

## IN THE HIGH COURT OF JUDICATURE AT PATNA

### Civil Writ Jurisdiction Case No.10912 of 2016

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Nazia Bagum w/o Md. Ali, resident of Mohalla - Zakki Shaheed, P.O. and P.S. Sasaram, District - Rohtas.

.... .... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Govt. of Bihar, Patna.
2. The Principal Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
3. The Principal Secretary- General Administration, Government of Bihar, Patna.
4. The District Magistrate, Rohtas at Sasaram, District - Rohtas at Sasaram.
5. The Sub Divisional Officer, Sasaram.
6. The District Account Officer, Rohtas at Sasaram.
7. The Executive Officer, Nagar Parishad, Sasaram, District - Rohtas at Sasaram.
8. Najma Begum w/o Md. Haffeez resident of Chief Councillor Nagar Parishad, Sasaram, resident of mohalla-Chota Sheikhpura, Ward No. 17, P.O. Sasaram, P.S. Sasaram town, District – Rohtas at Sasaram.
9. Dasrath Prasad s/o Late Jagdeo Ram, Ward Councillor of Ward no. 14, resident of mohalla - Kabirganj, P.O. Sasaram, P.S. Sasaram town, District - Rohtas at Sasaram.
10. Atendra Kumar Singh son of Late Sri Baban Singh, Ward Councillor of Ward no. 34, resident of Mohalla - Kabirganj, P.O. and P.S. Sasaram town, District - Rohtas at Sasaram.

.... .... Respondent/s

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#### Appearance :

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| For the Petitioner/s           | : | Mr. V. K. Kanth, Sr. Advocate.<br>Mr. Mukul Sinha, Advocate<br>Mr. Sanjay Kumar 'Mannu', Advocate<br>Ms. Anjana, Advocate. |
| For the Respondent/s           | : | Mr. S. B. K. Manglam, Advocate<br>Mr. Ravi Ranjan, Advocate.<br>Mr. Pratyush, Advocate.                                    |
| For the Sasaram Nagar Parishad | : | Mr. Vijay Shankar Upadhyay, Advocate.                                                                                      |
| For the State                  | : | Mr. Prabhakar Jha, G.P.-27<br>Mr. Mukund Mohan Jha, AC to GP-27                                                            |

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**CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH**

ORAL JUDGMENT

**Date: 23-01-2017**

Heard learned counsel for the parties.

The challenge in the present writ application is to  
the order dated 26.05.2016 contained in Memo No. 3331 passed by



the Principal Secretary, Urban Development and Housing Department, Government of Bihar, Patna by which the petitioner has been removed from the post of Chief Councillor, Sasaram Nagar Parishad in exercise of power under Section 25(5) of the Bihar Municipal Act, 2007 (hereinafter referred to as the 'Act').

The petitioner was the duly elected Chairman of the State Nagar Parishad and on the basis of complaint made before the District Magistrate, Sasaram, by the respondent no. 10 dated 30.08.2014 alleging various irregularities, an Enquiry Committee was set up comprising the Sub Divisional Officer, Sasaram and the District Provident Fund Officer, Rohtas, Sasaram, which submitted a report dated 17.10.2014. The District Magistrate forwarded the said report to the respondent no. 2 under Letter No. 452 dated 06.02.2015 for necessary action. The entire Empowered Standing Committee was noticed and subsequent to the reply submitted by them, personal hearing was also given on three occasions. Thereafter, there was a change of officer and the successor has passed the impugned order removing the petitioner from the post of Chairman of the Nagar Parishad, under Section 25(5) of the Act.

Learned counsel for the petitioner submitted that the procedure adopted for such extreme action by the respondents is not in accordance with law as there has been violation of the principles



of natural justice as also the law settled in this regard. He submitted that the petitioner has majority and because of there being frustration in some of the Councillors, including the respondent no. 10, when a 'No Confidence Motion' against her could not succeed, a complaint has been initiated through the District Magistrate. He submitted that even during the investigation, the petitioner was not party to the same and was also not required to take part in the enquiry for which Section 25(5) of the Act contemplates that the Government has to form an opinion with regard to there being sufficient ground to remove the Chief Councillor. He submitted that the opening sentence of the said Section itself stipulates that it is without prejudice to the provisions under the Act. He drew the attention of this Court to the State Government's power to make inspection or examination and report, under Section 66 of the Act and, thus, the procedure adopted in the present case is a nullity. He submitted that the State Government in order to form its opinion, may depute any of its officers to inspect or examine any department, office, service, work or property of the Municipality and to report thereon, but such officer shall not be below the rank of a Deputy Secretary to the State Government as the present Nagar Panchayat is a Municipal Council of Class 'B'. Learned counsel submitted that even the report submitted before the District Magistrate is based



only on surmises and conjectures and has not taken into note either the legal position or the practical aspect. Learned counsel submitted that the petitioner has taken a categorical stand in paragraphs no. 15 and 16 of the writ petition that the then incumbent respondent no. 2 had heard the matter on 10.11.2015 and 20.11.2015 and after his transfer in early April, 2016, without affording any opportunity of hearing to the petitioner, the impugned order has been passed on 26.05.2016, by his successor, who is a different person. He submitted that this is a grave infraction of the principles of natural justice, as the person who has passed the order has not heard the petitioner, though his predecessor in office had done so on two occasions. It was submitted that the mechanical way of passing the order would be reflected from the fact that at various places there is reference to there being hearing in the matter, more specifically at paragraphs no. 7 and 12(vii), which is contrary to the records as no such hearing was ever given to the petitioner by the person who has passed the impugned order. It was submitted that once this is an admitted position, the order impugned cannot be sustained in the eyes of law. Learned counsel further submitted that the Hon'ble Supreme Court in the decision rendered in the case of **Ravi Yashwant Bhoir v. Collector** reported as (2012) 4 SCC 407, has held that there is to be a cogent and detailed discussion with regard



to every charge and then only an order of such extreme consequences of removal from the post can be passed. It was submitted that in the present case, the impugned order is weaker as compared to the impugned order in the case before the Hon'ble Supreme Court as although facts have been discussed, but neither is there any consideration nor the consideration is logical and cogent and most glaringly, the discussion is very short and limited. By way of example, learned counsel draws the attentions of the Court to the charge of procuring of Laptop for Councillors as also the finalization of the bid for establishment of mast light etc. for beautification of the town, where, in terms of the records and the law, no illegality can be shown and still the impugned order has been passed where only on the basis of imaginary misconduct, the petitioner has been penalized. Though learned counsel for the petitioner has also taken the Court to various factual aspects, the Court does not consider it necessary to go into the same as it does not deem it appropriate to give any finding, either way, on facts.

Learned counsel appearing for the Nagar Parishad takes a categorical stand that the order impugned is correct. However, he has neither assisted the Court nor submitted anything on merits to justify the position taken by him.

Learned counsel for the respondents no. 8, 9 and 10



submitted that the order impugned has been passed in accordance with law after following the due procedure. He submitted that the charges are grave and relate to public money which *prima facie*, appears to have been defalcated, for which Vigilance P.S. Case No. 93 of 2016 dated 20.09.2016 has been instituted. He submitted that the petitioner and the entire Empowered Standing Committee have flouted the Rules with regard to purchase and also of awarding tender for the beautification work, without complying with the legal requirements. Though, learned counsel has taken the Court through such charge and the reply thereto on the facts and has tried to support the impugned order, but because of there being no admitted position relating to such facts, the Court is not going into such aspect. Learned counsel submitted that Section 25(5) contemplates that a reasonable opportunity has to be given before passing an order and in the present case such opportunity was given and the petitioner has in fact, submitted his explanation also. Learned counsel submitted that the requirements of the principles of natural justice do not *ipso facto* require of giving of a personal hearing and where the facts itself disclose the wrong done on the part of any person, as a mere formality, the matter is not required to be remanded afresh. For such proposition learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of



**Aligarh Muslim University v. Mansoor Ali Khan** reported as **(2000) 7 SCC 529** as well as in the case of **Dharampal, Satyapal Ltd. v. CCE** reported as **(2015) 8 SCC 519**.

Learned counsel for the State when called upon to reply to the specific stand taken by the petitioner in the writ petition of the matter being heard by the previous incumbent on the post of respondent no. 2 and thereafter, the officer who has ultimately passed the order not having heard the matter, such fact is not disputed. On a further query from the State counsel as to whether the same is justified in the eyes of law, the answer is in the negative. Though, he has tried to support the order on facts, but the Court is not going into the same in view of the order which is proposed to be passed without getting into any factual finding as the facts are contested and there are different versions to the same, from different parties.

Having considered the rival contentions, this Court is unable to uphold the order impugned. The said order though, at first glance, seems to have dealt with the various factual aspects, but this Court is of the opinion that the consideration has neither been objective nor the entire issues have been considered. The main reason, according to the Court for such a situation is that the petitioner was not given a personal hearing, which had been given to



her twice by the predecessor in the office of the respondent no. 2. Had such opportunity been given, many things could have been explained, and which have been argued before this Court, and in which the Court finds substance, but is not recording the same as it may prejudice the case of either side, which the Court does not want to do. Besides the same, the indication of there being no proper application of mind is writ large from the fact that on more than one occasion, it has been written in the order impugned, the matter was heard, but on the contrary, the admitted position is that the same is incorrect. The Court is equally of the firm opinion that in a case like the present, the requirement of personal hearing is not just a mere formality, but was required, moreso, when the allegations were of a nature which had also to be explained and mere stating of facts, either way, were not sufficient for arriving at an objective conclusion based on such allegations. The Court is equally of the opinion that the judgment relied upon by learned counsel for the respondents no. 8 to 10, in the case of **Dharampal, Satyapal Ltd.** (supra) as well as **Aligarh Muslim University** (supra) also lays down the law that the principles of natural justice cannot be put in a straight jacket and may have to be decided on the facts and circumstances of the case. In the present case, the Court has no hesitation to record that the petitioner was required to be given



personal hearing in view of the allegations made and the factual aspects involved for arriving at a conclusion in deciding the issue. The Court would also like to observe that even though the basis for issuing notice to the petitioner being the report forwarded by the District Magistrate may technically not be vitiated in law, but then, once a proceeding is initiated, before the Government can form an opinion, it has to get an enquiry done in accordance with Section 25(5) of the Act, the requirement of the other provisions of the Act, which in the present case would be Section 66 of the Act relating to the power of the State Government to depute officers to make inspection or examination, the requirement was that a full fledged enquiry with proper notice to the petitioner, by a person not below the rank of a Deputy Secretary to the State Government was required, and based upon such report, the matter was required to be heard by the Government and a decision taken. In this regard, the Court is tempted to quote from the decision of the Hon'ble Supreme court in the case of **Ravi Yashwant Bhoir** (supra) in which it has been held as under:

*“19. Further, the expression “misconduct” has to be construed and understood in reference to the subject-matter and context wherein the term occurs taking into consideration the scope and object of the statute which is being construed. Misconduct is to be measured in the terms of the nature of misconduct and it should be viewed with the consequences of misconduct as to whether it has been*



*detrimental to the public interest.*

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*34. In a democratic institution, like ours, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law or he is removed by the procedure established under law. The proceedings for removal must satisfy the requirement of natural justice and the decision must show that the authority has applied its mind to the allegations made and the explanation furnished by the elected office-bearer sought to be removed.*

*35. The elected official is accountable to its electorate because he is being elected by a large number of voters. His removal has serious repercussions as he is removed from the post and declared disqualified to contest the elections for a further stipulated period, but it also takes away the right of the people of his constituency to be represented by him. Undoubtedly, the right to hold such a post is statutory and no person can claim any absolute or vested right to the post, but he cannot be removed without strictly adhering to the provisions provided by the legislature for his removal (Vide: Jyoti Basu v. Debi Ghosal, Mohan Lal Tripathi v. District Magistrate, Rae Bareilly and Ram Beti v. District Panchayat Raj Adhikari).*

*36. In view of the above, the law on the issue stands crystallized to the effect that an elected member can be removed in exceptional circumstances giving strict adherence to the statutory provisions and holding the enquiry, meeting the requirement of principles of natural justice and giving an incumbent an opportunity to defend himself, for the reason that removal of an elected person casts stigma upon him and takes away his valuable statutory right. Not only the elected office-*



*bearer but his constituency/electoral college is also deprived of representation by the person of their choice.*

*37. A duly elected person is entitled to hold office for the term for which he has been elected and he can be removed only on a proved misconduct or any other procedure established under law like “No Confidence Motion” etc. The elected official is accountable to its electorate as he has been elected by a large number of voters and it would have serious repercussions when he is removed from the office and further declared disqualified to contest the election for a further stipulated period.*

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*56. The explanation furnished by the appellant for not holding the meeting and acceptance of tender by the Council itself and not by the appellant, has not been considered at all. No reasoning has been given by the statutory authority for reaching the conclusions. We fail to understand as to on what basis such a cryptic order imposing such a severe punishment can be sustained in the eye of law.*

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*68. To conclude, we are of the considered opinion and that too after appreciation of the entire evidence on record that the first charge proved against the appellant for not calling the meeting of Council, did not warrant the order of removal and the explanation furnished by the appellant could have been accepted. Other charges could not be proved against the appellant in view of the fact that the tenders at a higher rate were accepted by the Council itself and the appellant could not be held exclusively reasonable for it”.*



For the reasons aforesaid, the writ petition succeeds.

The impugned order contained in Memo No. 3331 dated 26.05.2016 passed by the respondent no. 2 is set aside. The Court has been informed that during the interregnum period, the respondent no. 8 has been elected to the post of Chairman. Since the matter was pending in this Court and there was no fault or laches on the part of the petitioner and also in view of the settled principle of *lis pendens*, all subsequent events/actions, pursuant to setting aside of the order impugned, have but necessarily to be set aside and it is ordered accordingly.

At this juncture, learned counsel for the respondents no. 8 to 10 submitted that if the Court has found the impugned order to be unsustainable on the ground of violation of principles of natural justice, the petitioner may not be put back into the office as gross irregularities have been alleged against her for which Vigilance Case is also going on and submitted that even the respondent no. 8, who has been elected in her place may also not perform such duty till the time the matter is decided by the said council. He has relied upon the judgment passed by this Court in the case of **Janak Sah** in **C.W.J.C. No. 7781 of 2016** dated 01.12.2016.

In the present facts and circumstances of the case, in



the opinion of the Court, Section 25(5) of the Act being relevant is quoted hereinbelow:-

*“25(5) Without prejudice to the provisions under this Act, if, in opinion of the Government the Chief Councillor/Deputy Chief Councillor absents himself without sufficient cause for more than three consecutive meetings or sittings or willfully omits or refuses to perform his duties and functions under this Act, or is found to be guilty of misconduct in the discharge of his duties or becomes physically or mentally incapacitated for performing his duties or is absconding being an accused in a criminal case for more than six months, the Government may, after giving the Chief Councillor/Deputy Chief Councillor a reasonable opportunity for explanation, by order, remove such Chief Councillor from office.”*

The said provision stipulates that without prejudice to the provisions under the Act if, in the opinion of the Government, meaning thereby that prior to even giving the Chief Councillor an opportunity for explanation, the Government has to form an opinion, and this opinion, as has been discussed earlier in this order, can be formed only upon the report of the *Lok Prahari* appointed under Section 45 or in the alternative by an enquiry made under Section 66 of the Act. Once, before the Government, there is material which can be relied upon, and which is in accordance with law i.e., the report either of the *Lok Prahari* or from an officer of the rank as contemplated under Section 66, the Government can form an



opinion. Once an opinion is formed that the Chief Councillor has absented without sufficient cause for more than three consecutive meetings or sittings or willfully omits or refuses to perform his duties and functions under the Act, or is found to be guilty of misconduct in the discharge of his duties or becomes physically or mentally incapacitated for performing his duties or is absconding, being an accused in a criminal case for more than six months, reasonable opportunity for explanation has to be given and then an order to remove the person from the post can be passed. In the present case, since the Government, without forming an opinion in accordance with the requirements of the Act, has proceeded straight away to consider the matter of removal, the same, in the considered opinion of the Court, is not proper. Moreover, the allegations made and grounds taken basically relate to misconduct in the discharge of duties. In such conditions also the very language of the Section contemplates that the person has to be 'found guilty' of misconduct, and it does not contemplate a position where only on 'charges of misconduct', such proceeding can be initiated.

Thus, upon considering the position in law, the Court does not deem it an appropriate case for remanding the matter. The action taken in the impugned order having been set aside, the natural consequences shall follow including the petitioner being



restored to the post of Chairman, Nagar Parishad, Sasaram as well as removal of the respondent no. 8 from the said post.

However, in the present order, the discussions made are only for the purpose of deciding the present case purely from a legal aspect. This shall not preclude the State Government in taking action in accordance with law in future.

The writ petition stands allowed in the aforementioned terms.

**(Ahsanuddin Amanullah, J)**

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