IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.08.2020

CORAM:

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

W.P.No.35226 of 2019
and
WMP.Nos.36023 & 36024 of 2019
and WMP.No.5891 of 2020

A.V.Govindaraj,
S/o.Venkatachala Gounder,
5/155, East Arasur,
Sulur Taluk,
Coimbatore District 641 407.

... Petitioner

Vs.

1.The District Collector,
O/o.The District Collector,
Coimbatore.

2.The Assistant Director of Panchayats Development, Audit,
Coimbatore-18.

3.The Block Development Officer (V.P.)
Sulur, Coimbatore District.

4.Assistant Returning Officer,
The Tamil Nadu State Election Commission,
Arasur Village Panchayat,
Sulur Union, Coimbatore District.

... Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India, seeking Writ of Certiorarified

Mandamus, calling for the records relating to the impugned order in Na.Ka.No.428/18/A4 dated 16.12.2019 on the file of respondents 1 and 2 and quash the same and further restrain the respondents 1 to 3 from initiating further action and pass orders.

For Petitioner:Mr.I.Abrar Mohamed Abdullah

For Respondent:Mr.K.S.Suresh, for RR1 and 2

Mr.V.Jayaprakash Narayanan, for R3
Government Pleader.

ORDER

This writ petition has been filed challenging the impugned order passed by the first respondent dated 16.12.2019.

2.The case of the petitioner is that he was the President of the Village Panchayat during the period from 2011 to 2016. During his tenure, proceedings were initiated under Section 205 of Tamil Nadu Panchayat Act, 1994 for his removal. The same was challenged before this Court by filing writ petition in W.P.No.22860 of 2016. Even before the conclusion of the proceedings, his tenure came to an end and this Court recorded the same and closed the writ petition by an order dated 07.07.2017 on the ground that it has became infructuous. The petitioner received the impugned letter dated 16.12.2019 from the first respondent, wherein the first respondent had issued a surcharge certificate against the petitioner and had directed the petitioner to deposit a sum of Rs.1,05,56,452/- within a period of 30 days. Aggrieved by the same, the present writ petition has been filed before this Court.

3.Mr.I.Abrar Mohamed Abdullah, learned counsel appearing on behalf of the petitioner primarily attacked the impugned order passed by the first respondent on the ground that it has been passed in total violation of Rule 4(1) of Tamil Nadu Panchayats (Surcharge, disallowance or charge) Rules 2000 (herein after called as 'Rules'). The learned counsel submitted that the Rule clearly contemplates issuance of show cause notice, submission of a reply and an opportunity of hearing before the surcharge certificate being issued against the petitioner. The learned counsel submitted that the impugned order passed by the first respondent is unsustainable on the ground of violation of principles of natural justice. The learned counsel further submitted that the entire action is actuated with malafides and repeated attempts were made to remove the petitioner from the Panchayat and when that was not successful, the present impugned order has been issued by the first respondent and thereby the petitioner was prevented from participating in the Election held in the year 2019 on the ground that there is payment due from the petitioner payable to the Panchayat. The learned counsel therefore submitted that the impugned order passed by the first respondent requires interference.

4.The third respondent has filed a counter affidavit in this case. The relevant portions in the counter affidavit is extracted hereunder.:

> “3. I submit that the allegation made in para 4 in affidavit the action under section 205 of the Tamilnadu Panchayat Act, 1994 was only vindicate at the based of certain persons are totally denied as false and unwarranted. In fact the 205 proceedings were initiated, after taking into account the irregularities committed by the President during his tenure as reported during the periodical inspections of relevant records by the Assistant Director of Panchayat. The initiation of 205 has not been vindictive by any means and the norms have been scrupulously followed giving the petitioner necessary time to give his explanations i.e. opportunity for representation given twice. Explanations given were found unacceptable and unsatisfactory. Hence the averment of 205 under instigation of someone may be set aside.
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> 4. The petitioner has approached the Hon'ble Court, challenging the 205 initiation vide W.P.22860/2016, which was dismissed as infructuous. As the writ petition was in the Hon'ble court, during which the tenure of the president came to an end, the

necessity of removing the president may have been considered infructuous and redundant. The court dismissed the case without any tangible direction / observations. At this juncture it is submitted to the Honble court, that in absence of any observation or verdicts by the Honble court, the initiation of 205 by the District collector, by virtue of authority vested in him as Inspector of Panchayat still holds good and the matter stands in vogue. It is further submitted that the dismissal of petition as infructuous does not render him exculpate of the responsibilities for the irregularities committed during his tenure as president of the Arasur Panchayat. Based on the fact of the collector's finding his explanation not satisfactory, the 205 proceedings were steered towards initiating surcharge proceedings to recover losses to government caused by financial misappropriations committed by the petitioner vide ROC.2329/2015/A3, dated 9.3.2019. But it is submitted to Honble court that the Surcharge proceeding could not be implemented as the connected and relevant records had been submitted to vigilance and anti-corruption wing (In lieu of FIR came to be registered on 24.11.2015 in crime No.11/2015/AC/CB under section 13(2) r/w 13(1)(c), 13(1)(d) and 13(i)(e) of Prevention of corruption Act and under section 409 of the IPC and the same is under investigation) on this inspection and was handed over on 26th November 2019 to this office. Hence the delay in the further action which the petitioner wants to take advantage of. Hence this averment may be set aside as unsustainable.

5. Under the circumstances stated above, and the time taken to asses the loss to the government, by the actions of the petitioner as panchayat president cannot be construed as an ulterior motive for the rejection of his candidature. It is also submitted that the petitioner is liable for the losses and in pursuance of this, levy of surcharge on misappropriation of funds and loss caused was contemplated. The petitioners attempt to get a stay on the proceedings Na ka 428/18 /A4, dated, 16.12.2019 was also rendered invalid bv the court (copy enclosed). Further one Mr.R.Arjunan, filed a WP. No.26798/2019 under Article 226 of the constitution of India praying to issue writ of Mandamus directing the respondents to recover the loss caused by the respondent within a time frame fixed by the Court. As per the court order dated 27.09.2019, the court ordered that "In any event, respondents shall not delay in initiating the proceedings beyond three month". Further the Hon'ble court has observed "The apprehension of the petitioner

herein is well found. Already the 5th respondent (A.V.Govindaraj), when action under Section 205 of the Tamil Nadu Panchayats Act, 1994 was proposed to be taken, had adopted all sorts of tactics till the expiry of his term. If the 4th respondent does not act with alacrity on misappropriation charge alleged by the petitioner against the 5th respondent, it will be difficult to recover the money from him. Hence, the 4th respondent shall initiate departmental proceedings against him at the earliest." Based on the honble court order we had to complete the surcharge process before 27.12.2019 and we issued in the date of 16.12.2019. Hence the averment made by the petitioner to attach motive on the ARO for rejecting his candidature is untrue and may be set aside. Since the petitioner having all his past records of non viability and without taking any effort to get them cleared before contesting the election is a note worthy point for his rejection as a candidate, and the action of ARO, it is pleaded to be upheld as ensuring only eligible candidates are allowed to contest elections."

5.The learned Government Pleader by placing reliance upon the counter affidavit submitted that notice was issued to the petitioner by initiating proceedings under Section 204 of Tamil Nadu Panchayat Act 1994 on the very same grounds on which the present impugned order has been passed and the petitioner had also submitted the explanation. Before action could be taken, his tenure as President came to an end. Therefore, the explanation given by the petitioner was taken into consideration for the purpose of issuing the surcharge certificate. It was submitted that the petitioner had by his acts made the panchayat suffer a huge loss of a sum of Rs.1,05,56,452/-. The learned counsel therefore submitted that the first respondent has applied his mind on each charge that was made against the petitioner and passed the impugned order.

6.The learned Government Pleader further submitted that the petitioner has an alternative remedy of appeal under Rule 5 of the Rules and without exhausting the alternative remedy, the present writ petition has been filed and this writ petition is liable to be dismissed on that ground alone.

7.Heard Mr.K.S.Suresh, learned counsel appearing on behalf of respondents 1 and 2.

8.It may not be necessary for this Court to enter into the merits of the case. The impugned order passed by the first respondent itself shows that no notice has been issued to the petitioner before the surcharge certificate was issued. The impugned order totally consists of nine charges against the petitioner and there is nothing to indicate that the first respondent has considered the stand of the petitioner for each charge. Obviously, the first respondent could not have considered the defence of the petitioner since the petitioner was never put on notice. It is also clear from the counter that what was offered as an explanation by the petitioner when proceedings were initiated under Section 205 of the Act, has been taken to be an explanation to justify the impugned order passed by the first respondent.

9.For proper appreciation, Rule 4(1) is extracted hereunder:

> "4.Issue of Surcharge Certificate: (1) The Auditor who is empowered to issue a Surcharge Certificate, before issuing a Surcharge Certificate, shall give a show cause notice to the person concerned, calling upon him to state his defence about the proposed notice in writing within a specified time which shall not be less than fifteen days. If such person desires to be heard in person, the opportunity of personal hearing shall be given by the Auditor. In such personal hearing, the Auditor shall record the proceedings of such hearing. The Auditor shall issue Surcharge Certificate after taking into consideration the representation, if any, given by the person concerned and the proceedings by the personal hearing. The show cause notice and the Surcharge Certificate shall be in Tamil Version."

10.It is clear from the Rule that it contemplates the issuance of show cause notice, explanation and an opportunity of hearing before issuing a surcharge certificate. This procedure is mandatory since the order/surcharge certificate has Civil consequences. Once this procedure is not followed and the order has been passed without giving an opportunity to the petitioner, it becomes violative of principles of natural justice. Once an order suffers from violation of principles of natural justice, the availability of an alternative remedy will not act as a bar before this Court in exercising its jurisdiction under Article 226 of Constitution of India. The law on this issue is well settled.

11.In view of the above discussion, the impugned order/surcharge certificate issued by the first respondent by proceedings dated 16.12.2019 is hereby quashed. If the first respondent wants to proceed against the petitioner, the procedure as contemplated under 4(1) of the Rule shall be strictly followed and thereafter necessary orders can be passed based on the explanation given by the petitioner and after affording an opportunity to the petitioner.

12.In the result, this writ petition is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The District Collector,
   O/o.The District Collector,
   Coimbatore.

2. The Assistant Director of Panchayats,
   Development, Audit, Coimbatore-18.

3. The Block Development Officer (V.P.)
   Sulur, Coimbatore District.

4. Assistant Returning Officer,
   The Tamil Nadu State Election Commission,
   Arasur Village Panchayat,
   Sulur Union, Coimbatore District.

+1cc to M/s.V.Jayaprakash Narayanan, Advocate, Sr.No.27236

KJ(CO)
GS(19/10/2020)