

**Court No. - 38**

**Case :-** WRIT - A No. - 5335 of 2023

**Petitioner :-** Smt Pinki Devi

**Respondent :-** State Of U.P. And 3 Others

**Counsel for Petitioner :-** Sheikh Moazzam Inam

**Counsel for Respondent :-** C.S.C.

**Hon'ble Saurabh Srivastava,J.**

1. Heard Shri S.C. Dwivedi assisted by Shri Sheikh Moazzam Inam, learned counsel for the petitioner and Shri Satyendra Kumar Tripathi, learned Standing Counsel appearing on behalf of the respondents.

2. Present petition has been filed seeking the following reliefs:-

*"i) Issue a writ, order or direction in the nature of certiorari to quash the order dated 29.08.2022 passed by respondent no. 3 as well as order dated 06.03.2023 passed by the respondent no. 2.*

*ii) Issue a writ, order or direction in the nature of mandamus commanding/directing the respondent no. 3 not to take any action in pursuance of the impugned orders."*

3. It is the case of the petitioner that inquiry has been conducted with regard to certain loss, misappropriation and misuse of the funds which has to be utilized for the public cause under the supervision of Gram Vikas Adhikari, Block Bahadurpur, District-Basti and the petitioner was rendering her services over the same post.

4. The said inquiry has been conducted by the Committee comprises of District Horticulture Officer, Tehsildar, Sadar, District Basti and Assistant Engineer, D.R.D.A. for ascertaining the fact which is specifically with regard to the irregularities while performing the public work under the supervision of the petitioner as well as Gram Pradhan of the concerned Village.

5. On the basis of inquiry report as submitted by the Inquiry Committee, the District Magistrate i.e. respondent no. 3, determined the loss of Rs. 3,52,083/- and the same has been fastened in equal proportion to be recovered from the petitioner, Ex-Gram Pradhan along with Assistant Engineer, Bahadurpur,

District-Basti vide order dated 29.08.2022.

6. Having being aggrieved by the order dated 29.08.2022 passed by the respondent no. 3, the petitioner challenged the same before the respondent no. 2 who has been designated as Appellate Authority in pursuance to the judgment and order dated 06.12.2022 and as such, the same has been adjudicated by the respondent no. 2 under the strict compliance of the directions passed in Civil Misc. Writ Petition No. 18959 of 2022 (Smt. Pinki Devi versus State of U.P. and Others).

7. While preferring the Appeal before the respondent no. 2, the specific stand taken up by the petitioner regarding the competency of the Committee constituted by the District Magistrate for Enquiry as well as the respondent no. 3 being the District Magistrate which is contrary to the Section 27(2) wherein the prescribed authority who is competent to fix the amount of the surcharge according to the procedure has been defined only in the case where the responsibility is fastened against the Pradhan or other member of the Gram Panchayat or Joint Committee or any other Committee constituted under this Act and as such, being the Village Development Officer/Village Secretary, the respondent no. 3 proceeded against the petitioner under the statutory provisions as defined under the Uttar Pradesh Panchayati Raj Act, 1947, for better appreciation of legal issues defined under Section 27 of the Act of 1947 and the Rules 256 and 257 of the U.P. Panchayat Raj Rules, 1947 (hereinafter referred to as "the Rules of 1947") the same are being reproduced hereinbelow:-

*"27. Surcharge. - (1) Every Pradhan or [ \*\*\*] of a [ Gram Panchayat], every member of a [Gram Panchayat] or of a Joint Committee or any other committee constituted under this Act [shall be liable to surcharge for the loss, waste or misapplication of money or property belonging to the Gram Panchayat, if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan or Member].*

*Provided that such liability shall cease to exist after the expiration of ten years from the occurrence of such loss, waste or misapplication, or five years from the date on which the person liable ceases to hold his office, whichever is later.*

*(2) The prescribed authority shall fix the amount of the surcharge according to the procedure that may be prescribed and shall certify the amount to the Collector who shall, on being satisfied that the amount is due, realise it as if it were an arrear of land revenue.*

*(3) Any person aggrieved by the order of the prescribed authority fixing the amount of surcharge may, within thirty days of such order, appeal against the*

order of the State Government or such other appellate authority as may be prescribed.

(4) Where no proceeding for fixation and realization of surcharge as specified in sub-section (2) is taken the State Government may institute suit for compensation for such loss, waste or misapplication, against the person liable for the same."

## CHAPTER XIII

### SURCHARGE RULES

"256. (1) In any case where the Chief Audit Officer, Co-operative Societies and Panchayats, considers that there has been a loss, waste or misuse of any money or other property belonging to a Gaon Sabha as a direct consequence of the negligence or misconduct of a Pradhan, he may call upon the Pradhan, Up-Pradhan, Member, Officer or servant should not be required to pay the amount misused or the amount which represents the loss or waste caused to the Gaon Sabha or to its property and such explanation shall be furnished within a period not exceeding two months from the date such requisition is communicated to the person concerned.

Provided that an explanation from the Pradhan, Up-Pradhan or member of the Gaon Panchayat shall be called for through the District Magistrate and from the officer or servant through the Panchayat Raj Officer:

Provided also that no explanation shall be called for from any member who is recorded in the minutes of the Gaon Panchayats or any of its committee as having been absent from the meeting at which the expenditure objected to was sanctioned or who voted against such expenditure.

Note. - Any information required by the Chief Audit Officer, Co-operative Societies and Panchayats or any officer subordinate to him not below the rank of auditor, Panchayats for preliminary enquiry, shall be furnished and shall be connected papers and records shall be shown to him by the Pradhan immediately on demand.

(2) Without prejudice to the generality or the provisions contained in sub-rule (1) the Chief Audit Officer, Co-operative Societies and Panchayats, may call for the explanation in the following cases:

(a) where expenditure has been incurred in contravention of the provisions of the Act or of the rules or regulations made thereunder;

(b) where loss has been caused to the Gaon Sabha by acceptance of a higher tender without sufficient reasons in writing;

(c) where any sum due to the Gaon Sabha has been remitted in contravention of the provisions of the Act or the rules or regulations made thereunder;

(d) where the loss has been caused to the funds or other property of the Gaon Sabha on account of want of reasonable care for the custody of such money or property.

(3) On the written request of the Pradhan, Up-Pradhan, Member, Officer or servant from who an explanation has been called for, the Gaon Panchayat shall give his necessary facilities for inspection of the records connected with the requisition for surcharge. The Chief Audit Officer may, on application from the person surcharged allow a reasonable extension of time for submission of his explanation if he is satisfied that the person charged has been unable, for reasons, beyond his control, to consult the record for the purpose of furnishing his explanation.

*Explanation.* - Making of an appointment in contravention of the Act, the rules or the regulations, made thereunder shall amount to misconduct or negligence and payments to employees of salaries and other dues on account of such irregular appointments shall be deemed to be a loss, waste or misuse of Gaon Fund.

257.(1) After the expiry of the period prescribed in sub-rule (1) or (3) of Rule 256, as the case may be, and after examining the explanation, if any, received within time, the Chief Audit Officer shall submit the papers along with his recommendations to the District Magistrate of the district in which the Gaon Sabha is situated in case of Pradhan, Up-Pradhan and Members and to the District Panchayat Raj Officer of the district in which the Gaon Sabha is situated in case of officers and servants.

(2) The District Magistrate or the District Panchayat Raj Officer as the case may be, after examining and after considering the explanation, if any, shall require the Pradhan, Up-Pradhan, Member, Officer or servant of the Gaon Panchayat to pay the whole or part of the sum to which such Pradhan, Up-Pradhan, Member, Officer or servant is found liable:

*Provided, firstly, that no Pradhan, Up-Pradhan, Member, Officer or servant of a Gaon Panchayat would be required to make good the loss, if from the explanation of the Pradhan, Up-Pradhan, Member, Officer or servant concerned or otherwise the District Magistrate of the District Panchayat Raj Officer, as the case may be, is satisfied that the loss was caused by an act of the Pradhan, Up-Pradhan, Member, Officer or servant in the bona fide discharge of his duties.*

*Provided, secondly, that in case of loss, waste or misuse occurring as a result of a resolution of the Gaon Panchayat or any of its committees the amount of loss to be recovered shall be divided equally among all the members including Pradhan and Up-Pradhan, who are reported in the minutes of the Gaon Panchayat or any of its committee as having voted for or who remained neutral in respect of such resolution:*

*Provided, thirdly, that no Pradhan, Up-Pradhan, Member, Officer or servant shall be liable for any loss, waste or misuse after the expiry of four years from the occurrence of such loss, waste or misuse or after the expiry of three years from the date of his ceasing to be a Pradhan, Up-Pradhan, Member, Officer or servant of the Gaon Panchayat whichever is later."*

8. After considering the grounds as taken up by the petitioner in the memo of Appeal presented before the respondent no. 2 for

challenging the order dated 29.08.2022 passed by the respondent no. 3 the vital submission in shape of legal issues has never ever been discussed or determined by the Appellate Authority who was exercising power under the orders passed by Coordinate Bench in ***Civil Misc. Writ Petition No. 18959 of 2022 (Smt. Pinki Devi versus State of U.P. and Others)***.

9. Learned counsel for the petitioners submitted that a perusal of Section 27 of the Act of 1947 read with Rule 256 of the Rules of 1947 clearly shows that surcharge was leviable on an enquiry which was conducted by the Chief Audit Officer and which had to be forwarded to the District Magistrate in the case of Pradhan, Up-Pradhan and Members of Gram Panchayat and to the District Panchayat Raj Officer in the cases of officers and servants of the Gaon Sabha.

10. Learned counsel for the petitioners, therefore, submitted that it was the Chief Audit Officer of the Cooperative Societies and Panchayat who was the officer authorized to conduct the enquiry for the purposes of the imposition of surcharge.

11. He further submitted that after the report was submitted to the District Magistrate, the order ought to have been passed by the Competent Authority and the learned counsel for the petitioners submitted that since there was yet no competent authority appointed, the order of the District Magistrate was also beyond jurisdiction.

12. To bolster his argument, learned counsel for the petitioners relied upon the judgement of this Court in ***Smt. Shyam Wati vs. State of U.P and others*** reported in ***2013 (6) AWC 6339***. This judgement was cited to show that if the enquiry was not conducted by the Chief Audit Officer then the enquiry as had been done in this case by the Deputy Director (Agriculture) Basti, was without jurisdiction. He further submitted that when there was no Prescribed Authority as has been referred to in Section 27(2) of the Panchayat Raj Act then the District Magistrate had no jurisdiction to impose the surcharge. For this purpose, learned counsel for the petitioner relied upon ***Uday Pratap Singh @ Harikesh vs. State of U.P. and others reported in 2019 (10) ADJ 443***.

13. Per contra, learned Standing Counsel vehemently opposed the prayer as made in the petition and supported the order dated 06.03.2023 passed by the respondent no. 2 by way of raising his argument that the prescribed authority as defined under the Act of 1947 is not defined, but the same has been answered in the verdict

pronounced by this Hon'ble Court.

14. Learned counsel for the petitioner while making the submissions very fairly conceded that as far as the jurisdiction with the Deputy Director (Agriculture), Basti, was concerned, it was only the Chief Audit Officer who was authorized to conduct the enquiry. He, however, submitted and also placed a written submission that now when the Panchayat had attained constitutional status and as per Article 243, 243(A) to 243(O) of the Constitution of India there were provisions in the Constitution to provide for a three tier Panchayat system such as the Village Panchayat, Kshetra Panchayat and the District Panchayat instead of the Chief Audit Officer, some more powerful body should be brought into existence. He submitted that further since as per Article 243(I) of the Constitution, a Finance Commission to review the financial position of Panchayats had been formed, on which there was the duty to enquire into the financial deals of the Panchayat then the finances of a gram panchayat should be monitored by a much more powerful body. While making his submissions, he also submitted that under Article 243 (G), there were various powers, authorities and responsibilities bestowed upon the Panchayat, so much so that under Article 243 (H) even powers to impose taxes had been given to the panchayats. He submits that though various amendments had been made in the Panchayat Raj Act, the provision for enquiry for the purposes of surcharge had remained only with the Chief Audit Officer. He submits that the various Panchayat work had to be supervised and had to be audited and there were times that even before the audit could take place after the completion of work, the responsibilities had to be fixed for the works which had commenced and which were not being done properly.

15. Learned Standing Counsel for the respondents however, submitted that so far as the jurisdiction under Section 27(2) of the 1947 Act for imposing the surcharge with the District Magistrate had been questioned, the question was no longer res intergra as now a Division Bench of this Court in the case of **Ram Vilas vs. Commissioner Devi Patan Mandal Gonda and others** reported in **2022 (1) ADJ 1** had decided that the District Magistrate could impose the surcharge.

16. For substantiating the arguments as raised above, the learned counsel for the petitioner has relied upon the judgment and order dated 16.12.2022 passed in **Writ C No. 28230 of 2022 (Dinesh Kumar And 4 Others versus State of U.P. And 3 Others)**, wherein it is crystal clearly defined and discussed while arriving over the

issue with regard to the competency of the District Magistrate to specifically proceed against the officer or servant as prescribed under the U.P. Panchayati Raj Act, 1947.

17. The operative portion of the judgment is reproduced hereinbelow:-

*"Having heard the learned counsel for the parties, there is not an iota of doubt that the enquiry which was conducted by the Deputy Director (Agriculture), Basti, was an enquiry which was without jurisdiction. In fact, as per Rules 256 and 257 of the 1947 Rules, the enquiry ought to have been conducted by the Chief Audit Officer and now as per the order of delegation made by the Chief Audit Officer by the District Audit Officers.*

*Under such circumstances, the impugned order dated 29.8.2022 passed by the District Magistrate, Basti, is quashed and is set aside.*

*However, the Court suggests that the Law Commission may take up the matter and as per the conditions prevailing now i.e. as per the various powers which have been bestowed upon the Panchayats after the amendment of the Constitution of India by the 73rd Amendment by which Articles 243(A) to 243 (O) have been added in the Constitution of India and the Panchayats have attained constitutional status, a body which has powers to supervise the working of the Pradhans and its officials should be constituted for monitoring of the Panchayats and for supervising the work which is being done by them.*

*For the reasons stated above, the writ petition stands allowed.*

*A copy of this order be sent by the Registrar General of this Court to the State Law Commission."*

18. It is undisputed fact that the inquiry as conducted which initiated the entire proceedings against the petitioner whereupon the respondent no. 3 relied upon and the entire determination has been fastened against the petitioner has been conducted by the authorities other than the Chief Audit Officer or by the District Audit Officers, and as such, the respondent no. 3 exceeded its jurisdiction specifically with regard to determining the liability against the petitioner.

19. It is apparent from the order which impugned the present petition that inspite of taking the specific grounds at the time of preferring the Appeal before the respondent no. 2 there is hardly any discussion available with regard to the competency of the respondent no. 3 while determining the loss which has been attributed to the petitioner and as such, the same is liable to be set aside.

20. The instant matter is hereby decided without calling the

counter affidavit from the respondents since the action of the responding authorities are contrary to the settled provisions of the U.P. Panchayati Raj Act, 1947 which has been broadly discussed in the judgment dated 16.12.2022 passed in **Writ C No. 28230 of 2022 (Dinesh Kumar And 4 Others versus State of U.P. And 3 Others)** and after footing the action of the respondents in the litmus of the judgment as mentioned above, the same seems to be illegal.

21. In the above mentioned facts and circumstances, the orders dated 29.08.2022 and 06.03.2023 passed by the respondent nos. 3 and 2 respectively is hereby quashed and set aside.

22. The writ petition stands **allowed** accordingly.

**Order Date :- 12.4.2023**

SY