

(2012) 03 SHI CK 0511

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 6538 of 2011-G

B.S. Thakur

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 29-03-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 21

Himachal Pradesh Panchayati Raj Act, 1994 — Section 133, 138, 145, 146, 146(1)(a)

Citation : AIR 2012 HP 95 : (2012) 2 ShimLC 880

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : T.S. Chauhan, for the Appellant; Rajinder Dogra, Additional Advocate General with Mr. Vikas Rathore, D.A.G., for the Respondents No. 1 to 4 and Mr. Rajiv Jiwan, Advocate, for the Respondent No. 5, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—A complaint was filed against respondent No. 5, who was holding the office of Pradhan Gram Panchayat, Jukhala by the petitioner and co-villagers on 23.3.2008 to the Deputy Commissioner, Bilaspur. A show-cause notice was issued to respondent No. 5 by the Deputy Commissioner on 9.6.2008, to which the reply was filed by him on 23.6.2008. Respondent No. 5 was put under suspension on 24.7.2008. Inquiry was held by the Sub Divisional Officer (Civil), Sadar, District Bilaspur. Both the charges levelled against respondent No. 5, according to the Inquiry Officer, were duly proved. The Director, Panchayati Raj upheld the order of suspension on 28.10.2008. Respondent No. 5 filed a revision before the Secretary (Panchayat). He remanded the matter to the Deputy Commissioner on 29.1.2009. Thereafter, a show cause notice was issued to respondent No. 5 on 28.2.2009, to which he filed reply on 9.4.2009. Respondent No. 5 was removed by the Deputy Commissioner on 30.4.2009. Respondent No. 5 preferred an appeal before the Divisional Commissioner. He remanded the matter back to the Deputy Commissioner on 15.7.2009. The Deputy Commissioner again found him guilty and re-affirmed order dated

30.4.2009 on 19.8.2009. Respondent No. 5 preferred an appeal before the Divisional Commissioner. He remanded the matter back on 16.11.2009. The matter was re-inquired by the Sub Divisional Officer (Civil), Sadar, District Bilaspur. He again gave findings that the charges levelled against respondent No. 5 were proved. Thereafter, the Deputy Commissioner re-affirmed the earlier orders dated 30.4.2009 on 28.4.2010. Thereafter, respondent No. 5, as per the pleadings, approached this Court by filing CWP No. 3810/2010. It was disposed of on 4.10.2010. Thereafter, the Divisional Commissioner again passed order on 29.10.2010. He has directed respondent No. 5 to be more vigilant in future. In other words, the proceedings against respondent No. 5 were dropped. It is in these circumstances that the petitioner has filed the present writ petition seeking quashing of order dated 29.10.2010 passed by the Divisional Commissioner. It will be apt at this stage to take note that respondent No. 5 has been re-elected as Pradhan, Gram Panchayat, Jukhala on 1.1.2011.

2. Mr. T.S. Chauhan has strenuously argued that order dated 29.10.2010 is against law. He has also argued that the charges levelled against respondent No. 5 have been duly proved in two inquiry reports dated 29.1.2009 and 27.2.2010. He then argued that respondent No. 5 and the Secretary, Gram Panchayat are remiss in discharge of their statutory duties and as far as respondent No. 5 is concerned, he has incurred disqualification u/s 146 of the Panchayati Raj Act and could not participate in the selection process for the post of Pradhan, Gram Panchayat, Jukhala. He further argued that the Deputy Commissioner has affirmed his order repeatedly, but the higher authorities without due application of mind and by misdirecting themselves on the question of law and facts have saved respondent No. 5.

3. Mr. Rajinder Dogra, learned Additional Advocate General has argued that the Divisional Commissioner has only warned respondent No. 5.

4. Mr. Rajiv Jiwan, Learned Counsel appearing on behalf of respondent No. 5 has vehemently argued that order dated 29.10.2010 is absolutely in accordance with law. According to him, in 63 Gram Panchayats, the same practice has been followed and respondent No. 5 cannot be singled out for discrimination.

5. I have heard the Learned Counsel for the parties and have perused the pleadings carefully.

6. It will be apt at this stage to take bird's eye view of the Himachal Pradesh Panchayati Raj Act, 1994, Himachal Pradesh Panchayati Raj (General) Rules, 1997 and the Himachal Pradesh Panchayati Raj (Finance, Budget, Accounts, Audit, Works, Taxation and Allowances) Rules, 2002. Section 133 of the Himachal Pradesh Panchayati Raj Act, 1994 (hereinafter referred to as "Act" for short) provides that there shall be a Secretary for a Gram Panchayat or a group of Gram Panchayats, who shall be appointed by the Director and it shall be the duty of the Secretary to assist the Pradhan or the Up-Pradhan of the Gram Panchayat, as the case may be, in the discharge of their functions. Section 145 provides for

suspension of office bearers of Panchayats. Section 146 deals with removal of office bearers of Panchayats. It is stipulated in sub-section (2) of Section 146 that a person who has been removed under sub-section (1) shall forthwith cease to be a member of any other Panchayat of which he is a member and such person shall also be disqualified for a period of six years to be elected as office bearer of a Panchayat under this Act.

7. The duties of Panchayat Secretary are stipulated under Rule 35 of the Himachal Pradesh Panchayati Raj (General) Rules, 1997. u/s 138, the State Government or the prescribed authority has the power to suspend the execution of any resolution passed. Rule 3 of the Himachal Pradesh Panchayati Raj (Finance, Budget, Accounts, Audit, Works, Taxation and Allowances) Rules, 2002 provides for Panchayat fund. Rule 5 deals with receipt of funds. Rule 6 provides for maintenance, Rule 7 provides for maintenance of cash book and Rule 10 deals with withdrawal and deposit in accounts. According to this rule, every withdrawal from the Gram Panchayat account are to be promptly entered in the cash book on receipt side and the deposit on the disbursement side. The pass books of the accounts are to be maintained and these are to be sent with every remittance or withdrawal to the banker for making relevant entries in the pass books. According to sub-rule (2) of Rule 10, Secretary is the cashier of the Gram Panchayat, who is competent to withdraw or deposit the money in the accounts of the Gram Panchayat. There is a proviso appended to sub-rule (2) of Rule 10, which provides that the payments are to be made to the supplier for purchase of material by crossed cheques only. Rule 17 deals with payment from Panchayat fund. According to sub-rule (2) of Rule 17, payment over Rs. 1,000/- are to be made by means of cheques and reference to cheque number and date are to be quoted on the bill concerned so as to avoid its double payment. All the cheques payable to third parties are to be made over to them for obtaining payment from the treasury/bank.

8. In the instant case, following two charges were levelled against respondent No. 5:

(i) That the Pradhan spent a sum of Rs. 14,458/- under Swajal Dhara from the Panchayat fund without prior approval of the competent authority while the total assessment amount had to be paid in the second installment. In doing so, the Pradhan gave under advantage to M/s Shiva Drillers and made the payment by misappropriation of Panchayat funds.

(ii) The Pradhan made a cash payment of Rs. 6,93,569/- for the installments of 4 hand pumps under Swajal Dhara Yojana in contravention of Rule 10 (2) of the H.P. Panchayati Raj Financial Rules, 2002 which specify that the payment is to be done through cross cheque to the concerned party.

9. A complaint was filed against respondent No. 5 by the petitioner and co-villagers, as noticed above. Regular inquiry was held against respondent No. 5. Both the charges levelled against respondent No. 5 were found to be duly proved

as per report dated 29.1.2009 held by the Sub Divisional Officer (Civil), Sadar, District Bilaspur. Respondent No. 5 was put under suspension on 24.7.2008. Order of suspension was upheld by the Director, Panchayati Raj on 28.10.2008. The Secretary (Panchayat) remanded the matter back on 29.1.2009, which led to issuance of notice to respondent No. 5 on 28.2.2009, to which he filed reply on 9.4.2009. Respondent No. 5 was removed from the office on 30.4.2009. The Divisional Commissioner remanded the matter back on 15.7.2009 and the Deputy Commissioner again re-affirmed the matter on 19.8.2009. The matter was remanded back by the Divisional Commissioner on 16.11.2009. He has ordered the Deputy Commissioner to ensure that fresh inquiry is conducted against respondent No. 5. The inquiry was again held and as per report dated 27.2.2010, charges levelled against respondent No. 5 were again proved. It is in these circumstances that the Deputy Commissioner again re-affirmed the order of removal order dated 30.4.2009 vide order dated 28.4.2010.

10. Surprisingly enough, the Divisional Commissioner in an appeal, vide order dated 29.10.2010 without taking into consideration that respondent No. 5 has been severely indicted by the Inquiry Officer by coming to conclusion that both the charges stood proved against him, he has been let off lightly u/s 146 (1) (a). What stands proved against respondent No. 5 and Secretary of the Gram Panchayat is that they have transgressed Rules 10 and 17 of the Himachal Pradesh Panchayati Raj (Finance, Budget, Accounts, Audit, Works, Taxation and Allowances) Rules, 2002. The Gram Panchayat had authorized Pradhan, Gram Panchayat, i.e. vide resolution No. 6 to incur expenditure of Rs. 14,458/- from Swajal Dhara funds. This could not be done by the Gram Panchayat. It was the duty cast upon Secretary also to ensure that this resolution is not given effect to. He could bring it to the notice of competent authority u/s 138 that a wrong resolution has been passed. The payments have been made by the Panchayat in cash and not through cheque in favour of M/s Shiva Drillers as per findings recorded by the Inquiry Officer. All the payments are above Rs. 1,000/- and as per Rule 10 of the Himachal Pradesh Panchayati Raj (Finance, Budget, Accounts, Audit, Works, Taxation and Allowances) Rules, 2002 were required to be made through cheque. The inquiry ought to have been instituted against the Secretary and other members/office bearers, as ordered by the Deputy Commissioner.

11. Mr. Rajiv Jiwan has strenuously argued that similar practice has been adopted in 63 Panchayats. This practice, to which Mr. Rajiv Jiwan, has made reference, was contrary to law and the same could not be basis to discharge respondent No. 5. It is evident from first inquiry Annexure R-2 dated 29.1.2009 that the Learned Counsel appearing on behalf of respondent No. 5 has admitted that cash payment of four hand pumps to M/s Shiva Drillers, as per resolution dated 25.6.2008, has been made though in the Himachal Pradesh Panchayati Raj (Finance, Budget, Accounts, Audit, Works, Taxation and Allowances) Rules, 2002, there is no provision to make payment in cash. Panchayat could not pass resolution in violation of Rule 17 of the Himachal Pradesh Panchayati Raj (Finance, Budget, Accounts, Audit, Works, Taxation and Allowances) Rules, 2002.

The payments are to be made by way of cheque(s) and the corresponding entries are to be made in the books of accounts maintained for this purpose. There is non-application of mind by the Divisional Commissioner, Mandi by exonerating respondent No. 5. Serious charges were levelled against respondent No. 5. The charges have been duly proved. He was associated during the course of inquiry. He also appeared as witness. The Divisional Commissioner as per subsection (1-A) of Section 146 on consideration of the inquiry report or if he thinks proper, for reasons to be recorded in writing, revoke the suspension order and instead of removing an office bearer, warn him to be vigilant in the discharge of his duties or may also debar him from taking part in any act or proceedings of the Panchayat for the period of six months. In the instant case, it was not a case where sub-section (1-A) of Section 146 could be invoked. Two inquiry reports have severely indicted the respondent No. 5 and it constituted grave misconduct and he was to be removed and was to be disqualified for a period of six years to be elected as office bearers of the Panchayat under the Act. No cogent and convincing reasons have been given why the petitioner has been let off merely by administering warning. The statutory authorities have to discharge their duties under the law.

12. Their Lordships of the Hon"ble Supreme Court in NOIDA Entrepreneurs Association v. NOIDA and others, (2011) 6 SCC 508 have held that the actions of the instrumentality of State must be reasonable and fair and must be exercised for a bona fide purpose. Their Lordships have further held that the power vested in the public authority is to be exercised strictly adhering to the statutory provisions and fact situation of a case. A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other. Their Lordships have further held that the action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". Their Lordships have held as under:

38. The State or the public authority which holds the property for the public or which has been assigned the duty of grant of largesse etc., acts as a trustee and, therefore, has to act fairly and reasonably. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. Every holder of a public office is a trustee.

39. State actions required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance.

Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.

40. The Public Trust Doctrine is a part of the law of the land. The doctrine has grown from Article 21 of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides, as it would only be a case of colourable exercise of power. The Rule of Law is the foundation of a democratic society. (Vide: *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation*, *Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. and others*, AIR 1991 SC 537; and *M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others*,

41. Power vested by the State in a Public Authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact-situation of a case. "Public Authorities cannot play fast and loose with the powers vested in them". A decision taken in arbitrary manner contradicts the principle of legitimate expectation. An Authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other. (Vide: *Commissioner of Police, Bombay Vs. Gordhandas Bhanji, Sirsi Municipality by its President Sirsi Vs. Cecelia Kom Francis Tellis*, ; *The State of Punjab and another v. Gurdial Singh and others*, AIR 1980 SC 319; *Collector (District Magistrate) Allahabad and Another Vs. Raja Ram Jaiswal, Delhi Administration (Now N.C.T. of Delhi) Vs. Manohar Lal*, ; and *N.D. Jayal and another v. Union of India and others*, AIR 2004 SC 867).

13. Their Lordships of the Hon^{ble} Supreme Court in *Delhi Airtech Services Pvt. Ltd. and Another Vs. State of U.P. and Another*, have held that the principles of public accountability and transparency in State action are applicable to cases of executive or statutory exercise of power, besides requiring that such actions also not lack bona fides. Public officers are answerable for both their inaction and irresponsible actions. If what ought to have been done is not done, responsibility should be fixed on the erring officers; then alone, the real public purpose of an answerable administration would be satisfied. Their Lordships have further held that the doctrine of "full faith and credit" applies to the acts done by the officers. Their Lordships have held as under:

212. It was also the duty of respondent No. 2 to ensure that the payments were made to the claimants prior to taking of possession but, in any case, it was an unequivocal statutory obligation on the part of the State/Collector to ensure that the payments were made to the claimants in terms of Section 17(1) read with Section 17(3A) prior to taking of possession. No justification whatsoever had been advanced and can be advanced for such an intentional default and the casual attitude of the concerned officers/officials in the State hierarchy.

213. These authorities are instrumentalities of the State and the officers are empowered to exercise the power on behalf of the State. Such exercise of power attains greater significance when it arises from the statutory provisions. The level of expectation of timely and just performance of duty is higher, as compared to the cases where the power is executively exercised in discharge of its regular business. Thus, all administrative norms and principles of fair performance are applicable to them with equal force, as they are to the Government department, if not with a greater rigour. The well established precepts of public trust and public accountability are fully applicable to the functions which emerge from the public servants or even the persons holding public office.

215. The concept of public accountability and performance of functions takes in its ambit, proper and timely action in accordance with law. Public duty and public obligation both are essentials of good administration whether by the State or its instrumentalities. In the case of *Center for Public Interest Litigation and Another Vs. Union of India (UOI) and Another*, this Court declared the dictum that State actions causing loss are actionable under public law. This is a result of innovation, a new tool with the Courts which are the protectors of civil liberties of the citizens and would ensure protection against devastating results of State action. The principles of public accountability and transparency in State action are applicable to cases of executive or statutory exercise of power, besides requiring that such actions also not lack bona fides. All these principles enunciated by the Court over a passage of time clearly mandate that public officers are answerable for both their inaction and irresponsible actions. If what ought to have been done is not done, responsibility should be fixed on the erring officers; then alone, the real public purpose of an answerable administration would be satisfied.

216. The doctrine of "full faith and credit" applies to the acts done by the officers. There is a presumptive evidence of regularity in official acts, done or performed, and there should be faithful discharge of duties to elongate public purpose in accordance with the procedure prescribed. Avoidance and delay in decision making process in Government hierarchy is a matter of growing concern. Sometimes delayed decisions can cause prejudice to the rights of the parties besides there being violation of the statutory rule.

218. Principles of public accountability are applicable to such officers/officials with all their rigour. Greater the power to decide, higher is the responsibility to be just and fair. The dimensions of administrative law permit judicial intervention

in decisions, though of administrative nature, which are ex facie discriminatory. The adverse impact of lack of probity in discharge of public duties can result in varied defects, not only in the decision making process but in the final decision as well. Every officer in the hierarchy of the State, by virtue of his being "public officer" or "public servant", is accountable for his decisions to the public as well as to the State. This concept of dual responsibility should be applied with its rigours in the larger public interest and for proper governance.

14. The Deputy Commissioner removed respondent No. 5 initially on 30.4.2009 and thereafter on 28.4.2010. The Divisional Commissioner, instead of letting off lightly respondent No. 5, was required to look into the matter more seriously. There has been no escape to respondent No. 5 from incurring disqualification under sub-section (2) of Section 146. The effect of letting off respondent No. 5 by the Divisional Commissioner in a cursory manner has led to his re-election as Pradhan of the same Panchayat on 1.1.2011. The statutory authorities have to act within the four corners of law. In the instant case, it is evident from the sequence of events that as and when the Deputy Commissioner passed the removal orders, the matter has been remanded initially by the Secretary (Panchayat) and thereafter by the Divisional Commissioner without there being any cogent and convincing reasons for remanding the matter. Accordingly, in view of the observations and analysis made hereinabove, the writ petition is allowed. Annexure P-5 dated 29.10.2010 is quashed and set aside. Respondent No. 5 could not be reelected to the post of Pradhan, Gram Panchayat, Jukhala. He will cease to hold the office of Pradhan Gram Panchayat, Jukhala forthwith. Respondent No. 1 is directed to hold inquiry against the Secretary and office bearers, who were party in passing illegal resolution, which has led to diversion of funds without authority of law within a period of two months from today. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.