

1 WA. No. 294/2016 and WA. No. 359/2016

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR
(DB : SHEEL NAGU and SA DHARMADHIKARI J,J)

Writ Appeal No.294/2016

Narendra Pandey

Vs.

State of M.P. and Ors.

Writ Appeal No.359/2016

Man Singh Bhagel

Vs.

State of M.P. and Ors.

For Appellant

Shri Gaurav Mishra Advocate

For Respondents/State.

Shri Praveen Newaskar Govt. Advocate.

Whether approved for reporting: Yes/No.

J U D G E M E N T

(Delivered on 20th of February, 2017)

Sheel Nagu, J:

1. Both these writ appeals involving common questions of law and based on more or less similar foundational facts have been heard together and are decided by this common order.

1.1 At the very outset it is pertinent to mention that the only difference between the two appeals is that in W.A. No. 359/16 the basic impugned show cause notice before the writ court had not been responded to by way of reply while in W.A. No. 294/2016 the petitioner appellant has filed reply to impugned show cause notice. Moreso WA. No. 359/2016 is by a former Sarpanch of Gram Panchayat whereas WA. No. 294/2016 is by a former Secretary of Gram Panchayat.

2. Learned Single Judge has dismissed the challenge to the show cause notice issued u/S. 92 (1) (4) of the M.P. Panchayat Raj Avam

Gram Swaraj Adhinyam, 1993 (for brevity Adhinyam of 1993) calling upon the appellants to show cause as to why the appellants be not sent to civil jail for indulging in embezzlement of funds arising out of the fact that work of only Rs. 50,000/- has been certified by the Sub-Engineer, Janpad Panchayat, Dabra as against the sanctioned amount of Rs. 4,40, 800/- thereby leaving an amount of Rs. 3,90, 800/- unaccounted and thus recoverable. The show cause notices further hold the petitioners to have misused government funds and indulged in serious financial irregularities.

2.1 The writ court while declining interference on merits held the petitions to be pre-mature since no final order was passed by the competent authority under any of the clauses u/S. 92 of Adhinyam of 1993.

3. APPELLANTS SUBMISSIONS:

Learned counsel for the appellant primarily contends that the show cause notices are unlawful due to following grounds;

1. The terminology used in the show cause notices demonstrates premeditated mind of the competent authority;
2. The competent authority is not empowered u/S. 92 to make up it's minds of sending the defaulter to civil jail unless 'reasonable opportunity' contemplated by Sec. 92 (4) is afforded.
3. The impugned show cause notices are vitiated for being stigmatic in nature since appellants are held to have misused the government funds and being involved in embezzlement and serious financial irregularities without first considering the explanation of the appellants.

The above said grounds had though been raised in the writ petitions although in generic terms but not considered by the writ

court and therefore it would be appropriate to deal with the same herein as these grounds go to the root of the matter and involve the correct interpretation of Sec. 92.

3.1 The learned counsel has relied upon decision of single bench in the case of **Sewak v. State of M.P.** reported in **2016 (2) MPLJ 271** and another decision of single bench of this court dated 11.8.2014 in W.P. No. 7575/2013.

4. RESPONDENT'S SUBMISSIONS:

Per-contra learned counsel for the State defending the order impugned herein passed by the writ court relies upon decision of the Apex Court in the case of **Union of India and Anr. v. Kunisetty Satyanarayana** reported in **(2006) 12 SCC 28** to contend that petitions in question were pre-mature as having been filed against show cause notices where final decision was yet to be taken by competent authority and therefore the said show cause notice were not amenable to the judicial review under Article 226 of the Constitution of India.

5. FINDINGS:

Sec. 92 of Adhiniyam of 1993 is reproduced below for convenience and ready reference;

92. Power to recover records articles and money.-

"(1) Where the prescribed authority is of the opinion that any person has un-authorisedly in his custody any record or article or money belonging to the Panchayat (or Gram Nirman Samiti and Gram Vikas Samiti) (or committee of Gram Sabha), he may, by a written order, require that the record or article or money be delivered or paid forthwith to the Panchayat (or Gram Nirman Samiti and Gram Vikas Samiti) (or committee of Gram Sabha), in the presence of such officer as may be appointed by the prescribed authority in this behalf.

(2) If any person fails or refuses to deliver the record or article or pay the money as directed under sub-section (1) the prescribed authority may cause him to be apprehended and may send him with a warrant in such form as may be prescribed, to be confined in a Civil Jail for a period not longer than thirty days.

(3) The prescribed authority may- (a) for recovering any such money direct that such money be recovered as an arrear of land revenue; and

(b) for recovering any such record or articles issue a search warrant and exercise all such powers with respect thereto as may lawfully be exercised by a Magistrate under the provisions of Chapter VII of the Code of Criminal Procedure, 1973 (No.2 of 1974).

(4) No action under sub-section (1) or (2) or (3) shall be taken unless a reasonable opportunity has been given to the person concerned to show cause why such action should not be taken against him.

(4-A) The case pertaining to recovery of any record or article or money initiated by the prescribed authority shall be disposed of within six months from the date of initiation.

(5) A person against whom an action is taken under this section shall be disqualified to be member of any Panchayat (or Gram Nirman Samiti and Gram Vikas Samiti) (or committee of Gram Sabha) for a period of (six) years commencing from the initiation of such action."

5.1. Sec. 92 of 1993 Adhiniyam forms part of Chapter (X) of the said Adhiniyam which deals with 'Control'. Thus the object behind Sec. 92 is to exercise control over any person who in the opinion of the prescribed authority is in unauthorized custody of any record, article or money which belongs to the Panchayat. This power of control is exercised u/S. 92 (1) by the prescribed authority by forming an opinion that any record, article or money belonging to the Panchayat is unauthorizedly held by a person. Formation of this opinion which is prima facie in nature is a unilateral act of prescribed authority which may though be founded on his subjective satisfaction but the same ought to be arrived at by objective consideration of relevant material. Once having so formed the said opinion the prescribed authority asks the defaulting person in writing to return the article/record/money.

5.2. The terminology employed by the prescribed authority while issuing show cause notice u/s. 92 (1) should not only reflect but also advance the object behind Sec. 92. The object is to restore the possession of record/article/money belonging to the Panchayat which is in wrongful possession of some other person. The object is not to

prosecute, condemn or punish the person who holds the record, article or money unauthorizedly. Thus the language in the show cause notice ought not to contain any stigma or taint or allegation on the character or conduct of the noticee or else said show cause notice can become vitiated as being stigmatic. It is settled principle of law that stigma or allegation against the character of any person ought not to be alleged or made without holding an enquiry in which element of reasonable opportunity to the person concerned is required to be afforded. Sec. 92 though contemplates in sub-sec. (4) affording of reasonable opportunity but the same cannot mean conduction of full scale enquiry as contemplated in Sec. 40 of Adhinyam of 1993 for removing an elected office bearer.

5.3. Moreso, when a defaulting person is called upon to deliver the possession of the record/article/money belonging to the Panchayat then the show cause notice should merely mention the fact of the defaulting person having wrongful custody of the record, article or money belonging to the Panchayat without making any taint or allegation as regards the conduct and character of the defaulting person. This notice/order issued u/S. 92 (1) also should not contain any recital that if the possession of the record, article or money is not handed over then the defaulting person would be sent to civil jail. Such precaution is necessary as otherwise the authority would be blamed for being prejudiced against the defaulting person for having a premeditated mind.

5.4. When the defaulting person fails or refuses to respond to the show cause notice in writing issued u/S. 92 (1) of Adhinyam of 1993 then the prescribed authority is obliged to issue another notice in terms of Sec. 92 (4) informing the defaulting person that due to failure/refusal to comply with the order passed under 92 (1) he shall be confined to civil jail by affording the noticee some reasonable time of a few days so as to avoid the extreme step of subjecting the

noticee to arrest and civil jail and further that during this notice period of a few days the defaulting person may have an opportunity to avoid civil jail by handing over the custody of record, article or money as the case may be.

5.5. The above said steps are not only in line with the provisions of Sec. 92 (4) but also satisfy the object of this provision which refers to sub-sec. (1), sub-sec (2) and sub-sec (3) disjunctively by employing the term 'or'. Meaning thereby that the reasonable opportunity is to be afforded to the defaulting person to show cause as and when the power u/S. 92 (1) or power u/s. 92 (2) or u/s. 92 (3) is exercised. Affording of reasonable opportunity contemplated by Sec. 92 (4) relates to each of the sub-secs. (1), (2) and (3) separately and cannot be pressed into service conjointly for two or more of the three sub-secs of Sec. 92. This interpretation subserves the rule of law which is manifested interalia by affording reasonable authority and adopting procedure established by law which is reasonable when tested on the anvil of Article 14 of the Constitution of India.

5.6. The abovesaid interpretation of Sec. 92, best serves the object behind this provision and also ensures strict adherence to the principle of natural justice of reasonable opportunity. Such cautious approach is all the more necessary since passing of an order u/S. 92 (1) or (2) or (3) attracts disqualification from contesting panchayat elections for a period of six (6) years.

5.7. Pertinently the requirement of 'reasonable opportunity' in Sec. 92 (4) would suffice in case summary enquiry is held where the fundamentals of 'reasonable opportunity' are adhered to, which can be summarized as follows :-

- (a) Intimating the person concerned by means of show cause notice in writing u/S. 92 (1) that he is in possession of the money / article / record belonging to Panchayat and that the said possession be restored back to Panchayat within a reasonable

period of time. This notice u/S. 92 (1) of Adhinyam of 1993 should not contain insinuating recital of allegation, prosecution, stigma, punishment, character assassination, derisive remark, etc;

(b) The above said show cause notice in writing should be served on the person concerned by modes prescribed by law under the 1993 Adhinyam & Rules framed thereunder;

(c) reasonable time period depending upon attending facts and circumstances should be afforded to the noticee to respond to the abovesaid show cause notice u/S. 92 (1) of Adhinyam of 1993;

(d) in case the noticee denies the nature of possession to be unauthorized and demands supportive material which was considered by the prescribed authority while forming opinion u/S. 92 (1) of Adhinyam of 1993 in regard to the possession being unlawful, the said incriminating material shall be supplied to enable the noticee to submit reply;

(e) thereafter on receipt of the reply or failure to file the same, the prescribed authority shall then record it's satisfaction by passing a speaking order, that the possession of record/article/money held by the noticee, is unauthorized. This speaking order containing this satisfaction arrived at about unauthorized possession should form part of fresh show cause notice issued to the noticee u/S. 92 (2) or 92(3) r/w Sec. 92 (4) directing the noticee to return the record/article/money belonging to the Panchayat within reasonable period of time failing which any or both of the coercive steps of sending the noticee to civil jail or/and recover the money as arrears of land revenue and in case of record/article by appropriate mode prescribed under Chapter VII of the Code of Criminal Procedure, would be taken;

(f) in case within reasonable period provided in (e) (supra) the record/article/money is not returned to the Panchayat the prescribed authority shall then be free to adopt the coercive methods u/S. 92 (2) or/and u/S. 92 (3) to ensure recovery of

possession of record/article/money.

8. The decision cited by the learned counsel for the petitioner in the case of Shivansh (supra) though pertains to Sec. 92 but was attended with distinct set of facts ie non-supply of material on the basis on which action u/S. 92 was taken. While the other judgment in W.P. No. 7575/2013 cited by the learned counsel for the petitioner is also distinguishable on facts as it related to the factual scenario where it was found that no enquiry worth it's name was conducted by the prescribed authority to arrive at the finding of money being outstanding against petitioners therein.

9. As regards the objection of the learned counsel for the State that the petitions before the writ court were premature since challenge was to show cause notices and final decision is yet to be taken, this court is of the considered view (as detailed infra) that since the very exercise of power by the prescribed authority u/Ss. 92 (1), 92 (2) and 92 (4) is dehorse the said provisions, the said objection stands overruled.

10. On the anvil of the above analysis if the impugned show cause notices in both the petitions are tested it is evident that they suffer from following substantial legal defects;

1. The show cause notices are stigmatic in nature as it brands the petitioners to have misused the government funds having indulged in embezzlement and serious financial irregularities which is not the objective of Sec. 92.
2. The impugned show cause notices are said to be issued u/S. 92 (1) and yet without waiting for the reply of the petitioners the prescribed authority has discloses it's mind of sending the petitioners to civil jail without first complying with Sec. 92 (4) of Adhinyam of 1993 qua Sec. 92 (2) of Adhinyam of 1993.
3. The impugned show cause notices issued u/S. 92 (1) and u/S. 92 (2) have both been clubbed together which is impermissible

in view of provisions of Sec. 92 (4) which contemplates affording of reasonable opportunity by way of show cause notice issued separately for Sec. 92 (1) and 92 (2) of 1993 Adhinyam.

11. In view of the above this court has no hesitation to hold that the impugned show cause notices in both the petitions are vitiated in the eye of law as having been issued without affording reasonable opportunity as contemplated by Sec. 92 (4) and further reflects premeditated mind of the prescribed authority besides being stigmatic in nature.

12. Consequently, both the W.A. No. 359/2016 and W.A. No. 294/2016 are allowed. The order of the writ court dated 9.9.2016 passed in W.P. No. 6302/2016 and order dated 6.9.2016 passed in W.P. No. 6170/2016 are set aside. The impugned show cause notices dated 6/7/2016 (in W.P. No. 6170/2016) and dated 6/7/2016 (in W.P. No.6302/2016) are quashed.

12.1. Passing of this order shall not come in way of the prescribed authority to exercise it's powers u/S. 92 afresh after following the due process of law as enumerated above.

No cost.

(SHEEL NAGU)
Judge
20/02/2017

(SA DHARMADHIKARI)
Judge
20/02/2017

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