

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 05.04.2018****Pronounced on 13-04.2018****Writ Petition(C) No. 231 of 2018**

Smt. Shanti Dhruwe W/o Shri Sonaram Dhurwe Aged About 37 Years Ex. Sarpanch Gram Panchayat Belgahana Tehsil Kota, District Bilaspur CG.

---- Petitioner**Versus**

1. State of Chhattisgarh through the Secretary, Panchayat Department, Mantralaya, Naya Raipur, District : Raipur, Chhattisgarh
2. Smt. Geeta Tiwari W/o Shri Shobhnath Tiwari R/o Gram Panchayat Belgahana Tehsil Kota, District Bilaspur Chhattisgarh.
3. Shri Sachin Sahu S/o Shri Ashok Sahu R/o Gram Panchayat Belgahana Tehsil Kota, District Bilaspur, Chhattisgarh
4. Smt. Saroj Manikpuri Panch Ward No. 4 R/o Gram Panchayat Belgahana Tehsil Kota, District Bilaspur, Chhattisgarh

---- Respondents

For petitioner	: Shri Shailendra Bajpai & Shri Varun Sharma, Advs.
For State	: Shri R.K. Gupta, Deputy Advocate General.
For R- 2 to 4:	: Shri K.R. Nair and Ms. Veena Nair, Advs.

And**Writ Appeal No. 103 of 2018**

1. Smt. Geeta Tiwari W/o Late Shri Shobhnath Tiwari Aged About 50 Years R/o Phatakpara (Mohalla) Belgahana Gram Panchayat Belgahana Tahsil Kota District Bilaspur Chhattisgarh.
2. Sachin Sahu S/o Shri Ashok Sahu Aged About 40 Years R/o Hatri Chowk Belgahana Gram Panchayat Belgahana Tahsil Kota District Bilaspur, CG
3. Smt. Saroj Manikpuri W/o Shri Jewan Sao Aged About 35 Years Panch Ward No. 4, R/o Ward No. 14 Belgahana Gram Panchayat Belgahana Tahsil Kota District Bilaspur,CG

---- Appellants**Versus**

1. Smt. Shanti Dhruwe W/o Shri Sonaram Dhurwe Aged About 37 Years Ex. Sarpanch Gram Panchayat Belgahana, Tahsil Kota District Bilaspur, CG

2. State Of Chhattisgarh Through The Secretary Panchayat Department Secretariat Mahanadi Bhawan Police Station and Post Rakhi Naya Raipur District Raipur, Chhattisgarh

---- Respondents

For appellants	: Shri K.R. Nair and Ms. Veena Nair, Advocates.
For R-1	: Shri Shailendra Bajpai and Shri Varun Sharma, Adv.
For State	: Shri R.K. Gupta, Deputy Advocate General.

Hon'ble Shri Thottathil B. Radhakrishnan, Chief Justice
Hon'ble Shri Sharad Kumar Gupta, Judge

C.A.V. ORDER

Sharad Kumar Gupta, Judge

1. By this common order, Writ Petition (C) No. 231/2018 and Writ Appeal No. 103/2018 are being disposed of as the writ appeal itself has arisen out of an interim order dated 25-1-2018 passed in the Writ Petition (C) No. 231/2018.
2. In this order parties shall be referred as per their discription mentioned in the writ petition.
3. In the writ petition, challenge is levied to the order dated 2-1-2018 of the Additional Commissioner, Bilaspur Division, Bilaspur vide Annexure P-3 whereby and whereunder he set aside the order dated 21-8-2017 of Collector, Bilaspur vide Annexure P-2 and affirmed the order dated 31-5-2017 of Sub Divisional Officer (Revenue), Kota, Distt. Bilaspur vide Annexure P-1.
4. In the writ appeal, challenge is levied to the interim order dated 25-1-2018 passed by learned Single Judge of this Court in the Writ Petition (C) No. 231/2018 whereby and whereunder he stayed the order of the Additional Commissioner Bilaspur vide Annexure P-3.

5. This is admitted by respondents No. 2, 3 and 4 that :-

The petitioner is Sarpanch of Gram Panchayat, Belgahna. Santosh Kumar Birko was the Secretary of the said Gram Panchayat. Respondent No. 4 is Panch of said Gram Panchayat. Respondent No. 2 had made a complaint against the petitioner and the said Secretary before the authority concerned that they have not paid pension amount Rs. 3,150/- from January, 2016 to September, 2016 (nine months) at the rate of Rs. 350/- per month payable under Indira Gandhi National Divorce Pension Scheme. Respondent No. 4 also made a complaint that the petitioner had not signed the cheque of Rs. 9,500/- for water harvesting work done by her, Chief Executive Officer, Janpad Panchayat, Kota appointed the Taxation Officer of said Janpad Panchayat to conduct an inquiry. Said inquiring officer conducted inquiry on 4-10-2016 and submitted his inquiry report to the Chief Executive Officer, Janpad Panchayat, Kota. The inquiry report along with some other documents are filed as Annexure R-J/4 collectively. The inquiry report was forwarded to the Sub Divisional Officer (Revenue), Kota, Distt. Bilaspur. The Sub Divisional Officer (Revenue), Kota, Distt. Bilaspur registered a case against the petitioner on 26-10-2016 under Section 40 of the CG Panchayat Raj Adhiniyam, 1993 (in brevity 'Act of 1993'). Order sheets of the Sub Divisional Officer (Revenue), Kota are filed as Annexure R-J/3 collectively. The Sub Divisional Officer (Revenue), Kota

issued a show cause notice on 26-10-2016 vide Annexure R-J/2 under Section 40(1) of the Act of 1993 to the petitioner. The petitioner replied the show cause notice on 9-11-2016 vide Annexure P-15. Thereafter on demand of the petitioner, the Sub Divisional Officer (Revenue), Kota gave the inquiry report along with documents to the petitioner on 7-12-2016, thereafter the Sub Divisional Officer (Revenue), Kota, recorded the statement of the respondents No. 2 to 4 and the petitioner. The aforesaid pension amount was deposited by the petitioner on 25-10-2016 in the bank account of SBI of the petitioner. The Sub Divisional Officer (Revenue), Kota passed the aforesaid order. Being aggrieved, the petitioner preferred an appeal before the Collector, Bilaspur who passed the aforesaid order. Being aggrieved, the respondent no. 2 preferred a revision before the court of Additional Commissioner, Bilaspur who passed the aforesaid order. Being aggrieved, the petitioner preferred this writ petition.

6. This is admitted by the petitioner that being aggrieved by the aforesaid interim order passed in said writ petition, the respondent No. 2 to 4 preferred the aforesaid writ appeal.
7. In brief, petitioner's case is that there is no withdrawal of aforesaid pension amount of respondent No.2 through the withdrawal register, thus, there is no misappropriation of the aforesaid pension amount. Respondent No.2 was not present at village – Belgahna from January, 2016 to June, 2016, thus, the pension amount was not disbursed to her.

As per the resolutions of the Gram Panchayat she had kept the aforesaid pension amount. The said Gram Panchayat never passed any resolution regarding the harvesting work to be carried out by respondent No.3. There is no technical report of the harvesting work with necessary specifications. Thus, she had refused to sign the aforesaid cheque. The Sub Divisional Officer (Revenue), Kota had not supplied her the inquiry report along with documents while issuing the Show Cause Notice. The Sub Divisional Officer (Revenue), Kota had not given her proper opportunity of hearing in consonance with principle of natural justice. The Sub Divisional Officer (Revenue), Kota had passed the order Annexure P-1 after expiration of 90 days from the Show Cause Notice, thus, his entire proceeding vitiated. Because she is an elected office bearer, her removal is a serious matter and affects the entire constituency. Thus, the aforesaid order of the Commissioner, deserves to be set aside.

8. In brief, the case of respondents No. 2, 3 and 4 is that the petitioner should have deposited the undisbursed pension every month from January, 2016 onwards. The Sub Divisional Officer (Revenue), Kota had supplied the inquiry report and documents to the petitioner before examination of the witnesses of both parties. Thus, no prejudice has been caused to her. The Sub Divisional Officer (Revenue), Kota was bound to make inquiry under Section 40 of the Act of 1993 thus, there is no substance in the contention of

the petitioner that the Sub Divisional Officer (Revenue), Kota had acted as prosecutor as well as judge. The harvesting work was done under the resolution of the Panchayat, thus, there was no need of the technical evaluation report. Thus, petition may be dismissed.

9. The learned Counsel for the petitioner strenuously argued that respondent No. 2 had left village Belgahna in the month of January, 2016, thus her aforesaid pension amount was not disbursed to her. There is no entry of the withdrawal of aforesaid pension amount in the withdrawal register, thus no question arises about the misappropriation of aforesaid pension amount. She had kept the aforesaid pension amount with her in accordance with the resolutions of the Gram Panchayat. The Gram Panchayat had not passed any resolution regarding water harvesting work, which was to be done by the respondent No.4. There was no technical report with necessary specifications. The Sub Divisional Officer (Revenue), Kota had not followed the principles of natural justice. The Sub Divisional Officer (Revenue)), Kota had acted as prosecutor as well as judge. The inquiry had been completed after expiration of 90 days from the date of issuance of show cause notice. Thus, the impugned order Annexure P-3 may be set aside.
10. Shri K.R. Nair, Counsel for the respondents No. 2 to 4 argued that the petitioner was duty bound to deposit the undisbursed pension every month. The petitioner failed to show as to what prejudice is caused to her due to non-

supply of the inquiry report along with the documents while issuing show cause notice. Prescribed period of 90 days is directory and not mandatory. The harvesting work was carried out on the strength of the resolution of the Gram Panchayat, there was no need of technical report. Thus, the petition may be dismissed.

11. First and foremost considerable point for determination before this Court is as to whether the Sub Divisional Officer (Revenue), Kota had not followed the principle of natural justice, thus, his inquiry vitiated.
12. Shri Shailendra Bajpai, Counsel for the petitioner placed reliance on a decision of Single Bench of High Court of Madhya Pradesh in the matter of **Manita Jaiwar -v- State of MP** [(2009) 3 MPLJ 370], para 14 of which is quoted below :-

“14. In the present case there was not total violation of the principles of natural justice as a show cause notice was given and the reply of the petitioner obtained. But keeping in view the facts of the case certain facets of natural justice as stated above were not complied with resulting in prejudice to the petitioner. He was not permitted to adduce his own evidence to rebut the material collected against him. The charges were such which could be proved or disproved by evidence in the inquiry. One of the main charges was the distribution of pattas to those who were not landless and a conclusion on this point could be reached after recording evidence and after seeing the list supplied by the Tehsildar or the B.D.O. The prescribed authority in the impugned order has

not dealt with this aspect. Similarly the charges regarding negligence in the maintenance of garden, supply of water, drainage and information regarding the meeting of the Gram Sabha could be decided on the basis of evidence and not merely relying upon a preliminary inquiry report. The basic fault in the impugned order is that an inquiry held by the B.D.O, behind the back of the petitioner has been held to be a valid 'inquiry' under section 40 of the Act and he has been packed up on the basis of that inquiry without even supplying a copy of the same to the petitioner, and without affording him an opportunity to lead his own evidence even when he repeatedly asked for the same. This was denial of fair hearing resulting in serious prejudice to the petitioner. The action of removal and disqualification has to be struck down as there has been a failure of justice. The guilty must be punished but the finding of guilt has to be arrived after fair hearing which was denied in this case. In *Ballabhdas v. State of M.P.*, 1998 (2) J.L.J 303, it has been observed by this Court that a full-fledged enquiry is provided under section 40 of the Act. It contemplates 'due enquiry'. As observed in *Delhi Transport Corporation v. DTC Mazdoor Congress*, [1991 Supp (1) SCC 600] right to fair treatment is an essential inbuilt of natural justice which is an integral part of the guarantee of equality assured by Article 14 of the Constitution of India. The concept of reasonableness and non-arbitrariness pervades the entire constitutional spectrum and is a golden thread which runs through the whole fabric of the Constitution."

13. Shri Shailendra Bajpai, Counsel for the petitioner also placed reliance on a decision of Single Bench of this Court in the matter of **Smt. Kamti Bai -v- State of Chhattisgarh**

in WPC No. 2675/2017 decided on 11-12-2017 para 15 of which is reproduced below :-

“15. Reverting back to the facts of the case in hand, it is quite apparent that upon receipt of preliminary enquiry report which the Sub Divisional Officer (Revenue) got conducted beyond the back of the petitioner and which was submitted on 16-6-2016, the show cause notice was issued to the petitioner and after getting reply from the petitioner, straightway, the order of removal was passed. In fact, this is a case where no enquiry was done and mainly relying upon the report of ex parte preliminary enquiry, the Sub Divisional Officer (Revenue) has removed the petitioner from the post of Sarpanch. In order to establish the charge alleged against the petitioner, the Sub Divisional Officer (Revenue) has examined none and thus, no opportunity of hearing much less reasonable opportunity of hearing was granted to the petitioner to refute the said charges. Thus, the order of removal has been passed without following the mandate of Section 40(1) of the Act of 1993 and therefore it suffers from illegality as well as the principles of natural have been followed in its full breach and such illegality and non-compliance of audi alteram partem remain unnoticed by the learned Collector and the learned Commissioner as well.”

14. As per the order sheet dated 09.11.2016 which is the part of
Annexute- RJ/3, the petitioner had filed reply of the show cause notice. As per the order sheet dated 07.12.2016 which is also the part of Annexure-RJ/3 on the demand of the petitioner inquiry report and the other documents have been supplied to her.

15. This is not the petitioner's case that after 9.11.2016 she had made the request to the Sub Divisional Officer (Revenue), Kota to give an opportunity for filing additional reply, which was refused by him. She had filed the additional reply which was not taken on record by him. In the case in hand, the petitioner had got full opportunity to cross-examine the witnesses of the respondents No. 2, 3 and 4, and examine her own witnesses. Looking to these circumstances and concerned admitted facts, it does not appear that supply of the inquiry report and documents after filing of the reply by her, had caused prejudice to the petitioner in any manner or it had frustrated any valuable right of her. Thus, this Court disallowed the argument advanced by Shri Shailendra Bajpai, counsel for the petitioner regarding this matter.
16. As per the provisions of Section 40(1) of the Act of 1993, the Sub Divisional Officer (Revenue), Kota was bound to conduct the inquiry and then pass the order in accordance with law. Thus, it could not be said that the Sub Divisional Officer (Revenue), Kota had played the role of judge. Thus, this Court is not impressed with the arguments advanced by Shri Shailendra Bajpai, Counsel for the petitioner regarding this matter.
17. Looking to the above mentioned facts and circumstances of the case, this Court finds that the petitioner does not get any help from the case laws of **Manita Jaiwar** (supra) and **Smt. Kamti Bai** (supra).

18. Looking to the above-mentioned facts, circumstances of the case, and material placed on record, this Court finds that the Sub Divisional Officer (Revenue), Kota had followed the principles of natural justice, thus, his inquiry is not vitiated.
19. Second question for our consideration is as to whether the Sub Divisional Officer (Revenue), Kota had committed illegality or gross irregularity while arriving at a finding that the petitioner is guilty of committing gross negligence in discharging her duties.
20. It would be pertinent to mention the provisions of Section 40 of the Act of 1993, which reads as below:-

“40. Removal of office-bearers of Panchayat. - (1)

The State Government or the prescribed authority may after such enquiry as it may deem fit to make at any time, remove an office-bearer,-

(a) if he has been guilty of misconduct in the discharge of his duties; or

(b) if his continuance in office is undesirable in the interest of the public:

Provided that no person shall be removed unless he has been given an opportunity to show cause why he should not be removed from his office.

Explanation. - For the purpose of this sub-section "Misconduct" shall include--

(a) any action adversely affecting,-

(i) the sovereignty, unity and integrity of India; or

(ii) the harmony and the spirit of common brotherhood amongst all the people of State

transcending religious, linguistic, regional, caste or sectional diversities; or

(iii) the dignity of women; or

(b) gross negligence in the discharge of the duties under this Act;

(c) the use of position or influence directly or indirectly to secure employment for any relative in the Panchayat or any action for extending any pecuniary benefits to any relative, such as giving out any type of lease, getting any work done through them in the Panchayat by an office-bearer of Panchayat.

Explanation. - For the purpose of this clause, the expression 'relative' shall mean father, mother, brother, sister, husband, wife, son, daughter, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law :

Provided further the final order in the inquiry shall be passed within 90 days from the date of issue of show cause notice to the concerned office-bearer.

(2) A person who has been removed under subsection (1) shall forthwith cease to be a member of any other Panchayat of which he is a member, such person shall also be disqualified for a period of six years to be elected under this Act.”

21. It is worthy to refer the provisions of Rule 3(1)(a) of the Chhattisgarh Panchayat (Powers and Function of Sarpanch and Up-Sarpanch of Gram Panchayat, President and Vice President of Janpad Panchayat and Zila Panchayat) Rules, 1994 (in brevity 'the Rules of 1994'), which reads as under:-

“3. Powers and Functions of Sarpanch and Up-

Sarpanch of Gram Panchayat. - (1) The Sarpanch shall be directly responsible for carrying out or getting to be carried out :-

(a) the resolutions of the Gram Panchayat passed by it for the purpose of carrying out the provisions of the Act.”

22. Shri Shailendra Bajpai, Counsel for the petitioner placed reliance in **Poonam Verma v. Ashwin Patel**, [(1996) 4 SCC 332], para 42 of which is extracted below :-

“42. Negligence has many manifestations — it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or negligence per se, which is defined in *Black’s Law Dictionary* as under:

“*Negligence per se*.—Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.”

23. Shri Shailendra Bajpai, Adv. further placed reliance on a decision of Hon'ble Supreme Court in **Jacob Mathew v. State of Punjab**, (2005) 6 SCC 1, paras 12, 13, 14, 15, 16 and 17 of the decision are reproduced below :-

“12. The term “negligence” is used for the purpose of fastening the defendant with liability under the civil law and, at times, under the criminal law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of *mens rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In *R. v. Lawrence* [(1981) 1 All ER 974 : 1982 AC 510 : (1981) 2 WLR 524 (HL)] Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in *R. v. Caldwell* [(1981) 1 All ER 961 : 1982 AC 341 : (1981) 2 WLR 509 (HL)] and dealt with the concept of recklessness as constituting *mens rea* in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being “subjective” or “objective”, and said: (All ER p. 982e-f)

“Recklessness on the part of the doer of an act does presuppose that there is something in the

circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it."

13. The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimising violations, may be motivated by thrill-seeking. These are clearly reckless.

14. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in *Andrews v. Director of Public Prosecutions* (All ER p. 556 C) stated :

“Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established.”

Thus, a clear distinction exists between “simple lack of care” incurring civil liability and “very high degree of negligence” which is required in criminal cases. In *Riddell v. Reid* [(1942) 2 All ER 161 : 1943 AC 1 (HL)] (AC at p. 31) Lord Porter said in his speech —

“A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability.”
(*Charlesworth & Percy, ibid.*, para 1.13)

15. The fore-quoted statement of law in *Andrews* [1937 AC 576 : (1937) 2 All ER 552 (HL)] has been noted with approval by this Court in *Syad Akbar v. State of Karnataka* [(1980) 1 SCC 30 : 1980 SCC (Cri) 59] . The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

16. Law laid down by Straight, J. in the case of

Empress of India v. Idu Beg [ILR (1881) 3 All 776 : (1881) 1 AWN 132] has been held good in cases and noticed in *Bhalchandra Waman Pathe v. State of Maharashtra* [1968 Mah LJ 423 (SC) : 1968 ACJ 38 : 1968 MPLJ 371 (SC)] a three-Judge Bench decision of this Court. It has been held that while negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the *gross and culpable neglect or failure* to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

17. In our opinion, the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To be latter, the negligence has to be gross or of a very high degree.”

24. Shri Shailendra Bajpai, Counsel for the petitioner also placed reliance on the decision of Hon'ble Supreme Court in **Malay Kumar Ganguly v. Dr. Sukumar Mukherjee**, (2009) 9 SCC 221, paras 135 and 136 of the same are quoted below :-

“135. Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. (See *Law of Torts*, *Ratanlal &*

Dhirajlal, 24th Edn. 2002, at pp. 441-42.) Negligence means “either subjectively a careless state of mind, or objectively careless conduct. It is not an absolute term but is a relative one; it is rather a comparative term. In determining whether negligence exists in a particular case, all the attending and surrounding facts and circumstances have to be taken into account”. (See *Municipal Corpn. of Greater Bombay v. Laxman Iyer* [(2003) 8 SCC 731 : 2004 SCC (Cri) 252] , SCC para 6, *Advanced Law Lexicon*, P. Ramanatha Aiyar, 3rd Edn. 2005, p. 3161.)

136. Negligence is strictly nonfeasance and not malfeasance. It is the omission to do what the law requires, or the failure to do anything in a manner prescribed by law. It is the act which can be treated as negligence without any proof as to the surrounding circumstances, because it is in violation of statute or ordinance or is contrary to the dictates of ordinary prudence.”

25. Shri Shailendra Bajpai, Adv. further placed reliance on a decision of Division Bench of Madhya Pradesh High Court in **Nanhelal v. Asstt. Registrar, Co-operative Societies**, (AIR 1970 MP 39), in which it has been held that :-

“There is yet another defect in the impugned order. There is no finding that the petitioner was guilty of gross negligence; the finding merely is that the petitioner was guilty of negligence. There is a distinction between negligence and gross negligence, although the exact dividing line is difficult to demarcate. “Gross negligence” connotes higher degree of negligence; it is negligence not arising merely from some want of foresight or mistake of judgment but from some culpable default; see *Giblin v. McMullen*, (1869) LR 2 PC 317 at p. 337. In

Black's Law Dictionary the expression is defined as follows:

“The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness.”

26. Shri Bajpai, Counsel for the petitioner placed reliance on a decision of Single Bench of Madhya Pradesh High Court in the matter of **Kamal Kishore -v- Janpad Panchayat, Nankheda** [AIR 2000 MP 225] in which it has been held that :-

“7. In the present case the opponents do not have any ground to show that the petitioner's conduct was any way coming under the category prescribed by word “misconduct”. If the action has to be taken on other counts, the prescribed authority is obliged to find-out whether the act committed by such delinquent is falling under the category indicated by sub-clause (b) of the explanation i.e. “gross negligence” in the discharge of the duty under this Act. The opponents are also not in a position to show any such act on the part of the petitioner which would bring him under the category of sub-clause (b) of the explanation provided to sub-section (1) of section 40 of the Panchayat Raj Adhiniyam.”

27. It would be pertinent to mention the provisions of the Clause 7 of direction of the Social Welfare Department, Govt. of Chhattisgarh dated 22.08.2007 (in brevity 'the Direction') which reads thus :-

“7 पेंशन भुगतान प्रक्रिया :-

ग्रामीण क्षेत्र के लिए जनपद पंचायत एवं शहरी क्षेत्र के लिए नगरीय निकायों द्वारा पेंशन का भुगतान बैंक / पोस्ट ऑफिस में खाता खोलकर उनके माध्यम से सामान्यतः किया जाएगा। संबंधित आवेदक को पेंशन की स्वीकृति के तत्काल पश्चात स्वयं का बचत खाता बैंक अथवा पोस्ट ऑफिस में खोलना होगा। इस कार्य में विभागीय अमला आवेदक की पूर्ण मदद करेगा।

अपवाद स्वरूप ऐसे ग्रामीण क्षेत्र जहां पर दस किलोमीटर की दूरी के अंदर पोस्ट ऑफिस या बैंक नहीं है, व वहां नितान्त आवश्यकता पड़ने पर ग्राम पंचायत की बैठक में नगद पेंशन राशि का भुगतान किया जा सकेगा, किन्तु यह अपवाद स्वरूप ही होगा व नगद भुगतान के लिए सतर्कता के बतौर ग्राम पंचायत की पूर्ण बैठक में ही किया जावेगा एवं भुगतान के समय सरपंच / उस क्षेत्र के पंच / पटवारी / पंचायत सचिव में से कम से कम दो व्यक्तियों का उपस्थित रहना अनिवार्य होगा।”

28. The petitioner failed to show as to why the aforesaid pension amount had not been directly disbursed in the bank account of the respondent No. 2.
29. In the copy of the proceedings of meeting of Gram Panchayat, Belgahna dated 23.04.2016 vide Annexure P-11, dated 24.04.2016 vide Annexure P-12, dated 20.07.2016 vide Annexure P-13, there are resolutions that pension of the respondent No. 2 would be stopped and be kept in the custody of the Sarpanch.
30. The petitioner had not explained that when on the date 23.04.2016, there was resolution to stop the pension of the respondent No.2 then why her pension was drawn up after the month of April, 2016 till June, 2016.
31. The petitioner failed to show that when Gram Panchayat had allegedly passed the resolution on 23.04.2016 to keep the pension of respondent No.2 from the month of January,

2016 to April, 2016 then why she kept the pension amount from January, 2016 till March, 2016.

32. Moreover, as per the copy of another resolution dated 24.04.2016 which is enclosed in the record of the Sub Divisional Officer (Revenue), Kota, the aforesaid pension amount had been deposited on 25.10.2016. How it is possible that the amount which has been deposited on 25.10.2016 may be mentioned in the proceedings which have been carried out six months before it.
33. As per the statement of Saroj Manikpuri which is a part of Annexure RJ/5, the Sarpanch had demanded 20% commission and told that after receiving the commission in advance she would sign the cheque. The Engineer had told that there is no need of valuation/ verification of the work which is less than Rs. 10,000/-.
34. As per the statement of Sachin Sahu, which is a part of Annexure RJ/5, Saroj Manikpuri had told him that the Sarpanch is demanding 20% commission, the Engineer had told him that there is no need of valuation/ verification.
35. As per the Ex.P-1 which is in the record of the Sub Divisional Officer (Revenue), Kota, the Gram Panchayat, Belganha has passed the resolution on 31.05.2016 that for the work of rain water harvesting a cheque of Rs. 9,500/- is issued in the name of respondent No. 2.
36. Looking to the aforesaid facts and circumstances of the case it could not be said that, resolutions of Gram Panchayat

authorising petitioner to keep the pension amount with her were in consonance of the provisions of the Act of 1993.

37. Looking to the above mentioned facts and circumstances of the case, this court finds that the judicial precedents laid down in the matters of **Poonam Verma** (supra), **Jacob Mathew** (supra), **Malay Kumar Ganguly** (supra), **Nanhelal** (supra) and **Kamal Kishore** (supra) do not help the the petitioner.
38. Looking to the above mentioned facts, circumstances of the case and material placed on record, this Court finds that the Sub Divisional Officer (Revenue), Kota had not committed any illegality or gross irregularity while giving the finding that the petitioner is guilty of committing gross negligence in discharging her duties.
39. Third question for adjudication before us is that whether proviso to Section 40 of the Act of 1993 is mandatory or directory.
40. Shri Shailendra Bajpai, Counsel for the petitioner placed reliance on a decision of the Division Bench of High Court of MP in the matter *Dhanwanti v. State of M.P.*, [(2013) 1 MP LJ 549] para 9 of which is quoted below :-

“9. After reading the aforesaid provided, unambiguous and clear meaning is that the prescribed authority has no power and jurisdiction to continue the proceeding beyond the period of 90 days because it is mentioned that if the final order in the inquiry is not passed within a period of 90 days, the prescribed authority shall inform all facts to his next senior

officer in writing and request extension of time for disposal of the inquiry but such extension of time shall not be more than 30 days. It means that beyond the period of 90 days from issuance of show cause notice, the prescribed authority has no jurisdiction to continue the inquiry proceedings.”

41. Shri Bajpai further placed reliance on a decision of Division Bench of Madhya Pradesh High Court in the matter of **Santosh Raghuvanshi -v- State of MP** (2013) 2 MPWN 58, para 6 of which is extracted below :-

“6. In this case, the show cause notice was issued on 24.7.2012 and the order was passed on 31.12.2012, after a period of 120 days. Hence, the order was without jurisdiction. When the order of removal of the appellant is without jurisdiction, then certainly the writ petition could be entertained even though there is alternative remedy available because for issuance of writ of certiorari alternative remedy is no bar. This point has already been considered in the case of *Dhanwanti* (supra). The present case is squarely covered by the judgment as quoted above.”

42. Shri Bajpai further placed reliance on a decision of Single Bench of Madhya Pradesh High Court in the matter of **Phulvasiya Pal -v- State of MP** in WP No.13692/2014 dated 11-11-2014, para 6 of which is quoted below:-

“6. After hearing learned counsel for the parties at length and after going through the records as also the Division Bench decision in the case of **Dhanwanti Vs. State of M.P. and others** (supra), it is clear that the order was passed by the Sub Divisional Officer against the petitioner beyond the period prescribed under the provisions of the Act and

as such the Prescribed Authority was having no jurisdiction to pass such an order. Specifically when a mandatory provision is made for completing the enquiry within the prescribed period, no scope is left for extension of time, except as set out in the said provisions, the Prescribed Authority was having no jurisdiction to pass the order against the petitioner. Admittedly, the show cause notice was issued to the petitioner on 31.05.2012 and the enquiry was to be completed within a period of 90 days. At the best, the Prescribed Authority could have asked for extension of said limit by 30 more days by making appropriate proposal before the next senior officer in terms of the proviso added to Section 40 of the Act. However, there is nothing on record nor anything is reflected from the order impugned that the time was extended by any competent authority. Even otherwise, if there was extension it could not be upto 24.04.2013 and, therefore, the competent authority was having no jurisdiction to pass any order against the petitioner in the proceeding so initiated. At the best, the competent authority could have issued another show cause notice after closing the proceeding earlier initiated and to complete the proceeding within the time prescribed under the provisions of Section 40 of the Act. ”

43. In the aforesaid proviso of the Act of 1993, it has been mentioned that final order shall be passed within 90 days from the date of issuance of show cause notice as far as possible. There is no amendment in aforesaid proviso as has been done in the Madhya Pradesh Panchayat Raj Adhiniyum, 1993. The word “as far as possible” used in the proviso of the Act of 1993 authorise the officer that he can pass final order after the prescribed period of 90 days, if

the circumstances so arise. Looking to these circumstances, this Court finds that the judicial precedents laid down in **Dhanwanti** (supra), **Santosh Raghuvanshi** (Supra), and **Phulvasiya Pal** (supra) are not helpful to the petitioner.

44. Looking to the above mentioned facts and circumstances of the case and material placed on record, this Court finds that the provisions of proviso to Section 40 of the Act of 1993 are directory and not mandatory.

45. Shri Shailendra Bajpai, counsel for the petitioner placed reliance on **Nisar Ahmad Ibrahim Khan v. Deolali Cantonment Board**, 1987 Supp SCC 562, para 14 of which is quoted below :-

“14. There is no common law of elections. The proceedings calling in question the validity of an election are purely statutory proceedings. An election contest is not an action at law or a suit in equity, but is purely a statutory proceeding unknown to the common law and the court possesses no common law power. It is trite proposition that in such proceedings statutory requirements must strictly be established. It is also well settled that the success of a candidate who has won at an election should not be lightly interfered with.”

46. Shri Bajpai further placed reliance on **Ram Sukh v. Dinesh Aggarwal**, (2009) 10 SCC 541 in which of the same is quoted below :-

“8. Before examining the merits of the issues raised on behalf of the election petitioner with reference to

the relevant statutory provisions, it would be appropriate to bear in mind the observations of this Court in *Jagan Nath v. Jaswant Singh* [AIR 1954 SC 210 : 1954 SCR 892] . Speaking for the Constitution Bench, Mehr Chand Mahajan, C.J., had said that the statutory requirement of election law must be strictly observed and that the election contest is not an action at law or a suit in equity, but is purely a statutory proceeding unknown to the common law and that the Court possesses no common law power. It is also well settled that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. Nevertheless, it is also to be borne in mind that one of the essentials of the election law is to safeguard the purity of the election process and, therefore, the courts must zealously ensure that people do not get elected by flagrant breaches of that law or by indulging in corrupt practices, as enumerated in the Act.”

47. He also placed reliance on a decision of Hon'ble Supreme Court in ***Ravi Yashwant Bhoir v. Collector***, (2012) 4 SCC 407 para 33 of the same is quoted below:-

“33. This Court examined the provisions of the Punjab Municipal Act, 1911, providing for the procedure of removal of the President of the Municipal Council on similar grounds in *Tarlochan Dev Sharma v. State of Punjab* [(2001) 6 SCC 260 : AIR 2001 SC 2524] and observed that removal of an elected office-bearer is a serious matter. The elected office-bearer must not be removed unless a clear-cut case is made out, for the reason that holding and enjoying an office, discharging related duties is a valuable statutory right of not only the elected

member but also of his constituency or electoral college. His removal may curtail the term of the office-bearer and also cast stigma upon him. Therefore, the procedure prescribed under a statute for removal must be strictly adhered to and unless a clear case is made out, there can be no justification for his removal. While taking the decision, the authority should not be guided by any other extraneous consideration or should not come under any political pressure.”

48. Shri Bajpai also placed reliance on **Sadashiv H. Patil v. Vithal D. Teke**, (2000) 8 SCC 82 para 14 of which is quoted below :-

“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.”

49. This is true that when any candidate won an election then his success should not be lightly inferred with. Where any petition seeking such interference is filed it must strictly be

conformed to the requirements of the law. The removal of an elected officer bearer is a serious matter. The elected officer bearer must not be removed unless a clear cut case is made out. The reason is that holding such an office is a valuable statutory right of the elected member and also of his constituency or electoral college. His removal may curtail the term of the office bearer and also cause a stigma upon him. Therefore, the procedure prescribed under a statute for removal must be strictly adhered to.

50. Equally this is also true that in a democratic set up, an elected member is a very powerful and respected person. The people elect him with the hope that he would look after the welfare of the society without taking undue advantage. There may be no doubt that democratically elected representatives must behave with responsibility and should ensure that the functioning of the local body is not stalled for their personal interest. He is morally and legally bound to follow the rules and regulations enacted for welfare of the society, so that nobody can impeach his/her conduct. An elected member performs his duty as a role model in the public so that people may follow him. If they fail to do their duty in its true spirit, the local governance would become a mockery.
51. In the case in hand, it has been earlier decided that the Sub Divisional Officer (Revenue), Kota had not committed any illegality or gross irregularity while giving the finding that the petitioner is guilty of committing gross negligence

in discharging her duties. Thus, the judicial precedents laid down in **Nisar Ahmad** (supra), **Ram Sukh** (supra), **Ravi Yashwant Bhoir** (supra) and **Sadashiv H. Patil** (supra) are not applicable in favour of the petitioner.

52. Looking to the facts and circumstances of the case and material placed on record, this Court is of the considered opinion that there is no material on record which calls for any interference by this Court in the impugned order in exercise of its extraordinary jurisdiction vested under Article 226 of the Constitution of India. Thus, this writ petition being devoid of substance, deserves to be and is hereby dismissed.

53. As the writ petition itself has been dismissed, the writ appeal arising out of the interim order passed in the writ petition is dismissed as unnecessary.

54. No order as to costs.

Sd/-
(Thottathil B. Radhakrishnan)
Chief Justice

Sd/-
(Sharad Kumar Gupta)
Judge