

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.18250 of 2018

1. Sanju Kumari W/o Subhash Kumar Prasad, R/o Village- Nadwa, Ward No.11, P.O.- Manjhariya, P.S.- Choutarwa, District- West Champaran.
2. Lalchuni Devi, W/o Kitab Baitha, R/o Village- Badgaon, Chutki Patti, P.O.- Badgaon, P.S.- Bagaha, District- West Champaran.

... .. Petitioner/s

Versus

1. The State Of Bihar through Principal Secretary, Panchayat Raj Department, Bihar, Patna.
2. The District Magistrate, West Champaran, Bettiah.
3. The District Panchayat Raj Officer, West Champaran, Bettiah.
4. The Sub-Divisional Officer, Bagaha, West Champaran.
5. The Executive Officer, Panchayat Samiti cum Block Development Officer, Bagaha- 1, West Champaran.
6. Madhuri Devi, Member Panchayat Samiti, Gram Panchayat, 28, Siswa Basantpur, Block- Bagaha-1, West Champaran.
7. Sunita Devi, Member Panchayat Samiti, Gram Panchayat, 29, Englishia, Block Bagaha-1, West Champaran
8. Tunu Kumar, Member Panchayat Samiti, Gram Panchayat, 17, Bharoganj, Block Bagaha-1, West Champaran.
9. Ashok Sah, Member Panchayat Samiti, Gram Panchayat, 33, Tesarhiya Bathuariya, Block Bagaha-1, West
10. Mantu Devi, Member Panchayat Samiti, Gram Panchayat, 13, Patilar, Block Bagaha-1, West Champaran.
11. Binda Devi, Member Panchayat Samiti, Gram Panchayat, 35, Chandraha Rupwaliya, Block Bagaha-1, West Champaran.
12. Sanjay Kumar Pal, Member Panchayat Samiti, Gram Panchayat, 10, Lalgunaha Choutarwa, Block Bagaha-1, West Champaran.
13. Sushila Devi, Member Panchayat Samiti, Gram Panchayat, 19, Baswgaon Manjharia, Block Bagaha-1, West Champaran.
14. Moti Lal Sah, Member Panchayat Samiti, Gram Panchayat, 03, Parsa Banchahri, Block Bagaha-1, West Champaran.
15. Munib Prasad Yadav, Member Panchayat Samiti, Gram Panchayat, 32, Tesariya Bathuaria, Block Bagaha-1 West Champaran.
16. Sheikh Kamaluddin, Member Panchayat Samiti, Gram Panchayat, 21, Kolhuwa Choutarwa, Block Bagaha-1, West Champaran.
17. Kaushalya Devi, Member Panchayat Samiti, Gram Panchayat, 11, Lalgunaha Choutarwa, Block Bagaha-1, West Champaran
18. Ramesh Thakur, Member Panchayat Samiti, Gram Panchayat, 18, Bhairganj, Block Bagaha-1, West Champaran



19. Antima Devi, Member Panchayat Samiti, Gram Panchayat, 31, Manjhuwa, Block Bagaha-1, West Champaran.
20. Savita Devi, Member Panchayat Samiti, Gram Panchayat, 07, Singhari Pipariya, Block Bagaha-1, West Champaran
21. Mohammad Jeyauddin, Member Panchayat Samiti, Gram Panchayat, 25, Salha Bariarwa, Block Bagaha-1, West Champaran.
22. Rajan Thakur, Member Panchayat Samiti, Gram Panchayat, 12, Patilar, Block Bagaha-1, West Champaran.
23. Md. Izhar Siddique, Member Panchayat Samiti, Gram Panchayat, 05, Chakni Rajwaatiya, Block Bagaha-1,
24. Ramadhar Ram, Member Panchayat Samiti, Gram Panchayat, 06, Singhwariya Pipariya, Block Bagaha-1, West Champaran.
25. Shyamjee Yadav, Member Panchayat Samiti, Gram Panchayat, 26, Salha Bariyawa, Block Bagaha-1, West Champaran.
26. Rekha Ram, Member Panchayat Samiti, Gram Panchayat, 22, Kolhuwa Choutrawa, Block Bagaha-1, West Champaran.
27. Sheshnath Sah, Member Panchayat Samiti, Gram Panchayat, 12, Bhashee Paararkhap, Block Bagaha-1, West Champaran.
28. Lalsa Devi, Member Panchayat Samiti, Gram Panchayat, 14, Mehudan, Block Bagaha-1, West Champaran.
29. Gayatri Devi, Member Panchayat Samiti, Gram Panchayat, 16, Nadda, Block Bagaha-1, West Champaran.
30. Aashis Kumar Gain, Member Panchayat Samiti, Gram Panchayat, 30, Manjhowa, Block Bagaha-1, West Champaran.
31. Jay Prakash Yadav, Member Panchayat Samiti, Gram Panchayat, 20, Baasgaon Manjharia, Block Bagaha-1, West Champaran.
32. Binda Devi, Member Panchayat Samiti, Gram Panchayat, 08, Chandarpur Ratbal, Block Bagaha-1, West Champaran.
33. Sarwajeet Patel, Member Panchayat Samiti, Gram Panchayat, 34, Chandraha Rupwaaliya, Block Bagaha-1, West Champaran.
34. Lalita Devi Pramukh, Member Panchayat Samiti, Gram Panchayat, 02, Maahipur Mathoda, Block Bagaha-1 West Champaran.
35. Lilawati Devi, Member Panchayat Samiti, Gram Panchayat, 01, Maahipur Mathoda, Block Bagaha-1, West Champaran.
36. Nasim Ara, Member Panchayat Samiti, Gram Panchayat, 24, Raybari Mahuawan, Block Bagaha-1, West Champaran.
37. Sahodri Devi, Member Panchayat Samiti, Gram Panchayat, 09, Bibibanwatka, Block Bagaha-1, West Champaran.
38. Lalmuni Devi, Member Panchayat Samiti, Gram Panchayat, 27, Baswariya, Block Bagaha-1, West Champaran.

... .. Respondent/s

Appearance :



For the Petitioner/s : Mr. Shailesh Kumar
For the Respondent/s : Mr. Prabhat Ranjan, AC to G.P.6
For the Resp. 24,25,26,37: Mr. Ashok Kumar Mishra, Advocate
For Resp. 19,27,29,30 : Mr. Milind Kumar Mishra, Advocate
For Resp. 34 : Mr. Ansul, Advocate

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

Date : 12-04-2019

In this writ application the two petitioners are seeking quashing of notice vide letter no. 1827 dated 17.07.2018 issued by the Executive Officer, Panchayat Samiti cum- Block Development Officer, Bagaha – 1, West Champaran by which a special meeting of the Panchayat Samiti Members for discussion on “No Confidence Motion” against the Pramukh (respondent no. 34) was fixed on 21.07.2018. The petitioners are also seeking issuance of a writ of certiorari to quash the letter no. 1853 dated 21.07.2018 issued by the Executive Officer, Panchayat Samiti cum- Block Development Officer, Bagaha – 1, West Champaran whereby one vote casted in the meeting was declared cancelled and accordingly the no confidence motion against the Pramukh (respondent no. 34) was defeated.

The prayer of the petitioners is to declare that the entire procedure adopted by the Executive Officer



Panchayat Samiti is illegal and is a result of conspiracy hatched between the Pramukh and the officer concerned to defeat the special meeting of no confidence.

Brief Facts

The facts are not in dispute. Petitioners are the elected members of the Panchayat Samiti, Block Bagaha – I, West Champaran from area no. 13 and 31 respectively. After declaration of the result, in a meeting of the elected members, Lalita Devi (respondent no. 34) was elected as Block Pramukh.

On 09.07.2018, a requisition addressed to Pramukh with copy to Executive Officer, Panchayat Samiti was submitted. There were allegations against the respondent no. 34. A special meeting to discuss “No Confidence Motion” against respondent no. 34 was sought to be convened. The respondent no. 34 gave her consent on 17.07.2018 for fixing a special meeting on 21.07.2018. Meeting was accordingly held on 21.07.2018. Out of total 35 numbers of members, 19 members were present in the Meeting. 17 Members voted in favour of the Motion, one against Motion and one vote was cancelled. Since the



number of votes in favour of Motion fell short of required '18' votes to pass the Motion, the Motion failed.

Submission of the parties.

Learned counsel for the petitioners submits that the impugned notice for convening the special meeting dated 17.07.2018 is in the teeth of the provisions as contained under Section 44 of the Bihar Gram Panchayat Raj Act, 2006 and as such it requires interference by quashing the said notice.

On the other hand, learned counsel for the State as well as Private Respondents have opposed the writ application. It is stated that so far as these two petitioners are concerned, they have no *locus standi* to maintain the present writ application.

In course of hearing, attention of this court has been drawn towards Annexure 'E' to the counter affidavit filed on behalf of the respondent nos. 2 to 5. Annexure 'E' is the attendance register of the special meeting held on 21.07.2018. It shows that both the petitioners were present in the meeting and they had signed the attendance register at serial no. 23 and serial no. 04 respectively. It is also pointed



out from the minutes of the meeting recorded in Annexure 'E' that both these petitioners had spoken in the meeting and had supported the allegations against the Pramukh, thereafter voting had taken place. 17 votes were casted in favour of the "No Confidence Motion", one vote was casted against the motion whereas one vote was cancelled because in both the columns of the ballot paper cross mark was put. The reasons for rejection of the vote is also provided in Annexure 'E'.

In the aforesaid circumstance learned counsel for the respondents have relied upon a judgment of this court in the case of Neetu Kumari Vs. The State of Bihar (CWJC No. 13513/2018) decided on 14.03.2019 wherein this court has, after taking note of the conduct of the petitioner in the said case refused to grant discretionary relief in it's writ jurisdiction. The court came to a conclusion that even if Section 44 (3)(1) of the Bihar Panchayati Raj Act, 2006 is mandatory in nature, the conduct of the petitioner was not bonafide and hence the relief prayed under Article 226 of the Constitution of India cannot be granted.

Learned counsel has also relied upon a Division



Bench Judgment of this court in the case of **Smt. Shamshad Khatun Vs. State of Bihar** (LPA No. 39/2010) decided on 21.01.2010, as reported in **2010 (1) PLJR 929** in which the Hon'ble Division Bench took note of Section 44(3)(1) and Section 46 of the Act of 2006 and held that the said provision is mandatory in nature. The Hon'ble Division Bench held that there has to be a notice of 7 clear days. Thereafter the court proceeded to consider as to whether the appellant in the said case had by her own conduct waived the mandatory requirement commanded by the statute and after going through the series of decisions of the Hon'ble Supreme Court, the Hon'ble Division Bench came to a conclusion that it was the petitioner who had fixed the date for convening the meeting for consideration of no confidence motion against her in the register of the Panchayat Samiti for issuing the notice by the Executive Officer for 12.12.2009, the date of the meeting was accordingly fixed, she had participated in the meeting and took a chance. Thus, fixing of the meeting by the appellant and participation in the meeting would tantamount to waiver by express conduct.



Consideration

Having heard learned counsel for the parties and on perusal of the records before proceeding further Section 44 & 46 of the Act of 2006 are quoted hereunder for a ready reference: -

44. Resignation and Removal of Pramukh and

Up- Pramukh- (1) The Pramukh may resign his office by writing under his hand and addressed to the Subdivisional Magistrate and the Up-Pramukh may resign his office by writing under his hand addressed to the Pramukh and in the absence of Pramukh to the Subdivisional Magistrate and the said office shall be deemed to be vacant on the expiry of seven days from the date of such resignation unless within the said period of seven days he withdraws such resignation by writing under his hand addressed to the Subdivisional Magistrate or the Pramukh, as the case may be.

(2) A Pramukh or Up- Pramukh shall vacate office if he ceases to be a member of the Panchayat Samiti.

(3) (i) A Pramukh/Up-Pramukh of the Panchayat Samiti shall be deemed to have vacated his office forthwith if a resolution expressing want of confidence in him is passed by a majority of the total number of elected members of the Panchayat Samiti at a meeting specially convened for the purpose.

The requisition for such a special meeting shall be presented to the Pramukh in writing with a copy to the Executive Officer of the Panchayat Samiti, by not less than one third of the total number of



members elected directly from the territorial constituencies of the Panchayat Samiti. The Executive Officer shall immediately bring the requisition to the notice of the Pramukh. The Pramukh shall convene such meeting on a date falling within 15 days of such requisition. If the Pramukh fails to call the special meeting, the Up-Pramukh or one third of the total number of directly elected members may fix a date for such meeting and require the Executive Officer to give notice to the members and to take such action as may be necessary to convene the meeting. The Executive Officer shall necessarily issue such notice in time and convene the meeting. No such meeting shall be postponed once the notice for the same has been issued. No quorum shall be required for the special meeting convened to discuss no confidence motion.

(ii) No confidence motion shall not be moved against the Pramukh or the Up-Pramukh within the first two year period of their tenure.

(iii) No confidence motion against the Pramukh or the Up-pramukh or both, as the case may be, shall not be brought during the last six months of the term of the Panchayat Samiti as mentioned in section 39 (1) of this Act.

(iv) Such reasons/charges, on the basis of which no confidence motion has to be moved against the Pramukh or Up-Pramukh, shall be clearly mentioned in the notice of meeting called to consider the no confidence motion.

(v) As soon as the meeting called under this section begins, the presiding member of this meeting shall read out the motion on which the meeting has been called to consider before the



members present and declare it open for discussion. Any discussion on the motion shall not be adjourned.

(vi) During discussion, opportunity shall be given to the Pramukh/Up-Pramukh against whom no confidence motion has been moved for his defence before the Panchayat Samiti. The motion shall be put to vote on the same day after discussion and shall take place by secret ballot in the prescribed manner.

(vii) In case of no confidence motion against a Pramukh, the meeting shall be presided by the Up-Pramukh; in case of motion against Up-Pramukh by the Pramukh and in case of motion against both Pramukh and Up-Pramukh, by any member elected from among the members of the Panchayat Samiti present in the meeting.

In case of the post of Up-Pramukh being vacant or his absence from the meeting convened for discussion on no confidence motion against the Pramukh or the post of Pramukh being vacant or his absence from the meeting convened for discussion on no confidence motion against the Up-Pramukh, as the case may be, shall be presided over by any member elected from amongst the directly elected members from the territorial constituency of the Panchayat Samiti present in the meeting.

(4) Without prejudice to the provisions under this Act, if in opinion of the Commissioner having territorial jurisdiction over the Panchayat Samiti, a Pramukh or an Up-Pramukh of Panchayat Samiti 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 abuses the power vested in him 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 Pramukh or Up-Pramukh, as the case may be, a reasonable opportunity for explanation, by order, remove such Pramukh or Up-Pramukh, as the case may be, from office.

[Provided when a system of Lok Prahari, instituted under sub-section (6) of Section 152 comes into force by a valid notification of the State Government, the Government may only pass order of removal of such Pramukh/Up-Pramukh, as the case may be in the light of inquiry and recommendation of Lok Prahari for the removal.]

[The Pramukh or Up-Pramukh so removed on the charge of being found guilty or misuse of vested powers of or misconduct in the discharge of his duties shall not be eligible for election to any Panchayati bodies till further five years from the date of such removal. The Pramukh or Up-Pramukh so removed on rest of the charges shall not be eligible for re-election as pramukh or Up-Pramukh during the remaining term of office of such Panchayat Samiti.]

(5) A Pramukh or Up- Pramukh removed from his office under sub-section (4) may also be removed by the Government from membership of the Panchayat Samiti.

46. Meetings of Panchayat Samiti–

(1) A Panchayat Samiti shall hold a meeting for the transaction of business at least once in two months



(hereinafter in this section called the ordinary meeting) and shall subject to the provisions of the following sub-sections, make regulations in conformity with this Act or with any rules made thereunder with respect to the day, hour, notice, management and adjournment of its meetings and generally with respect to the transaction of business thereto.

(2) Every meeting of the Panchayat Samiti shall ordinarily be held at the headquarters of the Panchayat Samiti.

(3) The date of the first meeting of the Panchayat Samiti after its constitution shall be fixed by the Subdivisional Magistrate who shall preside at such meeting and date of each subsequent ordinary meeting shall be fixed at the previous meeting of the Panchayat Samiti;

Provided that the Pramukh may for sufficient reason alter the day of the meeting to a subsequent date. The Pramukh may, whenever he thinks fit and upon the written request of not less than one third of the total number of members and on a date within fifteen days from the receipt of such request shall call a special meeting. Such request shall specify the object for which the meeting is proposed to be called. If the Pramukh fails to call a special meeting, the Up-Pramukh or one-third of the total number of members may call the special meeting for a day not more than fifteen days after presentation of such request and require the Executive Officer to give notice to the members and to take such action as may be necessary to convene the meeting.

(4) Ten clear days' notice of an ordinary meeting and seven clear days' notice of a special meeting specifying the time at which such meeting is to be



held and the business to be transacted thereat shall be sent to the members and affixed at the office of the Panchayat Samiti. Such notice shall include in case of a special meeting any motion or proposition mentioned in the written request made for such meeting.

(5) Half of the total number of members of the Panchayat Samiti shall form a quorum for transacting business at a meeting of the Panchayat Samiti. If at the time appointed for the meeting a quorum is not present, the person presiding shall wait for one hour and if within such period there is a quorum, proceed with the meeting, but if within such period there is no quorum, the person presiding shall adjourn the meeting to such hour on some future day as he may deem fit. He shall similarly adjourn the meeting at any time after it has begun if his attention is drawn to the want of quorum. At such adjourned meetings a quorum of at least one fifth of the total number of member shall be required and the business which would have been brought before the original meeting shall be transacted.

(6) Every meeting shall be presided over by the Pramukh or if he is absent by the Up-Pramukh and if both are absent or if the Pramukh is absent and there is no Up-Pramukh the members present shall elect one from among themselves to preside.

(7) All questions shall, unless otherwise especially provided, be decided by a majority of votes of the members present and voting. The presiding member, unless he refrains from voting, shall give vote before declaring the number of votes for and against a question and in case of equality of votes he may give his casting vote.



(8) No member of a Panchayat Samiti shall vote on, or take part in the discussion of, any question coming up for consideration at a meeting of the Panchayat Samiti, if the question is one in which, apart from its general application to the public, he has any pecuniary or personal interest and if the person presiding has such an interest, he shall not preside over the meeting when such question comes up for consideration.

(9) If the person presiding is believed by any member present at the meeting to have any such pecuniary or personal interest in any matter under discussion and if a motion to that effect be carried, he shall not preside at the meeting during such discussion or vote on or take part in it. Any member of the Panchayat Samiti may be chosen to preside at the meeting during the continuance of such discussion.

(10) No proposition shall be discussed at any ordinary meeting unless it has been entered in the notice convening such meeting or in the case of a special meeting in the written request for such meeting. A member may propose any resolution connected with or incidental to the subjects included in the list of business. The Pramukh may propose any urgent subject of a routine nature not included in the list of business if no member objects to it. No permission shall be given in the case of a motion or proposition to modify or cancel any resolution within three months after passing thereof except in accordance with sub-section (12). The order in which any business or proposition shall be brought forward at such meeting shall be determined by presiding authority who in case it is proposed by any member to give particular



proposition shall put the proposal to the meeting and be guided by the majority of votes given for or against the proposal.

(11) Any ordinary meeting may with the consent of a majority of the members present be adjourned from time to time but no business shall be transacted at any adjourned meeting other than that left or undisposed at that meeting.

(12) No resolution of Panchayat Samiti shall be modified or cancelled within six months after passing thereof except by a resolution passed by not less than one-half of the total number of members at an ordinary or special meeting the notice whereof shall have been given fulfilling the requirements of sub-section (4) and setting forth fully the resolution which it is proposed to modify fully or cancel at such meeting and motion or proposition for modification or cancellation of such resolution.

(13) The proceeding of every meeting shall be recorded in the minutes book immediately after the deliberations of the meeting and shall after being read over by the presiding authority of the meeting be signed by him. The action taken on the decisions of the Panchayat Samiti shall be reported at the next meeting of the Panchayat Samiti. The minutes book shall always be kept in the office of the Panchayat Samiti. The Executive Officer shall be the custodian of the minute book.

(14) The Panchayat Samiti may require the presence of Government officers at its meeting. If it appears to a Panchayat Samiti that the attendance of any officer of the Government having jurisdiction over an area of a district or part of a district and not working under the Panchayat Samiti is desirable at a meeting of the Panchayat Samiti, the Executive



Officer shall by a letter addressed to such officer not less than fifteen days before the intended meeting request that officer to be present at the meeting and the officer shall, unless prevented by sickness or other reasonable cause, attend the meeting :

Provided that the officer on receipt of such letter may if he for any of the reasons aforesaid is unable to be present thereat himself, instruct his deputy or other competent subordinate officer to represent him at the meeting.”

This court finds substance in the submission of learned counsel representing the official respondents as well as learned counsel representing the respondent no. 34. In the facts of the present case, it is apparent from the records particularly from Annexure ‘E’ to the counter affidavit of the official respondents that these two petitioners had participated in the special meeting, they had spoken in the meeting in favour of “No Confidence Motion” and as such at this stage they cannot be allowed to take a plea that the notice of the special meeting was not issued giving 7 clear days for the meeting. It is the conduct of the petitioners which would amount to an express waiver of the conditions of 7 clear days notice.

The provision for seven clear days notice in case



of a special meeting has been held to be mandatory. But, by now it is no longer a *res-integra* that even a mandatory provision in favour of an individual may be waived and every non-compliance thereof would not necessarily result in rendering an action null and void. In this case nothing has been brought to the notice of this court that the petitioners had objected to the notice on the above ground. No other member has come forward to challenge the notice.

In the Division Bench judgment of **Smt. Shamshad Khatun (supra)** their Lordships have taken note of the various judgments on the subject and the general rule in case of non compliance of a mandatory requirement of law. I am tempted to quote the relevant paragraphs from the judgment of the Hon'ble Division Bench as under:

12. In *Swaran Singh & Ors. (supra)*, their Lordships have held to construe a statute, the scheme of the Act has to be taken into consideration and, for the said purpose, it has to be read as a whole and then chapter by chapter, section by section and word by word. In the present case we are concerned with the proposition whether a mandatory provision can be waived. Therefore, we are disposed to think the said decision does not aid or assist the stand put forth by Mr. Singh.

[National Insurance Co. Ltd. vs. Swaran Singh reported in (2004) 3 SCC 297]



13. In *Jogindra Singh Sodhi v. Amar Kaur*, (2005) 1 SCC 31, a two-Judge Bench of the Apex Court was dealing with the stand taken as regards waiver on the part of the landlady by her own conduct. Their Lordships expressed the view that waiver is a question of fact which must be expressly pleaded, clearly proved and no such plea had been raised by the tenant or by the sub-tenant. Their Lordships further held a bald plea of waiver cannot defeat statutory provision made in larger interest.

In that context their Lordships referred to the earlier decisions rendered in *Shalimar Tar Products Ltd. v. H.C. Sharma*, (1988) 1 SCC 70 and *Pulin Behari Lal v. Mahadeb Dutta & Ors.*, (1993) 1 SCC 629. In *Shalimar Tar Products Ltd.* (supra) the Apex Court has expressed the views as follows:-

"13. Everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his individual capacity. We are, however, in this case unable to agree. Firstly, in this case there was no case of waiver. Waiver is a question of fact which has to be tested by facts and evidence. There was no conscious relinquishment of the advantage of any statute. No court has gone into this fact. It does not seem to have been urged before the High Court also. Apart from this, in this requirement of the statute which is in the public interest there cannot be any question of waiver of a right, dealing with the rights of the tenants or the landlord."

In *Pulin Behari Lal* (supra) it has been held as follows:-

"6. Waiver is a question of fact which



depends on the facts and circumstances of each case. In the case of waiver of any provisions of the statute it is necessary to prove that there was conscious relinquishment of the advantage of such provisions of the statute."

14. In this regard we may fruitfully refer to the decision in Bibi Amna Khatun & Ors. (supra) wherein the majority speaking through Hari Lal Agrawal, J. (as His Lordship then was), expressed the view as under:-

"8. In my opinion, simply because the second part of Section 11A is mandatory in nature, will not rule out the application of the principle of waiver, if once the correct scope of this maxim is appreciated and understood. Although the desired assistance was not rendered at the Bar, I have taken some pains to examine the proposition in its true perspective with reference to the facts of the present case.

9. The essence of waiver is estoppel and where there is no estoppel, there can be no waiver, the connection between estoppel and waiver being very close. But in spite of that, there is an essential and fundamental difference between the two and that is that whereas estoppel is a rule of evidence, waiver is a rule of conduct. The accepted connotation of waiver is that to constitute waiver there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of an existing legal right and a conduct which warrants an inference of the relinquishment of a known right or a privilege (see AIR 1959 SC 149).

There is, however, a tendency to mix up waiver and estoppel, as a single idea, although the one has apparently reference to a man's conduct and the other to the legal consequence of that conduct. The principle



underlying both these maxims is the same, namely, that a party will not be permitted to approbate and reprobate or, in other words, to blow hot and cold, in respect of the same matter. This is the underlying principle behind the maxim waiver.

I may now refer to a few authorities where the application of waiver has been considered, in order to bring home my point of view. The principle that has been decided by those authorities, if I may briefly put it here, is that where a right or privilege guaranteed by law rests in the individual and is primarily intended for his benefit and does not infringe the right of others, it can be waived provided such waiver is not forbidden by law and does not contravene any public policy. This principle was recognized by this Court also in the case of Sashibhusan Prasad Singh v. Dalip Narain Singh (AIR 1936 Pat 75) and then again in the case of Jogendra Missir v. Ramnandan Singh (AIR 1968 Pat 218). The Supreme Court also in the case of Basheshar Nath v. Commr. of Income-tax, Delhi and Rajasthan (AIR 1959 SC 149) made a similar observation. Maxwell in his interpretation of Statutes, 11th Edition (1962) at page 376, has also enunciated the same principle for applying this principle of estoppel."

15. In this context we may profitably refer to Krishna Bahadur v. Purna Theatre, (2004) 8 SCC 229, wherein it has been held as follows:-

"9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right



for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

16. In Babulal Badriprasad Varma v. Surat Municipal Corpn., (2008) 12 SCC 401, the Apex Court has held in paragraphs 28 and 29 as follows:-

"28. We would, however, assume that it was obligatory on the part of the State to serve a special notice upon the appellant. The question, however, would be: what would be the consequence of non-compliance therewith vis-a-vis the conduct of the appellant himself?"

"29. A person may waive a right either expressly or by necessary implication. He may in a given case disentitle himself from obtaining an equitable relief particularly when he allows a thing to come to an irreversible situation."

17. In Jaswantsingh Mathurasingh & Anr. V. Ahmedabad Municipal Corporation, 1992 Suppl. (1) SCC 5, a three-Judge Bench of the Apex Court while dealing with the principle of the waiver has expressed thus: -

"14. The principle of waiver connotes issuance of notice and non-response thereto. Everyone has a right to waive an advantage or protection which law seeks to give him/her. Undoubtedly, if a notice is issued and no representation was made by either the owner, tenant or a sub-tenant, it would amount to waive the



opportunity and such person cannot be permitted to turn round, after the scheme reaches finality, to say that there is non-compliance of sub-rules (3) and (4) of Rule 21. It would amount to putting premium on dilatory and dishonest conduct."

18. In *Krishna Lal V. State of J & K*, (1994) (4) SCC 422, the Apex Court after referring to the earlier decisions rendered in *Vellayan Chettiar v. Government of the Province of Madras*, AIR 1947 PC 197; *Bhagchand Dagadusa v. Secretary of State for India in Council*, 54 IA 338; *Dhirendra Nath Gorai v. Shudhir Chandra Ghosh*, AIR 1964 SC 1300; *Lachoo Mal v. Radhey Shyam*, AIR 1971 SC 2213 has expressed the view as follows: -

"20. Having seen the pronouncements of judicial fora, we can now inform ourselves as to the view of the reputed authors on interpretation of statutes as well as administrative law. We may start with what has been stated in Maxwell's *The interpretation of Statutes*. This aspect has been dealt at pages 328-330 (12th Edn.) and it has been stated that if the benefit be for the protection of an individual in his private capacity the same can be waived.

To illustrate, reference has been made about waiver of the benefit of the Limitation Act. This is on the maxim of law ""Quilibet potest renunciare juri pro se introducto", meaning "an individual may renounce a law made for his special benefit". Maxwell then says that if the benefit be one which has been imposed in public interest there can be no waiver of the same."

"21. Craies in his *Statute Law* has opined the same, as would appear from what has been stated at page 269 of 7th Edn. By drawing attention to the aforesaid maxim, it has been observed that if the object of a statute is "not one of general policy, or if



the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered as being indispensable". To illustrate this principle, it has been stated that if the statutory condition be imposed simply for the security or the benefit of the parties to the action themselves, such condition will not be considered as indispensable and either party may waive it."

"22. Crawford in his Interpretation of Laws takes the same view as would appear from pages 540-542 (1989 Reprint). The learned author while quoting the aforesaid maxim states at page 542 that requirement like giving of notice may be waived as the same is intended for the benefit of the person concerned."

"23. We may also refer to the views expressed by Francis Bennion in his Statutory Interpretation (1984), wherein this aspect has been dealt with at pages 27 et seq and it has been stated that if the performance of statutory duty be one which would come within the aforesaid maxim, the person entitled to the performance can effectively waive performance of the duty by the person bound. As an illustration mention has been made (at page 29) of decisions in Toronto Corpn. V. Russell and Stylo Shoes Ltd. v. Prices Tailors Ltd. wherein it was held that a duty to give notice of certain matters can be waived by the person entitled to notice, if there is no express or implied indication that absence of notice would be fatal "

"24. H.W.R. Wade's name is well known in the world of administrative law. He has dealt with this aspect at page 267 of the 6th Edn. of his treatise wherein he has quoted what Lord Denning, MR said in Wells v. Minister of Housing and Local Government which is as below:



"I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid."

19. In this context we may refer with profit the decision in Indira Bai (supra) wherein the Apex Court while drawing a distinction between private and public interest has expressed thus:-

"5. The test to determine the nature of interest, namely, private or public is whether the right which is renounced is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct."

[Emphasis supplied]

20. The present factual expose has to be appreciated on the touchstone and anvil of aforesaid pronouncements. As is demonstrable, the petitioner in paragraph 6 of the writ petition has stated as follows:-

"6. That the petitioner has fixed the date for convening the meeting for consideration of no confidence against her in the Register of the Panchayat Samiti for issuing the notice by the Executive Officer for 12.12.09."

From the aforesaid it is perceived that she herself had fixed the date of meeting. The meeting as fixed was held on 12.12.2009. She participated in the meeting and took a chance. Thus, fixing of the meeting by the appellant and participation in the meeting would tantamount to waiver by express conduct. If the provisions contained in Section 44 and 46(4) of the Act are read appositely there can be no shadow of doubt that they provide a protective



umbrella to the elected Pramukh.

Thus, the same does not contravene any public policy. It does not involve any public interest. As we perceive the scheme and anatomy of the provisions of the Act, it is, in fact, basically a protection to the elected candidate. In this regard a Full Bench decision of the High Court of Madhya Pradesh in Smt. Bhulin Dewangan Vs. State of M.P. & Ors., 2000 (4) M.P.H.T. 69 (FB), is apposite to refer. The Full Bench while dealing with the validity of notice calling a meeting of no confidence under M.P. Panchayat (Gram Panchayat Ke Sarpanch Tatha Up-Sarpanch, Janpad Panchayat Tatha Zila Panchayat Ke President Tatha Vice President Ke Virudh Avishwas Prastav) Niyam, 1994 speaking through D.M. Dharmadhikari, J. (as His Lordship then was) held as follows:-

"15. The general rule is that non-compliance of mandatory requirement results in nullification of the Act. There are, however, several exceptions to the same. If certain requirements or conditions are provided by statute in the interest of a particular person, the requirements or conditions, although mandatory, may be waived by him if no public interest are involved and in such a case the act done will be valid even if the requirements or conditions have not been performed. This appears to be the reason for learned C.K. Prasad, J. in Dhumadhandin Vs. State of M.P. (1997 (1) Vidhi Bhasvar 49) which was followed by R.S. Garg, j., in Mahavir Saket Vs. Collector, Rewa (1998 (1) JLJ 113) for holding that mere non-compliance of first part of the rule in fixing a meeting beyond the prescribed days of the motion of no-confidence would not invalidate the whole proceedings. In case of Dhumadhandin (supra), the Sarpanch did not question



the validity of the notice calling the meeting of no-confidence and in fact had taken chance by facing the motion. R.S. Garg, J. in Mahavir Saket (supra) placed reliance on the decision of C.K. Prasad, J., in Dhumadhandin (supra) to up-hold the passing of the no-confidence motion in the adjourned meeting as in the meeting called within the prescribed fifteen days the Presiding Officer was not available. Sub-section (4) of Section 21 permits reference of a dispute to the Collector by Sarpanch or Up-Sarpanch against whom a notice of no confidence motion had been passed. The proceedings of the no-confidence motion or other proceedings under the Act are also assailable in this Court as Constitutional Court under Article 227 of the Constitution of India. As has been construed by us, even though second part of the rule requiring dispatch of notice of the meeting to the member is mandatory, yet in every case of challenge to the proceeding of no-confidence motion either before the Collector or this Court, it would still be open to the Collector or his Court to find out whether in a given case non-compliance of any part of the rule has in fact resulted in any failure of justice or has caused any serious prejudice to any of the parties. The general rule is that a mandatory provision of law requires strict compliance and the directory one only substantial. But even where the provisions is mandatory, every non-compliance of the same need not necessarily result in nullification of the whole action. In a given situation even for non-fulfillment of mandatory requirement, the authority empowered to take a decision may refuse to nullify the action on the ground that no substantial prejudice had been caused to the party affected or to any other party which would have any other substantial interest in the proceeding. This Court



under Article 227 of the Constitution has also a discretion not to interfere even though a mandatory requirement of law has not been strictly complied with as thereby no serious prejudice or failure of justice has been caused. This is how various Single Bench decisions in which even after finding some infraction of the second part of Rule 3(3) of the Rules of 1994, the resolution of no-confidence motion passed was not invalidated on the ground that no substantial prejudice thereby was caused to the affected parties. The intention of the legislature has to be gathered from the provisions contained in Section 21 and the Rule 3(3) framed thereunder. The provisions do evince an intention that a meeting of the no-confidence motion be called within a reasonable period of not later than 15 days and every member has to be informed of the same seven days in advance. A notice of no-confidence motion is required to be moved by not less than 1/3rd of the total number of elected members as required by first Proviso to sub-rule (1) of Rule 3 and can be lawfully carried by a resolution passed by majority of not less than 3/4th of the Panchas present and voting and such majority has to be more than 2/3rd of the total number of Panchas constituting the Panchayat in accordance with sub-section (1) of Section 21 of the Act. This being the substance of the provisions under the Act and the rules, a mere non-compliance of second part of sub-rule (3) would not in every case invalidate the action unless the Collector while deciding the dispute under sub-section (4) of Section 21 or this Court in exercise of its supervisory jurisdiction under Art.227 of the constitution comes to the conclusion that such non-compliance has caused serious prejudice to the affected office bearer or has otherwise resulted in failure of justice."



16. We get some support in our conclusion on the construction of the provisions contained in the Rule from Statutory construction by Francis J. Mc. Caffrey, 1953 Edition, Article 52, Page 110 where it stated:

"Where a statute regulates the time at or within which an act is to be done by a public officer or body, it is generally construed to be permissive only as to the time, for the reason "that the public interests are not to suffer by the laches of any public officer" (Looney Vs. Hughes, 26 N.Y., 514). While the Courts are inclined to hold such provisions to be directory only as to time, they will be read as mandatory if the nature of the act to be performed or the phraseology of the statute indicates an intention on the part of the legislature to exact a literal compliance with the requirement of time. The Courts seek to achieve a just result in not ascribing an invalidating effect to the failure of public officers to observe the time provisions of statutes; a contrary rule would operate unfairly in prejudicing the rights of persons who have no control over the conduct of the public officer."

(Emphasis supplied) and from the following passage in Statutory Interpretation by Francis Bennion, Second Edition, Part I Section 10 Page 34:

"Even where the duty is mandatory, the Court will not now-a-days hold it to be contravened because of a purely formal or technical defect. This may be described as a defect that does not materially impair the remedy intended to be provided by the enactment for the mischief to which it is directed."

The facts have already been taken note of by this



court hereinabove. The factual matrix of the present case would lead this court to take a view that the petitioners having participated in the special meeting and in the no confidence motion without any protest have waived their mandatory requirement of seven clear days notice commanded by the statute.

This writ application has, thus, no merit. It is dismissed accordingly.

(Rajeev Ranjan Prasad, J)

Rajeev/-

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CAV DATE	
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