

(2004) 07 PAT CK 0116
In the Patna High Court
Case No : C.W.J.C. No. 4148 of 2003

Md. Mustaque

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 15-07-2004

Acts Referred:

Citation : (2004) 07 PAT CK 0116

Judgement

Ravi S. Dhavan, C.J.—This issue raises an important point on what actually should be the content of local self Government with civic functions. What is urbanisation about? Is it not a civic function with local self Government? It is local Government by the people, for the people and of the people. The attack in the present petition is on the Bihar Regional Development Authority Act, 1981.

2. As long as 73rd and 74th amendments to the Constitution had not arrived, the encouragement to even debate such issues was not available. Not a single argument has been advanced to resist the proposition that the content of the development authority within the area of a municipality has to with elected representatives. If the Government is local Government in its content then why should peoples representatives be eliminated in participating in municipal Government.

3. Circumstances of the set up which has been structured in Bihar (and Uttar Pradesh) will be better understood in its back ground. The supersession of local self Government in Uttar Pradesh began at the end of the decade of 1960s. In Bihar it happened by an ordinance. In Bihar the process started in 1971. In the context of Bihar the process started in 1971. In the context of Bihar this is best noticed in the judgment of the Supreme Court in re. Dr D.C. Wadhwa and Others Vs. State of Bihar and Others,

4. Within a municipality the improvement, development and expansion of towns in the State of Bihar so as to secure to their present and future inhabitants, sanitary conditions, amenity and convenience was hitherto provided by an enactment known as The Bihar Town Planning And Improvement Trust Act, 1951.

The objects to this legislation say so. This got repealed by the Bihar Regional Development Authority Act, 1981.

5. Taking both the enactments into account whether the 1951 enactment or the 1981 enactment, one aspect is conspicuous by its absence that it virtually has no content of local Government. Whether it is the Bihar Town and Planning and Improvement Trust Act, 1951 or Bihar Regional Development Authority Act, 1981 there cannot be any suggestion that the local bodies which these acts have created have any element of self Government, as part of the third tier of the Government.

6. Who will be responsible for planning of the District? The answer to this is provided by Article 243ZD of the Constitution of India. Article 243ZD in no uncertain terms transfers the powers of all things which are municipal, of common interest between the rural and the urban, including spatial planning, sharing of water and other physical and natural resources, the integrated development of infrastructure and environment conservation to the District Planning Committee. Who will constitute the District Planning Committee? The Constitution says that it will be such that shall be elected by and amongst the elected members (of the Panchayat at the district level and of the Municipality in the district) in proportion to the ratio between the population of the rural area and of the urban area in the district. The brackets have been provided by the Court. The content of local Government, the Constitution says in this context shall not be less than 4/5ths of the total number of the members. This is democracy. The court is not concerned on who the rest of 1/5th will be. But the 1/5th if they are to come for the third tier of the Government within the State they will be in subjugation and under local self Government. The 1/5th is a representation from amongst those who are not locally elected to represent local self Government. Thus, until a truer representation on the District Planning Committee is installed in Bihar, the non elected representatives may only be to the extent of 1/5th.

7. The Regional Development Authority of the district has to have a local content coming from the third tier of the Government. There must be a peoples participation in the planning of the urban area within the district. Article 243ZD is very clear on this. The structure which is given as the content of the authority in Section 3 virtually reads like a superseded municipality. From amongst, up stairs, the Minister and down stairs to the bureaucrat and petty officials, there is no content of local democracy in the authority. This can be seen from a bare reading of Section 3 itself. It is reproduced :

"3. Regional Development Authority.- (1) The State Government shall, at any time after the commencement of this Act, by notification in the official Gazette, constitute for the purposes of this Act, an Authority to be called as Regional Development Authority bearing the name of that Region.

(2) The Authority shall be a body corporate by the aforesaid name, shall have

perpetual succession and a common seal with power to enter into contract and to acquire, hold and dispose of property both movable and immovable and shall by the said name sue and be sued.

(3) The Authority shall consist of the following members, namely :--

(a) Chairman, who shall be the Minister of the Urban Development Department of the State of Bihar or any person nominated by the State Government and his tenure shall be generally of three years;

(b) Vice-Chairman, to be appointed by the State Government;

(c) A Planning Member who shall be the Chief Town Planner, Bihar, or his nominee not below the rank of Assistant Town Planner (Ex-officio);

(d) ?Mh? {ks=h; izkf/kdkjksa esa i<+us okys LFkkuh; fudk;ksa ds lnL;ksa ds chp ls rhu izfruh/kh ftuesa ,d v/;{k ,d vuqlwfpr tkfr ;k vuqlwphr tutkfr ds lnL; vkSj ,d efgyk gksxh tks jkT; ljdkj }kjk uke funsZ"khr fd;s tk,s

(e) two other persons to be nomination by the State Government of whom one shall be a person of administrative or technical experience and the other shall be a social scientist :

(f) Administrator/Chief Executive Officer of the Municipal Corporation of Executive Officer/Special Officer of the Municipality situated at the Head quarters of the Regional Development Authority;

(g) Chairman, Bihar State Housing Board or his nominee who should not be below the rank of Executive Engineer (Ex-Officio);

(h) Not more than three members of the Bihar Legislature of the Regional Development Area nominated by the State Government;

(i) Collector or Deputy Development Commissioner-cum-Chief Executive Officer of the District, to be nominated by the State Government (Ex-Officio);

(j) Chief Engineer, Public Health Engineering Department or his nominee not below the rank of Executive Engineer (Ex-officio);

(k) Chief Engineer, Public Works Department or his nominee not below the rank of Executive Engineer (Ex-officio);

(l) Secretary, Urban Development or his nominee not below the rank of Deputy Secretary (Ex-Officio);

(4) The Vice-Chairman shall be a whole time Government Servant;

(5) The Vice-Chairman shall be entitled to receive from the funds of the Authority such salaries and such allowances, if any and governed by such conditions of service as may be determined by rules made in this behalf.

(6) Other member specified in Clauses (d), (e) and (h) of Sub-section (3) may

be paid from the funds of the Authority such allowances, if any, as may be fixed by the State Government in this behalf.

(7) The Chairman, if he is a person nominated by the State Government under Clause (a) of Sub-section (3) of Section 3; and the Vice-Chairman shall hold office during the pleasure of the State Government.

(8) Members referred to under Clauses (d), (e) and (f) shall hold office for a term of three years from the date of their nomination to the Authority:

Provided that such term shall come to an end as soon as the member ceases to be a member of the body from which he was nominated.

(9) A member other than an Ex-officio Member may resign his office by writing under his hand addressed to the State Government but shall continue in office until his resignation is accepted by that Government.

(10) No act or proceedings of the Authority shall be invalid by reason of the existence of any vacancy or defect in the constitution of the Authority."

8. Being a Cabinet Minister, a member of the State Legislature, a Minister cannot head a local body which is part and parcel of local self Government, which has to exist in the purity of its content as spelled out in the constitution of India the chapters on Panchayats and Municipalities, Part IX and IXA, respectively. This 1/5th may also include the local members of Parliament representing the district and along with them the members of the Legislative Assembly. But all will have to be contained in the ratio not exceeding 1/5th.

9. Now the dischotomy and the contradictions. A Minister cannot be a member of the Legislative Assembly and then preside over the municipal functions and the regional authority of the district. The Minister of the Government may call a meeting of all the regional development authorities in the State and preside over it along with the Secretary State Government which deals with this subject. Then the (sic) for the whole State.

10. In Bihar, though the 73rd and 74th amendments to the Constitution of India stare it in the face it has not interfaced its Governmental affairs to have a full fledged Secretariat of Panchayats (Part IX of the Constitution of India.) and Municipalities (Part IXA of the Constitution of India.) separately under one and composite Ministry of Local Self Government. Whether the two subjects Panchayats and Municipalities are a Directorate or a Ministry is the business of the State Government. But, it is the business of the High Court, that with a Constitutional amendment and identified subject heads, the subject matter itself, as a constitutional obligation, needs to be given much more respect than the State Government of Bihar gives to it. Self Government, as a constitutional obligation has come to stay after the 73rd and 74th amendments.

11. But, the Minister cannot run, for instance, the regional development authorities. Its content is local to the district. Its functions are civil and municipal.

12. One argument before the Court has been that the entire Bihar Regional Development Authority Act, 1981 is ultra vires. The Court will not put its attention on this aspect, at present. The other provisions and chapters of the enactment are about control of discipline in urban planning. Most of the functions in this enactment are duplication and overlapping the provisions of the Patna Municipal Corporation Act, 1951 and Bihar and Orissa Municipal Act, 1922.

13. Of the municipal functions, and there is no denying that these are not municipal or civic functions, the overlapping is clear. For example the following subjects are contained in all the three enactments, and can be seen from a chart study below :

Subject PMC Act B&OM Act BRDA Act 1951 1922 1981 Public Roads Chapter XVI: Chapter V: Chapter V: & Streets Sections Sections Section 256 to 271 164 to 185 85A Chapter XVII : Sections 271 to 280 Buildings, Chapter XIII Chapter V Chapter VI Lands & Sections Sections Streets 228 186 to 30 to 43 Chapter XIV 195 Sections 229 to 250 Chapter XV Sections 244 to 255 Conservancy Chapter XVIII Chapter VI Chapter VIII & Drainage Sections Sections Section 79 282 to 336 204 to 226 Latrines & Chapter VI Chapter VI Part III Urinals Sections Sections Para 290 to 312 212A to 221 24.1.3 Burial & Chapter XXV Chapter VII Part III Burial Sections Sections Section 38 Grounds 444 to 455 248 to 258 Encroachment Chapter XVI Chapter V Part I on roads Section 258 Sections Section 196 to 203 85A Regulation Chapter XXII Chapter VII Part V of Factories Sections Sections Section & Trade 387 to 398 259 to 264 36, 36.1, 36.2, 36.3 Water supply Chapter XX Chapter IX Chapter VIII Sections Sections Section 338 to 375 292 to 325 53 Lighting Chapter IX Chapter XXI Part III Section 292 Section 376 Section 30.1 Vehicles Chapter XI Chapter X Part III Sections Sections Section 186 to 195 326 to 338 23, 23.1 14. This should best be taken out from the drawer of the Bihar Regional Development Authority Act, 1981 and fitted into the other two enactments whether Patna Municipal Corporation Act, 1951 and Bihar and Orissa Municipal Act, 1922, as the case may be.

15. The entire enactment, Bihar Regional Development Authority Act, 1981 after the 73rd and 74th amendments to the Constitution has been rendered redundant to the extent of such provision "which is inconsistent" with the Constitutional provisions (Part IX and Part IXA) "shall continue to be in form until amended or repealed by a competent Legislature or other competent authority or until the expiration of One year from such commencement, whichever is earlier". (Article 243-ZF). The Court cannot assume that there will be no District Planning Committee. The fact that the State of Bihar has avoided installing this institution required by the Constitution does not mean that the regional development authority can become a poor substitute for it. There is no denial that there will be overlapping functions between the District Planning Committee, mandated by the Constitution, and the Regional Development Authority Act. 1981. But, this should have been considered by the Legislature a long time ago. The District Planning

Committee cannot be shelved to be forgotten. The regional development authorities of the region cannot eclipse the district Planning Committee. One owes to its origin to the Constitution of India, the other a creature of statute, prior to the amendments in the Constitution, has rusted. The Constitution of India prevails, not the State statute. The Court only suggests that such of those subjects mentioned in the Bihar Regional Development Act, 1981, which are a duplication with the municipal Acts (The Patna Municipal Corporation Act, 1951 and the Bihar and Orissa Municipal Act, 1922), the duplication may be removed otherwise there will be a multiplicity of control. If not trilogy of conflicts within the three, state enactment the District Planning Committee cannot be viewed as if offering a fourth conflicting situation or institution. One does not conflict with the Constitution, There should be a municipal Act and the District Planning Committee. The purpose of the Bihar Regional Development Authority Act, 1981, after the constitutional amendments, does not leave it with any sanction to conflict with the Constitution.

16. In a new found democracy and local self Government, which is yet to take off fully in Bihar there will yet be a place for bureaucracy to guide the people who constitute local self Government institutions on what they can do and cannot do. In local politics there will be a misplaced power to destroy conforming vises of land. This no one can do neither the Parliament nor the State Legislature nor the third tier of the Government, its protection is a constitutional obligation now. The Constitution is a constitutional obligation now. The Constitution of India protects spaces and demands integrated spatial development (Article 243ZD).

17. Spaces are to be preserved. The Constitution itself talks about spatial planning. Constriction of land use will be an antithesis of planning. An integrated development will mean protecting the residential or commercial area. A pressured habitat calls for moving into a fresh new found land use for yet further habitation. There cannot be a combustion and explosion of putting all the people into one compacted area. That will be against, the very concept of spatial planning. A living hell, as the Prime Minister has so aptly referred to out towns and the way they are heading for disaster. Here will lie the functioning of the bureaucrats to guide the elected representatives that they cannot transgress conforming uses of land. The Constitution requires protection of such areas. Of course, the contradiction of the last two decades is that the bureaucracy in the Bihar Regional Development Authority Act, 1981, did not exactly make the city a better place, but a veritable hell. In Patna, there is one exception. It is the Patliputra Colony of high ranking Indian Administrative Service Officers.

18. In this regard the Court can hardly ignore the recent statement of the Hon''ble Prime Minister on what exactly has happened to the major cities of the nation. It is acknowledged today by the Government of India that in the States of the nation people in more than thirty of them are virtually living in hell. Patna or other towns of Bihar are not exactly a paradise. They came within the concern of the Hon''ble Prime Minister. A passage from the Prime Minister's speech to the

nation on 24 June, 2004 is reproduced:

"A striking feature of development in our country has been the rapid increase in urbanization. There are now more than 30 cities with a population of more than one million. The rapid and unplanned growth of these cities has contributed to increased urban pollution, crime and absence of the required infrastructure like access to drinking water, sanitation, roads, footpaths for pedestrians and public spaces, parks and greenery is making life in urban India a living hell for many. Most of the responsibility for this rests with States and municipal Governments. It will be our effort to give special attention to policies that can encourage urban development and urban renewal. We will actively seek public-private partnership in building urban Infrastructure in a planned manner."

19. This passage of the Prime Minister may now be read with the concept of urban planning as the Constitution refers to it in Article 243ZD, the two may be seen side by side.

20. Thus, the only effort of the Court has been that democracy must be restored. The bureaucracy must see that the every civic function or municipal function is restored to the representatives of the people for planning with their participation. Thus, Section 3 of the Bihar Regional Development Authority Act, 1981, in its content cannot remain. It is declared as ultra vires to the Constitution.

21. The State will be free to reconstitute Section 3, aforesaid, as compatible with local self Government given in Parts IX and IXA of the Constitution of India. In a municipality area the local content of the body cannot be less than 4/5ths from amongst the elected representatives. In a Metropolitan area it will not be less than 2/3rd. The balance 1/5th or 1/3rd, as the case may be, the Legislature will be free to bring in ex-officio members. But, such members must have an interest connected with administration of the district and it must not be the caprice of the State Government to nominate members which may be a misplaced representation in the face of the Constitution. The State Government does not have that much freedom to avoid the Constitution of India but must fall in line with it.

22. But, as it has been shown in this order there is a total overlapping of functions. It is the suggestion of the Court that such of these functions, municipal and civic in nature, should be put in a slot or a drawer separately and each of these must be transferred into the Patna Municipal Corporation Act, 1951 or The Bihar and Orissa Municipal Act, 1922. This will leave the municipalities with all their functions in the correct pattern of local self Government and in total co-ordination with the District Planning Committee so ordained by the Constitution. The conflict and confusion is apparent on the face of the record. It is manifest. It will play havoc if all the authorities function with simultaneous functions. All three laws with parallel subjects cannot function equally so as to provide equal protection. This is and will function arbitrarily only for the reason that one enactment (Bihar Regional Development Authority Act, 1981) is sans

the content of local self Government. This is violative of Article 14. But if life is not civic in its content it affects liberty. It affects human dignity. Self preservation of life without civic amenities is difficult. The components of right to live, food, water, environment, shelter are attributes of life and liberty under Article 21. Bandhua Mukti Morcha Vs. Union of India (UOI) and Others, Bandhua Mukti Morcha Vs. Union of India (UOI) and Others, Surjit Singh Vs. State of Punjab and Others, and Chameli Singh and others etc. Vs. State of U.P. and another, As the Bihar Regional Development Authority Act, 1981 is creating confusion as it is not in harmony with the provisions of the Constitution, (Article 243-ZD, read with the functions as given in the TWELFTH SCHEDULE. Then within the district, a municipality has received the same functions from the Legislature. The message of the Constitution is very clear. For, with the municipality of the district the Zila Parishads, Nagar Panchayats and the Panchayat Samities also have a function. The Bihar Regional Development Authority Act 1981 does not coordinate all the local bodies. For the coordination of all, the District Planning committee (Article 243-ZD, does so, and replaces the conflicting and overlapping enactments after the coming of 73rd and 74 Amendments.

23. The Chairman of the Municipality of the region be the head of the regional development authority of the district. This is consistent with Section 134 of the Bihar Panchayat Raj Act, 1993 which takes the 73rd and 74th Amendments into account. In Section 134 the Chairman of the Zila Parishad has been made the Chairman of the District Planning Committee (Article 243-ZD, The Vice-Chairman, Section 3(b), a bureaucrat may remain, but he will be a whole time servant, a separate officer for each regional development authority of the district. The Secretary, Urban Development, Section 3(1), is connected with district development, also, he may come in as an ex-Officio member but he cannot nominate his substitute. This is local Government which is working. Then, the necessary local officials of the District within whose region the regional development authority functions, the District Magistrate is one, the district police official (Superintendent of Police or the Senior Superintendent of Police), the Civil Surgeon, the district town planner, the District Chief Engineer, the District Water Supply and Sewerage in-charge. All may come in as ex-officio representatives but will have to be contained within 1/5th or less of it. Then these ex-officio persons cannot be paid from the funds of the regional development authority of the district, but by the State after special allocation has been made for this purpose. The one-fifth is the ex-officio representation, not from elected representatives. It goes without saying that persons as may represent within 1/5th or 1/3rd guidance may be had to the basic circumstances that the functional attribute of a local body which plans a habitat is civic. This can be seen from Sub-Article (3) of Article 243ZD. Experts in the management of civic functions, particularly mentioned in the Twelfth Schedule can be taken in to constitute the district regional development authority of the region. These are matters of integrated town planning, with the concept of spatial planning and environmental conservation. A town planner who is an architect, is a must,

Without this expert an urban development authority cannot function.

24. Amongst the aforesaid 1/5th may be included the elected representatives of the other two tiers of the Government, the member of Parliament elected from that district and the member of the Legislative Assembly. The State Government will have to consider seriously whether, the Regional Development Authorities of the region can continue in the face of the District Planning Committees (Article 243-ZD. Conflict there is. The functions of the district regional development authorities are no different than mentioned in the TWELFTH SCHEDULE of the Constitution of India. The District Planning Committee ordained by the Constitutional (Article 243-ZD, also carries out the same functions as are mentioned in the TWELFTH SCHEDULE. Clearly the District Planning Committee as structured by the Constitution has virtually replaced the regional development authorities of the district. Thus, the argument that the entire Act the, Bihar Regional Development Authority Act, 1981 should be declared as ultra vires. It could, it ought to. But, the cardinal principle is not to destroy a working order until the replacement is ready. Thus, this is left to the State Legislature to rectify the defect. Today, in Bihar, the State Government has not structured the District Planning Committee. In a democracy the likes of a Bihar Regional Development. Authority Act, 1981 also cannot remain so as to ignore local self Government. It conflicts with Article 243ZF also.

25. Thus, the Court has given its attention to Section 3 alone.

26. The petition succeeds.