

A.F.R.

Court No. - 19

Case :- WRIT - C No. - 1000219 of 2006

Petitioner :- Ram Lakhan Harshit

Respondent :- D.M. Lucknow And 4 Ors.

Counsel for Petitioner :- B.R.Singh,Devashish Bhatt,Mukesh Kumar,Rakshit Raj Singh

Counsel for Respondent :- C.S.C.

Hon'ble Subhash Vidyarthi J.

1. Heard Sri Rakshit Raj Singh, the learned counsel for the petitioner and Sri Hemant Kumar Pandey, the learned Standing Counsel representing the State - respondents.
2. By means of the instant petition filed under Article 226 of the Constitution of India, the petitioner has sought quashing of a recovery notice dated 06.12.2005 issued by the District Magistrate, Lucknow and recovery citation dated 07.01.2006 issued by the Tahsildar, Mohanlalganj, as also a notice dated 08.09.2005 issued by the District Magistrate, along with the entire proceedings initiated on the basis of an inquiry report dated 25.04.2005 submitted by an inquiry committee consisting of Chief Development Officer, Unnao, Executive Engineer, Rural Engineering Service, Unnao and District Panchayat Raj Officer, Unnao.
3. On 08.09.2005, the District Magistrate, Lucknow had issued a notice under Rule 256 of the U. P. Panchayat Raj Rules, 1947 stating that the Government had constituted a three member inquiry committee consisting of the Chief Development Officer, Unnao, District Panchayat Raj Officer, Unnao and Executive Engineer, Rural Engineering Service, Unnao to inquire into the works conducted in village Panchayat Samesi during the year 2003-04 and 2004-05.

4. The inquiry committee submitted a report stating that the petitioner was guilty of misappropriation of Rs.5,10,212/-, half of which amounting to Rs.2,55,106/- was to be recovered from the petitioner. The petitioner was directed to submit his explanation in this regard, failing which an ex parte order would be passed for recovery of the amount from the petitioner. This letter was accompanied by a copy of the inquiry report submitted by the three members committee. It mentions the date of inspection to be 25.04.2005 but the date of report is not mentioned therein. A perusal of the report indicates that it makes no mention that the inspection was carried out in presence of the petitioner or after giving any opportunity of hearing to the petitioner.
5. On 21.10.2005, the applicant gave a letter to the Block Development Officer stating that all the meetings of Gram Panchayat and its committee were conducted as per the Rules. The works had been conducted as per the resolutions passed by the Gram Panchayat. The entire records about the resolutions, the projects and the expenditures etc. are available in the office.
6. On 21.11.2005, the petitioner gave another letter to the Block Development Officer, Mohanlalganj stating that the entire relevant records were available with the Secretary of Gram Panchayat and he prayed for being permitted to inspect the records and for being provided a copy thereof to enable him to submit his reply. The petitioner stated that as the records were with Secretary of Village Panchayat and not with him, he could not submit a reply, unless he was provided a copy of the records.
7. On 06.12.2005, the District Magistrate, Lucknow passed the impugned order stating that the petitioner was given an opportunity to submit his explanation by means of a notice dated 08.09.2005. The petitioner submitted an undated explanation which has not been found to be satisfactory, from which it appears that the petitioner has misappropriated an amount of Rs.5,10,212/- and half of it i.e.

Rs.2,55,106/- was ordered to be recovered from the petitioner. Accordingly the Tahsildar has issued a recovery citation.

8. Sri. Rakshit Raj Singh, the learned counsel for the petitioner has submitted that the statutory provision regarding recovery of surcharge contained in Section 27 of the Uttar Pradesh Panchayat Raj Act, 1947 and the procedure therefor prescribed by Rules 256 and 257 of the 1947 Rules has not been followed in the present case, which vitiates the impugned recovery order and recovery citation.
9. The learned counsel for the petitioner has placed reliance a judgment rendered by a Division Bench of this Court in **Dinesh Kumar v. State of U.P.**, 2022 SCC OnLine All 861 = AIR 2023 All 26 wherein this Court has held that as per the provisions contained in Rules 256 and 257 of the 1947 Rules, an inquiry ought to have been conducted by the Chief Audit Officer and now as per the orders of delegation made by the Chief Audit Officer, by the District Audit Officer. The learned counsel for the petitioner has submitted that the inquiry committee consisting of Chief Development Officer, Executive Engineer, Rural Engineering Service and District Panchayat Raj Officer has no jurisdiction to hold an inquiry in accordance with the provisions contained in Rules 256 and 257 of the U.P. Panchayat Raj Rules, 1947.
10. The learned counsel for the petitioner has next submitted that the petitioner had submitted an application seeking permission to inspect the document and demanding copies of the documents, as all the documents were with Gram Panchayat Secretary, but no document was provided to him, which has resulted in denial of a proper opportunity of hearing to the petitioner.
11. Sri. Hemant Kumar Pandey, the learned Standing Counsel has raised a preliminary objection that Section 27(3) of the Act of 1947 provides that any person aggrieved by the order of the Prescribed Authority fixing the amount of surcharge may, within 30 days of such order, appeal against the order to the State Government or such other

appellate authority as may be prescribed. He has submitted that as the petitioner has got a statutory remedy, the writ petition is liable to be dismissed on this preliminary ground.

12. The learned Standing Counsel has further submitted that the village in question is a 'Samagra Gram' as per the provision contained in a Government Order dated 22.12.2004 and the procedure for holding an inquiry in respect of any illegality committed by a Pradhan of a Samagra Gram is provided in the aforesaid Government Order. The inquiry in the present case has been conducted in accordance with the provisions contained in the aforesaid Government Order dated 22.12.2004.
13. The learned Standing Counsel has relied upon a division bench's judgment of this Court in the case of **Ram Vilas versus Commissioner, Devi Patan Mandal, Gonda and others**: 2022 (1) ADJ 1.
14. Section 27 of the Uttar Pradesh Panchayat Raj Act, 1947 provides as follows:-

"27. Surcharge – (1) Every Pradhan or Up-Pradhan of a Gram Panchayat every member of a Gram Panchayat or of a Joint Committee or any other committee constituted under this Act and every Sarpanch, Sahayak Sarpanch or Panch of a Nyaya Panchayat shall be liable to surcharge for the loss, waste or misapplication of money or property belonging to the Gram Panchayat or Nyaya Panchayat as the case may be, if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan, Up-Pradhan, member, Sarpanch, Sahyak Sarpanch or Panch;

Provided that such liability shall cease to exist after the expiration of the years from the occurrence of such loss, waste or misapplication, or five years from the date on which the person liable ceases to hold his office, whichever is later.

(2) The prescribed authority shall fix the amount of the surcharge according to the procedure that may be prescribed and shall certify the amount to the Collector who shall, on being satisfied that the amount is due, realize it as if were an arrear of land revenue.

(3) Any person aggrieved by the order of the prescribed authority fixing the amount of surcharge may, within thirty days of such order, appeal against the order to the State Government or such other appellate authority as may be prescribed.

(4) Where no proceeding for fixation and realization of surcharge as specified in sub-section (2) is taken the State Government may institute a suit for compensation for such loss, waste or misapplication, against the person liable for the same.”

15. The word ‘prescribed’ has been defined in Section 2(p) of the U.P. Panchayat Raj Act, 1947 as prescribed by this Act or Rules made there under. The procedure referred to in Section 27 (2), has been prescribed in Chapter 13 of the U.P. Panchayat Raj Rules, 1947, which contains Rules 256 to 260. Rules 246 and 257 read thus:

“Rule 256(1) In any case where the Chief Audit Officer, Co-operative Societies and Panchayats, considers that there has been a loss, waste or misuse of any money or other property belonging to a Gaon Sabha as a direct consequence of the negligence or misconduct of a Pradhan, he may call upon the Pradhan, Up-Pradhan, Member, Officer or servant, as the case may be, to explain in writing why such Pradhan, Up-Pradhan, Member, Officer, or servant should not be required to pay the amount misused or the amount which represents the loss or waste caused to the Gaon Sabha or to its property and such explanation shall be furnished within a period not exceeding two months from the date such requisition is communicated to the person concerned:

Provided that an explanation from the Pradhan, Up-Pradhan or member of the Gaon Panchayat shall be called for through the District Magistrate and from the officer or servant through the Panchayat Raj Officer.

Provided also that no explanation shall be called for from any member who is recorded in the minutes of the Gaon Panchayats or any of its committee as having been absent from the meeting at which the expenditure objected to was sanctioned or who voted against such expenditure.

257. (1). After expiry of the period prescribed in sub-rule (1) or (3) of Rule 256, as the case may be, and after examining the explanation, if any, received within time, the Chief Audit Officer shall submit the papers along with his recommendations to the District Magistrate of the district in which the Gram Sabha is situated in case of Pradhan, Up-Pradhan and Members and to

the District Panchayat Raj Officer of the district in which the Gram Sabha is situated in case of Officers and servants.

(2) The District Magistrate or the District Panchayat Raj Officer, as the case may be, after examining and after considering the explanation, if any, shall require the Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat to pay the whole or part of the sum to which such Pradhan, Up-pradhan, Member, Officer or servant is found liable:

PROVIDED, firstly, that no Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat would be required to make good the loss, if from the explanation of the Pradhan, Up-Pradhan, Member, Officer or servant concerned or otherwise the District Magistrate or the District Panchayat Raj Officer, as the case may be, is satisfied that the loss was caused by an act of the Pradhan, Up-pradhan, Member, Officer or servant in the bonafide discharge of his duties:

PROVIDED secondly, that in the case of loss, waste or misuse occurring as a result of a resolution of the Gram Panchayat or any of its committees the amount of loss to be recovered shall be divided equally among all the members including Pradhan and Up-pradhan, who are reported in the minutes of the Gram Panchayat or any of its Committee as having voted for or who remained neutral in respect of such resolution:

PROVIDED thirdly, that no Pradhan, Up-Pradhan, Member, Officer or servant shall be liable for any loss, waste or misuse after the expiry of four years from the occurrence of such loss, waste or misuse or after the expiry of three years from the date of his ceasing to be a Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat, which ever is later.”

16. In **Dinesh Kumar v. State of U.P.**, 2022 SCC OnLine All 861 = AIR 2023 All 26, a Division Bench of this Court has held that as per the provisions contained in Rules 256 and 257 of 1947 Rules, an inquiry ought to have been conducted by the Chief Audit Officer and now as per the orders of delegation made by the Chief Audit Officer, by the District Audit Officer. Therefore, the inquiry committee consisting of Chief Development Officer, Executive Engineer, Rural Engineering Service and District Panchayat Raj Officer had no jurisdiction to hold an inquiry in accordance with the provisions contained in Rules 256 and 257 of the U.P. Panchayat Raj Rules, 1947.

17. In **Ram Vilas versus Commissioner, Devi Patan Mandal, Gonda and others**: 2022 (1) ADJ 1, this Court held that: -

*“13. Chapter-XIII was added in the Rules vide Notification dated May 22, 1969 published in Gazette on May 31, 1969. Rule 256 of the Rules provides different authorities for taking action in terms of Section 27 of the Act. A perusal of Rules 256 to 260 of Chapter XIII of the Rules show that complete procedure has been provided for fixation of the surcharge to be recovered from different officers in Gram Panchayat on account of loss, waste or misuse of any money/property belonging to the Gaon Sabha which is on account of a direct consequence of negligence or misconduct of the person concerned. **Chief Audit Officer, Cooperative Society and Panchayats is to consider the same and after examination of the explanation, if any, received from persons concerned, submit the papers along with recommendation to the District Magistrate of the District in which the Gaon Sabha is situated, in case of Pradhan, Up-Pradhan and Member.** The report along with recommendation has to be sent by Chief Audit Officer to the District Panchayat Raj Officer of the District in which Gaon Sabha is situated, in case of Officers and servants. The District Magistrate or the District Panchayat Raj Officer, as the case may be, is to finally fix the amount, which is recoverable from the person concerned.*

14. Rule 258 provides the appellate authority, in terms of Section 27 (3) of the Act. An order passed by the District Magistrate is appealable to the Commissioner of the Division, whereas an order passed by District Panchayat Raj Officer is appealable to the District Magistrate.

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16. The District Magistrate is the competent authority for fixation of amount of surcharge recoverable from Pradhan, Up-Pradhan and Member and the District Panchayat Raj Officer is competent authority for fixing the amount of surcharge in case of officers and servants.”

18. In the present case, the Chief Audit Officer, Cooperative Society and Panchayats has not made any consideration and he has not called for any explanation from the petitioner. Therefore, even as per the law laid down in **Ram Vilas** (Supra), reliance upon which has been placed by the learned Standing Counsel, the impugned order has been passed without jurisdiction.
19. The learned Standing Counsel has submitted that in **Dinesh Kumar** (Supra), it is recorded that the powers conferred by Rule 256 upon the

Chief Audit Officer have been delegated upon the District Audit Officer. Be that as it may, undisputedly, the District Audit Officer has also not passed any order in this case. Therefore, in spite of delegation of power by the Chief Audit Officer to the District Audit Officer, the order impugned remains without jurisdiction.

20. So far as the submission of the learned Standing Counsel that the order has been passed in accordance with the provisions of a Government Order dated 22.12.2004, which prescribes the procedure for holding an inquiry in respect of any illegality committed by a Pradhan of a Samagra Gram, suffice it to say that Section 2 (p) of the U.P. Panchayat Raj Act, 1947 defines the word 'prescribed' as prescribed by the Act or Rules made thereunder. The procedure has been prescribed by Rules 256 and 257 of the Panchayat Raj Rules. The procedure prescribed by the Rules cannot be superceded by the provisions of any Government Order for two reasons – Firstly, Section 2 (p) of the U.P. Panchayat Raj Act, 1947 does not include the procedure prescribed by any Government Order and Secondly, in the hierarchy of laws, the Government Orders stand much below the Rules and the provisions contained in a Government Order cannot override the provisions contained in any Rule.
21. Further, as the petitioner was not supplied copies of the material relied against him in spite of his demand and there is nothing on record to indicate that even a copy of the enquiry report was provided to him, it is established that the principles of natural justice have been violated in the present case by denial of adequate opportunity of hearing to the petitioner, which vitiates the impugned orders.
22. Regarding the preliminary objection raised by the learned Standing Counsel against maintainability of the Writ Petition on the ground of availability of alternative remedy, it would be relevant to refer to the judgment of the Hon'ble Supreme Court in **Whirlpool Corpn. v. Registrar of Trade Marks**: (1998) 8 SCC 1, wherein the well established principles regarding the effect of existence of alternative

remedy on maintainability of a Writ Petition were reiterated in the following words: -

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

23. Although normally this Court refrains from exercising its discretionary writ jurisdiction when an alternative remedy is available to the petitioner but in the present case the impugned order has been passed without jurisdiction and in violation of the principles of natural justice and in these circumstances, this Court would not be justified in declining to exercise its discretionary Writ jurisdiction, more particularly, when the petition was filed in the year 2006 and it has remained pending for about 18 years.
24. Having considered the aforesaid facts and circumstances of the case and the submissions made by the learned counsel for the parties, this Court is of the considered view that when Section 27 of the U.P. Panchayat Raj Act, 1947 provides for imposition of surcharge and for fixation of the amount of surcharge according to the procedure prescribed, surcharge can only be fixed in accordance with the

procedure prescribed and not otherwise. It is well settled law that where the law prescribes a procedure for doing a thing, the thing has to be done in that manner alone and other modes of doing the thing are necessarily forbidden.

25. Rule 256 of the Rules of 1947 provides that the Chief Audit Officer, Cooperative Societies and Panchayats will be the competent authority for making an inquiry, if he considers that there has been a loss, vested or misuse of any money or other property belonging to a Gram Sabha as a direct consequence of the negligence or misconduct of a Pradhan etc., he would call for an explanation from the Pradhan through the District Magistrate. In the present case, the Chief Audit Officer has not recorded any prima facie satisfaction that a loss has been occasioned because of a direct consequence of the negligence or misconduct of the petitioner while he was a Pradhan. Therefore, the entire proceedings have been initiated by an authority, which had no jurisdiction as per the provisions contained in the U.P. Panchayat Raj Rules.
26. The District Magistrate has not referred to the contentions of the petitioner made in his application that he did not have any record and, therefore, he was unable to submit his reply and that the petitioner had demanded copies of the relevant documents to enable him to submit his explanation.
27. The District Magistrate has blamed the petitioner for not mentioning any date on his application. Although the application submitted by the petitioner to the District Magistrate, Lucknow does not bear any date, it bears endorsements of acknowledgment of the application showing that the application has been served on 26.11.2005. It is interesting to observe that the enquiry report, which has been relied upon by the District Magistrate for penalizing the petitioner, itself does not bear any date, but the District Magistrate has not criticized the officers constituting the Enquiry Team for non-mention of the date of report. This difference in approach towards the enquiry officers and the petitioner shows that the District Magistrate has acted with an

apparent prejudice against the petitioner and his approach while passing the impugned order was not just and unbiased.

28. The District Magistrate has held the petitioner guilty merely because the petitioner failed to give a satisfactory explanation of the allegations against him, without even referring to the material to hold the petitioner guilty. It is settled law that an authority proposing to take an adverse action against any person has to record a satisfaction regarding his guilt in accordance with the procedure prescribed law and the person cannot be penalized merely for the reason that he failed to defend himself.
29. Accordingly, the writ petition is allowed. Order dated 06.12.2005 passed by the District Magistrate, Lucknow ordering recovery of Rs.2,55,106/- from the petitioner under Section 27 (2) of the U.P. Panchayat Raj Act is **quashed**. The parties shall bear their own costs of litigation.
30. The authorities shall be at liberty to initiate fresh proceedings against the petitioner in accordance with law.

(Subhash Vidyarthi J.)

Order Date: 12.09.2024

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