

(2011) 07 GAU CK 0042

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 104 (K) of 2011

Apongo Ovung & Ors.

APPELLANT

Vs

State of Nagaland & Ors.

RESPONDENT

Date of Decision : 27-07-2011

Acts Referred:

Nagaland Village and Area Council Act, 1978 — Section 17, 17

Citation : (2013) 2 GLR 259 : (2011) 4 GLT 823

Hon'ble Judges : P.K.Musahary, J

Bench : Single Bench

Advocate : For the Petitioners: Mr.Yanger Wad, Mr.N.Mozhui, Ms.Irena Vizo, Ms.K.Kire & Mr.L.Likhas Sangtam, For the Respondents: Mrs.Lucy Nsu, G.A., Mr.C.T.Jamir, Mr.N.Longkumar, Mr.Akum Jamir, Mr.I.Watti Walling & Mr.Imkong Jamir, Advocates appearing for Parties

Judgement

P. K. Musahary, J.

1. Heard Mr. N .Mozhui ,learned counsel for the petitioners and Mrs. Lucy, learned Government Advocate, Nagaland. Also Heard Mr. C.T.Jamir, learned senior counsel assisted by Mr. N Longkumar, learned counsel for the respondent No.5.

2. The instant writ petition arises out of election /selection of the respondent No.5 as Village Council Member (in short ?VCM?) of Phiro Village in Wokha District for a tenure of 20112015. The petitioners are the newly elected VCMs and Head Gaonbura (in short ?HGB?) and Goan Buras (G.B in short) of the said village. In the year 2008, the respondent No.5, while serving as chairman of the said Village Council along with the Secretary of Village Development Board (VDB), allegedly misappropriated/ misused an amount of Rs.1,68,962/ only meant for implementation of National Rural Employment Guarantee Scheme (in short ?NREGS?). The alleged act of misappropriation was detected by the Special Audit Committee of the Department and accordingly the Village Council headed by its seasonal Chairman deliberated over the matter and by a resolution

adopted in the meeting held on 29.8.2008 removed the respondent No.5 from the office the Chairman of the Village Council. The Respondent Deputy Commissioner on being intimated took up the matter and by an order dated 22.1.2009 (AnnexureC), convicted the respondent No.5 as well as the then VDB Secretary by way of directing them to deposit the misappropriated/misused amount of Rs.15,000/ each with simple imprisonment of five months. The Respondent No.5 deposited the misappropriated amount and no further action was initiated against him. On completion of the previous tenure of the Village Council, a process for constitution of new Village Council for the period 2011-2015 was initiated. Accordingly, a new team of VCMs including the petitioners were selected/elected, wherein the respondent No.5 was also selected /elected as VCM. The names of the newly elected VCMs including the name of the respondent No.5, were forwarded to the Respondent Deputy Commissioner on 11.4.2011 for necessary action. The petitioners simultaneously filed a written complaint dated 21.4.2011 to the Respondent Deputy Commissioner against respondent No.5 and requested him not to forward the name of respondent No.5 to the Government for approval as the respondent No.5 was convicted under Section 16(4) of the Nagaland Village and Area Councils Act, 1978 (hereinafter in short, referred to as 'VC Act?'). But inspite of such complaint and request the Respondent Deputy Commissioner forwarded the name of respondent No.5 along with the names of the petitioners and others as newly elected VCMs to the Secretary Home Department (Local Self Government), Government of Nagaland, Kohima vide letter dated 17.5.2011. The petitioners apprehend that the name of respondent No.5 would be approved along with other legally elected/selected VCMs in violation of the provision under Section 16(4) of the VC Act. They have filed the present writ petition to

? A. Quash and Set aside :

?(i) Letter dated 11.4.2011 submitted by the Head GB, the name of selected VCMs in so far as it relates to respondent No.5 appearing at Sl. No.18 (AnnexureE);

(ii) Letter bearing No. COUNCIL1/201011 Dated 17.5.2011 forwarding the names of selected/elected VCM in so far it relates to respondent No.5 appearing at sl No.18 (AnnexureG);

B. Direct the State Respondent not to approve the name of respondent No. 5 as VCM in view of the letter dated 11.4.2011 Annexure E) and 17/5/2011 (AnnexureG) ?

3. Mr. Mozhui, learned counsel for the petitioners referring to provision under Section 16(4) of the VC Act submits that respondent No.5 has become disqualified to hold the post of VCM for a period of five years or such less period as the State Government may determine inasmuch as , he has been convicted for misappropriation and misuse of Village Council fund. As to how the respondent No.5 has been convicted , he has taken me through order dated

22.1.2009 (Annexure C to the writ petition) passed by the Respondent Deputy Commissioner, wherein it has been recorded that the misappropriation of amount was detected by the special audit committee which audited the accounts as per direction of the department and submitted a report to the Phiro Village General Meeting whereupon the General Body of the said Village decided to write off 50% of the total misused amount directing the accused namely the respondent No.5 and the then Secretary of the VDB to deposit the money on or before 29.9.2008. It has also been recorded in the said order that while rechecking the expenditure and receipt register it was detected that the Chairman and the VDB Secretary misused Rs.30,000/ (Rupees Thirty Thousand) only and the aforesaid Village Council Chairman (Respondent No.5) and the Secretary VDB were directed to deposit Rs.15,000/ each with the Deputy Commissioner, Wokha on or before 15.2.2009 and to undergo simple imprisonment for five months each. The repayment of Rs.15,000/ by the respondent No.5 in compliance to the aforesaid order of the Respondent Deputy Commissioner, according to Mr. Mozhui, learned counsel, amounts to admission of the guilt and he has accepted the punishment for commission of offence of misappropriation of Village Council's fund and he cannot be allowed to hold the office of the VCM unless the period of disqualification expires. Due to such disqualification, although he was elected/ selected as VCM and got his name forwarded by the Deputy Commissioner concerned, his name should be dropped from the list of VCM as his name was sent by the Village Council by mistake to the Govt. through the Respondent Deputy Commissioner without condoning his disqualification.

4. Mr. C.T. Jamir, learned Sr. counsel appearing for respondent No. 5 submits that there was no conviction order passed against the respondent No. 5 by any court of law or competent authority for alleged misappropriation/ misuse of Village Council fund. The impugned order dated 22.1.2009, according to him, is not a conviction order. What is reflected from the aforesaid order dated 22.1.2009 is that the respondent No.5 and the VDB Secretary were granted honorarium @ Rs.15000/ each in recognition of their service rendered for the Village Council and the grant of such honorarium was opposed by some members of the Village Council and on such objection, the respondent No.5 and the VDB Secretary had to refund the amount of Rs.1,5000/ each to the Deputy Commissioner. But the respondent No.5 was not required to undergo imprisonment, rather he was allowed to complete the usual term of Chairmanship of the Village Council without any objection from any corner. Had there been any order of conviction requiring respondent No.5 to undergo imprisonment, he would not have been allowed to continue as Chairman of the Village Council concerned till completion of the normal term on 31.3.2011. In that view of the matter, the disqualification, if any attached to respondent No.5 has been waived with the expiry of the tenure of the Chairman of the VC on 31.3.2011. Moreover, it is argued that there was no order from the Govt. to remove the respondent No.5 from the office of the Chairman of the Village Council which is evident from the Govt. letter dated 20.5.2009, whereby the Deputy Commissioner was directed only to verify the

representation submitted by the Phiro Village and submit a detailed report for arriving at appropriate decision regarding removal of the Chairman of Phiro Village Council under the VC Act. The respondent No.5 incurred no disqualification debarring him from being elected/selected as VCM in the new Village Council. The present petition has been filed by the petitioners with mala fide intention to debar the respondent No.5 from holding the post of VCM and thereby depriving him of the chance of getting elected as Chairman of the new Village Council Committee. It is further argued that there is a fallacy in the stand of the petitioners inasmuch as the Clan members of the Village have selected/elected the respondent No.5 as VCM and accordingly his name was forwarded by the Village Council to the Respondent Deputy Commissioner along with others for obtaining necessary approval from the Govt. The petitioners are, therefore, estopped by their conduct to oppose approval of the petitioner's name as VCM. He has therefore raised the question of locus standi of the petitioner's in filing the instant petition.

5. From the pleadings of the parties, it is found that there is no dispute as regards the completion of previous tenure as Chairman of the Village Council by the Respondent No.5 which expired on 31.3.2011. It is an undisputed position that he was not required to undergo any imprisonment for alleged commission of misappropriation or misuse of Village Council Fund. However, the Respondent No.5 admitted refund of Rs.15,000/which he received as honorarium as directed by the Deputy Commissioner, Wokha District vide order dated 22.1.2009. The said order has a mention of simple imprisonment for five months and to deposit Rs.15,000/ against the Respondent No. 5 but the word convicted has not been used therein. For ready reference and appropriate appreciation, the aforesaid order is quoted below:

? ANNEXUREC GOVERNMENT OF NAGALNAD OFFICE OF THE DEPUTY COMMISSIONER WOKHA,NAGALAND No. COUN/PHIRO/8990/594 Dated Wokha the22 nd Jan,2009

ORDER

Undersigned received complaint petition from Seasonal Chairman Phiro Village on 30/8/08 and Hd GB Phiro on 5/12/08 in regard of misused of NREGS programme fund by Shri Yanpemo Tungoe, Chairman and Shri Zanthungo Enio VDB Secretary amounting to Rs.1,68,962/(Rupees One Lakh Sixty Eight Thousand and Nine Hundred Sixty Two) for immediate and befitting action. The misappropriation amount is detected by the social audit committee as per the direction of the department and the said report is submitted to the Phiro village general meeting. The general body of Phiro village held meeting and make a decision to write off 50% of the total misused amount and directed the accused to deposit the money on or before 29/9/08. However, both the accused are to recover the money stating that the materials procurements for the construction of water tank was entrusted to different groups of VCM, GB and VDB members and they are equally responsible. Both the accused denied intentional involvement in the said

misappropriation amount figured by the social audit .

Now therefore after carefully examined the records and verifying the expenditure registers, receipts, etc the misappropriation amount figured in the audit report could not be totally accepted by the court for various reasons like fluctuation of vehicle hire charges material rate and handling loses is not taken into account.

Further the general body of Phiro village decision to write off 50% of social audit committee finding is against the procedural matter. However, the NREGS programme in respect of Phiro Village is more or less successful.

While rechecking the expenditure registers , receipts it is detected that the Chairman and the VDP Secretary misused Rs.30,000/therefore, the Village Council Chairman Shri Yanpemo Tungoe and Shri Zanthungo Enio to deposit Rs.15,000/ each to the undersigned court on or before 15.2.2009 on SI for 5(Five) months each.

Henceforth, the development programme like NREGS and BRGF will be implemented through a separate committee consisting of 5 members to be selected by the general body as implementing committee for the said programme for a period of five years. Order pass and pronounce in my open court.?

6. On careful reading of the aforesaid order it appears that there was some misuse/misappropriation of the Village Council fund against the respondent No.5 and VDB Secretary, which was detected in the audit and on examination/ verification of the records. What was the exact amount of misuse/ misappropriation has not been indicated but a decision was taken in the general body of the village that the 50% of the total misused amount would be written off and the same should be deposited on or before 29.9.2008. However in the said order it has been clearly recorded that the Chairman (respondent No.5) and the VDB Secretary misused Rs.30,000/ and they were directed to deposit the said amount (Rs.15,000/ each) with the Deputy Commissioner on or before 15.2.2009.

7. As regards the payment of honorarium, explanation has been offered by the respondent No.5 in paragraph 2 (a) of his affidavit in opposition saying that ? The Block Development Officer (herein referred to as BDO) of the concern area on consideration of the initiative taken by the VDB Secretary and the respondent No.5, by his letter dated 27.6.08, requested the Village council members of the Phiro Village to grant Rs.1,5000/(rupees fifteen thousand) each to the respondent No.5 and VDB Secretary as an honorarium from NREGS works payment and accordingly, the Village Council of Phiro Village accorded the said amount to the Village Chairman and the VDB Secretary to met the expenses incurred during the initiation of various Schemes in the Village.?

8. This is how the respondent No.5 and the VDB Secretary happened to draw/use Rs.15,000/ each as honorarium. It has not been shown as to how and under what authority the BDO could direct/request the Village Council Members to

grant honorarium. Nor has the provision under which such honorarium could be granted been shown. It has also not been shown whether as per request of the BDO the Members of the Village Council passed any resolution or took any decision sanctioning payment of such honorarium. But the fact remains that the respondent No.5 in his capacity of Chairman of the Village Council , at the relevant point of time , received an amount of Rs.15,000/ as honorarium without any provision under the Act and without being supported by any resolution/ decision of the Village Council. The said amount was received as honorarium for personal gain of the Respondent No. 5. No doubt the aforesaid honorarium amount was admittedly refunded/returned but from the said fact it has become evident that there was an unauthorised temporary use of Village Council fund/ development fund under the NREGS i.e. public fund. Such an unauthorised temporary use of public fund comes under the mischief of definition of term misappropriation .The relevant question is whether such temporary misuse/ misappropriation of public fund would entail disqualification of the respondent no.5 for being elected/selected as VCM ? And whether disqualification could be declared only on conviction of a person on charge of misappropriation of public fund.

9. For answering this question, it is necessary to have a look at the provision under Section 16(4) of the VC Act which reads as under :

16. A person shall be disqualified from being selected as and for being a member of Village Council:

(1) ??????????????????????

(2)

(3) ??????????????????????..

(4) If having held an office under any Council he has been found guilty of corruption, disloyalty or breach of such Council laws; unless a period of five years or such less period as the State Government may determined in any particular case has elapsed since his becoming so disqualified; or

10. The aforesaid provision is to be read with Section 17 of the V.C.Act which provides that if any question arises as to whether a member of village council has been subjected to disqualification, the question should be referred to the State Government for taking decision and the decision of the Government thereon shall be final. From the pleadings of the parties, I find that the aforesaid question has not been referred to the State Government while the Respondent No. 5 was holding the post of Chairman of the village council or after he completed the normal tenure. The State Government had no occasion to decide this question as it was not referred to earlier by any party. This question has been raised only when the Respondent No.5 has been reelected/ reselected by the Clan members of the village as VCM and it has been made known that he is intending to contest the post of Chairman of the village Council for the term

2011 to 2015. Because of existence of such provision under Section 17 of the V.C Act, as mentioned above, I feel that the matter should be left with the State Government for taking appropriate decision as to whether the Respondent No.5 should be disqualified or not. This is a function assigned with the executive under the provision of Section 17 of the V.C. Act. Any decision taken by this court would mean usurpation of the powers and functions of the concerned authorities of the State Government. I am alive with the decision rendered by the Apex Court in Municipal Committee, Patiala Vs. Model Town Residents Assn. and others , reported in (2007) 8 SCC 669, wherein it is held that the court cannot usurp the functions assigned to the legislative bodies under the Constitution and even indirectly require the legislature to exercise its power of lawmaking in a particular manner. The court cannot assume to itself a supervisory role for the lawmaking power of the legislature under the provisions of the Constitution. The said principle, in my considered opinion , is also applicable to the present case inasmuch as the court cannot assume to itself the powers and functions of the executive in the matter of administration of village council.

11. For the aforesaid reasons, I dispose of this writ petition directing the respondents State Government to decide the issue involved regarding disqualification of Respondent No. 5 and also as to whether or not the name of the Respondent No. 5 should be approved as VCM or dropped from the list of VCM as demanded by the petitioners. The State Respondents shall decide the entire matter in the light of the observations and provisions under the V.C. Act within a period of 15 days from the date of receipt of a certified copy of this order by a speaking order and communicating the same to the parties concerned.

12. With the above observations and directions, this writ petition stands disposed.

13. However, I pass no order as to costs.