
(2008) 07 OHC CK 0024
In the Orissa High Court

Fakirmohan Das and Others

APPELLANT

Vs

Government of Orissa and Others etc. etc.

RESPONDENT

Date of Decision : 22-07-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 243, 243C, 243G, 243O

Citation : (2008) 106 CLT 416 : (2008) 2 OLR 530

Hon'ble Judges : P.K. Tripathy, J;A.K. Parichha, J

Bench : Division Bench

Judgement

P.K. Tripathy, J.—All the aforesaid cases were heard analogously on consent of the parties and disposed of by this common judgment.

2. Secretaries working under different Gram Panchayats in the State of Orissa and in some cases Sarpanches of the Grama Panchayats together with the Secretaries have filed the writ petitions challenging amendment of Sections 122 and 123 of the Orissa Grama Panchayat Act, 1964 (in short, "the Act") and the orders dated 18.10.2004 and the consequential order thereof dated 01.11.2004 passed respectively by the Government in Panchayati Raj Department and the concerned Panchayat Officers/the Block Development Officers.

3. In nut shell, the Secretaries and also the Sarpanches of some of the Grama Panchayats have questioned the authority of the Government in making amendment of Sections 122 of 123 of the Act contrary to the spirit of self governance proclaimed by the Constitution in Article 243G by curtailing independence of the Grama Panchayats and to get it controlled through deputed staffs i.e. Village Level Workers and Village Agricultural Workers (in short, "V.L. Ws and V.A.Ws"). Bone of contention of the petitioners is that by the impugned amendment of the statute not only the position of the Secretaries as the employee under the Grama Panchayat is minimized but also by induction of V.L.Ws. and V.A.Ws, the Grama Panchayats are kept under direct control of the Executive, which is controlled by the ruling political parties. Accordingly, petitioners pray to declare the aforesaid amendment to Sections 122 and 123 of

the Act as ultra vires. Their further contention is that when the Rules under the pre-amended Act relating to the power and jurisdiction of the Secretaries has remained unaffected, the order dated 18.10.2004, issued by the Panchayatiraj Department and the consequential action taken by the Block Development Officers for handing over the charge of the relevant records by the Secretaries to the V.L. Ws. and V.A.Ws. is illegal and liable to be quashed.

4. In a common counter affidavit filed on behalf of the opposite parties-State, it has been stated that the impugned amendment was made by the State Government in the larger public interest and the same is within the parameters and ambit of Article 243G of the Constitution and the provision in Section 44-(iii) of the Act. It is stated that 73rd amendment of the Constitution bestows the Panchayats with various new functions and considerable amounts of funds are being allotted to implement different schemes which are sponsored or organized and a Panchayat may not be able to handle such situation with the aid and assistance of one Secretary in each Gram Panchayat. Thus, increase in dimension functions i.e. the workload and the flow of funds for timely proper utilization necessitated the State Government to decide to post additional hands i.e. the V.L.Ws. and V.A.Ws. so as to avoid any additional financial burdens of the State and at the same time to cater to the need of the people at the grass root level of the democracy. It is further stated that provision of Section 152 of the Act, provision in the Constitution of India and the other provisions in the Act and Rules enable the State Government to take such measures and there is nothing unconstitutional about it. Accordingly, it defends the impugned amendment.

5. The V.L.Ws. and V.A.Ws. who are contesting the dispute through their Association reiterated the stand of the State Government and argued for sustenance of the same.

Since the documents under challenge in all the writ petitions are common, the Annexures filed in W.P.(C) No. 12191 of 2004 are noted for the sake of convenience. Annexure-2 is the Amended Act, which was notified and published in The Orissa Gazette on 12th October 2004. Annexure-1 is the Circular Order dated 18.10.2004 issued by the Commissioner-cum-Secretary to Government in Panchayati Raj Department imparting instructions relating to posting of V.L.Ws. and V.A.Ws and maintenance of record by them and to take steps in furtherance thereof. Annexure-3 is one such order passed by the Block Development officer, Khandapada on 01.11.2004 directing the V.L.Ws. and V.A.Ws. to take over the charges from the Secretaries. As noted above, similar orders of the Block Development Officers are also annexed in the other writ petitions in respect of different Grama Panchayat.

6. To appreciate the issue raised for its proper adjudication, it is appropriate to quote Sections 122 and 123 before and after the impugned amendment.

Before amendment After amendment
122. Officers and servants 122. Executive Officer or of Grama Sasan - (1) Subject to Grama Sasan : such general or special

orders, (1) There shall be an Executive if any, made in that behalf by the officer, for every Grama Sasan State Government there shall be who shall: a Secretary and such officers and servants for the Grama Sasan as (a) maintain the records of the may be necessary for enabling proceedings of the meetings the Grama Panchayat to exercise of Grama Panchayats: its powers, discharge its duties, (b) remain in custody of all and perform its functions for carrying such records and out the purposes of this Act and documents, cash and the rules made thereunder and valuable securities the powers, duties and functions belonging to or vested I of such officers and servants shall or under the direction, be as may be prescribed. management or control of (2) All matters relating to the Grama Sasan as may the appointment, qualification, be Prescribed; and manner of recruitment of the (c) exercise such other powers, Secretary and offices and servants discharge such other duties and to their salary, allowances, and perform such other leave and all other conditions of functions as may be prescribed. (2) The VLWs and VAWs working in a district shall, for the service including the exercise of purposes of Sub-section (1), act disciplinary control and supervision as Executive Officers within the over such officers and servants local area of such Grama or Gramas shall be governed by the rules made as may respectively be assigned in that behalf. to them by the Collector,

(3) Notwithstanding anything Explanation - For the purposes in any other law for the time being of Sub-section (2): in force the State Government may, (a) "VLWS" shall mean the whenever they consider it expedient Village Level workers so to do, provide by rules made appointed by the Collector in that behalf a common cadre for implementing different of posts and services- developmental schemes (a) for all or any of the Grama relating to different levels Sasan within the State or of panchayats in the State; a part thereof or within the and State or a part thereof; or (b) "VLWS" shall mean the (b) for all Grama Sasans and Village Agriculture Workers Samitis a district together appointed for extension with the Parishad; or of agricultural activities (c) for all Grama Sasans together in the State. with all Samitis and Parishads (3) Subject to the general within the State. superintendence and overall control and all matters incidental or ancillary of the Grama Panchayat, the thereto and in the event of any Executive Officer shall function conflict between the provisions under the control and supervision of any other law as aforesaid and of the Director, Collector and District the provisions of this Act, and the Panchayat Officer. rules made thereunder the latter 123. Secretary and other shall prevail. employees of Grama Sasan: 123. Powers, duties and (1) Subject to such general or special functions of Secretary - Subject order as may be made in tnis behalf to such general or special orders by the state Government, a Grama issued from time to time by the State Panchayat may appoint a Secretary Government in that behalf the Secretary and such other employees for the of the Grama Sasan shall- Grama Sasan as may be necessary for enabling the Gram Panchayat (a) maintain the records of to performs its functions who shall the proceedings of the discharge such duties and perform Panchayat. such functions as may be prescribed. (2) The expenditure on (b)

remain in custody of all remuneration or allowances of the records and documents, Secretary and other staff appointed, cash and valuable securities if any under Sub-section (1) shall belong to or vested in be borne by the Grama Panchayat. or under the direction, management or control of (3) Notwithstanding anything the Grama Sasan as to the contrary in Sub-section (1), prescribed; and any person appointed as a Secretary (c) exercise such other powers, Prior to the commencement of the discharge such other duties Orissa Grama Panchayats and perform such other (Amendment) Act, 2004 shall be functions as may be deemed to have been appointed conferred or assigned to as such under the said Sub-section him by or under this Act. and he shall continue to receive the remunerations and other financial benefits, if any, as were admissible to him prior to such commencement. 7. Article 243 in its present form came into being on the basis of 73rd Amendment of the Constitution. Articles 243 to 243-O in part 9 of the Constitution deals with the Panchayats. Article 243C provides the manner in which Panchayats in a State are to be composed. Article 243G provides the power, authority and responsibility of the Panchayats and it reads as follows:

243G. Powers, authority and responsibilities of Panchayat. Subject to the provisions of this constitution the Legislature of a state may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to, function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to-

(a) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

8. In exercise of the above quoted power in Article 243G inter alia different provisions were enacted/introduced in the Orissa Gram Panchayat Act, 1964, so as to provide the manner of functions of the Grama Panchayat starting from elections, control over the Grama Panchayat etc. In Chapter 11 of the Act from Sections 109 to 121, the manner of control over the Grama Panchayat has been stated. Section 112 thereof provides that:

112. Deputation of officers to advise Grama Panchayats - The Collector may by general or special order direct any Officer of any of the departments of Government engaged in development work within the district to attend any meeting of the Grama Panchayat and to advise and assist such Panchayat on any matter relating to the work of the Department to which such officer belongs.

9. Chapter XII of the Act provides for "Establishment and conduct of business". Sections 122 and 123 thereof, before and after the amendment, have already been quoted. Rules 212 to 216 of the Orissa Grama Panchayats Rules, 1968 (in

short, "the Rules"), deal with the manner of creation of post and appointment of Secretary and the service conditions, remuneration, leave etc. Rule 217 provides that

217. Notwithstanding anything contained in the rules, the State Government may by special or general order direct any public servant to act as Secretary to any Grama Panchayat.

Rules 255 makes the Secretary of the Grama Panchayat as the ex officio Secretary of each functional committee. Apart from that under the Rules various other responsibilities have been fixed on the Secretary of the Grama Panchayat.

10. Looking to the dispute under consideration and the documents under challenge, it emerges that the petitioners have objection to appointment of Executive Officers for every Grama Sasan in addition to the Secretaries of the Grama Panchayats and keeping the executive officers under the control and supervision of the Director, Collector and District Panchayat Officers. According to them, the amendment brought is with a view to control the performance of the Panchayats through bureaucratic set up and if that is done, then the principle of self governance as mandated by the Constitution of India in Article 243 is interfered with. Accordingly, petitioners argued that the aforesaid conduct of the State Government and amended law ultra virs Article 243G specifically and the entire Chapter thereof in general.

11. The State and the Executive Officers (V.L.Ws. and V.A.Ws.) have a different say in the matter. It is argued by them that not only under Articles 243G but also according to the provisions in the Grama Panchayat Act, power and authorities is vested with the State Legislature as well as of the State Government to make suitable provision for smooth running of Panchayats in furtherance of the self governance with a view to make overall improvement. Thus, the steps which have been taken by the State is neither unconstitutional nor against the mandate of Article 243G or any public policy. They claim that the Sarpanches and the Secretaries of the Grama Panchayats have no locus standi to claim for particular staffing pattern and as to what power and duties are to be conferred on different servants working under the Grama Panchayats, that being the domain of the State Legislature. They have further said that in its wisdom, when the Legislature of the State have made the law and amended Sections 122 and 123 of the Act, 1964, that cannot be challenged, because it does not ultra vires the Constitution of India and in that respect Court has no jurisdiction to interfere with the power and jurisdiction of the Legislature.

12. Authority of the Court to examine a law to find out whether it is within the parameters of the Constitution and the Law established by it, has tested the text and it is the trite law that the Court has jurisdiction to consider that contention. However, the High Court in exercise of the jurisdiction under Article 226 has no unfettered power to sit as the appellate authority or the conscience keeper of the Legislators so as to dictate or advise to frame the law in any particular manner. If

the Court finds that the law in question ultra vires the Constitution, then it should declare so and in that process explain the reasons on the deficiency in the law. This is the gist of the ratio from the Apex Court cited by the parties. See the cases of R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, ; Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others, ; Naga People's Movement of Human Rights v. Union of India AIR 1998 SC 431; Paluru Ramkrishnaiah and Others Vs. Union of India (UOI) and Another, ; Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, ; State of U.P. and others etc. Vs. Pradhan Sangh Kshettra Samiti and others etc., ; State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., , J.P. Ravidas and others Vs. Navyuvak Harijan Uthapan Multi Unit Industrial Co-op. Society Ltd. and others, ; Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc., ; Saurabh Chaudri and Others Vs. Union of India (UOI) and Others, ; Satchidananda Mishra v. State of Orissa and Ors. AIR 2004 S.C. 4639 and The State of Andhra Pradesh and Another Vs. T. Suryachandra Rao, .

13. Judging from the above angle, we find that in view of the provision under Article 243G, Legislature of a State has the authority to make provision of law to endow the Panchayats with such power and authority to enable them to function as institution of self-government and to provide such powers which may contain provisions for devolution of power and responsibilities on the Panchayats at appropriate level. Before amendment of the Act in 2004, Section 122 provided that subject to general or special order if any made by the State Government, there shall be a Secretary and such officers and servants for the Grama Sasan as may be necessary for enabling the Grama Panchayat to exercise its power, discharge its duties and perform its functions for carrying out the purpose of the Act and the Rules made thereunder. It was also provided in that Section that the Grama Panchayat Rules shall provide matters relating to the appointment, qualification, manner of recruitment of the Secretary and officers and servants, their salary, allowance etc. and all other conditions of service including the exercise of disciplinary control and provision over such officers and servants. The pre-amended Section 122 also provided that State Government may provide a common cadre of post and service for the Grama Sasans and made it clear that any conflict between the provisions of any other law as aforesaid and the Grama Panchayat Act and the Rules made thereunder, the latter shall prevail.

14. Pre-amended Section 123 mentioned about the power, duties and function of the Secretaries. After the amendment, the impugned Section 122 provides that there shall be an Executive Officer for every Grama Sasan and their duties have been described therein. It has also been stated in Sub-section (2) that V.L.Ws. and V.A.Ws. working in a district shall be the Executive Officer within the local area of such Grama or Grama Panchayat as would be assigned to them by the Collector. In Sub-section (3) thereof, it has been provided that subject to the general superintendence and overall control of the Grama Panchayats, the Executive Officers shall function under the control and supervision of the

Director, Collector and District Panchayat Officers. Though generally petitioners challenges each of the aspects relating to bringing into the system, the Executive Officers, but they specifically attack this Sub-section (3) calling it guillotining of self-governance.

15. As noted earlier, the State Government has the authority to make provision for functioning of the Grama Panchayats and prescribing the categories of servants to function under it. Therefore, creating the post of Executive Officer as per amended provisions in Sub-sections 1 and 2 of Section 122 are found to be within the jurisdiction and competency of the State Legislature. Therefore, this Court in exercise of jurisdiction under Article 226 of the Constitution of India has no jurisdiction to interfere with that enacted provision to the above extent. The Secretaries of the Grama Panchayats or even the Sarpanches of Panchayats in the State cannot question the authority of the State and the State Legislature in that respect when the aforesaid act and wisdom of the State does not run contrary to the mandate of the Constitution of India and does not interfere with the principle of self government.

16. When the matter stands thus, the criticism by the petitioners on Sub-section (3) of Section 122 still remains to be considered. Answer of the State Government on the aforesaid point is flimsy. According to the counter affidavit of the opposite parties-State, the workload in the Panchayats has increased and still likely to increase many fold in view of different developmental schemes introduced by both the Central Government and the State Government and huge flow of money for development and therefore, additional staffs are necessary to cope with that pressure of work and to properly monitor and utilize of the funds allocated and allotted. This part of the logic of the State also run consistent with the provision of law and the competency of the State to create post and to assign/entrust work on the new employees of the Panchayats. But the further logic of the State that the V.A.Ws. and V.L.Ws. remaining in the dual charge are to remain under the specific control and supervision of Director, Collectors and District Panchayat Officers, as stated above is unacceptable, inasmuch as, if the Executive Officers of the Panchayats, who have been bestowed with all the responsibilities relating to maintenance of records, registers and cash be kept under the control of the bureaucrats relating to their service conditions and function, then the Panchayats cannot function within independence and that is how that would interfere with the constitutional mandate of self-government. For the reasons assigned by the State, if V.A.Ws and V.L.Ws are to function as Executive Officers, then their duties and responsibilities with respect to the duties in the Panchayat and their services should be within the control of the Grama Panchayats, or else the Grama Panchayats may suffer for any indiscipline or refusal or negligence to carry out the lawful order of the Sarpanch or Panchayat, as the case may be. Apart from that their may be clash of priority to carry out specific orders issued by the two authorities (Panchayat and State).

17. The argument of the petitioners is that in the event of conflict between the

Rule and the Act, the Rule shall prevail and because the amended provision of Section 122 is in conflict with Rule 212, the amended provision of the Act will be of no avail. Such argument has no legal force inasmuch as it is the trite law that in the event of any conflict between the Act and the Rules made thereunder, the former will prevail. At the same time, it is trite law that the Rule framed in any statute should be in conformity with the Act and not in deviation, derogation and contradiction of the provision in the Act. Therefore, the Rule, which is in existence conferring different rights and duties to the Secretaries of the Grama Panchayats is automatically taken away by amendment of Sections 122 and 123. However, when Sub-section (3) of Section 122 confuses the issue and makes the provision of Sections 122 and 123 inoperative in its amended form and hampers the right of the Panchayats in the matter of self-Government, the orders under Annexures 1 and 3 cannot be accepted as legal, valid and in conformity with Article 243(g) of the Constitution.

18. For the aforesaid reasons, we dispose of these writ petitions with conclusion that the provisions in Section 122(3) of the Act ultra vires the Constitution and in view of that the amended provision in Sections 122 and 123 of the Act relating to appointment and functioning of the Executive Officers cannot be done validly and legally. As a consequence thereof, the Circulars at Annexures 1 and 3 are also quashed.

Accordingly, all the writ petitions are allowed in part.

A.K. Parichha, J.

19. I agree.