

(2009) 11 PAT CK 0046
In the Patna High Court
Case No : CWJC No. 7567 of 2009

Pawan Kumar Purvey, Farooque Ansari	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 24-11-2009

Acts Referred:

Bihar Municipal Act, 2007 — Section 2(76), 25(4), 487, 51, 51(2)
Constitution of India, 1950 — Article 309

Citation : (2010) 58 BLJR 337 : (2010) 1 PLJR 272

Hon'ble Judges : Navaniti Prasad Singh, J

Bench : Single Bench

Advocate : Ajay Kumar Thakur and Amir Alam, in C.W.J.C. Nos. 7646 and 8075 of 2009, Ram Balak Mahto and K. Ravish, in C.W.J.C. No. 7567 of 2009, for the Appellant; S.B.N. Singh, A.C. to G.A.-10 in C.W.J.C. No. 8075 of 2009, Pursottam Jha in C.W.J.C. Nos. 7567 and 8075 of 2009, B.N.P. Singh in C.W.J.C. Nos. 7646, 7567 and 8075 of 2009, Bimal Kumar Datta, A.C. to AAG-I and Namrata Mishra in C.W.J.C. No. 7646 of 2009, for the Respondent

Judgement

Navaniti Prasad Singh, J.—Heard the parties.

2. These three writ petitions have been taken up and heard at length for its final disposal at this stage itself, as they raise a common issue. It relates to Madhubani Nagar Parishad constituted under the provisions of the Bihar Municipal Act, 2007.

3. Counter affidavits have been filed and with consent of parties the writ petition has been heard for final disposal at this stage itself.

4. Madhubani Nagar Parishad has an elected Chief Councillor and Deputy Chief Councillor and consists of 30 elected members. On two years expiring 18 members filed a requisition for convening a special meeting of the Nagar Parishad for considering vote of no confidence as against the Chief Councillor and the Deputy Chief Councillor. Upon notice being given, the Chief Councillor fixed 16.07.2009 as the date for convening the special meeting and noticed the

Counselors. On 09th of July, 2009 the in-charge Additional Collector by his memo No. 944 of the said date informed the Chief Executive Officer of the Nagar Parishad that in view of the order dated 08.07.2009 of the District Magistrate-cum-Collector, Madhubani, the meeting in respect of no confidence against Chief Councillor and Deputy Chief Councillor would now be held at 10:30 AM on 17.07.2009 at the Vikash Bhawan. In the said communication it is admitted that the Collector-cum-District Magistrate have received the earlier communication from the Nagar Parishad in which meeting was fixed for 16.07.2009. It is contained in Annexure-1 to the first writ petition. It is the validity of such a direction that is under challenge.

5. On behalf of petitioners, it is submitted that the Collector-cum-District Magistrate is nobody and has no authority to interfere in the democratic function of the Nagar Parishad. The Act does not recognize his authority nor confer any authority on him. In the counter affidavit the stand of the State and the contesting private-respondents is that this direction has been issued in terms of State Government order, as contained in memo No. 2360 dated 22.06.2009, by which purporting to act in terms of Section 25(4) of the Bihar Municipal Act, the State Government by an executive order has laid down the procedure for holding the special meeting for consideration of no confidence.

6. It is further submitted on behalf of the State that in absence of statutory rules, State would be competent to issue circulars, which would have force of statute. This circular provided that where there is no confidence motion against the Chief Counselor and the Deputy Chief Counselor simultaneously the meeting would be called for by the Collector of the district and would be presided over by him and convened under his supervision or under his delegated authority. It further provided that for such a special meeting there would be no requirement of quorum. The authority and validity of the circular is then put in issue.

7. On behalf of petitioners, it is submitted that under the Act no no confidence motion can be brought within the first two years of tenure of the elected Nagar Parishad. After expiry of two years no confidence motion can be brought in and situation is contemplated u/s 25(4) of the Bihar Municipal Act, 2007, which is quoted hereunder:

25. Removal of Chief Councillor/Deputy Chief Councillor.-

...

(4) The Chief Councillor/Deputy Chief Councillor may be removed from office by a resolution carried by a majority of the whole number of councillors holding office for the time being at a special meeting to be called for this purpose in the manner prescribed, upon a requisition made in writing by not less than one-third of the total number of Councillors, and the procedure for the conduct of business in the special meeting shall be such as may be prescribed:

Provided that a no confidence motion shall not be brought against the Chief

Councillor/Deputy Chief Councillor within a period of two years of taking over the charge of the post:

Provided further that a no confidence motion shall not be brought again within one year of the first no confidence motion:

Provided further also that no confidence motion shall not be brought within the residual period of six months of the municipality.

8. A perusal of Section 25(4) would show that it is in a special meeting that such a resolution would be taken up. In my view, a special meeting is nothing but a general meeting with a special agenda. The significance of this would be seen when we refer to Section 51 of the Act. Section 51 is in Chapter-VII of the Act which deals with conduct of business. It makes no distinction between the special meeting and the general meeting. It talks of meetings and therefore meetings in general which may or may not have special agenda. Thus, it covers all meetings whether special or general. Section 51 is quoted hereunder:

51. Presiding officer of a meeting of Municipality.-(1) The Chief Councillor shall preside at every meeting of the Municipality and in his absence the Deputy Chief Councillor shall preside the meeting:

Provided that when a meeting is held to consider a motion for the removal of the Chief Councillor, the Chief Councillor shall not preside at such meeting.

(2) The Chief Councillor, or the person presiding over a meeting of the Municipality, shall also have, and may exercise, a casting vote in all cases of equality of votes.

9. Sub-section (1) is general provision, which provides that the Chief Councillor would preside over the meeting. In his absence the Deputy Chief Councillor. There is an exception to this in the shape of the proviso, which provides that the Chief Councillor shall not preside any meeting in which no confidence is under consideration against him. It goes without saying that in any contingency where motion is against the Deputy Chief Councillor, accordingly he would also not preside over the meeting. Now, we come to Sub-section (2) of Section 51, which is important. Sub-section (2) clearly stipulates that Chief Councillor or the person presiding over the meeting shall have and may exercise casting vote in all cases of equality. There are three things in this provision. Firstly, Councillor or any other persons may preside over the meeting. Secondly, the person who presides cannot normally vote and thirdly in case of tie alone he would have a casting vote.

10. A lot of argument has been made in relation to this provision. On behalf of petitioners, it is submitted that a reference to this provision itself would show that firstly a person who has no right to vote can never preside in any meeting of the Nagar Parishad. It is then submitted that the expression any person cannot be read as widely submitted by the State and the respondents to include any person even outside the Parishad. It must necessarily be from amongst the

members. In my view, petitioners' contention has to be accepted. Nagar Parishad, let us not forget that is a form of local self government and has constitutional sanction. It is a democratic body set up on constitutional mandate to permit persons to govern themselves. The concept of executive interference is abhorrent to the whole concept of this democratic institution. Executive must accept the fact that their rule in administration is now curtailed and is being replaced by local self government. Statute in no uncertain terms says that the Presiding Officer may be the Chairman or any person who shall have a casting vote in case of tie. Can a member of executive, who is not an elected member of the democratic body, not answerable to the body, which is nothing but representative of the people, can be given a casting vote, for which he is not answerable to anybody? That would be destructive of the entire democratic scheme. The answerability of the members is to the members of the House and through them to the citizens, who elect them. The Executive are foreigners to this body. He is not answerable either to the House or to the members or to the people and cannot form part of these proceedings. That is the legislative intent. The expression "the persons" used in Sub-section (2) of Section 51 has to be interpreted in the company in which it is used ejusdem genesis. The Company is Chief Councillor, the purpose is casting vote, which again is the right of a member, thus, Chief Councillor is a member, the right to vote is to a member and therefore the expression "the person" as used in Sub-section (2) of Section 51 can only includes such persons, who are members of the House and not foreigners and outsiders like the Collector.

11. Thus, in absence of rule, which is regretted that even though the Act was passed two years back, State Government is still to wake up to frame rules, the State cannot indirectly control the local self government by executive fiat. I may only refer Sub-section (76) of Section 2 which clearly defines the expression "prescribed" as used in Act to mean by prescription of rules. Rules are subordinate legislations. Rules cannot be substituted by executive instructions. Rules have force of law. They are passed in the manner prescribed by the Bihar & Orissa General Clauses Act. It is placed before the legislature. Those powers cannot be usurped by the executive and instead of rule of law, rule by executive fiat cannot take its place. One misconception, I would like to clear is, that submissions were made on behalf of the State that in absence of statutory rule it was open to the State to issue executive circulars. The argument is only noted to be rejected. We are not dealing with service rules, as contemplated under Article 309 of the Constitution, we are dealing with statutory functions guided by statutory limitations. Executive orders cannot supplement/supplant rules or fill up the gap which has to be filled up by the rule. It is impermissible and destructive of rule of law.

12. As a last resort, learned Counsel for the State has referred to Section 487 of the Act, though, the said circular only refers to Section 25(4). In my view, what in fact the State intended to do was take upon itself the rule making power and substitute it by executive fiat. It has referred to Section 25(4) in the circular

because Section 25(4) at two different places refers to "the manner prescribed" which would mean the manner prescribed as in statute. State thinks that in absence of rule it can issue executive instructions, which as noted above, is not permissible. State has referred to Section 487 of the Act, which is quoted hereunder:

487. Removal of difficulties.- If any difficulty arises in giving effect to the provisions of this Act, the State Government may, as occasion may require, by order do or cause to be done anything which may be necessary for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of five years from the date of commencement of this Act.

13. Before Section 487 can be invoked, it was incumbent upon the State to show that there was indeed a difficulty that required to be clarified. It was strongly argued on behalf of the State that the Act did not provide for a contingency where a no confidence motion was moved against both the Chief Councillor and the Deputy Chief Councillor simultaneously. In such a situation, who is to call the meeting, who is to preside the meeting and how the meeting has to be convened is not provided. I am afraid that the argument is fallacious. Provisions are there waiting to be read. As noted above, Section 51 clearly provides that it is the Chief Councillor, who would preside, in his absence, the Deputy Chief Councillor. Sub-section (2) thereof, further provides that "any person", as held earlier, a member can also preside. Thus, if as provided by Sub-section (1) a person against whom vote of no confidence is to be considered is not to preside, then, it is any other person who would preside and the person would be a member from amongst the members and not non-member. Thus, the contingency is provided in the Act itself. The Act makes no distinction between the quorums required because, as noted above, it is a general meeting with special agenda. The quorum which is otherwise provided would automatically apply to any such meeting as well. The State acted wholly without jurisdiction to amend the statute by an executive order, when in this very circular it is stated that such a meeting would not require a quorum. The effect could be that out of 30 members 2 members would turn up on the date and decide to remove the Chief Councillor and the Deputy Chief Councillor, even though, the rest for some reason or the other could not come and would have opposed the decision. The concept of rule by democracy would crumble if for such an important agenda there was no quorum. I wonder under what authority State by a circular removed the concept of quorum, thus, amending the Act by executive fiat. That cannot be done.

14. Now, coming back to Section 487, as pointed out above, there appears to be no difficulty and in fact even on their own conduct State and the District Collector found no difficulty because the first meeting on 16.07.2009 was fixed not by the District Collector but by the Chief Councillor himself. That was the right thing to do. The counter affidavit does not state that the District Collector changed the date because under the circular he had the authority to fix the date and the date

was wrongly fixed by the Chief Councillor. Rightly that is not the stand. Had the meeting taken place on 16.07.2009, there would have been no problems, but the Collector chose to adjourn the meeting because of his preoccupation. Who had invited him to the meeting to preside over the meeting is anybody's guess, even the Chief Councillor's communication does not invite him to the meeting. If the meeting were to be held on 16.07.2009, as scheduled, the Collector would be foreigner to the meeting, if that were so how the Collector could assume jurisdiction in the matter and adjourn the meeting fixed by the Chief Councillor.

15. Seen from all angles, the circular of the State Government is invalid and necked usurpation of power not vested in it. The communication of the District Collector is equally without jurisdiction, thus, the meeting could not be validly adjourned by him. Thus, far the petitioners succeed. However, the fact remains that the District Collector rightly or wrongly adjourned the meeting. This Court by its order dated 16.07.2009, the day when the original meeting was fixed, which had already been adjourned on 17.07.2009, stayed the communication of the Collector. Now, petitioners urge that on strength of the stay order passed on that day itself a meeting was held in which he, the Chief Councillor, has succeeded in winning vote of confidence. The meeting was attended by 12 members only. I am afraid that the meeting has no sanctity in law for the simple reason that the meeting stood adjourned. Once by notice to all the meeting was adjourned, an interim order passed by this Court on 16.07.2009, in which parties were not represented, would not be with notice to all, as such, the meeting of 16.07.2009, even if held, could not be with notice to all. Petitioner, who was the Chief Councillor, challenged the action of the District Collector. Thus, having obtained an interim order and immediately held the meeting, on the same very day, is not a meeting in accordance with law. Thus, any resolution passed therein would not be a valid resolution.

16. Petitioner, Pawan Kumar Purvey, who is the Chief Councillor, would now be required to fix and notify a special meeting, with the agenda with regard to no confidence motion, against him and Deputy Chief Councillor in accordance with the requisition, as received and seek confidence of the House within the period, as has been provided in the Act.

17. With the aforesaid observations and directions, the writ petitions stand disposed of.