

AFR

Court No. - 21

Reserved

(1) **Case :-** MISC. SINGLE No. - 26883 of 2019

Petitioner :- Neelam Nigam

Respondent :- State Of U.P. Thru Secy. Panchayati Raj Lko. & Ors.

Counsel for Petitioner :- Devendra Pratap Singh

Counsel for Respondent :- C.S.C.

(2) **Case :-** MISC. SINGLE No. - 22127 of 2019

Petitioner :- Neelam Nigam

Respondent :- State Of U.P. Thru. Secy. Panchayatraj Lucknow & Ors.

Counsel for Petitioner :- Devendra Pratap Singh

Counsel for Respondent :- C.S.C.

Hon'ble Attau Rahman Masoodi,J.

Heard learned counsel for the petitioner and Sri Anuj Garg, learned Standing Counsel for the State.

These two writ petitions were heard together and the same are being decided by this common judgement. Writ Petition No. 22127 (MS) of 2019 has arisen against the show cause notice dated 11.7.2019 whereas the second writ petition i.e. Writ Petition No. 26883 (MS) of 2019 is directed against the order dated 19.9.2019 whereby the petitioner has been removed from the office of Gram Pradhan on the alleged ground of holding the office of profit i.e. Auxiliary Nursing Midwifery (hereinafter referred to as the 'ANM')

It is not in dispute that the petitioner is an elected Gram Pradhan and during currency of her term as Gram Pradhan, she came to be selected as ANM and has been engaged on a monthly payment of honorarium to the tune of Rs. 12128/-. It is gathered from the record that a

complaint was made by one Maya Ram Verma to the District Panchayat Raj Officer on 23.4.2019 which triggered an action against the petitioner. The alleged disqualification gave rise to a notice dated 11.7.2019 under Section 5-A(c) of the U.P. Panchayat Raj Act, 1947 which was assailed by the petitioner in Writ Petition No. 22127 (MS) of 2019.

During pendency of the above writ petition, an order was passed by the District Magistrate on 19.9.2019 removing the petitioner from the office of Gram Pradhan. Resultantly, another Writ Petition No. 26883 (MS) of 2019 was filed assailing the order passed by the District Magistrate under Section 95(1)(g) of the Act.

The sum and substance of the controversy involved in the two petitions is as to what procedure is open to be adopted by the competent authority before passing an order of removal from office of Gram Pradhan on the alleged disqualification of holding an office of profit; secondly, as to whether the State Election Commission has authority to identify and categorise the offices of profit and; thirdly, as to whether the petitioner's engagement as ANM by the District Society of National Health Mission program in district Ayodhya on the payment of monthly honorarium of Rs. 12128/- funded by the Central Government and utilised through the societies registered under the Societies Registration Act, 1860 would be an office of profit or not. Holding of office of profit by an elected pradhan is undisputedly a disqualification which one incurs by virtue of Section 5-A(c) of the U.P. Panchayat Raj Act, 1947 and the same is extracted for ready reference as under:

"5-A. Disqualification for membership- A person shall be disqualified for being chosen as, and for being [the Pradhan or] a member of a Gram Panchayat, if he-

(a)

(b)

(c) holds any office of profit under a State Government or the Central Government or a [local authority, other than a Gram Panchayat or Nyaya Panchayat; or a Board, Body or Corporation owned or controlled by a State Government or the Central Government];

....."

The appointment of the petitioner as ANM became a subject matter of complaint at the instance of one Sri Maya Ram Verma who filed a representation before the District Panchayat Raj Officer on 30.4.2019. It is not clear from the record as to whether Sri Maya Ram Verma, the complainant, pursued the matter further or not but the complaint so made did yield a response at various levels. Ultimately a notice under Section 5-A(c) was issued to the petitioner on 11.7.2019 to show cause as to why she may not be removed, which precedes by several letters issued by District Panchayat Raj Officer to take action against the petitioner on the basis of complaint.

On a plain reading of Section 5-A(c), it is evident that the provision simply prescribes a ground of disqualification but it does not lay down any procedure for setting up an enquiry by District Magistrate who is vested with the powers of removal of a Gram Pradhan on the grounds mentioned under Section 95(1)(g), which includes a disqualification under Section 5-A of the Act. For ready reference Section 95(1)(g) is also extracted below:

"95. Inspection – (1) *The State Government may –*

(g) remove a Pradhan, Up-Pradhan or member of a Gram Panchayat or a Joint Committee or Bhumi Prabandhak

Samiti, or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he –

(i) absents himself without sufficient cause for more than three consecutive meetings or sittings.

(ii) Refuses to act or becomes incapable of acting for any reason whatsoever or if he is accused of or charges for an offence involving moral turpitude,

(iii) has abused his position as such or has persistently failed to perform the duties imposed by this Act or Rules made thereunder or his continuance as such is not desirable in public interest, or

iii-a) has taken the benefit of reservation under sub-section(2) of Section 11-A or sub- section (5) of Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of Scheduled Castes, the Scheduled Tribes or the backward classes, as the case may be,

(iv) being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in politics, or

(v) suffers from any of the disqualifications mentioned in Clauses (a) to (m) of Section 5-A:

Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government.

Provided that no action shall be taken under Clause (f), Clause (g) except after giving to the body or person concerned a reasonable opportunity of showing cause against the action proposed.

(2) A person under sub-clause (iii) and (iv) of clause (g) of sub-section (1) of this section shall not be entitled to be re-elected or re-appointed to any office under this Act for a period of five years or such lesser period as the State Government may order in any case.

(3) No order made by the State Government under this section shall be called in question in any Court.

(4) Where any Gram Panchayat, Joint Committee or Bhumi Prabandhak Samiti is dissolved the State Government may appoint such person or persons to exercise and perform the powers and duties thereof as it may deem fit."

The constitutional mandate after 73rd amendment in the Constitution of India by virtue of Article 243(F) clearly prescribes that an elected person at the local self government cannot be removed except in accordance with the procedure prescribed. Article 243(F) for that purpose being relevant is also reproduced as under:

"243F. Disqualifications for membership.

(1) A person shall be disqualified for being chosen as, and for being, a member of a Panchayat-

(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State.

(2) If any question arises as to whether a member of a Panchayat has become subject to any of the disqualifications mentioned in Clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide."

In the light of provisions extracted above, it is urged by the learned counsel for the petitioner that even if an information or complaint regarding holding of office of profit had reached to the office of District Magistrate, the same ought to have been referred to the prescribed authority as required under Section 6-A of the Act.

For establishing a disqualification specified under Section 5-A, the Statute requires the question to be referred to the prescribed authority under Section 6-A of the Act which reads as under:

"6-A. Decision on question as to disqualifications – *If any question arises as to whether a person has become*

subject to any disqualification mentioned in Section 5-A or in sub-section (1) of Section 6, the question shall be referred to the prescribed authority for his decision and his decision shall, subject to the result of any appeal as may be prescribed, be final."

Section 2(q) of the Act defines the prescribed authority. It is this definition alone that aids the implementation of Section 5-A through the procedure provided under Section 6-A of the Act. Section 2(q) of the Act for ready reference is reproduced hereunder:

"(q) 'Prescribed authority' means –

i) for the purposes of the provisions of this Act mentioned in Schedule III of the [Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961], the Zila Parishad or the Kshettra Samiti, as may be specified in column 3 of that Schedule; and

ii) in respect of any other provisions of this Act, the authority notified as such by the State Government whether generally or for any particular purpose;"

The State Government in order to make Section 6-A workable has defined the prescribed authority either by reference to Schedule-III of U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 as specified in Column-3 and in respect of other provisions of the Act, the authority notified as such by the State Government whether generally or for any particular purpose. This Court may note that Schedule-III, Column-3 appended to U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 does not specify any authority with reference to Section 6-A of the Panchayat Raj Act. The only Rules framed to serve the purpose of Section 6-A of the Act are U.P. Panchayat Raj (Computation of Period of Five years for Removal of Disqualification, Fixation of period of dues etc. and Settlement of Disputes of Disqualification) Rules, 1994.

The above mentioned rules pose a peculiar difficulty when the matter is viewed within the scope of Rule 4 and 5. The proceeding under Rule-4 is not inclusive of the disqualification of office of profit i.e. 5-A(c) of the Act whereas, Rule-5 prescribes the authority for those cases which arise otherwise than a claim or objection. Rule 5 for ready reference is extracted hereunder:

5. Reference under Section 6-A pertaining to disqualification:-(1) *Where any question as is referred to in Section 6-A of the Act is raised otherwise than in a claim or objection, it shall be referred to the Tehsildar by the officer or authority before whom such question arises for consideration.*

(2) *On the receipt of a reference under sub-rule (1) the Tehsildar shall fix the date, time and place for it's hearing and shall give notice to the parties concerned.*

(3) *The Tehsildar shall after hearing the parties and after such other enquiries as he deems fit, give his decision on the question referred to him.*

(4) *Any person aggrieved by the order of the Tehsildar may, within fifteen days of the date of such order, prefer an appeal to the Sub-Divisional Officer.*

(5) *The Sub-Divisional Officer, shall after notice to the parties and after hearing such of them as desire to be heard, dispose of the appeal.*

(6) *A copy of the final order passed on the question referred to the Tehsildar as modified in appeal, if any, shall be forwarded to the Secretary of the Gram Panchayat and to the Assistant Development Officer (Panchayat) of the concerned Kshettra Panchayat."*

The case at hand is a case of complaint by one Maya Ram Verma and there is no reason as to why such a complaint may not be understood as an objection by a person who is a resident of the same village. The difficulty arises when such an objection raising the question of disqualification does not fall within the scope of Rule-4 which applies to disqualifications other than those provided under Section 5-A(a) to (c). At the same time there is no specification of the prescribed authority under Rule-5 for cases arising out of a claim or objection. Thus, the present

case essentially an objection (complaint) under Section 5-A(c) raised by Maya Ram Verma a resident of the village is a case for which the prescribed authority is not specified under the Rules, 1994. Therefore, the question of reference under Section 6-A unless the authority is specified, does not arise. The wisdom of the State Government leaving the Prescribed Authority undefined for adjudication of disqualifications under Section 5-A(a) to (c) and restricting the scope of Rule-4 to other disqualifications alone is not under question, therefore, the authority to issue show cause notice on 11.7.2019 by the District Magistrate is traceable to Section 95(1)(g) of the Act as a delegate of the State Government.

The authority to remove a Gram Pradhan who incurs a disqualification under Section 5-A of the Act is undoubtedly possessed by the State under Section 95(1)(g) of the Act. This power has been delegated by the State Government to the District Magistrate by virtue of G.O. dated 28.3.2001. This government order specifies various authorities for the exercise of powers which the Act contemplates under various provisions and the power under Section 95(1)(g) is prescribed to be exercised by the District Magistrate.

This government order when looked at in the light of Article 243-F of the Constitution of India is bound to be understood meaningfully.

Separation of powers and independence of each organ of the State are essential features of the Constitution of India and the Courts of law while interpreting the provisions of the Constitution or statute must bear in mind this

significant aspect. Panchayati Raj which in common parlance is known as Local Self Government operates at the grass root level of democracy and must find its means and ways of self sustenance leaving least scope for the State to topple whimsically.

For a democratically elected representative, the removal on the grounds of disqualification prescribed under law is to achieve the purpose of good governance. This is an external control maintained by the State for a definite purpose. The disqualifications prescribed under Section 5-A of the Act are the grounds in addition to financial and administrative lapses which entail the consequence of removal. For any disqualification provided under Section 5-A(a) to (c) of the Act, the District Magistrate in absence of the prescribed authority being specified for reference under Section 6-A is thus fully empowered to proceed against a Gram Pradhan on any ground mentioned under Section 95(1)(g)(v). It is for this reason as well that two provisos are appended to Section 95(1)(g).

The first proviso appended to Section 95(1)(g) envisages an enquiry by such person and in such manner as may be prescribed. For the purposes of removal of a Gram Pradhan on the ground of any disqualification mentioned under Section 5-A(a) to (c), there is no such prescription of any person for enquiry. The District Magistrate himself being a delegatee of the State cannot sub-delegate, hence the first proviso has no application in the matter of disqualification provided under Section 5-A(a) to (c).

The only procedure which logically emerges is that of the second proviso appended to Section 95(1)(g) of the Act

according to which observance of rule of opportunity is a condition precedent. There is no other provision within which the authority to issue the impugned notice dated 11.7.2019 on the alleged disqualification under Section 5-A(c) can be traced. The power to supervise the conduct of election is vested in the District Magistrate under Section 12-BC of the U.P. Panchayat Raj Act, 1947 which is for a different purpose and its applicability cannot be stretched beyond the conduct of elections.

The second proviso appended to Section 95(1)(g) is reiterated below:

"Provided that no action shall be taken under clause (f), clause (g) except after giving to the body or person concerned a reasonable opportunity of showing cause against the action proposed.

It is in the spirit of above provision that the District Magistrate issued the show cause notice on 11.7.2019 competence whereof, in my humble opinion, is doubtless. The argument that the notice issued on 11.7.2019 suffers from lack of jurisdiction must fail. Therefore, Writ Petition No. 22127 of 2019 filed by the petitioner against the show cause notice dated 11.7.2019 fails and is accordingly dismissed.

The real issue raised in the subsequent writ petition is as to whether the petitioner holds an office of profit or not. For establishing such a disqualification, the notice dated 11.7.2019 makes a reference to the so called government order issued by the Joint Commissioner, State Election Commission on 28.6.2010 according to which certain appointments on honorarium though not a disqualification under U.P. State Legislature (Prevention of Disqualification)

Act, 1971 or the corresponding Central Act are nevertheless identified by State Election Commission to be a disqualification for being an elected member of Panchayats. These offices are Aanganbadi Karyakattri/Sahayika, Ashabahu, Kisan Mitra, Shiksha Mitra, Rozgar Sewak etc. The petitioner, however, is appointed as ANM which is not specifically included in the circular dated 28.6.2010, yet there is resemblance in the matter of payment of honorarium.

The petitioner in response to the show cause notice has stated that all the appointments mentioned in the circular of State Election Commission dated 28.6.2010 are made in the Gram Panchayats, whereas, the petitioner having duties related to maternity and vaccination was serving in the other adjoining district for which the honorarium paid is not salary but a kind of compensatory allowance. The honorarium is not linked to any permanent post having independent existence except that there is a contract of service which is entered into between the petitioner and the society at the district level. The chief executive of the district level society is the Chief Medical Officer who under the bye-laws of the society is empowered to terminate the contract on the ground of dissatisfactory service. The renewal of contract is also dependent upon the satisfactory service.

Before coming to the aspect as to whether the time bound contractual services on honorarium basis can be termed to be an office of profit in terms of the circular dated 28.6.2010, the Court would go into the second issue relating to the source of power under which the State

Election Commission has issued the said circular. The opposite parties in the counter affidavit have not clarified as to under what authority and in what manner the said circular was binding on the State Government or the District Magistrate.

For laying down the conditions of disqualification, Article 243(F) lays down twin conditions. Firstly, the disqualifications for being a member of State legislature under law shall equally apply to a member of Panchayats. Secondly if a person is so disqualified by or under any law made by the legislature of the State, a person may be removed by following the procedure as prescribed.

By virtue of Article 243(K) of the Constitution of India the State Election Commission is empowered with superintendence, direction and control of the preparation of electoral rolls as well as the conduct of elections. This power vested in the State Election Commission cannot be understood to have conferred upon the Commission an authority to lay down as to holding of what offices would be a disqualification which essentially lies within legislative domain of the State. Article 243(K) read together with Section 12-BB of the U.P. Panchayat Raj Act does not in any manner authorise the State Election Commission to identify the offices of profit.

This Court would hasten to add that under Article 298 of the Constitution of India, Parliament is vested with the powers to legislate on the matters not included in the concurrent and State list. The apex court decision rendered in the case of ***Lily Thomas v. Union of India and others*** reported in **(2013) 7 SCC 653** also gives a clear indication

that it is the legislature of the State or Parliament alone which may prescribe the conditions of disqualification. To say that the State Election Commission has a power to specify offices of profit that too without there being any constitutional or statutory authority, in my humble view, is clearly in excess of the jurisdiction and for that reason, the very premise upon which the District Magistrate has placed reliance i.e. the circular dated 28.6.2010, is clearly unfounded and without authority of law.

It is not the case at hand that the State Government has prescribed certain appointments on honorarium basis to be a disqualification. Once it is clear that the District Magistrate has placed reliance upon the circular issued by the State Election Commission, this Court has no hesitation to observe that the District Magistrate stepped into an error which is apparent on the face of record.

To lay down as to which offices are to be treated in the category of offices of profit and which others may be understood not to have the trappings of the same, it is for the State Government to lay down. The Court is, however, conscious of the fact that the working hours may also be a factor for such consideration but a foolproof answer to this question is for the State legislature to provide. This Court on principle may only observe that the State Government while identifying an office to be an office of profit must bear in mind that the independence of each organ of the State is protected. It is the rule of independence of each organ of the State which consequently strengthens a democratic system based on the freedom of expression and speech.

Having answered the second question favourable to the petitioner, the Court would next consider as to whether a contractual time bound appointment on payment of honorarium by a society constituted at the district level would at all be an office of profit. The appointment of ANMs on contractual basis is to aid the existing staff appointed at Primary, Community and District level health centres. The strength of contractual staff appointed by the District Level Society are to aid the regular staff appointed against regular posts who are paid much higher salary. The services of contractual employees to carry out National Health Mission on honorarium basis is administratively controlled by the society registered under the Societies Registration Act, 1860. The Chief Medical Officer works as Chief executive of the society as per its bye-laws. Secondly, there is no concept of permanent posts in the Health Mission and the schemes keep on floating from one district to another. Thirdly, there is no payment of salary like against the regularly sanctioned posts having an independent existence. The societies and NGOs constituted at the district level who deal in health services are also open to be merged with the District Level Society. The Chairman, Zila Panchayat and District Magistrate are also ex-officio office bearers of the Management.

Insofar as the working hours are concerned, it is not the case before this Court that the petitioner has failed to perform her functions effectively as Gram Pradhan. The ground of inefficiency is independent of the alleged disqualification. An office of profit has two essential ingredients. Firstly, it must yield a true pecuniary benefit

based on a master and servant relationship between the government or any statutory or local body of the State and the person concerned, secondly, the executive authority of the person for which the pecuniary benefit against a position is derived must owe its existence to the office held by him. An employment of which the position goes with the termination of contract and for which there is no protection of tenure against any disciplinary measure is a pure contract of service, therefore, any incentive to meet out of pocket expenses like payment of honorarium cannot be classified to be an office of profit. Thus, the critical test of independent existence of the position irrespective of the occupant is not satisfied.

It is equally noteworthy that contractual appointment does not place a bar upon the incumbent to be a public representative at the panchayat level or otherwise. The question of conflict of public duty also does not arise with the service contract for reasons more than one. A contract of service finds its scope within the larger horizon of public duties which a citizen on being elected a public representative may owe to the State or its public institutions. The spirit of public duty is distinct from a service contract and every service contract for this reason alone may not debar a person from being a public representative. For coming to this reasoning, the Court would fruitfully place reliance on the judgment rendered by the apex court reported in **(2018)8 SCC 1(State Election Commissioner, Bihar, Patna and others versus Janakdhari Prasad and other)** wherein the Court had drawn a

distinction between service and the office of profit being it a situation in the case decided by the Apex Court.

Looking at the issue from a different angle attracts the Court to say that some honorarium to the tune of Rs. 5000/- p.m. is paid to the Gram Pradhan on his election to the office and the duties attached to the said office are no less onerous, yet holding the office of Gram Pradhan is not a disqualification to contest the election of an MLA. For the purposes of eligibility, Section 3(O) of the U.P. State Legislature (Prevention of Disqualification) Act, 1971, exempts holding the office of Gram Pradhan for being elected as an MLA. It is a different thing that two offices cannot be simultaneously held as per the mandate of statute. The payment of honorarium alone is not a decisive factor but it is the master and servant relationship of which the authority and control vests in the government coupled with the fact that the office has an independent existence irrespective of the occupant.

This Court is conscious of the fact that Hon'ble the apex court in the case **Ashok Kumar Bhattacharya v. Ajoy Biwan, (1985) 1 SCC 151**, has guided the courts to interpret the concept office of profit in a manner that the approach adopted by a court must reduce the risk of conflict between the public duty and private interest which in the present case does not seem to be the situation. The petitioner's services as ANM are rendered in the adjoining district and the remuneration of honorarium is nothing but a compensatory allowance to meet out of pocket expenditure. This, however, does not suggest that this Court has certified the efficiency of the petitioner in the matter of performance

of her duties as Gram Pradhan which is always open to be examined as per law. For this purpose, every District Magistrate must ensure that a CCTV camera and video conferencing facility connected to the district headquarter is installed in the district so that the participation of panchayat members in the meetings at Gram Panchayat is duly ascertained and monitored by the State.

In the present case, the Court is not straightaway called upon to answer as to whether the office of ANM is an office of profit or not which in any view of the matter lies within the domain of the State Government to lay down but what is surprising is that the District Magistrate has placed reliance upon a circular issued by the State Election Commission for such a purpose. The very premise upon which the District Magistrate has rested his decision i.e. a circular issued by State Election Commission on 28.6.2010, does not have any sanctity of law. The Court is of the considered opinion that unless an office is validly specified by the State to be an office of profit, it shall not confer power on the District Magistrate to remove an elected Gram Pradhan from his/her office on that ground alone. The District Magistrate has clearly erred in the present case by placing reliance upon the circular issued by the State Election Commission on 28.6.2010 and the impugned order passed by him, therefore, is liable to be set aside.

The District Magistrate ought to have taken up the matter with the State Government instead of calling for a report from his sub-ordinate officials for which he lacked the authority under law. The State Government is bound to consider the matter and come up with a clear stand on the

circular issued by the Commission on 28.6.2010 so that the disputes of this nature do not arise in future. Suffice it to say that the State Government while identifying an office to be an office of profit must bear in mind the true import and purpose of such a disqualification.

For the reasons aforesaid, the Court is of the considered opinion that the impugned order dated 19.9.2019 being illegal and arbitrary is liable to be set aside. It is accordingly quashed and petitioner is directed to be restored as Gram Pradhan.

Writ petition No. 26883 of 2019 is allowed. The cost of litigation is quantified at a sum of Rs. 25000/- payable by the State to the petitioner within a period of three months from today.

Order Date :- Jan. 10, 2020
Fahim/-