

(1998) 05 OHC CK 0032
In the Orissa High Court
Case No : O.J.C. No. 1055 of 1991

Sri Adwait Chandra Jena

APPELLANT

Vs

Khandahata Grama Panchayat and Others

RESPONDENT

Date of Decision : 15-05-1998

Acts Referred:

Constitution of India, 1950 — Article 309, 310, 311

Citation : (1998) 2 OLR 410

Hon'ble Judges : S.N. Phukan, C.J.; P.K. Mohanty, J.; A. Pasayat, J

Bench : Full Bench

Advocate : Biswajit Mohanty, for the Appellant; Anup Kumar Bose and P.K. Giri (for Opp. party No. 5) and Additional Government Advocate (for Opp. party Nos. 1 to 4), for the Respondent

Judgement

A. Pasayat, J.—Finding somewhat divergent views expressed in *Dinabandhu Swain Vs. State of Orissa and Others*, ; and in *Kasinath Pani Vs. Social Extension Officer and Others*, , the present reference has been made to the Full Bench to decide the question whether Secretary of a Grama Panchayat appointed under Orissa Grama Panchayat Act, 1964 (in short, the "Act"), and the Orissa Grama Panchayat Rules, 1968 (in short, the "Rules") holds a civil post under, the State Government, and therefore, any dispute relating to his service conditions has to be adjudicated by the Orissa State Administrative Tribunal (in short, the "Tribunal"). In *Kashinath Pani's* case (supra) it was observed that the Secretary of a Grama Panchayat does not hold civil post. In *Dinabandhu Swain's* case (supra) though no final opinion was expressed, it was observed that no opinion was necessary to be expressed, and the point was left open for adjudication in appropriate cases, because petitioner in that case had been pursuing his remedy for pretty long time before this Court, and it would not be appropriate to drive him after the length of time to again pursue the remedy before the Tribunal.

2. The foundation for contending that the Secretary of a Grama Panchayat holds civil post is stated to be the decision of the Apex court in *R.N.A. Britto v. Chief*

Executive Officer and Ors. AIR 1995 SC 1936. Referring to certain provisions of Karnataka Village Local Boards Act, 1959, the Apex Court held that Panchayat Secretaries are Government servants and hold civil post.

3. A member (person) in the civil service of the State or in the civil post under the State means a Government servant of the State. This well-settled position in law has emerged ever since it was ruled by a Constitution Bench of the Apex Court in *State of Assam and Others Vs. Shri Kanak Chandra Dutta*, that a member in civil service of the State or in civil post under the State envisaged in Article 311 of our Constitution, was a Government servant. Indeed, there, the Constitution Bench in reaching the conclusion that *Mauzadar of Assam Valley* was in the civil service of the State or in the civil post under the State and hence was a Government servant; has adverted to the criteria or factors, which could form the basis for finding that there existed the relationship of master and servant between the Government and the person concerned, so as to make the latter a Government servant.

4. There is no formal definition of "post" and "civil post". The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Article 310 from a post connected with defence, it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State. (See marginal note to Article 311). In Article 311, a member of a civil service of the Union or in all India Service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State. {See the marginal notes to Articles 309, 310 and 311}. The heading and the Sub-heading of Part XIV and Chapter I emphasises the element of service. There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indica, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.

5. In the context of Articles 310 and 311 a post denotes a office. A person who holds a civil post under a State holds "office" during the pleasure of the Governor of the State, except as expressly provided by the Constitution (See Article 310). A post under the State is an Office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post. Article 310(2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post, and it emphasises

the idea of a post existing apart from the holder of the post. A post may be created before the appointment or simultaneously with it. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post under the State means a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of persons appointed to the post.

6. State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, is another Constitution Bench decision of the Apex Court which requires mention. There, the question for consideration was whether members of Gujarat Panchayat Service under the Gujarat Panchayat Act, 1961 were Government servants. In the context of examining that question, it has been stated thus :

"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 to 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."

7. It is relevant to take note of Rules 212 to 217 of the Rules framed under the Act. The said provisions so far as relevant read as follows :

"212. Establishment rules - Appointment of staff of the Grama Panchayat - (a) No person shall be appointed as Secretary of Grama Sasan except with the previous approval of the District Panchayat Officer : -

Provided that no person who has been dismissed from service of any Government or any local authority or who is convicted of any offence shall be appointed as Secretary of the Grama Sasan without the previous approval of the State Government.

(b) No person shall be appointed as Secretary of the Grama Sasan unless he possesses the minimum of Matriculation or equivalent qualification :

Provided that where no such person is available, a person who passed the Middle English School Examination or any other examination of any equivalent standard may with the previous approval of the District Panchayat Officer, be appointed as Secretary of the Grama Sasan.

213. (a) After the Grama Panchayat decides in a meeting to appoint a Secretary

for the Grama Sasan either on a whole time or on a part time basis, it shall invite application for the purpose by giving wide publicity by way of affixing notices in the notice-board of the Panchayat Samiti and the different Grama Panchayats within the jurisdiction of the Panchayat Samiti concerned. The Grama Panchayat shall also notify the vacancy to the local Employment Exchange as required by Section 4 of Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959.

(b) All the applications so received shall 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.

(c) After a candidate is selected the Grama Panchayat shall write to the District Panchayat Officer for his approval under Rule 212. The Panchayat shall forward a copy of each of the Resolution under Clauses (a) and (b) above to the District Panchayat Officer.

(d) On receipt of the proposal for a appointment of Secretary from the Grama Panchayat if the District Panchayat Officer 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 this rule and the remuneration proposed to be paid to the Secretary is reasonable he shall approve the proposal. If the candidate selected by the Grama Panchayat is found to be disqualified for the post of Secretary or the remuneration proposed to be paid is excessive the District Panchayat Officer may direct the Grama Panchayat to select another candidate in the prescribed manner or reconsider the remuneration and resubmit the proposal.

(e) After receipt of the approval of the District Panchayat Officer, the Grama Panchayat may appoint the candidate as Secretary of the Grama Sasan:

Provided that before appointment the candidate selected for the post of Secretary shall produce a fitness certificate from a medical officer not below the rank of Assistant Surgeon :

Provided further that the person who are in the offices of the Secretaries of the Grama Sasans shall be deemed to have been appointed under this rule.

(f) After appointment of a Secretary the Grama Panchayat shall depute him to the office of the District Panchayat Officer for a period of four months, where he shall receive his departmental training. On completion of the training, the period of which may be extended upto one month by the District Panchayat Office for unsatisfactory work, the District Panchayat Officer shall issue a certificate that the candidate has completed his training.

214. (a) The whole time Secretary of a Grama Panchayat shall be entitled to a consolidated monthly remuneration not exceeding three hundred rupees as may be approved by the Grama Panchayat from the Grama Fund.

(b) The part-time Secretary of a Grama Panchayat shall be entitled to a consolidated monthly remuneration not exceeding one hundred rupees, as may be approved by the Grama Panchayat from the Grama Fund.

(c) The Secretary of a Grama Panchayat whether whole time or part time, shall be entitled to travelling and daily allowances at the following rates, namely :

(1) Travelling allowance -

(i) for journey by train, the actual fare in the lowest class, and

(ii) for journey by road, the actual fare in the public bus;

(2) Daily allowance at the rate of five rupees for half of every twenty-four hours or part thereof :

Provided that no travelling or daily allowance shall be paid if the place visited is within eight kilometres of the headquarters of the Grama Sasan.

(d) The Sarpanch of the Grama Panchayat shall have the power to grant leave to the Secretary of the Grama Sasan for a period not exceeding thirty days in a calendar year during which he shall be allowed full pay and the Sarpanch shall entrust the work of the Secretary to a Ward Member who shall remain in formal charge of the Secretary. Leave exceeding thirty days in a calendar year and upto a period of six months, which shall be without pay, can be granted to a Secretary with the approval of the Grama Panchayat. The Grama Panchayat shall have the power to appoint temporarily a substitute in place of Secretary when he proceeds on leave or remains absent continuously for a period exceeding thirty days due to suspension or otherwise. Where the Secretary remains on leave for a period exceeding six months and/ or remains absent from duty without proper authority,. it should be deemed that his services have been terminated with effect from the expiry of the period of six months leave and/or the date of unauthorised absence and under such event a new Secretary shall be appointed in the prescribed manner.

(e) No person shall be appointed as Secretary of the Grama Sasan unless he has completed eighteen years of age. The Secretary of the Grama Sasan shall not be retained in service after he has completed the age of. fifty-eight years.

The service book and the confidential character roll shall be maintained for the Secretary of the Grama Sasan in the form prescribed under the Orissa Service Code. The Block Development Officer shall be responsible for the correct and up-to-date maintenance of the Service Book. The character roll shall remain in the custody of the Block Development Officer. The Sarpanch shall record his annual remarks about the work and conduct of the Secretary in the form prescribed in the Orissa Service Code and shall forward the same to the Block Development Officer by the 7th April every year and thereafter the Block Development Officer shall communicate adverse remarks if any to the Secretary of the Grama Sasan and advise him to rectify the defects. He shall also keep the Grama Panchayat

informed and the Grama Panchayat may take such action as it deems fit within a period of three months from the date of receipt of such communication,

215. (a) Security shall be taken from the Secretary of the Grama Sasan, the amount of which shall not exceed the amount of cash and the money value of the valuables handled or likely to be handled by the Secretary. Such security shall be either (i) in cash; or (ii) Post Office Savings Bank Deposit; or (iii) Government Treasury Notes; or (iv) National Savings Certificates; or (iv) National Defence Certificates.

(b) In exceptional cases, where the Secretary is not able to render security either in lump sum or any other of the kinds specified in this rule, the security due shall be obtained from him in instalments by reduction of 10 per cent of the salary of such other sum as would make up the security in three years :

Provided that until the full amount of security required in cash has been recovered, personal security may be obtained for not less than double the security required in cash from persons who are solvent to the satisfaction of the Sarpanch or security in immovable property not less than double the amount of security required in case shall be taken. In letter case, the Sarpanch shall satisfy himself that the accepted as security is free from all encumbrances and that the person tendering such security has absolute title over it.

216. (a) The Grama Panchayat may remove the Secretary of the Grama Sasan from services if he wilfully omits or refuses to carry out the duties and functions entrusted to him under the provisions of the Orissa Grama Panchayats Act, 1964 and the rules or orders made thereunder abuses the powers, right and privileges vested in him or acts in a manner prejudicial to the interest to of the Grama Sasan or by his action causes loss to the Grama Sasan or has been convicted of any offence :

Provided that no order of removal shall be passed by the Grama Panchayat without giving him a reasonable opportunity of showing cause. The grounds on which he is proposed to be removed shall be reduced to the form of definite charge or charges which shall be communicated to him in writing. He shall be required to submit his explanation in writing within a reasonable time.

The Grama Panchayat shall take a decision in the matter after having considered the explanation of the Secretary, if any, and having heard him, if he has so desired and thereafter may remove him.

(b) The Grama Panchayat may suspend from office of the Secretary of the Grama Sasan pending disposal of the proceedings against him under this rule or if he has been detained in prison during trial, under the provisions of any law for the time being in force.

During the period of suspension the Secretary of the Grama Sasan shall be paid subsistence allowance the amount of which shall not exceed half of his monthly salary.

217. Notwithstanding anything contained in the rules, the State Government may by special or general order direct any public servant to act as Secretary to any Grama Panchayat."

8. Paragraph 14 of the decision in R.N.A. Britto's case (supra) is relevant to find out whether it has any similarity. It reads as follows:

"14. The provisions in the Act to which we have adverted, clearly show that several functions which were required to be performed by the State are entrusted to the Panchayats. They also show that the properties vested in the Panchayats and the funds of the Panchayat are that of the Government and those collected by way of tax or fee by exercising the power of taxation vested in the Panchayat by the Government. Above all provisions of the Act make it abundantly clear that the Panchayats have to run under the ultimate control of the State Government. When it comes to the Secretaries of the Panchayats appointed under the Act, their selection for appointment, their termination from service, their liability for transfer and all other conditions of their services are as provided for under the rules made under the Act or other rules made under Article 309 of the Constitution in respect of services of the State Government servants. When Sub-section (2) of Section 80 of the Act to which we have adverted states that subject to the provisions of rules made under the proviso of Article 309 of the Constitution, the qualification, powers, duties, remuneration and conditions of service including disciplinary matters of such Secretary shall be such as may be prescribed, it leaves no room for doubt that the Secretaries of the Panchayats are Government servants, like other Government servants, who are subject to the Rules to be made under the proviso to Article 309 of the Constitution as regards their service conditions."

9. The position is entirely different so far Secretaries of the State as Grama Panchayat Secretaries of the State are concerned, as a reading of Rules 212 to 217 show. According to Section 4 of the Act, 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. The Grama Sasan shall be a body corporate by the name of the Grama to which it relates having perpetual succession. As provided by Section 7 of the Act, there shall be for every Grama Sasan a Grama Panchayat which shall be the executive authority of the Grama Sasan. Section 122 of the Act deals with officers and servants of Grama Sasan. The said section has considerable relevance so far as present dispute is concerned. Same reads as follows :

"122. Officers and servants of Grama Sasan -

(1) Subject to such general and special orders, if any, made in that behalf by the State Government there shall be a Secretary and such officers and servants 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 this Act and the rules made thereunder and the powers, duties and functions of such officers and servants shall be as may be prescribed.

(2) 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 such officers and servants shall be governed by the rules made in that behalf.

(3) Notwithstanding anything in any other law for the time being in force the State Government may, whenever they consider it expedient so to do, provide by rules made in that behalf a common cadre of posts and services -

(a) for all or any of the Grama Sasan within the State or a part thereof; or

(b) for all Grama Sasan and Samities within a district together with the Parishad; or

(c) for all Grama Sasans together with all Samities and Parishad within the State.

and all matters incidental or ancillary thereto and in the event of any conflict between the provisions of any other law as aforesaid and the provisions of this Act, and the rules made thereunder the latter shall prevail."

10. Rule 213 deals with appointment of Secretary for the Grama Sasan either on a whole time or on a part time-basis. Applications are to be invited by the Grama Panchayat for the purpose. All the applications so received are to 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 selection is made by the Grama Panchayat, the District Panchayat Officer is to be intimated for his approval under Rule 212. On receipt of the proposal the District Panchayat Officer shall approve the proposal if he is satisfied that the candidate selected by the Grama Panchayat possesses the prescribed qualification is eligible for the post of Secretary, and the selection has been made in accordance with Rules and the remuneration proposed to be paid to the Secretary is reasonable. After approval is received from the District Panchayat Officer, the Grama Panchayat will appoint the candidate as Secretary of the Grama Sasan. The remuneration is payable either on whole-time or part-time basis. The remuneration is to be paid by the Grama Panchayat as may be approved by it from the Grama Fund. Section 2(i) defines "Grama Fund" to mean a local fund constituted u/s 93. In Chapter IX under the heading "Finance", Section 93 deals with "Grama Fund". Section 96 deals with priority of payments of Grama Fund. Sub-section (1), Clause (c) of said section deals with payment of salaries, allowances etc. The Sarpanch of the Grama Panchayat has power to grant leave to the Secretary of the Grama Sasan for a period not exceeding thirty days in a calendar year. The power of removal of the Secretary of a Grama Sasan from services is prescribed in Rule 216, Such power is to be exercised when, the Secretary (a) refuses to carry out the duties and functions entrusted to him

under the provisions of the Act, and the Rules or order made thereunder; or (b) abuses of the powers vested in him, or (c) acts in any manner prejudicial to the interest of the Grama Sasan, or (d) by his action causes loss to the Grama Sasan, or (e) has been convicted of any offences. This is, however, subject to the condition that he shall be given a reasonable opportunity to show cause before the order of removal is passed by the Grama Panchayat. During pendency of a proceeding, the Grama Panchayat has the power to suspend the Secretary. u/s 112 of the Act Collector has power of deputation of Officers to advise Grama Panchayats. By general or special order Collector can direct any officer of any of the departments of the Government to attend meeting and advise in respect of certain after.

11. A conspectus of the provisions makes it clear that under the Act and the Rules the power to appoint a Secretary and to take disciplinary action against him vests with the Grama Panchayat. Power of removal also vests with the Grama Panchayat. The relationship between the Grama Panchayat and the Secretary is that of master and servant, and State cannot be said to be the master of the latter. That being the position, the conclusion is inevitable that Secretary of a Grama Panchayat does not hold civil post under the State Government, and is not a Government servant.

The reference is accordingly answered.

S.N. Phukan, C.J.

12. I agree.

P.K. Mohanty, J.

13. I agree.