

(1996) 10 OHC CK 0001

In the Orissa High Court

Case No : Criminal Jurisdiction Case No. 5735 of 1995

Kasinath Pani

APPELLANT

Vs

Social Extension Officer and Others

RESPONDENT

Date of Decision : 07-10-1996

Acts Referred:

Orissa Grama Panchayat Act, 1964 — Section 133, 216, 4
Orissa Grama Panchayat Rules, 1968 — Rule 213

Citation : (1996) 2 OLR 661

Hon'ble Judges : S.C. Datta, J; R.K. Patra, J

Bench : Division Bench

Advocate : B.K. Nayak, for the Appellant; A.G.A. for opp. parties 3 to 5, for the Respondent

Final Decision : Allowed

Judgement

R.K. Patra, J.—By this writ petition, the petitioner Kasinath Pani seeks quashing of the order dated 14-8-1995 (Annexure-3) terminating his services as Secretary of Gaiba Grama Sasan.

2. The petitioner was serving as Secretary of Gaiba Grama Sasan at the material time. The Block Development Officer, Gumma (Opp. Party No. 3) issued letter No. 1609 dated 15-7-1996 (Annexure-1) directing the Sarpanch to terminate the services of the petitioner as Secretary after discussing the matter in the Grama Panchayat. In the said letter the Block Development Officer clearly stated that he issued the instruction pursuant to the letter of the District Panchayat Officer and the direction of the Collector. The Gaiba Grama Panchayat accordingly held its meeting on 26-7-1995 but decided unanimously not to remove the petitioner from service as he had been serving quite satisfactorily. In August, 1995 as a consequence of dissolution of all the Panchayat in the State the ejected member and Sarpanches of the Grama Panchayats ceased to function and so far as Gaiba Panchayat was concerned, the Social Extension Officer, Gumma Block (opp. party No. 1) remained in charge of the said Panchayat who in the capacity

of the Sarpanch issued the impugned order dated 14-8-1995 (Annexure-3) removing the petitioner from service as the Secretary.

3. Notice being issued, the District Panchayat Officer and the Collector, Gajapati, opp. parties 4 and 5 have filed their counter-affidavit contending, inter alia, that this Court has no jurisdiction to examine the validity of the order removing the petitioner from service as Secretary. According to them, the petitioner as Secretary of the Grama Sasan was a Government servant and the appropriate forum to challenge the impugned order was the State Administrative Tribunal established u/s 4 of the Administrative Tribunals Act, 1985. The opp. parties 4 and 5 have also contended in their counter-affidavit that the impugned order of termination of service is appealable u/s 133 of the Orissa Grama Panchayat Act, 1964 (hereinafter referred to as "the Orissa Act") and the petitioner having not availed of the alternative remedy is not entitled to invoke the writ jurisdiction of this Court. With regard to the validity of the order of termination of service, they have pleaded that it was passed in accordance with law.

4. From the pleadings of the parties, the following questions arise for consideration :

(i) Is the Secretary of a Grama Sasan constituted under the Orissa Act a State Government servant ?

(ii) Is the writ petition liable to be dismissed at the threshold merely because the petitioner has not availed of the alternative remedy of filing appeal u/s 133 of the Orissa Act against the order of termination of service ?

(iii) Whether the impugned order of termination of service is valid in law ?

5. Let us consider the questions posed above seriatim.

The learned Additional Government Advocate relying on the Judgment of the Supreme Court in R.N.A. Britto Vs. Chief Executive Officer and others, contends that the post of Secretary of Grama Sasan under the Orissa Act is a civil, post under the State and the petitioner thus being a Government servant could only challenge the Order of termination of his service before the State Administrative Tribunal. Shri Nayak for the petitioner on the other hand submits that the provisions of the Karnataka Village Local Boards Act, 1959 (hereinafter referred to as "Karnataka Act") construing which the Supreme Court in R. N. A. Britto's case (supra) held the Panchayat Secretaries in the State of Karnataka to be Government servants are quite different from the provisions of the Orissa Act and the Orissa Rules and as such the ratio of R.N.A. Britto's case cannot be extended to the petitioner's case.

6. The question whether a Mauzadar in Assam Valley is the holder of a civil post under the State and is entitled to the protection under Article 311(2) of the Constitution came up for consideration before the Supreme Court in State of Assam and Others Vs. Shri Kanak Chandra Dutta, . A Constitution Bench after considering the following main conditions of employment came to hold that the

Mauzadar is a holder of civil post under the State :

- (a) The State has the power and the right to select and appoint Mauzadar;
- (b) The State has the power to suspend and dismiss him;
- (c) He is a subordinate public servant working under the supervision and control of Deputy, Commissioner, who receives by way of remuneration a commission on his collections and sometimes salary
- (d) There is a relationship of master and servant between him and the State ;
- (e) He holds an office on the revenue side of the administration to which specific and onerous duties in connection with the affairs of the State are attached;
- (f) He is a responsible officer exercising delegated powers of Government.

A similar question whether the members of the Gujarat Panchayat Service under Gujarat Panchayats Act, 1961 are Government servants came up for decision before the Supreme Court in *State of Gujarat v. Raman Lal Keshav Lal Soni* : AIR 1974 SC 161. After considering different provisions of the Gujarat Act, the Constitution Bench held that the members of the Gujarat Panchayat Service are Government servants. In paragraph 27 of the Judgment, the Court observed as follows:

"We do not propose and indeed it is neither politic nor possible to lay down any definite test to determine when a person may be said to hold a civil post under the Government. Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as the right to select for appointment, the right to appointment, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of fact whether a person is a servant of the State or not."

In *R.N.A. Britto's case* (supra), the question which fell for consideration before the Supreme Court was whether a Secretary of Panchayat established under Karnataka Village Local Boards Act, 1959 is a State Government servant. By examining different provisions of the Karnataka Act, the Court answered the question in affirmative by taking into account the following factors.

The Secretary of a Panchayat is appointed by the Commissioner in accordance with Karnataka Panchayats (Secretaries Cadre and Recruitment) Rules, 1970. Under the aforesaid rules, Panchayat Secretaries form a district wise cadre and their scale of pay is such as the Government may from time to time, by order,

specify. The selection for appointment of Panchayat Secretary is done by a Committee consisting of the Deputy - Commissioner of the District, the District Development Assistant is the Deputy Commissioner, the District Social Welfare Officer and the Assistant Commissioner of the Revenue Sub-Division concerned. The said Committee selects suitable persons for appointment and prepares a list of selected candidates and forwards, it to the Commissioner who approves the list, publishes it in the official gazette and makes appointment from the list so published in the order in which names of the persons selected are arranged. The Secretary is appointed on probation for a period of two years and during the period of probation, he is to pass such test and undergo such training as envisaged under the Rules. The qualifications, powers, duties, remunerations and conditions of services including the disciplinary matters of Panchayat Secretaries will be such as may be prescribed by the Government under the relevant provisions of the Act. The funds of the Panchayat are that of the State Government. The amount collected by way of tax or fee by the Panchayat vests with the Government. The Panchayats are to function under the direct control of the State Government. The appointment of the Secretaries of the Grama Panchayats under the Act. termination of their service, transfer and all other conditions of services are according to the rules framed under Article 309 of the Constitution.

9. Keeping in view the aforesaid criteria let us now examine about the position of Secretary qua the Grama Sasan under the Orissa. Act. Section 4 of the Orissa Act states that for every Grama there shall be a Grama Sasan which shall be composed of all persons registered by virtue of the Representation of the People Act, 1950 in so much of the electoral roll for any Assembly constituency for the time being in force as relates to the Grama. Grama Sasan shall be a body corporate by the name of the Grama to which it relates, having perpetual succession. Section 7 of the Orissa Act states that there shall be a Grama Panchayat for every Grama Sasan which shall be the executive authority of the: Grama Sasan. Section 123 of the Orissa Act mentions about the officers and servants of Grama Sasan. Sub-section (1) thereof provides that subject to Such general or special order, if any, made in that behalf by the State Government; there shall be a Secretary and such officer and servant for the Grama Sasan as may be necessary for enabling the Grama Panchayat to exercise its powers, discharge its duties and perform its functions for carrying out the purposes of the Act and the rules made thereunder and the powers duties and functions of such officers and servants shall be as may be prescribed. Sub-section (2) states that all matters relating to the appointment, qualification manner of recruitment of the Secretary" and. officers and servants and to their salary allowances, leave and all other conditions of service, including the exercise of disciplinary control and supervision over them shall be governed by the rules made in that behalf. Sub-section (3) empowers the State government to provide by rules made in that behalf a common cadre of posts and services for all or any of the Grama Sasans within the State. Let us now look at the relevant rules contained in the

Orissa Grama Panchayat Rules, 1933 (hereinafter called "the Rules"). As per Rule 213 after Grama Panchayat takes decision to appoint a Secretary for the Grama Sasan either on a whole-time or part-time basis, it will invite applications for the purpose. All such applications received will be placed before the Grama Panchayat in a meeting and the Panchayat if necessary after interviewing the candidates shall select a person from among the applicants for appointment as Secretary. After a candidate is selected, the Grama Panchayat shall write to the District Panchayat Officer for his approval under Rule 213. On receipt of the proposal for appointment of Secretary from the Grama Panchayat, the District Panchayat Officer shall approve the proposal if he is satisfied that the candidate selected by the Grama Panchayat possesses the prescribed qualification and is eligible for the post of Secretary and the selection has been made in accordance with the rules, and the remuneration proposed to be paid to the Secretary is reasonable. On receipt of the approval from the District Panchayat Officer, the Grama Panchayat will appoint the candidate as the Secretary of the Grama Sasan. Rule 214 provides that the whole-time or part-time Secretary of the Grama Panchayat shall be entitled to consolidated monthly remuneration not exceeding Rs. 300/- in case of whole-time and not exceeding Rs. 100/- in case of part-time Secretary, as may be approved by the Grama Panchayat from the Grama fund. Under the said rule the Sarpanch of the Grama Panchayat has the power to grant leave to the Secretary for a period not exceeding thirty days in a calendar year. Rule 216 empowers the Grama Panchayat to remove the Secretary of the Grama Panchayat from service if he refuses to carry out the duties and functions entrusted to him under the provisions of the Act and, the rules, or orders, made thereunder or abuses, the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the Grama Sasan or by his action causes loss to the Grama Sasan or has been convicted of any offence. This is however, subject to the condition that he will be given a reasonable opportunity of showing cause before the order of removal is passed by the Grama Panchayat. The power to suspend the Secretary pending disposal of the proceeding against him vests with the Grama Panchayat.

It is abundantly clear from the aforesaid survey of different provisions of the Orissa Act and the rules that the power to appoint a Secretary, right to terminate his employment, power to take disciplinary action against him vest with the Grama Panchayat. The Grama fund is the source from which the Secretary is paid his remuneration the relationship between the Grama Panchayat and its Secretary is that of the master and its servant and the State is nowhere in the picture.

In view of the aforesaid, we have no hesitation to hold that under the Orissa Act, the Secretary of the Grama Panchayat is not a State Government servant. At this stage we may incidentally note that the Orissa Administrative Tribunal in *Sukanta Kumar Mallik v. Collector, Cuttack*: (1984) 2 ATT 464 has held that the Secretary of the Grama Panchayat under the Orissa Act is not a Government servant. The petitioner thus being not a Government servant, his grievance relating to the

impugned order is not cognizable by the Orissa Administrative Tribunal.

10. Question Nos. (ii) and (iii) being interlinked are taken up together for consideration. It was submitted that u/s 133 of the Orissa Act alternative remedy of appeal is available to the petitioner to challenge the order of removal and the petitioner having not exhausted the said remedy is not entitled to invoke the discretionary jurisdiction of this Court. Law is now well-settled that existence of alternative remedy is not an absolute bar to entertain a writ petition. In the present case, it would appear that the B.D.O. first in his letter dated 15-7-1995 (Annexure-1) requested the Sarpanch of Gaiba Grama Panchayat to terminate the services of the petitioner. In the said letter the B. D.O. has candidly stated that he requested the Sarpanch to do so because of the direction of the Collector. In the impugned order (Annexure-3) there is also clear mention that the petitioner was removed because of the direction of the concerned Collector. On conjoint reading of the Annexures-1 and 3 the conclusion is irresistible that on the direction of the Collector, the petitioner was removed from service. u/s 133 of the Orissa Act appeal can be filed by an aggrieved party against the termination of service. The appellate authority admittedly is none other than the Collector. As the impugned order was passed at the behest of and on the direction of the Collector, the appeal before him (sic) would be illusory. For the aforesaid reasons, we are (sic) to dismiss the writ petition at the threshold merely because the petitioner has not availed of the alternative remedy of preferring an appeal.

11. Let us now examine whether the impugned order of removal from service suffers from the vice of an illegality. As already indicated, it was passed at the behest and on the direction of the Collector. It also appears from the impugned order that because of alleged violation of the provisions of the Essential Commodities Act by the petitioner, the Collector directed the Sarpanch to remove the petitioner from service. Under Rule 216 of the Rules, we may state before the Secretary is removed from service, he shall be served with definite charges and will be given reasonable opportunity to meet them. Admittedly, the impugned order was passed without complying with the mandatory requirements of Rule 216. As there is total non-compliance of the provisions of Rule 216, the impugned order as Annexure-3 is vulnerable and cannot be sustained in law. We accordingly, quash the same. The opposite parties are directed to reinstate the petitioner, in service forthwith.

The writ petition is allowed. There shall be no order as to costs.

S.C. Datta, J.

I agree.