

(2017) 05 PAT CK 0047
In the Patna High Court
Case No : 19591 of 2016

Saran Zila Mukhiya Sangh

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 17-05-2017

Acts Referred:

Constitution of India, Article 243B, Article 243G - Constitution of Panchayats - Powers, authority and responsibilities of Pancha- yats
Bihar Panchayat Raj Act, 2006 ,

Citation : (2017) 05 PAT CK 0047

Hon'ble Judges : Sudhir Singh

Bench : SINGLE BENCH

Advocate : Vinod Kanth, ?S. B. K. Manglam, ?Anita Kumari, ?Lalit Kishore, ? Kumar Alok?Vinod Kanth, ?Pushkar Narain Shahi?Dhirendra Kumar

Judgement

1. On a reference made by the learned Single Bench after taking note of the legal questions involved in these writ petitions they

have been placed before us for consideration.

2. Petitioners in all these cases question the tenability of

instructions issued by the Panchayati Raj Department, Government of

Bihar on 23.09.2016 vide Annexure-P/2 and 25.10.2016 vide

Annexure-P/3, whereby certain instructions have been issued for

implementation of two schemes, namely, the Mukhya Mantri Gramin

Pay Jal Nischay Yojana and the Mukhya Mantri Gramin Gali-Nali

Pakkikaran Nischay Yojana. Inter alia contending that by issuing these

instructions, certain rights available to the Panchayats under the Bihar

Panchayat Raj Act, 2006 (hereinafter referred to as "the Act of 2006") and the mandate of Article 243-G empowering the Panchayats to function as institutions of Self-Government are being infringed with, these writ petitions have been filed. Looking to the public importance of the matter and the constitutional question involved, the learned Single Bench recommended for placing the matter for consideration before a division bench and, accordingly, matters are listed before us as directed by the Chief Justice on the administrative side. During the pendency of the writ petitions, by amending the writ petition bearing CWJC No.19591 of 2016, vide I.A. No.748 of 2017, certain instructions and directions issued by the State of Bihar in the Panchayati Raj Department vide Annexure P/4 on 27.01.2017, in the matter of distribution of funds received under the 14th Finance Commission have also been challenged.

3. The facts, in brief, go to show that the petitioners in these cases are either the elected representative of the Panchayat or the citizens in the area, who have called in question the impugned action.

4. According to the petitioners, the impugned schemes have been formulated by the State of Bihar and in the impugned scheme for implementing the provisions of the scheme, a committee has been constituted, namely the "Ward Vikas Samiti" under the Mukhya Mantri Gramin Pay Jal Nischay Yojana and the Mukhya Mantri Gramin Gali-Nali Pakkikaran Nischay Yojana which is not permissible in law and, therefore, these writ petitions.

5. Learned Senior Counsel Shri Vinod Kanth, appearing for the petitioners argued that by amending the Constitution, Part IX was introduced by the Seventy-third Amendment with effect from 24.04.1993 and the Panchayats, as institutions of self-government were introduced in the system of administration and under Article 243-G of the Constitution, the Panchayats were endowed with such powers or

authority as may be necessary to enable them to functions as institutions of Self-Government and in pursuance to the powers available under Article 243-G, initially the Bihar Panchayat Raj Act, 1993 and subsequently the Bihar Panchayat Raj Act, 2006 were brought into force. Under Section 2(w) of the Act of 2006, a "Panchayat" has been defined to mean an institution of Self-Government constituted under Article 243-B of the Constitution of India and a Standing Committee under Section 2(af) has been defined to mean a Standing Committee constituted by the Zila Parishad or a Panchayat Samiti or a Gram Panchayat under the Act of 2006.

6. It was argued that for carrying out the functions entrusted to the Panchayat by virtue of the entries made under the Eleventh Schedule to the Constitution, functions of Gram Panchayat have been laid down under Section 22 of the Act of 2006 which are nothing but the codification of various items under the Eleventh Schedule and for implementing these provisions, Standing Committees have been constituted in the Gram Panchayat under Section 25 of the Act of 2006 and one of the committees constituted for implementing the provisions of the Act of 2006 are the Public Works Committee as contained under Section 25(vi).

7. It is the case of the petitioners as canvassed by the learned Senior Counsel that by introducing an additional Committee by an executive instruction under the impugned Schemes, Annexures-P/2 and 3, a "Ward Vikas Samiti" has been constituted to supervise and implementation of the schemes, at the ward level in a Panchayat and as this is contrary to the mandate of the Constitution and the rights available to the Panchayat not only under the Constitution but also under the Act of 2006, the Schemes so far as they direct for constitution of the Ward Level Committees is liable to be quashed. That apart, it is argued that the 14th Finance Commission having

entrusted the entire funds recommended by the Commission to be utilized by the Panchayat and to be placed at the hands of the Panchayat, action taken for handing over the funds to the Ward Committee and the instructions issued by the State Government in the matter of distribution and utilization of funds, runs contrary to the mandate of the Act of 2006 and the Constitution and, therefore, they are illegal.

8. Learned Senior Counsel appearing for the petitioners took us through various documents to say and demonstrate that the State Government in the garb of issuing instructions and circulars is in fact interfering with the functions of the Panchayat which is impermissible and, therefore, it warrants interference. In support of his contentions, he placed reliance on a judgment of the Supreme Court in the case of Ravi Yashwant Bhoir versus District Collector, Raigad and others, [(2012) 4 SCC 407].

9. On the contrary, learned counsel appearing for the State, namely, Sri Lalit Kishore, learned Principal Additional Advocate General-I, and Sri Puskar Narain Shahi, learned Additional Advocate General-VI, argued that Section 156 of the Act of 2006 mandates that notwithstanding anything contained in the Act, the Government is lawfully empowered to issue directions to any Panchayat in matters relating to State and National policies and implementation of Government programmes and Schemes and as the action of the State Government is in conformity with the powers available under Section 156, there is no illegality in the same.

10. Sri Lalit Kishore argued that in accordance to the delegation of power available, the State Government having acted within its delegated power, no error has been committed and in support thereof, he draws our attention to the judgment of the Supreme Court in the case of Hinsa Virodhak Sangh Versus Mirzapur Moti

Kuresh Jamat and others [(2008) 5 SCC 33].

11. We have heard learned counsel for the parties at length and we have perused the documents available on record.

12. The State of Bihar Promulgated two Schemes, namely Mukhya Mantri Gramin Pay Jal Nischay Yojana and the Mukhya Mantri Gramin Gali-Nali Pakkikaran Nischay Yojana as is contained in Annexures- P/2 and 3. The first Scheme is to provide for house to house drinking water facility and connection at the Panchayat level and to implement the scheme of providing clean and pure drinking water through pipe to each house in the village level, the scheme has been formulated and details various provisions for implementing the scheme. It is not necessary to refer to various provisions of the Scheme which include functioning of the Scheme at the State Level, the Divisional Level, the District level, the Gram Panchayat Level etc. However, after laying down and prescribing instructions with regard to functioning of the Schemes at the Gram Panchayat level vide Clause 4.4. of the Scheme through the Standing Committees formulated under Section 25, particularly the Public Works Committee constituted under Section 25(vi), from Clause 4.5., the Scheme in question contemplates a provision for implementation of the Scheme at the Ward Level and while doing so, a different Committee known as the "Ward Vikas Samiti" has been constituted. This Samiti consists of seven members of the Ward who are to be elected by the Ward Sabha for a period of two years. They have been entrusted with the responsibility of implementing the Scheme at the Ward level. It is also indicated that the Committees shall consist of a President and Vice-President to be elected by the seven Ward Members. It is indicated that the members shall be the resident of the Ward. Provisions of reservation for Scheduled Caste, Scheduled Tribe and Women are contemplated. There is a provision for appointment and selection of a

Ward Secretary whose qualification and other particulars are prescribed and it is held that the Samiti constituted shall be by election for a period of two years. Thereafter, the powers, duties and functions of this Samiti are contemplated under Clause 4.5.2. of the Scheme in question.

13. Similarly, in the second Scheme, namely Mukhya Mantri Gramin Gali-Nali Pakkikaran Nischay Yojana, also after contemplating various provisions for making of pavements, repairing and maintenance of Nali and Gali in the village level, a Ward Level Committee has been constituted. From clause 4.5 which is similar to the Ward Vikas Committee constituted in the earlier Scheme.

14. The question, primarily, therefore, to be considered in these writ petitions are as to whether the constitution of such a Committee, namely, the "Ward Vikas Samiti", is in accordance to the requirement of law. This is the moot question to be answered in all these writ petitions. For doing so, we are required to take note of the constitutional provisions and that of the Act of 2006.

15. By the Seventy-third Amendment to the Constitution, Part-IX was introduced and provisions for establishment of Panchayats were incorporated. Under Article 243(d), a "Panchayat" has been defined to mean an institution of Self-Government constituted under Article 243-B in the rural area. Under Article 243-B, it is contemplated that there shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance to the provisions of Part-IX of the Constitution. Thereafter, the powers, authority and responsibilities of Panchayats are contemplated under Article 243-G and this Article provides that every State shall make a law to endow the Panchayats with such powers and authority as may be necessary to enable the Panchayats to function as institutions of Self-Government and by such law provision shall be made for devolution of powers and

responsibility upon Panchayats, at the appropriate level and the powers given to the Panchayat are with regard to preparation of plan for social economic development and for implementing the schemes of economic development and social justice as contained in the Eleventh Schedule, wherein 29 entries with regard to which activities have been detailed which are to be carried out by the Panchayat.

16. In pursuance to the mandate to the Constitution, as indicated hereinabove, initially in the State of Bihar, Bihar Panchayat Raj Act, 1993 and subsequently, the Bihar Panchayat Raj Act, 2006 were enacted. Section 2(w) of this Act defines a "Panchayat" to mean an institution of Self-Government constituted under Article 243-B of the Constitution and under Section 2(af), "Standing Committee" has been defined to mean a Committee constituted by the Zila Parishad or a Panchayat Samiti or a Gram Panchayat under the Act of 2006. The functions of Gram Panchayat are contemplated under Section 22 of the Act of 2006 and under sub-section (viii) and (ix) of this Section, the Panchayat is mandated to carry out works with regard to construction, repairing and maintenance of drinking water, wells, tanks, ponds and hand pumps, prevention and control of water pollution and for maintenance of rural water supply schemes. They are also empowered to make constructions of roads, buildings, culverts, bridges, ferries, waterways and other means of communication, maintain them and carry out various other functions. For the purpose of implementing the functions of the Panchayat, as are contemplated under Section 22, various Standing Committees are to be constituted by the Panchayat under Section 25 and one such Committee is contemplated under Section 25 (1) (vi) to be the Public Works Committee for carrying out all kinds of constructions and maintenance, including rural housing, sources of water supply, roads and other means of communication, rural electrification and related works.

17. If we analyze the schemes of the Act of 2006 in the backdrop of constitutional mandate and the various entries made in Eleventh Schedule, we find that in the State of Bihar, the Panchayats have been constituted at the district, intermediate and the village levels, the functions of the Panchayat are contained in Section 22 and under Section 25 (1) (vi), the Standing Committee known as the "Public Works Committee" has been entrusted with the responsibility of maintenance of water supply, roads and other means of communication, rural electrification and relates works etc. That being so, it is crystal clear that under the Act of 2006, i.e. by virtue of a legislation, statutory committees and bodies have been created for carrying out the work of the Panchayat. Under Section 156 of the Act of 2006, the State Government is empowered to issue directions to lawfully carrying out the works relating to national policies, Government Schemes etc. and in this regard issue instructions to the Panchayat. The Policies contained in Annexures P/2 and 3 are, therefore, nothing, but instructions issued by virtue of the powers available to the State Government under Section 156 of the Act of 2006. However, while doing so, apart from issuing the various instructions, the State Government has created a Special Committee known as "Ward Vikas Samiti" for carrying out the work pertaining to implementation of the two schemes contained in Annexures P-2 and 3. If we go through the Schemes, particularly, those provisions pertaining to implementation of the Schemes in the Ward Level, we find that by this executive instruction, "Ward Vikas Samiti" has been created consisting of members of the Ward to be elected by the Ward Sabha for a period of two years, the constitution of the Committee is contemplated, the manner of the constitution is laid down, with functions and power of the Samiti, even a provision for appointment of a Secretary to the Samiti is laid down. This admittedly has been done

on the basis of executive instructions issued under Section 156 of the Act of 2006. However, for implementing the purpose of the Scheme, namely water supply, maintenance of road, culvert etc., already a statutory committee has been created under the Act of 2006, namely the Standing Committee as contemplated under Section 25 and the Public Works Committee is already functioning in the area for the same purpose for which the Ward Samiti is constituted. That being so, it is a case where for carrying out the functions of the Act of 2006, in the Panchayat by an executive instructions allegedly on the basis of delegation of power, committees have been created which are not contemplated under the Act of 2006. Without amending the Act of 2006, creating a Committee by an executive order, in our considered view, is impermissible. This would amount to tampering with the provisions of the Act of 2006 and establishing and creating Samiti to carry out the constitutional and statutory mandate of the Act of 2006 without sanction of law. Once the Statutory Committee under the Act of 2006 was already in existence for implementing the Scheme, the State Government could not by an executive instruction create another Committee which is neither contemplated nor provided for under the Statute.

18. After analyzing the provisions of the Constitution as detailed hereinabove and the Act of 2006, we have no hesitation in holding that the Constitution prescribes a Scheme for conferring with the power of Local Self-Government after giving complete autonomy to the Panchayat and once the Statutory body, like the Panchayat, is created with specific provisions for creation of Committees and with specific statutory powers available, then contrary to the statutory provision, in exercise of executive power, the State Government cannot do something which runs contrary to the Scheme of the Act of 2006.

19. In the case of Ravi Yashwant Bhoir (supra), in para-

22, the Hon''ble Supreme Court lays down the following principles:

"22. Amendment in the Constitution by adding Parts IX and IX-A confers upon the local self-government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the institution." (Emphasis supplied)

20. If we analyze the act of the State in the backdrop of the aforesaid principle, it would be clear that the power exercised by the State in the present cases for implementing the schemes by creating a body, i.e. the "Ward Vikas Samiti", results in destroying the institute created under the Panchayat Raj Act, infringes the procedure prescribed under law for establishment of the Panchayat Raj system and the same is, therefore, impermissible in law.

21. The contention of Sri Lalit Kishore to say that the State has acted in exercise of the power of delegated legislation and the powers available under Section 156 of the Act of 2006 cannot be accepted. Even though while judging the validity of a delegated legislation and an executive action taken, this Court is required to exercise judicial restraint and a presumption has to be drawn in favour of the constitutionality or validity of an Act, but if it is found that the Act is in clear violation to any constitutional or legislative provision or a parent statute, like the Act of 2006, then the Act can be declared as un-constitutional or illegal. That is the principles of law which is recognized by various judgments and if we analyze the act of the State Government in creating the "Ward Vikas Samiti" for implementing the Scheme in question, we are of the considered view that it is impermissible. The act of creating a Committee or an authority which

is not contemplated or provided for under the Act of 2006 amounts to destroying the constitutional mandate of empowering the Panchayat as an institution of Self-Government. When the Panchayat as an institution of Self-Government is functioning in accordance to the Act of 2006 and when various committees under the Panchayat are functioning for implementing the Scheme, the Government in the garb of issuing instructions or an executive action cannot create a body or an authority which is not provided for either in the Constitution or in the Act of 2006, and therefore, entrusting the work of implementing the Scheme at the Ward Level through a "Ward Vikas Samiti", in our considered view, amounts to violating the basic scheme of the Act of 2006 and the same is not permissible. To that extent, the writ petitions have to be allowed and the provisions contained in Annexures P-2 and 3 for creating the "Ward Vikas Samiti" and entrusting the power to the "Ward Vikas Samiti" is clearly impermissible and to that extent, both the instructions contained in Annexures P-2 and 3 are quashed.

However, the other instructions contained in these documents being not under challenge and prima facie being in accordance to the powers available to the State Government under Section 156 of the Act of 2006 need not be interfered with at this stage in these petitions.

22. Having held so, we are now required to consider the amendment made and prayer made therein. The prayer made is that the funds made available by the 14th Finance Commission for implementation of various schemes are being mis-utilized and the Circulars and orders passed by the Government of India and the Finance Commission are being violated. However, a detailed reply has been filed by the State Government and from para 5 onwards of the reply it is indicated by filing various documents, including the communication made by various Ministries and authorities of the Government of India that there is no violation.

23. To examine the question as to whether the funds granted by the 14th Finance Commission are being misused and the Schemes are being implemented in violation to the recommendation made by the Finance Commission, it is absolutely necessary that the Government of India in the Ministry of Finance and various other authorities in the Government, who are responsible for implementing the recommendations of the 14th Finance Commission, are made parties, they noticed and it is only after hearing them, can a decision in this regard be taken. Except for filing an application for amendment without impleading the respective departments or authorities and the officers of the Government of India, we are not inclined to go into the prayer made by amending the writ petitions. The said issue is left open and the petitioners are granted liberty to take up the issues with the competent authorities of the Government of India or to file a properly constituted petition after impleading all necessary and requisite parties. The prayer made to that extent cannot be considered in these petitions.

24. Accordingly, we allow these petitions in part. The Schemes in question as contained in Annexure- P/2 dated 23.09.2016 and P/3 dated 25.10.2016, so far they direct for creation of "Ward Vikas Samiti" and entrusts the work to the "Ward Vikas Samiti" for carrying out the purpose of the Scheme are quashed. The State Government is granted liberty to either get the Schemes implemented through the Committees already functioning under the Act of 2006 or to take such steps as are permissible in law for implementing the Scheme.

25. With the aforesaid, all the four writ petitions are allowed and disposed of.