

**THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**FAO No.7779 of 2015 (O&M)
Decided on : 09.01.2017**

Sukhdev Singh

... Appellant

Versus

Mukhtiar Singh and others

... Respondents

CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA

Present : Mr. J.S. Toor, Advocate
for the appellant.

Mr. Baljinder Singh, Advocate
for the respondents.

G.S. Sandhawal, J.

The appellant challenges the order dated 31.08.2015 passed by the Election Tribunal-cum-Sub-Divisional Magistrate, Fatehgarh Sahib (hereinafter referred to as 'Tribunal'), whereby petitioner's election from the post of Sarpanch of Gram Panchayat Lullon, Block Bassi Pathana, District Fatehgarh Sahib was set aside. The Tribunal held that on account of embezzlement of money, a case had been registered against the petitioner and therefore decided issue No.1 against him and similarly also held that the election petition was maintainable.

The reasoning which prevailed with the Tribunal was that a case of embezzlement of Government grant had been registered against the petitioner. An inquiry had been conducted against the petitioner and he had been found guilty for committing embezzlement in grants in Gram Panchayat, Village Nanowal, Block Bassi Pathana while serving as Panchayat Secretary by conniving with Swaran Singh Sarpanch and the

BDPO, Bassi Pathana. FIR No.159 dated 16.11.2009 had been registered against him on which he was on bail. It was accordingly noticed that a person could not be treated as guilty till the final decision given by the Court, but the petitioner by conniving with the officials had sought no objection certificate without any need for the same. The Returning Officer did not cancel the papers of the appellant. Resultantly, by placing reliance upon Section 208 (1) (i) of the Punjab Panchayati Raj Act, 1994, it was held that the appellant had not made the payment of the outstanding amounts to the Gram Panchayat and Zila Parishad and, therefore, could not be elected as a member.

Counsel for the appellant accordingly submitted that the said order is not sustainable as the case of the respondent/election petitioner was that on account of the pendency of criminal proceedings, the petitioner was thus not entitled to be elected and once it is found that the conviction had not been ordered by the criminal Court, mere pendency of the case could not be a ground to set aside the election.

Counsel for the respondent mainly tried to justify the finding recorded to submit that the appellant was a elected candidate and has embezzled the funds while serving as a Panchayat Secretary of the Gram Panchayat Nanowal in the same block and therefore, the order was well justified.

After hearing arguments of the parties and going through the record, this Court is of the opinion that the order is not sustainable. The respondent No.1 had initially approached this Court by filing **CWP**

No.15463 of 2013 seeking setting aside of the election of the appellant-Sukhdev Singh on the ground of malafide role of the Returning Officer. Vide order dated 22.07.2013 this Court had relegated Mukhtiar Singh to his remedy under the Punjab State Election Commission Act, 1994 as questions of fact were involved which could be decided on the basis of the evidence.

Thereafter, the petition was filed under Section 76 of the Punjab State Election Commission Act, 1994 to set aside the election conducted on 03.07.2013, which was of the appellant from the post of the Sarpanch. The pleas taken were that the nomination paper had been accepted and he was not eligible for contesting the election as he had embezzled the funds of the Gram Panchayat for which FIR No.159 had been lodged. A complaint had been submitted to the Deputy Commissioner on 28.06.2013 and a detailed report had been submitted based upon the inquiry conducted by the DDPO and, therefore, the appellant had been notified as disqualified for appointment as public servant due to registration of the abovesaid criminal case. It was further averred that he had not deposited the embezzled amount in the Gram Panchayat. Apart from that allegations of corrupt practices were also alleged of distributing money and liquor and making false promises for giving plots and incurring expenses more than allowed by the rules etc.

The same was contested by the appellant on the ground that there has been wrong assessment of the funds of the Gram Panchayat of village Nunowal. The Sarpanch had filed an appeal which was decided

on 13.11.2009/27.07.2010 before the Director Rural Development and Panchayats. Lakhvir Singh-Sarpanch had filed an appeal against the same, which was dismissed on 17.05.2012. The appellant had made a complaint against the BDPO with regard to the utilization of funds and it had been found that he did not make any mis-appropriation of the funds, as per the inquiry dated 28.06.2010. His gratuity has been released on 09.09.2010 and no due certificate had also been issued by the BDPO, Bassi Pathana. The FIR was falsely got lodged by implicating him in which he had no concern and, therefore, he did not embezzle the funds. The nomination had been rightly accepted and there was no ambiguity as such. No disqualification at the time of the filing of the nomination paper was found, which was correctly accepted and there was no case of embezzlement and it was wrong he had not deposited the same in Gram Panchayat, Village Nanowal. The allegations of being in occupation of the property belonging to the Gram Panchayat was denied apart from the allegations pertaining to any corrupt practices. On the basis of the said pleadings following issues were framed:-

*“1) Whether election petition of respondent No.1 is liable to be set aside on the ground mentioned in the election petition?
OPP*

2) Whether election petition is not maintainable on the ground mentioned in written reply? OPR

3) Relief.”

After discussing the evidence, the allegations and counter allegations of the parties, the Tribunal regarding issue No.1 came to finding that on account of the lodging of the FIR, a case had been

registered and, therefore, the issue was decided against the appellant.

Similarly, on issue No.2, it was held that the election petition was maintainable as such and decided the said issue in favour of respondent No.1-appellant. While deciding issue No.3, it further went on to hold that the NOC as such had been issued and and therefore, there was an amount due as as such against the petitioner due to the lodging of the FIR.

The said reasoning cannot be accepted, keeping in view the fact that the election of a candidate is liable to be declared void under Section 89 of the Punjab State Election Commission, Act 1994. The relevant portion of the Act reads as under:-

“89. Grounds for declaring election to be void:- (1) Subject to the provisions of sub-section (2), if the Election Tribunal is of the opinion:-

(a) that on the date of his election, a returned candidate was not qualified, or was disqualified to be chosen to fill the seat under the Constitution of India or under this Act; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected,--

(i) by the improper acceptance of any nomination; or

(ii) by any corrupt practice committed in the interest of the returned candidate by an agent other than his election agent; or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void; or

(iv) by any non-compliance with the provisions of the Constitution of India or of this Act or of any rules or orders made

under this Act.

the Election Tribunal shall declare the election of the returned candidate to be void.”

The disqualifications for the membership of the Gram Panchayat are provided under Section 11 of the Punjab State Election Commission Act, 1994. The disqualification found are on various grounds on account of not being a citizen of India or being of a unsound mind or an undischarged insolvent or have been found guilty of corrupt practice or guilty of any offence as provided in Section 11 (e). The said Section reads as under:-

“11. Disqualifications for membership of a Panchayat or a Municipality.-- A person shall be disqualified for being chosen as and for being a member of Panchayat or a Municipality,-

(a) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement or allegiance or adherence to a foreign State; or

(b) if he is of unsound mind and stands so declared by a competent Court; or

(c) if he is an undischarged insolvent; or

(d) if he has in proceedings for questioning the validity or regularity of an election, been found guilty of any corrupt practice; or

(e) if he has been found guilty of any offence punishable under Section 153A or section 171E or section 171F or section 376 or section 376A or section 376B or section 376C or section 376D or section 498A or section 505 of the Indian Penal Code, 1960 or any offence punishable under Chapter XIII of this Act unless a period of six years has elapsed since the date of such conviction; or

(f) if he holds an office of profit under a Panchayat or a Municipality; or

(g) if he holds an office of profit under the Government of

India or any State Government; or

(h) if he is interested in any subsisting contract made with, or any work being done for, that Panchayat or Municipality except as a share-holder (other than a Director) in an incorporated company or a member of a co-operative society; or

(i) if he is retained or employed in any professional capacity either personally or in the name of a firm in which he is a partner, or with which he is engaged in a professional capacity, in connection with any cause or proceeding in which the Panchayat or the Municipality is interested or concerned; or

(j) if he, having held any office under the State Government or any Panchayat or any Municipality or any other State level authority or any Government company or any corporate body owned or controlled by the State Government or Government of India, has been dismissed from service, unless a period of four years has elapsed since his dismissal.”

Similarly disqualifications are also provided under Section 208 of the Punjab Panchayati Raj Act, 1994 that a person who has been convicted of any offence involving moral turpitude or an offence implying of any defect of a Sarpanch is barred from being qualified for chosen until a period of 5 years has elapsed. The said Section reads as under:-

“208. Disqualification for Membership. (1) A person shall be disqualified for being chosen as and for being a member of a Panchayat if, –

(a) 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. 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) has been found guilty of any corrupt practice in any election of a Gram Panchayat, Panchayat Samiti or Zila Parishad;

(c) has been convicted of any offence involving moral turpitude or

an offence implying of any defect of a Sarpanch or Panch of Gram Panchayat or member of a Panchayat Samiti or Zila Parishad, unless a period of five years has elapsed since his conviction, or

(d) has been convicted of an election offence, or

(e) has been ordered to give security for good behavior under section 110 of the Code of Criminal Procedure, 1973 , or

(f) has been notified as disqualified for appointment as public servant except on medical grounds ; or

(g) is a whole-time salaried employee of any local authority, Statutory, Corporation or Board or a Co-operative Society, registered under the Punjab Co-operative Societies Act, 1961, or of the State Government or the Central Government ; or

(h) is registered as a Habitual Offenders (Control and Reforms) Act, 1952 or any other law for the time being in force; or

(i) has not paid the arrears of tax imposed by a Gram Panchayat, Panchayat Samiti or Zila Parishad, as the case may be; or

(j) is a tenant or lessee or contractor or share-holder in any property of the Gram Panchayat, Panchayat Samiti and Zila Parishad, or

(k) is in unauthorised occupation of property belonging to any local authority; or

(l) being a Sarpanch has cash in hand exceeding the amount, permitted under the rules made-under this Act;

(m) is member of either House of Parliament or of the Legislature of the Punjab State:

Provided that a member of either House of the Parliament or Legislature of Punjab State may be elected as a Sarpanch or member of Gram Panchayat, Panchayat Samiti or Zila Parishad if, along with his nomination paper gives undertaking to the effect that he shall resign the membership of either House of Parliament or of the Legislature of the Punjab State, as the case may be, and so resigns before taking the oath or making affirmation for taking over the office of Sarpanch of a Gram Panchayat or a member of any Gram Panchayat, the Panchayat Samiti and Zila Parishad;

(n) has been convicted of an offence under the protection of the Civil Rights Act, 1955 within a period of five years immediately

*preceding the last date of the filing of the nomination papers; or
(o) being a Sarpanch or Panch does not attach certificate with his
nomination papers to the effect that he has handed over to the Block
Development and Panchayat Officer complete charge of the record
of the Gram Panchayat and of the cash, if any, with him.”*

The Apex Court in '**Som Lal Vs. Vijay Laxmi and others'**
2008 (5) SCR 49 has held that the disqualification which are provided
under the subsequent Election Commission Act would prevail and not the
disqualification mentioned under Section 208 of 1994 Act. The finding
thus recorded that the petitioner election is liable to be set aside on
account of disqualification under Section 208 (1) (i), therefore is not
justified, as the disqualifications had to be seen under Section 11 of the
Election Commission Act. The relevant portion of the observations read
as under:-

*“The disqualifications are only mentioned in Section 208 of the
Act 9 of 1994 and the intention of the legislature is very clear and
Section 11 of the Act of 1994 being in later point of time stating
therein what are the disqualifications, therefore, the
disqualifications mentioned in Section 11 of the Act 19 of 1994
will prevail and not the disqualifications mentioned in Section
208 of Act 9 of 1994. The disqualifications mentioned in Section
208 which are consistent with Section 11 of Act 19 of 1994 can
only survive and not other disqualifications.”*

Admittedly no finding has been recorded that the petitioner
is guilty of any offence punishable as provided under Section 11 (e) of
the subsequent Act and, therefore, in the absence of any such findings,
the election could not have been set aside.

The reasoning which was given under issue No.1 that on
account of lodging of the FIR, the election was liable to be set aside is

also without any basis. The person only having been found guilty of the offence mentioned in Section 11 (e) as such would be disqualified and even counsel for respondent No.1 could not dispute the said fact that there was no such conviction recorded against the appellant.

The Division Bench of this Court in '**Satnam Singh @ Kala Vs. State of Punjab and others'** 2003 (3) PLR 522 also held that mere pendency of an FIR could not be a ground for recording disqualification. The relevant portion of the observations read as under:-

“16. A perusal of provisions of Section 113 and Section 208 of 1994 Act, clearly indicates that mere pendency of an FIR against a member of Panchayat Samiti, cannot be made a ground for his suspension/removal, as has been done in the present case.

17. Under Section 208(1)(c) conviction for any offence involving moral turpitude or an offence implying of any defect of character is a dis-qualification to be chosen as a member and to remain as a member of the Panchayat but mere pendency of the FIR is not a dis-qualification.”

Resultantly, the findings as such on issue No.1, which was decided in favour of respondent is without any basis and is liable to be set aside. It is settled principle that the Tribunal could only exercise its jurisdiction and set aside the election on the grounds provided and merely on account of the pendency of an criminal case, the petitioner could not suffer from any disqualification as such.

The findings recorded under issue No.3, the relief clause are thus held to be without any basis as noticed, in view of the fact that the disqualification could only be done under the provisions of the Election Commission Act and not under the provisions of the earlier Act and only

those disqualifications which were consistent could survive.

In such circumstances, the findings which have been recorded by the Election Tribunal are suffering from grave illegality and not supported by appropriate reasons. The Tribunal has acted with impunity and on whims and fancies by setting aside the election of the appellant. Therefore, in view of the above the present appeal is accepted and the impugned order is, accordingly, set aside by dismissing the election petition as such.

JANUARY 09, 2017
Naveen

(G.S. SANDHAWALIA)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No