

Mahendra Kumar Vs. State and ors.

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Court : Rajasthan

Decided On : Apr-07-2005

Reported in : RLW2005(3)Raj1922; 2005(3)WLC422

Judge : Rajesh Balia and; Dinesh Maheshwari, JJ.

Acts : Rajasthan Panchayati Raj Act, 1994 - Sections 2, 19, 19(1), 38, 38(1), 39 and 39(2)

Appeal No. : D.B. Civil Writ Petition No. 842 of 2004

Appellant : Mahendra Kumar

Respondent : State and ors.

Advocate for Def. : O.P. Rathi, Dy. G.A. and; B.L. Bhati, Addl. G.A.

Advocate for Pet/Ap. : M.S. Singhvi, Adv.

Disposition : Petition allowed

Judgement :

Rajesh Balia, J.

1. Heard learned counsel for the parties.

2. This petition has been filed challenging the order of placing the petitioner under suspension vide order dated 12th February, 2004 (Annexure-5) on the alleged ground that prima facie it has been proved that the petitioner was ineligible to contest the election and to hold the elected office of Panchayati Raj Institutions as he has been found disqualified under Section 19(1) of Panchayati Raj Act, namely, that he had third child after the cut-off date i.e., 27.11.1995.

3. The challenge is on two fold grounds. Firstly, that the provision authorizing the State Government to nominate competent authority under Section 2(vii) of the Rajasthan Panchayati Raj Act 1994 is invalid as according to the learned counsel for the petitioner the naming of competent authority is a part of essential legislative function which could have been designated by the Legislature itself and such legislative function could not have been delegated to the State Government. Secondly, on merit of the case, it was contended that the charge and the prima facie finding in preliminary enquiry pertains to disqualification of the petitioner to hold the elected office of Panchayati Raj Institutions but it does not pertain to any matter which can be inquired into under Section 38 of the Act and, therefore, holding enquiry on the basis of alleged disqualification which fell under Section 39 of the Act while holding an enquiry into the matter within Section 39, no power vests in the State Government to suspend the incumbent during the pendency of enquiry relating to disqualification to hold the elected office under Section 19(1) of the Act. Therefore, the order of suspending the petitioner during pendency of enquiry by giving reference to Section 38(1) and 39(2) of the Act was wholly without jurisdiction.

4. So far as the constitutional validity of Section 2(vii) is concerned, the same has been held intra-vires by this Court in the case of Smt. Mridula Kanwar v. State of Rajasthan (D.B. Civil Writ Petition No. 5773/2003, decided on 15th September, 2004). Hence, no second declaration is required to be made.

5. However, so far as second contention is concerned, the contention is sustainable on the admitted facts of the case. The order (Annexure-5) placing the petitioner under suspension though refers it to be an enquiry both under Section 38(1) and 39(2), the fact into which enquiry is conducted is only referable to

alleged disqualification incurred by the petitioner under Section 19(1) of the Act of 1994. The respondents have placed on record the copy of the preliminary finding which was submitted to the CEO, Zila Parishad, Sirohi by Vikash Adhikari, Panchayati Samiti, Abu Road under letter dated 24.9.2001. The notice to show cause was issued on 20th February, 2004 which clearly states that since a birth of third child to the elected Member has been registered after 27.11.1995, which has been found to be correct in enquiry, he comes under purview of disqualification under Section 19(1) of the Act of 1994 and the petitioner was called upon to show cause against the preliminary finding reached by Chief Executive Officer, Zila Parishad, Sirohi (Annexure-7) dated 20.02.2004. Vide Exhibit R/1 submitted by the respondents, which is a copy of the letter dated 24.9.2001 by Vikash Adhikari, Panchayat Samiti, Abu Road to CEO, Zila Parishad, Sirohi along with Enquiry Report, also says that the petitioner has incurred disqualification under Section 19(1) of the Act of 1994 for holding the Elected Membership of the Panchayati Raj Institutions.

6. The Scheme of Section 38 and 39 of the Panchayati Raj Act, 1994 leaves no room of doubt that the scope of these Sections on the the matter which require enquiry under Section 38 or under Section 39 are entirely different. While during pendency of enquiry under Section 38, power to suspend an Elected Member has been conferred upon the State Government, Section 39 makes a clear provision contrary to what has been made in Section 38 of the Act that until declaring a Member of a Panchayati Raj Institution ineligible under Section 39(2) he shall continue to hold his office. For the present purposes, it would be apposite to reproduce the Section 38 and 39 in juxtaposition:-

Section 38. Removal and Section 39. Cessation of Suspension.- Membership.-1) The State Government may, (1) [A] member of a Panchayati by order in writing and after Raj Institution shall not giving him an opportunity of eligible to continue to be such being heard and making such member if he-enquiry as may be deemed necessary, remove from office any member including a chairper- (a) is or becomes subject to any son or a deputy chairperson of of the disqualifications a Panchayati Raj Institution, specified in Section 19; or who-(a) refuses to act or becomes (b) has absented himself from incapable of acting as such; or three consecutive

meetings of (b) is guilty of misconduct in the discharge of duties or any concerned without giving disgraceful conduct: information in writing to such Panchayati Raj Institution; or Provided that any enquiry un-der this sub-section may, even (c) is removed from the after the expiry of the term of membership; or the Panchayati Raj Institution concerned be initiated or, if al-ready initiated before such ex- (d) resigns from the piry, be continued thereafter membership; or and in any such case, the State Government shall, by order in writing, record its findings on (e) dies; or the charges levelled.(2) The chairperson or the de-puty chairperson removed under (f) fails to make the prescribed Sub-section (1) may at the discre- oath or affirmation of the office tion of the State Government of membership within three also be removed from the mem- months from the date of bership, if any of the election or appointment. Panchayati Raj Institution concerned.(3) The member or the chair- (2) Whenever it made to appear person or the deputy chairper- to the competent authority that son removed under Sub-section (1) a member has become or against whom findings have ineligible to continue to be a been recorded under the pro- member for any of the reasons viso to that sub-section, shall specified in Sub-section (1), the not be eligible for being chosen concerned authority may, after under this Act for a period of giving him an opportunity of five years from the date of his being heard, declare him to removal or, as the case may be, have become so ineligible and the date on which such findings thereupon he shall vacate his are recorded. office as such member.(4) The State Government may [xxx] suspend any member including a chairperson or a deputy chairperson of a Panchayati Raj Institution against whom an enquiry has been initiated Provided [xxx] that until a under Sub-section (1) or against declaration under this sub whom any criminal proceed- Section is made he shall ings in regard to an offence in- continue to hold his office. volving moral turpitude is pending trial in a Court of law and such person shall stand de- barred from taking part in any act or proceedings of the Panchayati Raj Institution con- cerned while being under such suspension.

7. Section 38 of the Act of 1994 deals with removal and suspension-(i) when a person or elected member refuses to act or becomes incapable of acting as such; or (ii) is found guilty of misconduct in the discharge of duties or any disgraceful conduct. Both the provisions of Section 38 do not refer to the disqualification to be

incurred as prescribed in Section 19 (1) of the Act.

8. Section 39 deals with cessation of membership on being or having become disqualified or incurring any disqualification prescribed under Section 19 of the Act. Sub-section (2) empowers a competent authority to declare a member to continue his office if he is satisfied on holding such enquiry as he deem fit that the member is disqualified and has become disqualified to hold the office and proviso to Sub-section (2) of Section 39 makes it abundantly clear that during pendency of enquiry, until it culminates into a declaration under this Sub-section (2) against the member, he cannot be ousted from the office.

9. In view thereof, by mere reference to Section 38 and 39 in the impugned order, the enquiry cannot be considered to have been held under Section 38 and the enquiry can only be related to Section 39.

10. There being prohibition against suspending a member of Panchayati Raj Institution and making him out of the office under Section 39 of the Act, the State cannot assume to exercise power which does not vests in it merely by making a reference to Sections 38 and 39 of the Act.

11. Consequently, the petition is allowed on merit, impugned order dated 12.2.04 (Annex.5) suspending the petitioner from the post Up-Pradhan, Panchayat Samiti, Pindwara during the pendency of enquiry into alleged disqualification is quashed.

No. costs.

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