be said by any stretch of imagination that an election under Section 38 can be assailed under Section 122 of the Act. What is contemplated is an election petition challenging the regular election. In this context I may profitably refer to definition incorporated under Section 2 (IV) and (V); which define 'election' and election proceedings'. They read as under :--

'2. (iv) 'Election' means an election for a seat or seats in a Panchayat and includes election of Sarpanch of Gram Panchayat.

(v) 'Election Proceedings' means the proceedings commencing from the issue of the notice for election and ending with the declaration of results of such election.'

In this context it is also apposite to refer to definition of returned candidate in Rule 2 (c) of Madhya Pradesh Panchayats (Election Petitions, Corrupt Practices and Disqualification of Membership) Rules, 1995. It reads as under:--

'2. (c) 'Returned candidate' means a candidate whose name has been published under Section 19, 26 or 33 of the Act as duly elected.'

8. On a conspectus reading of the aforesaid provisions there remains no trace of doubt that the adhoc filling up of the post under Section 38 is not assailable under Section 122 of the Act. However; in the case at hand such an application was entertained by the specified officer. It is submitted by Mr. Patel that even if an illegal order has been passed by the specified Officer the same could not have been rectified by the Collector in exercise of revisional jurisdiction as no revision is maintainable. True it is, this Court has held on number of occasions that against an order passed by specified officer under Section 122 of the Act no revision lies, but the present factual matrix has its own peculiarity for the simple reason the order passed by the specified officer cannot be regarded as one under Section 122 of the Act. The proceedings were not at all maintainable before him and he lacked inherent jurisdiction to entertain the application. In view of this interference by the Collector can not be regarded as bad in law. Infact, by such interference by the Collector, justice has been done and an order which was non est in law has been set aside. Hence, I am not inclined to interfere with same.

9. In view of my preceding analysis I do not find any merit in the writ petition and the same is accordingly dismissed without any order as to costs.