

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No.2440 of 2017

(Arising out of order dated 2-8-2017 in Appeal No.1153/2017/18 of the learned Special Secretary, Government of Chhattisgarh, Urban Administration and Development Department)

Santosh Namdeo, S/o Late Shri Khorbahra Namdeo, aged about 55 years, R/o Sheetla Ward No.19, Kawardha, District Kabirdham (C.G.)

---- Petitioner

Versus

1. State of Chhattisgarh, through the Special Secretary, Department of Urban Administration and Development, Mahanadi Bhawan, Mantralaya, Naya Raipur (C.G.)
2. Collector, Kabirdham, Collectorate, District Kabirdham (C.G.)
3. Shri Ram Kumar Thakur, S/o Late Shri Balkrishna Thakur, R/o Bajrang Chowk, Kawardha, District Kabirdham (C.G.)

---- Respondents

For Petitioner:	Mr. Amrito Das and Mr. Abhyuday Singh, Advocates.
For Respondents No.1 and 2 / State: -	Mr. Dhiraj Kumar Wankhede, Govt. Advocate.
For Respondent No.3:	Mr. P.P.Sahu and Mr. Vasant Zokarkar, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

25/10/2017

1. The petitioner herein was elected as Councillor from Ward No.19 in Kawardha Municipal Council on 4-1-2015. In an auction proceeding held for sale of cow & calf by the Municipal Council, it was alleged that the petitioner participated and purchased one cow & one calf leading to filing of complaint by respondent No.3 to the Collector under Section 36 read with Section 41 of the Chhattisgarh

Municipalities Act, 1961 (for short, 'the Act of 1961') for removing the petitioner from the post of Councillor. The said complaint was taken cognizance of by the Collector, Kabirdham and by order dated 7-2-2017, the petitioner was removed from the post of Councillor under Section 35 read with Section 38 (2) of the Act of 1961. Feeling aggrieved against that order, appeal was preferred under Section 41 (4) of the Act of 1961 and the appeal was dismissed by the State Government in first round which was set aside by this Court by order dated 2-5-2017 and the matter was remitted back for consideration afresh and now, after consideration, again the appeal has suffered the same fate leading to filing of this writ petition under Article 226/227 of the Constitution of India challenging the order passed by the appellate authority upholding the order of the Collector removing the petitioner from the post of Councillor.

2. The writ petition is primarily rested on the ground that the petitioner has never participated in the auction proceeding and a different person participated in the auction which is evident from the auction proceeding and under a conspiracy, the petitioner is sought to be maligned only for political mileage and advantage and the allegation of alleged participation in auction purchase was, therefore, not a disqualification which warranted removal of an elected Councillor on the concocted trivial allegation of participation in auction purchase of a cow and a calf. Therefore, the order of the Collector removing the petitioner from the post of Councillor and further order of the State Government affirming the order of the

Collector deserve to be quashed.

3. Return has been filed by the State/respondents No.1 and 2 opposing the writ petition and supporting the order passed by the Collector and the order of the State Government dismissing the appeal of the petitioner.
4. Respondent No.3 / complainant has also filed return supporting the action taken by the Collector and the order of the State Government dismissing the appeal.
5. Mr. Amrito Das, learned counsel appearing for the petitioner, would submit that the petitioner has neither participated in the auction proceeding nor purchase cow & calf, his father's name is Khorbahra Namdeo, whereas the person who has participated in the auction proceeding is Santosh Namdeo, son of Shri Ramsharan. He would further submit that pre-condition for attracting Section 35 (i) read with Section 110 of the Act of 1961 is that there must be a contract with the Municipal Council and in absence of any such contract, Section 35 (i) is not at all attracted and, therefore, the question of any disqualification does not arise. He would also submit that the alleged participation in the auction proceeding would not become a ground for removing the elected Councillor under Section 41 of the Act of 1961 and placed reliance upon the decisions of the Supreme Court in the matters of **Tarlochan Dev Sharma v. State of Punjab and others**¹ and **Sharda Kailash Mittal v. State of Madhya Pradesh and others**²,

1 (2001) 6 SCC 260

2 (2010) 2 SCC 319

and finally, he would submit that the impugned order deserves to be set aside on this ground.

6. Mr. Dhiraj Kumar Wankhede, learned State counsel, while supporting the impugned order passed by the Collector duly upheld by the State Government, would submit that Section 110 of the Act of 1961 is not attracted and it is no one else except the petitioner who has participated in the auction proceeding and, therefore, he suffered disqualification under Section 38 (1) (e) of the Act of 1961 which has been rightly taken cognizance of by the Collector and rightly held the petitioner to be disqualified for continuing on the post of Councillor and as such, the petitioner has rightly been removed under Section 41 (1) of the Act of 1961 by the Collector, as such, the writ petition deserves to be dismissed.
7. Mr. P.P. Sahu, learned counsel appearing for respondent No.3, would also argue in line with the stand taken by Mr. Wankhede, learned State counsel, while opposing the submissions made by Mr. Das.
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also gone through the record minutely and critically as well.
9. In order to decide the plea raised at the Bar, it would be appropriate to notice Section 35 (i) of the Act of 1961 which states as under: -

“35. Disqualification of candidates.—No person shall be eligible for election or as a President or election or nomination as a Councillor if he—

(a) to (hhh) *** *** ***

(i) has directly or indirectly any share or interest in any contract with, by or on behalf of the Council, while owning such share or interest; or”

10. A focused glance of Section 35 (i) of the Act of 1961 would show that a person shall not be eligible for election as a Councillor if he has directly or indirectly any share or interest in any contract with, by or on behalf of the Council, while owning such share or interest. The word “Council” has been defined in Section 3 (8) of the Act of 1961 which means Municipal Council or Nagar Panchayat constituted by or under this Act and under Section 18, Municipal Council is a body corporate by the name of the Municipal Council or Nagar Panchayat, as the case may be, and shall have perpetual succession and a common seal, with power to acquire and hold property, both movable and immovable and subject to the provisions of this Act or any rules made thereunder, to transfer any property held by it and to contract and to do all other things necessary for the purposes of this Act and may sue and be sued in its corporate name.

11. The word “contract” has not been defined in the Act of 1961, but the manner of entering into contract by and on behalf of the Council is provided in Section 110 of the Act of 1961, which states as under: -

“110. Contracts by or on behalf of the Council.—
The contracts by or on behalf of the Council shall be expressed to be made by the Chief Municipal Officer in accordance with the rules made in this behalf.”

12. The aforesaid provision clearly says that the contracts by or on

behalf of the Council shall be expressed to be made by the Chief Municipal Officer in accordance with the rules made in this behalf. Thus, in order to enter into a contract, a formal agreement in writing has to be entered into between the Council and the other party.

13. In the matter of **Shajuddin s/o Samsuddin and others v. Nagar Palika Parishad, Sheopurkalan and another**³, the M.P. High Court has held that contract by Council must be in writing and none except Council is competent to enter into contract. It was observed as under: -

“10. According to the provisions of Section 110 of the Madhya Pradesh Municipalities Act 1961, only the Municipal Council is competent to enter into a contract and that too in writing. Nagar Palika is a public body and none except the Council is competent to enter into a contract. It has not been pleaded by the applicants as to who was the person who permitted them to occupy the vacant newly constructed premises. The Act also provides that such premises are to be allotted by auction. Clearly, be that as it may, the Act does not contemplate any oral contract to be entered into by Nagar Palika.”

14. The principle of law laid down in **Shajuddin** (supra) has been followed by the M.P. High Court in the matter of **Hari Ram v. Nagar Palika Prashashak**⁴ and it has been held that there must be a written and enforceable contract between the parties in light of Section 110 of the Act of 1961. Again this principle has been followed by the M.P. High Court in the matter of **Raj Kumar s/o Moolchand Jain and another v. Radhey Shyam s/o Chintaram Lohia and another**⁵. Thus, the contract has to be in writing and must be entered into by or on behalf of the Municipal Council which

3 1987 M.P.L.J. 470

4 2001(4) M.P.H.T. 269

5 2006(4) M.P.L.J. 387

has to be expressed to be made by the Chief Municipal Officer in accordance with the rules.

15. This brings me to Section 38 (1) (e) of the Act of 1961 which states as under: -

“38. Effect of subsequent disabilities.—(1) If any Councillor or President—

(a) to (d) *** *** ***

(e) acts as Councillor or President in any matter—

(i) in which he has directly or indirectly, by himself or his partner, any share or interest, as is described in clause (i) of Section 35; or

(ii) in which he is professionally interested on behalf of a client, principal or other person; or

(f) *** *** ***

he shall, subject to the provisions of sub-section (2), cease to be a Councillor or President and his seat shall become vacant with effect from a date to be notified by the State Government except the case falling under clause (cc) and clause (r) of Section 35;”

16. By virtue of the above-stated provision, a Councillor shall suffer disqualification if he has directly or indirectly, by himself or his partner, any share or interest, as prescribed in clause (i) of Section 35 of the Act of 1961, then he will, subject to the provisions of sub-section (2), cease to be a Councillor and his seat shall become vacant with effect from a date to be notified by the State Government except the case falling under clause (cc) and clause (r) of Section 35. Thus, if a Councillor has directly or indirectly any share or interest in any contract with, by or on behalf of the Council, while owning such share or interest, then he is disqualified under Section 38 (1) (e) of the Act of 1961 and order has to be

passed by the prescribed authority under Section 38 (2) which has to be notified by the State Government.

17. The aforesaid proposition would lead me to the facts of the present case in which it has been stated that the petitioner has participated in the auction proceeding and purchased one cow and one calf from the Municipal Council and therefore he has suffered disqualification under Section 35 (i) read with Section 38 (1) (e) of the Act of 1961 and that has been held by the Collector. Neither the Collector nor the appellate authority adverted to the facts as to whether the Municipal Council has entered into contract that is to say concluded contract with the petitioner in terms of Section 110 of the Act of 1961. A contract has to be in writing and must be entered by or on behalf of the Municipal Council and unless the contract is entered into in terms of Section 110 of the Act of 1961 and in that contract, the Councillor must have directly any interest or share then only such Councillor can be said to have any interest and thus, suffer disqualification under Section 35 (i) which will disqualify him under Section 38 (1) (e). Undisputedly, no such written contract has been entered into by the Municipal Council with the petitioner and oral contract with the Municipal Council is not contemplated under the provisions of the Act of 1961. Therefore, the provisions contained in Section 35 (i) of the Act of 1961 would not be attracted and as such, the question of suffering disqualification under Section 38 (1) (e) would not arise.

18. Apart from this, the petitioner has seriously disputed the fact that

he has ever participated in the auction proceeding, as his father's name is Khorbahra and the person who has participated in the auction proceeding is also Santosh Namdeo and his father's name is Ramsharan. The petitioner has filed a certificate issued by respondent No.1 to the Collector-cum-Returning Officer in which the petitioner's name is stated to have been Santosh Namdeo, S/o Khorbahra. Accordingly, it is held that neither the Collector nor the appellate authority has reached to any conclusion that the petitioner has entered into any contract with the Municipal Council in terms of Section 110 of the Act of 1961 and, therefore, only to say that he has participated in the auction proceeding and suffered disqualification is unsustainable in law. Though the Collector has held that the petitioner has suffered disqualification under Section 35 (i) read with Section 38 (1) (e) of the Act of 1961, the Collector has also invoked Section 41 (1) (a). Section 41 (1) (a) of the Act, 1961 reads as follows: -

“41. Removal of Councillor.—(1) The Collector may, at any time remove an elected Councillor—

(a) if his continuance as a Councillor, is not, in the opinion of the Collector, desirable in the interest of the Public or of the Council; or”

19. Section 41 (1) (a) of the Act of 1961 empowers the Collector to remove a Councillor in the contingencies mentioned in the above provision. Exercise of power has serious civil consequences on the status of a Councillor and same has to be exercised objectively keeping in view the nature of power and consequences that flow on its exercise and also considering that removal of a democratically

elected office-bearer is an extreme step which must be resorted to only in grave and exceptional circumstances, as the consequences would not only affect the Council, but also the electorate of the constituency. The said power has to be exercised with due care and caution only in very strong and weighty reasons and same cannot be exercised without affording opportunity of hearing and the provisions have to be strictly construed.

20. In a decision of the Supreme Court in the matter of **Ravi Yashwant Bhoir v. District Collector, Raigad and others**⁶, Their Lordships of the Supreme Court have considered that removal of elected office-bearer from office on the basis of proved misconduct is a quasi judicial proceeding in nature and therefore the principles of natural justice are required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same and observed as under in paragraphs 30, 31 and 32: -

“30. There can also be no quarrel with the settled legal proposition that removal of a duly elected member on the basis of proved misconduct is a quasi-judicial proceeding in nature. [Vide *Indian National Congress (I) v. Institute of Social Welfare*⁷.] This view stands further fortified by the Constitution Bench judgments of this Court in *Bachhitar Singh v. State of Punjab*⁸ and *Union of India v. H.C. Goel*⁹. Therefore, the principles of natural justice are required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same. Principles of natural justice require a fair opportunity of defence to such an elected office-bearer.

31. Undoubtedly, any elected official in local self-

6 (2012) 4 SCC 407

7 (2002) 5 SCC 685 : AIR 2002 SC 2158

8 AIR 1963 SC 395

9 AIR 1964 SC 364

government has to be put on a higher pedestal as against a government servant. If a temporary government employee cannot be removed on the ground of misconduct without holding a full-fledged inquiry, it is difficult to imagine how an elected office can be removed without holding a full-fledged inquiry.

32. In service jurisprudence, minor punishment is permissible to be imposed while holding the inquiry as per the procedure prescribed for it but for removal, termination or reduction in rank, a full-fledged inquiry is required otherwise it will be violative of the provisions of [Article 311](#) of the Constitution of India. The case is to be understood in an entirely different context as compared to the government employees, for the reason, that for the removal of the elected officials, a more stringent procedure and standard of proof is required.”

21. Likewise, in paragraphs 34, 35 and 36 of the judgment rendered in

Ravi Yashwant Bhoir (supra), Their Lordships of the Supreme

Court held as under: -

“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](#)¹⁰, [Mohan Lal Tripathi v. District Magistrate, Rae](#)

10 (1982) 1 SCC 691 : AIR 1982 SC 983

*Bareilly*¹¹ and *Ram Beti v. District Panchayat Raj Adhikari*¹²).

36. In view of the above, the law on the issue stands crystallised 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 his choice.”

22. In the matter of **Sadashiv H. Patil v. Vithal D. Teke and others**¹³,

the Supreme Court in para-14 held thus:--

“14. A finding as to disqualification under the Act has the effect of unseating a person from an elected office held by him pursuant to his victory at the polls in accordance with the democratic procedure of constituting a local authority. The consequences befall not only him as an individual but also the constituency represented by him which would cease to be represented on account of his having been disqualified. Looking at the penal consequences flowing from an elected councillor being subjected to disqualification and its repercussion on the functioning of the local body as also the city or township governed by the local body the provisions have to be construed strictly. A rigorous compliance with the provisions of the Act and the Rules must be shown to have taken place while dealing with a reference under Section 7 of the Act.”

23. In **Tarlochan Dev Sharma** (supra), the Supreme Court has categorically held that a democratically elected person is entitled to continue the office for full term unless the election is set aside by a procedure known to law. Paragraphs 7 and 11 of the report read as follows: -

“7. In a democracy governed by rule of law, once elected to an office in a democratic institution, the

11 (1992) 4 SCC 80 : AIR 1993 SC 2042

12 (1998) 1 SCC 680 : AIR 1998 SC 1222

13 (2000) 8 SCC 82

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. That a returned candidate must hold and enjoy the office and discharge the duties related therewith during the term specified by the relevant enactment is a valuable statutory right not only of the returned candidate but also of the constituency or the electoral college which he represents. Removal from such an office is a serious matter. It curtails the statutory term of the holder of the office. A stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held. Therefore, a case of availability of a ground squarely falling within Section 22 of the Act must be clearly made out. A President may be removed from office by the State Government, within the meaning of Section 22, on the ground of “abuse of his powers” (of President), inter alia. This is the phrase with which we are concerned in the present case.

11. ... A singular or casual aberration or failure in exercise of power is not enough; a course of conduct or plurality of aberration or failure in exercise of power and that too involving dishonesty of intention is “abuse of powers” within the meaning of [Section 22](#) of the Act. The legislature could not have intended the occupant of an elective office, seated by popular verdict, to be shown exit for a single innocuous action or error of decision.”

24. Likewise, in **Sharda Kailash Mittal** (supra), the Supreme Court while dealing with removal of President under the Madhya Pradesh Municipalities Act, 1961 has held that removal of a democratically elected officer from office is an extreme step which must be resorted to only in grave and exceptional circumstances and not for minor irregularities. Paragraphs 24, 25 and 26 of the report read as under: -

“24. ... The President under the M.P. Municipalities Act, 1961 is a democratically elected officer, and the removal of such an officer is an extreme step which must be resorted to only in grave and exceptional circumstances.

25. ... The action of removal casts a serious stigma on the personal and public life of the office-bearer concerned and may result in his/her disqualification to hold such office for the next term. The exercise of power, therefore, has serious civil consequences on the status of an office-bearer.

26. There are no sufficient guidelines in the provisions of [Section 41-A](#) as to the manner in which the power has to be exercised, except that it requires that reasonable opportunity of hearing has to be afforded to the office-bearer proceeded against. Keeping in view the nature of the power and the consequences that flows on its exercise it has to be held that such power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for minor irregularities in discharge of duties by the holder of the elected post. The provision has to be construed in strict manner because the holder of office occupies it by election and he/she is deprived of the office by an executive order in which the electorate has no chance of participation.”

25. Going by the principles of law laid down by Their Lordships in the aforesaid provisions, it is quite vivid that the petitioner has been directed to be removed from the office of Councillor, by the Collector on the charge that he has participated in the auction proceeding and purchased a cow and a calf which is again doubtful, as there is no clear cut evidence available on record to hold that it is out and out the petitioner only who has participated in the auction proceeding and purchased cow & calf. According to the petitioner, he has not participated in the auction proceeding and there is no signature of the petitioner in any proceeding. Even otherwise, as held by the Supreme Court in **Tarlochan Dev Sharma** (supra), a singular or casual aberration or failure in exercise of power is not enough to oust an elected candidate from his office and so also in **Sharda Kailash Mittal** (supra) in which it

has been held that such a power is not to be exercised for minor irregularities in discharge of duties by the holder of the elected post and the provision has to be construed in strict manner, as the consequences are serious and ramifications are devastating. There is no specific finding recorded by the Collector that the petitioner's continuance as Councillor is not desirable in the interest of the Council or public.

26. On the basis of aforesaid discussion, I am of the considered opinion that the exercise of power by the Collector removing the petitioner from the office of Councillor of Kawardha Municipal Council on the basis of trivial charge of purchasing a cow and a calf is nothing but arbitrary and colourable exercise of power by the Collector which has been upheld by the State Government and, therefore, the orders of the Collector and the State Government deserve to be quashed.
27. As a fallout and consequence of aforesaid discussion, the order of the Collector removing the petitioner from the office of Councillor of Kawardha Municipal Council is hereby set aside and consequently, the order of the appellate authority i.e. the State Government is also set aside. The consequent proceeding initiated, if any, is also quashed.
28. The writ petition is allowed to the extent sketched herein-above leaving the parties to bear their own costs.

Sd/-
(Sanjay K. Agrawal)
Judge