(1981) 12 PAT CK 0007

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 1256 of 1981

Kateya Gram Panchayat APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 11-12-1981

Acts Referred:
Bihar Panchayat Samiti and Zila Parishad Act, 1961 — Section 41, 53, 53(6), 65

Citation : AIR 1982 Patna 82 : (1982) 30 BLJR 209 : (1982) PLJR 186

Hon'ble Judges : K.B.N. Singh, C.J;P.S. Sahay, J

Bench : Division Bench

Advocate : Thakur Prasad and Ravi Shankar Prasas, for the Appellant; S.N. Jha, Standing Counsel No. 2 and S.K. Verma, Jr. Counsel to Standing Counsel No. 2 (for Nos. 1 to 3) and Prabha Shankar Mishra and Yadu Vansh Giri, (for No. 4), for the Respondent

Final Decision : Allowed

Judgement

P.S. Sahay, J.—The petitioner has moved this Court under Articles 226 and 227 of the Constitution of India for quashing Annexure ''2'' order dated 9-4-1981 of the Secretary, Zilla Parishad Gopalganj, Respondent No. 2, settling the road-side flanks for vending articles in favour of respondent No. 4.

2. An interesting point which has to be answered by us is whether the Zilla Parishad or the Panchayat Samiti has the right to settle the road-side flanks for vending articles. In order to appreciate the point it will be necessary to state some relevant facts. The, petitioner, Kateya Gram Panchayat, consists of village Kateya, Rampur and Betwania and Shri Shivji Prasad is the Mukhiya of the said Gram Panchayat. There is a Bazar in Kateya and hat is held bi-weekly on Wednesday and Saturday in which articles of daily consumption like food-grains, vegetables, oil, tobacco and clothes etc. are sold and there are about 480 permanent and semi-permanent shops in the said Bazar. Prior to the vesting of the estate the aforesaid hat was a part of the Zamindari of Hathwa Raj and after the vesting the State of Bihar settled it every year under government instruction.

In the middle of Kateya Bazar there is a District Board Road which was formely maintained by District Board. After the taking over of the District Board it was maintained by the Government. On the road-side flanks of this road persons sit and sell articles like vegetables, foodgrain, tobacco etc.

3. According to the petitioner during the last 25 years Kateya Hat and also Bazar which is held on the flanks of the District Board road was settled either with the Gram Panchayat or with the Co-operative Society and on their refusal settlement was made with individuals. For the year 1979-80, 1980-81 roadside flanks shops were settled with Kateya Gram Panchayat on reserved jama of Rs. 851/- and the management of Kateya hat and this roadside shops was managed by the Gram Panchayat. The Zilla parishad held an auction for the year 1981-82, the period starting from 1-4-1981 to 31-3-1982, for Kateya hat for which a sum of Rs. 13,130/- was offered by respondent no. 4 who was the highest bidder. The petitioner (Gram Panchayat) also offered the same amount which was accepted, A copy of the order has been filed along with petition and marked as Annexure ''1''. The Deputy Development Commissioner directed the Secretary of the Zila Parishad, respondent No. 2, to finalise the settlement of the road-side flanks shops with respond-dent No. 4 who was the highest bidder. The petitioner appeared before respondent No. 2 and prayed for settlement of the roadside flanks shops in view of the fact that the settlement of the Kateya hat has been made with the Gram Panchayat but respondent No. 2 rejected the prayer of the petitioner and ordered that the settlement should be made with respondent No. 4. A copy of the order dated 9-4-1981 has been filed and marked as Annexure ''2''. The petitioner had also relied on a Government letter dated 12-3-1980 that hats and bazars should also be settled with the local Gram Panchayat or the local co-operative Society provided that the Panchayat Officer makes such recommendation. A copy of the letter has been filed and marked as Annexure ''5''. Order of Deputy Development Commissioner has been filed in which a decision was taken that the roadside flanks shops should be settled with Manjha Gram Panchayat, which is a different Gram Panchayat. so that there may not be dispute between the parties in collecting tolls. A copy of the order has been filed and marked as Annexure ''4''. By notification dated 18th November, 1980, issued by the State Government the properties and functions which were formerly vested in the District Board were transferred to the Zila Parishad and Panchayat Samiti. A copy of that notification has been filed and marked as Annexure ''5''. The petitioner has also filed a copy of the petition dated 17-2-1981 (Annexure ''6'') by which the petitioner had filed an application before the Chairman of the Zila Parishad for the settlement of the road-side flank shops. Similar petitions were also filed on 27-2-1981 and 9-3-1981 before the Chairman and the Zila Parishad Engineer (Annexures ''7'' and ''8''). It has also been stated in the petition that it has been the government policy to settle the hat and the road-side flank shops with one and the same person in order to avoid confrontation and confusion and on that basis settlements from the year 1977 to 1980 were made with the petitioner. It has been submitted. On behalf of the petitioner that

whenever vehicles carrying goods entered into Kateya hat and parked on the District Board Road respondent No. 4 compelled the truck or tractor and cart owner and other traders to pay tolls for which there was an apprehension of breach of peace and a proceeding u/s 107 of the Criminal P. C. had to be started. A copy of the petition filed before Officer-in-charge of Police Station has been filed and marked as Annexure ''11''. The petitioner has moved this Court for quashing the order as contained in Annexure ''2'' settling road-side shops in favour of respondent No. 4. The application was admitted on 6-5-1981 and an interim order was passed that during the pendency of the application the Gram Panchayat shall maintain proper accounts.

4. Counter affidavits have been filed on behalf of Zila Parishad and also on behalf of respondent No. 4 to which reply and supplementary affidavits have been filed on behalf of the petitioner. In the counter-affidavit filed on behalf of respondent Nos. 2 and 3 it has been asserted that after the vesting of the Zamindari there was an understanding between the Revenue Department and the District Board that the hats and bazars which are held side by side on Government land land lands of the District Board would be settled by Revenue Department and proportionate amount on the basis of the area covered would be deposited in the District Board fund and this arrangement continued till 1977-78, Regarding the settlement of the road side flank shops on the District Board Road it has been asserted on behalf of respondent Nos. 2 and 3 that it is the Zila Parishad who has the power to settle those shops as they have to maintain it. It has further been stated that the distance between Kateya hat and the road-side flanks is about 100 yards and the Zila Parishad held an auction and had made a settlement with respondent no. 4 who was the highest bidder. In the counter-affidavit filed by respondent No. 4 the settlement made in his favour has been justified and it has been asserted that it is Zila Parishad which has the power to settle the road-side flanks shops and after depositing the bid amount a receipt was granted (Annexure ''A''). The aforesaid settlement was also approved by the District Development Commissioner on 21-4-1981 and 27-4-1981. It has further been stated that the petitioner Gram Panchayat has not participated in the bid and, therefore, the writ application on its behalf, is not maintainable.

5. Mr. Thakur Prasad, appearing on behalf of the petitioner, has contended that by virtue of the notification contained in Annexure ''5'' the Zila Parishad has no power to settle shops even on Zila Parishad''s road and this power has been given to Panchayat Samiti and in that view of the matter the settlement made in favour of respondent No. 4 by Annexure ''2'' is fit to be quashed. Learned Standing Counsel No. 2, appearing on behalf of the State, has challenged this contention of Mr. Prasad and in support of the same has relied on some of the provisions of the Act which I shall discusg in detail later. Appearing on behalf of respondent No. 4, Shri Prabha Shankar Mishra, has, however, submitted that the road admittedly belongs to the Zila Parishad and they have to maintain the same and thus the Zila Parishad alone has the right to settle the road-side flank shops which according to him was in the form of a licence. It was, therefore, neither a

fee nor a toll and the money realised from those persons was merely contractual not covered by provisions of any statute. He has further submitted that neither the State nor the Panchayat Samiti has the power to settle the road-side flank shops belonging to the Zila Parishad and in this connection has relied on some of the provisions of the Act. Mr. Mishra has further contended that the Gram Panchayat had prayed before the Zila Parishad for settlement and having not obtained the same, now cannot be allowed to challenge the power of the Zila Parishad to settle those shops. This submission, in my opinion, is devoid of any substance and has to be rejected. The petitioner, no doubt, had prayed for settlement which was ultimately rejected but still it can challenge the settlement made in favour of the respondent No. 4 for the simple reason that it also claimed settlement. In my opinion, therefore, the writ is maintainable on behalf of Gram Panchayat.

6. On the background of the submissions made by the learned counsel for the parties, it will be necessary to refer to some of the provisions of the Bihar Panchayat Samitis and Zila Parishads Act, 1961 (hereinafter referred to as ''the Act''), in order to resolve the controversy between them. Panchayat Samiti is defined u/s 2 (k) which means a Samiti constituted u/s 4 by the State Government for a block with effect from the date from which they are notified. Zila Parishad is defined u/s 2 (o) which means a Zila Parishad constituted u/s 35, u/s 35 the Zila Parishad for a district is constituted with effect from the date of the notification. Power and functions of Panchayat Samiti have been defined in Section 13 which reads as follows:--

"Section 13, Power and functions of Panchayat Samiti -- (1) Subject to the provisions of this Act the Panchayat Samiti shall exercise all the powers conferred on, and perform all the functions entrusted to it, by or under this Act and such other powers and functions as may be conferred on and entrusted to it, by the State Government for carrying out the purposes of this Act, and shall also exercise and perform such of the powers and functions of the District Board including the power to levy any tax or fees as may be transferred to it under this Act:

Provided that it shall not exercise the powers or perform the functions expressly assigned by or under this Act or any other law to its Pramukh or to the Block Development Officer or to the Zila Parishad or any other authority.

(2) In particular, the Panchayat Samiti may, subject to the policy which may from time to time be laid down by Government, exercise the powers and perform the functions specified in the Schedule."

The Panchayat Samiti has a power to levy tax u/s 13A of the Act and sub-clause (iv) is relevant and runs as follows:--

"Section 13A. Levy of taxes:-- Subject to any rule or any general Or special order of the State Government in this behalf, a Panchayat Samiti may levy the following taxes, or fees, namely:--

X X X X (iv) -- a toll, at rates fixed by the Panchayat Samiti subject to limits prescribed by the State Government, on hats, fairs, markets and ferries within "the jurisdiction of the Panchayat Samiti and owned and maintained by it." The different sources of the income of Panchayat Samiti have been enumerated in Section 26 of the Act. We are concerned with sub-clause (ix) which is as follows:--

"Section 26. Income of Panchayat Samiti:--The sources of a panchayat samiti shall consist of-

X X X X (ix) -- income arising from leases granted by the panchayat samiti of public ferries, fairs, hats and the like, transferred to the panchayat samiti"" Powers and functions of the Zila Parishad have been enumerated in Section 41 of the Act and it may be mentioned that no power has been given to them to collect tolls or taxes. There is also no mention of tax and tolls in Section 53 of the Act wherein income from the different heads of Zila Parishads have been enumerated. The District Board has been defined u/s 2 (e) of the Act which means a district board constituted under the Bihar and Orissa Local Self-Government Act of 1885. District Boards are abolished from the date of the notification and after such abolition the assets and liabilities devolve on the Zila Parishads and the Panchayat Samiti. It will be relevant to quote Section 66 which is as follows;--

"Section 66. Abolition of district boards:--

(1) Notwithstanding anything in the Bihar and Orissa Local Self-Govern-Act of 1885 (Ben. Act 3 of 1885) or any other law for the time being in force, the State Government may, by notification in the Official Gazette, abolish any district board with effect from such date as may be specified therein.

(2) On the abolition of a district board under sub-section (1) all assets vesting in and all liabilities subsisting against it on the date of abolition under the Bihar and Orissa Local Self-Government Act of 1885 (Ben. Act 3 of 1885) or any other law for the time being in force, shall devolve on the Zila Parishad of that district on the Panchayat Samiti functioning therein or on both to such extent and in such manner as the State Government may by order, direct.

(3) The officers and employees of the abolished district board shall be absorbed in the establishment of the Zila Parishad or the Panchayat Samiti or otherwise as the State Government may deem fit."

Transfer of powers and functions of the District Board to the Panchayat Samiti and Zila Parishad has to be made by notification u/s 65 of the Act. Rules are framed u/s 75 and the Panchayat Samiti and the Zila Parishad have been given powers to frame their own bye-laws. Now, it will be relevant to consider the notification (Annexure ''5'') issued by the State Government u/s 65 of the Act and on which strong reliance has been placed by the learned counsel appearing on behalf of the petitioner. By this notification District Boards were abolished in a number of districts including Gopalgani. where Kateya hat is situated, and the powers and functions exercised by the District Boards were divided and distributed between the Zila Parishads and the Pamchayat Samitis. There are 13 items mentioned therein and items Nos. 2 and 8 are relevant which are as follows:--

Powers exercised by Zila Parishad. To whom power transferred.

Item No. (2) Roads of Zila Parishad Zila Parishad.

Item No. (8) Hats and Bazar held on land of Zila Parishnd. Panchayat Samiti.

7. From the aforesaid notification it is clear that the Zila Parishad has to maintain the roads belonging to the Zila Parishad, and the Panchayat Samiti has been given the right to settle the Hats and Bazars which are held on the lands belonging to the Zila Parishad. The question for consideration is as to who has the right to settle the shops of the road-side flanks of the roads belonging to the Zila Parishad -- whether the Zila Parishad or the panchayat Samiti.

8. There cannot be anv manner of doubt that if there is a Bazar held on the Zila Parishad lands, the right to settle the same vests in the Panchayat Samiti under Item No. 8 of the Notification (Annexure ''5''). issued u/s 65 of the Act, and the roads of Zila Parishad vest in the Zila Parishad. Zila Parishad has been given powers and functions enumerated in Section 41 of the Act and there is no mention of tolls and taxes. Its powers u/s 53 (6) of the Act, no doubt, refer to "proceeds from tax or fees, which the Zila Parishad may under any law levy", but no provision of the Act has been brought to our notice under which the Zila Parishad may levy tax or fees in respect of the road-side flank or Hats and Bazars on the roadside lands. The notification u/s 65 of the Act (Annexure 5) also does not confer such power on the Zila Parishad.

9. The powers and functions of the panchayat Samiti have been enumerated under Sections 13, 13A (iv) and 26, (ix) of the Act in this regard. The question is whether the power to realise tolls and taxes from Hats or Bazars, which vests in the Panchayat Samiti, is also given in relation to road-side shops in favour of the Panchayat Samiti or not.

10. Roads having been vested in the Zila Parishad. it is the Zila Parishad which is responsible for the maintenance of the roads and making the same safe add secure for use by the vehicular traffic as well as pedestrians. Road-side flanks are also part of the roads and the authority which has the control over the roads has also the control over the road-side flanks, for their better management and use. In absence of any specific mention that the right to hold Hats and Bazars not only extends over the lands over which Hats and Bazars are held, but also on the road-side flanks (which vest in the Zila Parishad), no such power can be inferred in favour of the Panchayat Samiti. It is another matter that the Zila Parishad may not have such right to hold Hats and Bazars on its road-side flanks. There cannot he any manner of doubt that the road-side flanks are really meant

for use by the pedestrians over the metalled or un-metalled portions of the roads. It may be that in some cases these flanks may be very wide, so as to allow holding of Hats even without the detriment to the travelling public, particularly pedestrians. The question arises, whether, in siren a situation, the Zila Parishad could hold Hats and Bazars on such wide road-side flanks. In absence of any notification u/s 65 of the Act by the State Government giving such power to the Zila Parishad in respect of such wider road-side flanks, it will not be possible to hold that the Zila Parishad has that right. The roads and the road-side flanks primarily exist for use of the travelling public and unless the road-side flanks are sufficiently wide, the question of holding shops and Hats on such flanks does not arise. Where the road-side flanks are sufficiently wide, the state Government may appropriately authorise the Zila Parishad u/s 65 of the Act by proper notifications, for augumenting its income, to hold Hats and Bazars on such road-side flanks, over which the Panchayat Samiti has no power to hold Hats or Bazars. Inferring such power in favour of the Panchayat Samiti, in view of Item No. 8 of the Notification, quoted above, would be creating a clash between the authorities in whom the road and the road-side flanks vest and in matters of which the responsibility rests with the Zila Parishads, and the Panchayat Samitis. This would also be beyond the purview of Item No. 8 of the Notification (Annexure 5), which only refers to those lands on which Hats and Bazars are held, i. e., on the lands of the Zila Parishad. Such a clash has to be avoided. It is the settled principle of interpretation that an interpretation which makes the provision workable has to be preferred to that which creates clash or confusion.

11. Learned counsel appearing on behalf of the petitioner has relied on a Bench decision of this Court in the case of Madan Gopal Rungta Vs. State of Bihar and Others, . In that case, the deed of lease was executed by the Collector for working the iron mines and trucks had to pass across the bed of river Koel. The State Government gave the right to collect tolls to certain individual, who started collecting tolls on trucks pass on payment of money. That was challenged in this Court that the State Government had no power to give lease to individuals to collect tolls not authorised by law. It was contended on be half of the State that it was done in exercise of the administrative powers and in that view of the matter the writ petition was not maintainable. The argument was repelled and this Court held that the right to collect tolls from the vehicles passing from the river shall only be granted by the legislature and for this the legislative authority authorises for imposition of such tolls. The Collector had no power to lease out those roads to individuals for collecting tolls from the trucks passing across the river. Article 265 of the Constitution reads as follows:--

"No tax shall be levied or collected, except by authority of law." It is not necessary to go into this question, as the case can be disposed of an on the interpretation of the notification u/s 65 of the Act (Annexure ''5''). The argument of Mr. Prabha Shanker Mishra, appearing on behalf of Respondent No. 4. in this regard may, however, be noted. He has urged that by settling the road-side flank shops, the Zila Parishad was neither collecting tolls nor fees, for the use of the flanks of the roads, but it was in the nature of a licence merely contractual, not under the provisions of any statute. Mr. Mishra has also submitted that the writ petitioner has taken settlement from the State Government and not from the Panchayat Samiti, and, therefore, the settlement was bad. This contention of Mr. Mishra has to be rejected, as the settlement made in favour of the Gram Panchayat of Kateya is not under challenge in this writ application,

12. Thus, on a careful consideration of all the points raised in this case. I find that the petitioner has made out a case for interference by this Court in exercise of its writ jurisdiction. Let a writ of certiorari be issued, quashing the order dated the 9th April. 1981, contained in Annexure ''2'', making settlement in favour of Respondent No. 4. There will, however, be no order as to costs. Before parting, I may, however, observe that as this question may arise in respect of other Zila Parishads also, the State Government may look into the matter for finding out an appropriate solution of the question.

K.B.N. Singh, C.J.

13. I agree.

