

(1973) 02 PAT CK 0017

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 404 of 1971

Brijlal Yadav

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 28-02-1973

Acts Referred:

Bihar Conduct of Business of Panchayat and Appointment of Executive Committee Rules, 1960 — Rule 31, 32
Bihar Panchayat Election Rules, 1959 — Rule 14, 21
Bihar Panchayat Raj Act, 1948 — Section 10, 11, 2, 49, 55
Constitution of India, 1950 — Article 226, 227

Citation : AIR 1973 Patna 462

Hon'ble Judges : Madan Mohan Prasad, J

Bench : Single Bench

Advocate : Janardan Sinha and Raghubansh Singh, for the Appellant; Tara Kant Jha, S.C. and Jagarnath Jha, for the Respondent

Final Decision : Allowed

Judgement

Madan Mohan Prasad, J.—This is an application under Articles 226 and 227 of the Constitution of India for issue of an appropriate writ directing the inclusion of the name of the petitioner in the list of duly nominated candidates for the election to the post of Sarpanch of the Katsakra Gram Panchayat in the following circumstances.

2. The general election of the aforesaid Gram Panchayat within Police Station Chandan in the district of Bhagalpur, was to be held in the year 1970. The petitioner filed his nomination on the date fixed therefore for the post of a Member of the Executive Committee. The nomination papers received for the posts of such Members were equal to the number of seats. As regards the post of Mukhia and Sarpanch however, the number of duly nominated candidates was more than one in each case and as such poll was necessary. The election was, however stayed and a fresh programme was published according to which the date for filing of nomination paper for the post of Sarpanch was the 25th of

March, 1971. The petitioner thus filed his nomination paper for the post of Sarpanch. The Election Officer rejected his nomination paper on the ground that he had already been elected a Member of the Executive Committee and was thus not eligible to contest the election for the post of Sarpanch. Being aggrieved with this order the petitioner filed an objection petition before the sub-divisional Magistrate under Rule 23 (4) of the Bihar Panchayat Election Rules (hereinafter referred to as "the Rules"). The subdivisional Magistrate also held that the petitioner was debarred in view of Section 55 of the Bihar Panchayat Raj Act (hereinafter referred to as "the Act") to contest the election for the post of Sarpanch as he had been declared elected Member of the Executive Committee. Hence this application,

3. The petitioner has further stated that he was the Sarpanch of the aforesaid Gram Panchayat continuously since the year 1962 and that he continued to be so at the date of the filing of his nomination paper for the membership of the Executive Committee and even there after at the date of filing his nomination paper for the post of Sarpanch and continues to be so. It is also said that the oath of office of a Member of the Executive Committee had not been administered to him and on that account he was not a Member of the Executive Committee at the date of filing of the nomination paper for the post of Sarpanch.

4. Learned counsel for the petitioner has urged firstly that the bar in Section 55 does not apply to Sarpanch because it refers to the Panches alone and "Sarpanch" is not included within the term. "Panch" and secondly that the petitioner had not become a Member of the Executive Committee for the reasons that the oath of office had not been administered to him and also because the Executive Committee had not been constituted until the date of nomination for the post of Sarpanch. Learned counsel for the State of Bihar has, however, contended that the disqualification applies to the Sarpanch as much as to the Panches and that the administration of the oath of office is immaterial in view of the fact that a person became Member of the Executive Committee as soon as he is declared to have been elected to that post.

5. This appears to be a case of first impression as it is stated by counsel for both parties that the points raised in this case have not been subject-matter of decision so far.

6. In order to appreciate the first point it is necessary to refer to the relevant provisions of Section 55 of the Act which is as follows:--

"Members of Executive Committee not eligible to be "Panches". No Mukhiya or other members of the Executive Committee shall be eligible to be a "Panch"."

In view of the language employed in this section it has been urged that this is a disqualification for election to the post of a Panch and not to that of a Sarpanch. In this connection learned counsel has placed the various provisions of the Act where there appear to be reference to Sarpanch and Panch. On that basis it has been argued that distinction has been drawn between a Sarpanch and a Panch

throughout the Act that their rights and duties are different, that their methods of election are different and, therefore, the word "Panch" used in Section 55 of the Act cannot be said to include the Sarpanch and thus there is no prohibition against a Mukhia or other Member of the Executive Committee becoming a Sarpanch.

7. Section 2 (p) gives the definition of "Sarpanch" which is as follows:--

" "Sarpanch." means the head Panch elected u/s 51 who presides over the Gram Cutcherry." There is however, no definition of the term "Panch". Chapter VII of the Act deals with the establishment, powers, duties and the procedure of Gram Cut-cherry and Benches thereof. Section 49 which falls in this chapter provides for the constitution of "Gram Panchayat" and election of "Fanchas." The relevant portion of Section 49 is as follows:--

"Constitution of "Gram Panchayat" and election of Panches--1). Every "Gram Panchayat" shall, for the purposes of discharging the judicial functions imposed upon it by or under this Act establish a "Gram Cutcherry" consisting of a panel of nine "Panches" including the "Sarpanch" out of which four panches "shall be elected by the "Gram Panchayat" and four "Panches" shall be nominated by a joint meeting of the "Sarpanch", all the elected "Panches" and all the elected members of the Executive Committee excluding the "Mukhiya" in such manner as may be prescribed by rules made in this behalf."

Reference may also be made to Rule 14 of the Rules which says that the "total number of the Panches who shall form the panel of Panches of a Gram Cut-cherry of the Panchayat shall be nine including the "Sarpanch" (underline mine). Reading these provisions of the Act it is quite clear that according to the definition the Sarpanch is very much a Panch being a head Panch. It is also clear from Section 49 and Rule 14 that the Gram Cutcherry is to consist of nine Panches including the Sarpanch. There is thus no doubt left that the Sarpanch is also a Panch and he has been expressly so included within the term in Section 49 and Rule 14. Although the Act does not provide any definition of the term "Panch", reading the aforesaid provisions of the Act it is quite clear that a Sarpanch is basically a Panch with certain additional rights and higher status being the head amongst the Panches. In my view it is immaterial for the purposes of finding out whether the term "Panch" includes a "Sarpanch" that they have been mentioned differently, they have different powers or duties or that the method of their election provided for is different from each other. It may be mentioned in this connection that the Sarpanch and four Panches are elected by the Gram Panchayat in the same manner. Four Panches are however, nominated. It is open to the legislature to provide for such difference in respect of different persons though they may be belonging to the same class. One amongst the Panches is the Sarpanch. The Legislature has thought fit to provide for more powers and duties for him than for any other Paanch, he being the Chief amongst them. This by itself would not suggest that the Sarpanch is not a Panch at all. An argument like that is excluded in view of the definition of Sarpanch and

the provisions of Section 49 of the Act. I am, therefore of the view that the terra "Panches" used in Section 55 of the Act includes the Sarpanch as well.

8. In this connection learned counsel for the petitioner has urged that prior to the amending Act of the year 1959 according to the provisions of the Act. a Sarpanch was to be elected from amongst the Panches, but after the amendment Section 51 of the Act now provides for the election of a Sarpanch from amongst the members of the Gram Panchayat but there was no consequential amendment to Section 55 of the Act and the very fact that the Legislature did not add the word "Sarpanch" in Section 55 after the amendment of Section 51 of the Act shows that the Legislature did not intend to apply the prohibition for the post of Sarpanch. I am unable to accept this argument. When the Legislature has clearly laid down that the Sarpanch is also one of the Panches the non-addition of the term "Sarpanch" would not point out the intention attributed to the Legislature. In view of the provisions of the Act referred to above the prohibition does apply to the post of Sarpanch in the absence of any provisions of law to the contrary.

9. Reading the preamble of the Act one finds that the Act has been passed to establish and develop local self Government in the village communities and to organise and improve their social and economic life. In order to achieve the first object executive and judicial functions are to be exercised by the Gram Panchayat. The two functions appear to have been kept separate from each other and are to be exercised by the Executive Committee and the Gram Cutcherry respectively. The Mukhia is to be the head of the Executive Committee and the Sarpanch the head of the Gram Cutcherry. Section 55 is intended to make the executive ineligible to occupy a judicial post. It is absurd to argue that the head of the executive, namely, the Mukhia, and the other members of the executive are eligible to become the head of the judiciary i. e. Sarpanch but not a subordinate member thereof namely, a Panch. The entire scheme of the Act in this respect has to be taken into consideration to find out the intention of the Legislature and in my opinion, it supports the conclusion that the intention of the Legislature was not to allow the Mukhia and members of the executive to be eligible to become a Sarpanch or a Panch. In order to give a harmonious construction to the different provisions of the Act relating to the constitution of the Executive Committee and the Gram Cutcherry, the election of the Mukhia and the Sarpanch and of the members of the Executive Committee and the Panches, the only proper reading of Section 55 is that the prohibition applies as much to the post of Sarpanch as to the post of a Panch.

10. Coming now to the second point the question arises whether a person becomes a Member of the Executive Committee on the declaration of the result of the election or after entering upon the office, having taken the oath of office. In the present case admittedly the number of duly nominated candidates for the post of Members of the Executive committee was equal to the number of posts to be filled. Rule 26 of the Rules provides that if the number of duly nominated candidates is equal to the number of seats the Election officer shall declare all

such candidates to be duly elected to fill those seats. There is no averment in the petition that there was no such declaration. Reading the orders of the Election Officer and the Sub-divisional Magistrate one finds that they have stated the declaration to have been made. Thus I must proceed on that footing. Learned counsel for the State has urged that as soon as the petitioner was declared elected, he became a Member of the Executive Committee for all purposes. I am unable to accept this contention. The provisions of the Act which I am going to discuss hereafter show clearly that a person does not become a Member of the Executive Committee at the date of his election. Section 2 (e) defines the "Executive Committee" and says that it means the Executive Committee consisting of Mukhia elected u/s 10 and Members appointed u/s 11. Section 11 lays down that the Executive Committee shall consist of the Mukhia, four Members to be elected by the Gram Panchayat and four members to be appointed by the Mukhia in the prescribed manner. Sub-section (2) of Section 11 says that the term of the office of a Member of the Executive Committee shall be five years, four years and three years respectively in the case of a Gram Panchayat of the first class, second class and third class. The term, however, begins with effect from the date of election of the Mukhia. Reading Section 11 as a whole it is quite obvious that the Executive Committee is not even properly constituted so long as the Mukhia is not elected. The term of the Members of the Executive Committee also, therefore, starts with the date of the election of the Mukhia. It is therefore, difficult to accept the contention that a person elected to be a Member of the Executive Committee becomes a Member of the Executive Committee by the mere declaration of the result of the election even though the Executive Committee is not properly constituted at all at that date.

11. Reference may be made next to Rule 31 of the Bihar Conduct of Business of Panchayat and Appointment of Executive Committee Rules. 1960. According to this rule the Mukhia, UpMukhia and other members of the Executive Committee are required at the time of entering upon their offices to make and subscribe before persons named therein an oath or affirmation in the form mentioned in that rule. The next Rule 32 lays down that before a Member of the Executive Committee enters upon his office the Mukhia shall administer to him the oath of secrecy in the form given therein. It is quite obvious, therefore, that a Member of the Executive Committee cannot be said to have entered upon his office unless he has made or subscribed an oath or affirmation bearing allegiance to the Constitution of India and has been administered an oath of secrecy. In my view, a person does not become a Member of the Executive Committee till then. I am, therefore, unable to accept the contention that as soon as a person is declared elected to the post of a Member of the Executive Committee he becomes a Member thereof and becomes subject to the disqualification mentioned in Section 55 of the Act.

12. The next question which arises is whether Section 55 provides for a disqualification by which a person becomes ineligible to be nominated for the post at the time of general election, or is it a disqualification which applies at a

subsequent stage. In this connection the scheme and constitution of the Gram Cutcherry must be borne in mind. According to Rule 14 of the Election Rules the Sarpanch who is the head-Panch and the four Panches are to be elected from amongst the Members of the Panchayat. Let us see as to who is a person eligible to be nominated for election to the post of a Sarpanch or Panch. Rule 21 contains the relevant provisions. It is as follows:--

"Disqualification for election etc. (1) A person shall not be qualified for election, nomination or appointment, as the case may be as a Mukhiya, member of the Executive Committee/Sarpanch or Panch. if he is in arrears of any tax, toll, fee or rate due from him to the Panchayat for a period of three months after a notice, requiring payment of such arrears has been duly served upon him by the panchayat. The production of a money order receipt showing payment of the amount mentioned in the notice in favour of the Panchayat shall be deemed to be sufficient proof of payment of any tax, toll, fee or rate due from the person to the Panchayat:

Provided that where a candidate claims that a notice requiring payment of the arrears of any tax. toll, fee or rate due from him to the Panchayat has not been served upon him. he shall be given an opportunity to pay the amount due from him and upon such payment the Election Officer shall cause a receipt to be granted to him for the amount paid and then he shall not be disqualified for the purposes of election, nomination or appointment as the case may be.

(2) Any person entitled to vote under three rules and who is not subject to any disqualification u/s 79 or Sub-rule (1) shall be qualified for filing nomination paper for being elected as a Mukhiya or member of the Executive Committee or Sarpanch or Panch.

(3) Each candidate shall, either in person or by his proposer, deliver to the Election Officer nomination paper duly completed in Form A and subscribed by the candidate himself as assenting to the nomination and by a qualified person as proposer.

(4) Any person entitled to vote under these rules and who is not subject to any disqualification u/s 79 or under Sub-rule (1) shall be qualified to subscribe as proposer of any one candidate only.

(5) Election to the office of the Mukhiya. Sarpanch, Panch, Member of the Executive Committee, as the case may be shall be deemed to be different elections for the purposes of this rule.

(6) Every nomination paper filed under sub-rule (3) shall be accompanied with a nomination fee of rupees twenty for the post of Mukhiya or Sarpanch and rupees ten for the post of Panch or Member of the Executive Committee, as the case may be. For members of the Scheduled Tribes and Scheduled castes the aforesaid fee would be rupees ten for the office of Mukhiya and Sarpanch and rupees five for the office of Panch or Member of the Executive Committee :

Provided that when a person has been nominated by more than one nomination paper not more than one nomination fee would be required to be paid.

(7) The nomination fee shall be deposited--

(a) in cash to the Election Officer at the time of filing nomination paper who shall cause a receipt to be granted to him and shall subscribe on the nomination paper giving the receipt number as endorsement to the effect that the nomination fee has been paid in cash; or

(b) in a Government treasury or sub-treasury under head "LII-Misc. Receipt under the Panchayat Act Fees. Fines and forfeiture under Bihar Panchayat Raj Act. 1947 -- Other receipts."

(8) The nomination fee deposited under Sub-rule (7) shall not be refundable in any case."

It will thus appear that under Sub-rule (1) he must not be in arrears of any tax toll, fee or rate due from him to the Panchayat. Sub-rule (2) allows any person entitled to vote and not subject to any disqualification u/s 79 or Sub-rule (1) of Rule 21 to file his nomination paper for being elected as a Mukhiya or Member of the Executive Committee or Sarpanch or Panch. It will appear that persons entitled to vote for the election of Mukhiye or Sarpanch are those who are included in the voters list under Rule 5, i. e. persons who are included in the electoral roll of an Assembly Constituency relating to the area concerned and for the election of panch and Member of the Executive Committee, persons entered in the said electoral roll appertaining to a particular ward are to constitute the voters list. It has to be noted thus that Rule 21 enables all such persons the right to be nominated for the aforesaid posts unless they suffer from the disqualifications mentioned in Section 79 or Rule 21 (1). It is significant that the disqualification mentioned in Section 55 has not been mentioned in Rule 21.

13. Let us turn to the other four Panches who are to be nominated. They are to be nominated at a Joint meeting of the Sarpanch and the four elected Panches and the elected members of the Executive Committee excluding the Mukhia. According to Rule 16 of the Election Rules the Sarpanch is to convene the joint meeting within 21 days of the election of the Sarpanch, the Panches and Members of the Executive Committee. It is further provided by Rule 16 that the persons to be nominated must not be "subject to any disqualification either u/s 4 or Section 79 or under Rule 21 of these Rules". It is again significant to notice that Section 55 has not been mentioned even in this rule. We have already noticed the contents of Rule 21. Section 4 of the Act provides that every Gram Panchayat shall consist of all persons enrolled as electors in so much of the electoral roll or rolls of an assembly constituency of the State of Bihar for the time being in force as relates to the local areas comprised within the limits of the Gram Panchayat, Therefore a person has to be such an elector in order to be able to become a Panch. Section 79 provides that a person shall be disqualified for election, nomination or appointment as a Mukhiya member of the Executive

Committee. Sarpanch or Panch" If such person is subject to any of the disqualifications mentioned in that section. It is thus obvious that wherever the Legislature has provided for any disqualification in respect of nomination, election or appointment it has used clear language to that effect. Section 55 however, does not use the words "disqualified for election nomination or appointment." The words used in this section are "shall be eligible to be a Panch".

14. In this connection it will be relevant to notice that the Up-Mukhia and the Up-Sarpanch are also to be elected. Rule 57 of the Election Rules provides for the same. Rule 58 provides for nomination papers for these posts to be received by the Mukhia and the Sarpanch. Rule 59 lays down as follows :--

"Qualification for Up-Mukhiya and Up-Sarpanch--

(1) Any duly elected or nominated member of the Executive Committee shall be qualified for election as a Up-Mukhiya and similarly any duly elected or nominated Panch shall be qualified for election as a Up Sarpanch.

(2) Any duly elected or nominated member of the Executive Committee or any duly elected or nominated Panch shall be qualified to subscribe as proposer or seconder to one nomination paper respectively for the office of Up Mukhiya or Up Sarpanch and no more.

(3) Each candidate shall, whether in person or by his proposer or seconder deliver to the Mukhiya or the Sarpanch between the hours fixed under Rule 58 a nomination paper in the following form subscribed by the candidate himself as assenting to the nominator and by two duly elected or nominated members of the Executive Committee in case of Up Mukhiya or two duly elected or nominated Panches as proposer and Seconder in case of Up Sarpanch."

It is significant to notice that the rule making authority have used the words "any duly elected or nominated." If a person were to become a member of the Executive Committee or a panch merely by his election, the use of the words "duly elected or nominated" would be superfluous.

15. It will also be relevant to notice the provisions of Rule 23 of the Election Rules. Sub-rule (2) provides that the Election Officer may reject any nomination paper on any of the following grounds, namely "(i) that the candidate is disqualified from being chosen to fill the vacancy u/s 4 or Section 79 or Sub-rule (1) of Rule 21; or (ii) that the proposer is disqualified from subscribing a nomination paper under Sub-rule (4) of Rule 21; or (iii) that there has been any failure to comply with any provision of these rules; or (iv) that the signature or thumb mark of the candidate or of any proposer has been obtained by fraud". It is again obvious therefrom that a candidate is disqualified if he suffers from any of the disqualifications mentioned in Section 4, Section 79 or Sub-rule (1) of Rule 21. There is no mention of Section 55 here and the disqualification mentioned in Section 55 has not been stated to be disqualification on which ground a nomination paper may be rejected.

16. It will thus appear that the disqualification u/s 55 of the Act is not meant to apply to the stage of nomination or election. It appears to be intended to apply at a subsequent stage, i. e. when the Mukhia and the, Members of the Executive Committee; have already been elected and have entered upon their offices. It is at this stage that a person who has already become a Member of the Executive Committee or a Mukhia cannot be eligible to become a Panch. And a person does not become a Mukhia or Member of the Executive Committee as long as he has not taken the oath of office. This view of mine receives support from a Bench decision of this Court in the case of Jagarnath Singh v. Rameshwar Prasad Tripathi reported in 1954 BLJR 371. In that case some of the Panches had not taken the oath of office before entering upon their duties as required by Rule 33 of the Bihar Conduct of Business of Panchayat and Appointment of Executive Rules, 1949 and had held the trial of the petitioner of that case. The trial was held to be without jurisdiction as the constitutipn of the Bench was illegal. It seems to me that that is why the Legislature has not used the words "shall be disqualified for nomination, appointment or election" in Section 55 as used in Section 79 of the Act or in Rule 21. In my view therefore, the disqualification mentioned in Section 55 does not attach to a person who has been merely elected to be a Member of the Executive Committee. He does not by mere election as such become disqualified to file a nomination for the post of Sarpanch or Panch. It is quite conceivable that election of Members of the Executive Committee and the Mukhia may be held earlier and they may enter upon their office before the Constitution of the Gram Cutcherry or the election of the Sarpanch and the four Panches. It is in such a case that the disqualification may apply after the Mukhia or the Members of the Executive Committee have entered upon their offices.

17. A contrary view cannot be taken for another reason. The Act itself provides that there shall be general election for these posts after the term of the office expires. If a person is a Mukhia or a Member of the Executive Committee during a current year and his term of office is going to terminate and general elections are to be held, can it be said that such a Mukhia or a Member of the Executive Committee is debarred from offering himself for election after the expiry of his term. If that were to be held, it would mean that if a person is a Mukhia or a Member of the Executive Committee today he is debarred from being a Panch even though he may cease to be a Mukhia or a Member of the Executive Committee by the next election. If the disqualification were to apply in this manner it would be denying the right of a person to contest election for different posts at different general elections. This could not be the intention of the Legislature for the simple reason it would violate the rights of a Member of the Gram Panchayat either to be a Mukhia or a Member of the Executive Committee or a Panch at different elections. It would also thus mean a disqualification for the sitting Members of the Executive Committee or sitting Mukhia with respect to the next general election. That cannot possibly be the intent of Section 55. The only reasonable interpretation possible in the case is that after a general election

when a person becomes a Mukhia or a Member of the Executive Committee and enters upon his office he shall not be eligible to become a Panch,

18. There is another reason which supports my conclusions aforesaid. It appears from Section 50 of the Act that the term of office of a Sarpanch is respectively five years, four years and three years in the cases of Gram Panchayat of the first, second and third class and includes any further period which may elapse between the expiry of the said period and the date on which the next Gram Cutcherry is established. The Gram Cutcherry is established, as stated earlier, after the election of the Sarpanch and the four Panches and the nomination of the other four Panches at the joint meeting. The Sarpanch is thus to continue in office until the next Sarpanch takes over from him. Such a Sarpanch is not debarred from seeking election to another office in the Gram Panchayat at the next election. Supposing an existing Sarpanch is a candidate for the office of the Membership of the Executive Committee at the next election and he is declared elected, would it mean that he has become a Member of the Executive Committee while he is a Sarpanch? If the declaration of the result of the election were to have the effect of his becoming a Member of the Executive Committee then obviously he could not continue to be a Sarpanch as well as a Member of the Executive Committee. That would result in a conflict between the relevant provisions of the Act entitling any elector to seek election to any post under Rule 21 (2) and Section 50 in respect of the term of office of such person. In the same manner the term of office of a Member of the Executive Committee u/s 11 of the Act is the same as in the case of Gram Cutcherry and includes the further period which may elapse between the expiry of the aforesaid period and the date on which the next Mukhie assumes charge of his office. The Executive Committee consists of the Mukhie and eight other members. The same result would follow if it were to be hold that the person elected to be the Mukhia becomes a Mukhia immediately on the declaration of the result because he has also to continue for such further period as may elapse between the expiry of the fixed period and the date on which the next Mukhia has assumed charge of office.

19. Having given my most anxious consideration to the matter I am of the view that Section 55 does not have the effect of debarring any person who is a Mukhia or a Member of the Executive Committee from seeking election to the post of Sarpanch or Panch at the next election.

20. In the circumstances of the present case I find that the petitioner was continuing to act as a Sarpanch because a fresh election for Sarpanch had not taken place. During his continuance as such Sarpanch he had been elected a Member of the Executive Committee. He had not, however, taken oath and had not thus become a Member of the Executive Committee. Further the Executive Committee itself had not been constituted fully till then, because the election of the Mukhia had not taken place. Even for that reason he could not be deemed to have become a Member of the Executive Committee simply because of the declaration of the result at the election. Therefore, his nomination paper had

undoubtedly been illegally rejected. The order passed by the Election Officer and the Subdivisional Magistrate rejecting his nomination paper cannot, therefore, be sustained.

21. In the result, this application is allowed and the orders aforesaid are quashed. The election authorities are directed to include the name of the petitioner in the list of duly nominated candidates provided there is no other valid objection to the acceptance of the nomination paper. In the circumstances of this case, there will be no order for costs.