

(2007) 05 MP CK 0055
In the Madhya Pradesh High Court

State of Madhya Pradesh and Others

APPELLANT

Vs

Ashok Kumar Tripathi and Another

RESPONDENT

Date of Decision : 14-05-2007

Acts Referred:

Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 — Section 129E

Citation : AIR 2008 MP 187 : (2007) ILR (MP) 949

Hon'ble Judges : S.R. Waghmare, J;Dipak Misra, J

Bench : Division Bench

Judgement

Dipak Misra, J.—Regard being had to the similarity pertaining to the question of law involved in both these appeals, they were heard analogously and are disposed of by this common order. Be it noted that the pregnability of the order dated 19-5-2005 passed by the learned single Judge in W.P. 853 of 2005 has been challenged by the State of M.P. and its functionaries in Writ Appeal No. 1364 of 2006 and the defensibility of the said order is assailed by the appellant in W.A. No. 658 of 2006 who had filed an application for intervention in the writ petition.

2. The facts which are required to be exposited are that district Shahdol was constituted of many a Tahsil. On 15-8-2003, it was re-organized and two separate districts, namely Shahdol and Anuppur were constituted. District Anuppur by virtue of re-organization comprises of four Tahsils, namely Anuppur, Pushparajgarh, Jaithari and Kotma. These four Tahsils were declared as Scheduled Areas under the provisions of Scheduled Area (State of Bihar, Gujarat, Madhya Pradesh and Orissa) Order, 1977. These four Tahsils were Scheduled Areas and all the seats of Gram Panchayats and Janapad Panchayats were reserved for Scheduled Tribes alone. Total numbers of Gram Panchayats in four tahsils are 276 and all have been reserved for Scheduled Tribes. Similarly, there are four Janapad Panchayats in four Tahsils and they have also been reserved for Scheduled Tribes. The respondents in W.A. No. 1364 of 2006 invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of

India contending inter alia that the respondent No. 1 is a resident of village Kuhka, Post Malga, Tahsil Kotma, District Anuppur and were Sarpanch of Gram Panchayat from 1994 to 2000 and the respondent No. 2 belongs to Scheduled Tribe and is a member of Zila Panchayat and has been elected in January 2005 from Ward No. 8 of Pushparajgarh. It was contended by them that while all the Tahsils of Anuppur district are reserved for Scheduled Tribes, the office of President of Zila Panchayat should have been reserved for Scheduled Tribes as the district Anuppur is constituted of such tahsils which form whole of the area of the district as scheduled area. It was put forth that Section 129-E of the M.P. Panchayat Raj and Gram Swaraj Adhiniyam, 1993 (for short "the Adhiniyam") provides for reservation of such area and there was no justification on the part of the State of M.P. and its functionaries not to reserve the office of the President, Zila Panchayat for the Scheduled Tribes.

3. The said stand and stance of the writ petitioners were combated by the respondents therein stating inter alia that the scheduled area for the office of the President, Zila Panchayat is meant for the district and unless the district Anuppur is notified to be a scheduled area by a Presidential notification, as envisaged under Article 244 of the Constitution of India, the State cannot issue a notification for such reservation. The learned single Judge adverted to Article 244 and the Fifth Schedule of the Constitution, the notification issued on 31-12-1977, the notification published in extraordinary gazette on 20th February, 2003 by which the President of India had rescinded the Scheduled Area of order of 1977 in so far as It relates to the area presently comprising in the State of Chhattisgarh, Jharkhand and Madhya Pradesh, Article 243-M, the Panchayat (Extension to the Scheduled Areas) Act, 1996, a Central piece of legislation (for short-Act of 1996), and directed as under:

(11). Consequently, this petition is allowed in part and following directions are issued:

1. Respondent No. 1 is directed to consider the matter to make a reference to the President in accordance with law and procedure for declaring Anuppur district as Scheduled Area. Aforesaid exercise shall be done by the respondent No. 1 within a period of 60 days from the date of communication of the order.

2. After reference is made by the respondent No. 1 to the President, the respondent No. 1 shall await final verdict from the President in this regard and thereafter shall proceed in accordance with the presidential notification, and proceed with in accordance with the provisions of Section 129E of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993.

3. Till the matter is finally decided by the President, the election of the office of President, Zila Panchayat, Anuppur shall remain in abeyance.

4. The appellant in. W.A. No. 658 of 2006 preferred SLP No. 19191 of 2005 and the Apex Court passed the following order:

The direction of the High Court that till the President, the election of the office of President. Zila Panchayat, Anuppur in abeyance is stayed till further orders.

Counter affidavits and vakalatnama be filed within two weeks thereafter.

5. It is worth noting at that time the enactment of the "Madhya Pradesh Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005" had not come into force and after its coming into force, the following order was passed by the Apex Court:

In view of the remedy of intra-court appeal being now available as a result of the enactment of the Madhya Pradesh Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005, we are not inclined to entertain this SLP under Article 136 of the Constitution of India. The SLP is, thus, dismissed with liberty to the petitioner to approach the High Court.

The interim protection granted by this Court will continue for a period of two months.

We have narrated the said aspect only to indicate the chronology.

6. We have heard Mr. T.S. Ruprah, learned Additional Advocate General for the appellants in the State Appeal and Mr. N.S. Kale, learned Senior Counsel assisted by Mr. Greeshma Jain in W.A. No. 658 of 2006 and Mr. A.M. Trivedi, learned Senior Counsel with Mr. Ashish Trivedi, Advocate for the private respondents in W.A. No. 1364 of 2006. We have also heard Mr. S.C. Sharma, learned Senior Counsel with Mr. S.N. Prajapati, Advocate for the respondent No. 5 in W.A. No. 658 of 2006.

7. It is submitted by Mr. Ruprah, learned Additional Advocate General and Mr. N.S. Kale, learned Senior Counsel along with Mr. Greeshma Jain, Advocate that unless there is a notification in respect of district Anuppur by the President of India in exercise of the power under Fifth Schedule to the Constitution of India, the State cannot reserve the office of the District Panchayat for Scheduled Tribes despite the fact that the District constitutes of all the tahsils which have been declared as Scheduled Areas. The learned Counsel for the appellant submitted that besides what has been notified by the Gazette on 20-2-2003, nothing can be added to it or extracted from it by the executive. It is urged by them, the learned single Judge has committed the error by directing the State Government to refer the matter to the President in accordance with law and procedure for declaring Anuppur as a Scheduled Area and even assuming the same is correct, there was no justification to direct that till the matter is finally decided by the President of India, the election of the office of President of Zila Panchayat, Anuppur shall remain in abeyance. It is proponed by them that Anuppur as a district cannot be regarded or treated as a Scheduled Area because its constituents form a Scheduled Area as the same is not permissible within the Constitutional framework to treat a particular thing with particular status by any kind of inference.

8. Mr. A.M. Trivedi, learned Senior Counsel being assisted by Mr. Ashish Trivedi, Advocate, per contra, submitted that the order of the learned single Judge is

absolutely impeccable inasmuch as when the entire area that constitutes the district has been declared as a Scheduled Area and the "area" being the term used in the Fifth Schedule to the Constitution, there would be no impropriety to declare Anuppur as a district, the Scheduled Area. The learned Counsel has invited our attention to Article 243-M, Article 244 and the Fifth Schedule of the Constitution to emphasize that if the said constitutional provisions are read with studied scrutiny, there can be no scintilla of doubt that district Anuppur falls within the ambit and sweep of Scheduled Area and there is no escape from the said conclusion. It is urged by the learned Senior Counsel that there is no need for the Presidential notification but the learned single Judge, by abundant caution, has directed the State Government to refer the matter to get the maze clear and soundly and correctly has directed election to the office of the President, Zila Panchayat, Anuppur to remain in abeyance. He has commended us to the decisions rendered in *Samatha Vs. State of A.P. and Others*, , *Amarendra Nath Dutta and Others Vs. State of Bihar and Others*, , the decision dated 12-4-2007 (reported in 2007 (3) MPHT 527) rendered in W.P. No. 3138 of 2007 (*NeeraJ Kumar Sharma v. State of M.P.*) decided by Division Bench of this Court, and *Jagannath Sonu Parkar Vs. State of Maharashtra*, .

9. The spinal and seminal issues that really emanate for consideration in these two appeals are whether the district Anuppur stands declared as a Scheduled Area because its constituents have been declared as Scheduled Areas and whether the Court. while exercising power under Article 226 of the Constitution can express an opinion In that regard and direct the State Government to move in that direction to refer the matter to the President of India and till then, direct stay of election to the office of President of Zila Panchayat.

10. Article 244 of the Constitution occurring in Part-X reads as under:

Article 244. Administration of Scheduled Areas and Tribal Areas:

(1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State, other than the States of Assam, Meghalaya and Tripura.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam, Meghalaya and Tripura and the Union territory of Mizoram.

Clause (1) makes the applicability of the 5th Sch. to the (a) Scheduled Areas, and (b) Scheduled Tribes in States other than Assam and Meghalaya e.g., the Scheduled Areas in Bihar, Gujarat, Madhya Pradesh, Orissa, Madras (Godavari Agency). The "Scheduled Areas" are such Areas in these States as are specified by the President under Para. 6 of the 5th Sch. post.

Clause (1) of Article 244, as is perceptible categorically provides that provisions of Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State. Part-B of the Fifth Schedule relates to

administration and control of Scheduled Areas and Scheduled Tribes. Paragraph 4 of the same deals with Tribes Advisory Council. Para 5 deals with law applicable to Scheduled Areas. Part-C which deals with Scheduled Areas contains para 6 and the same reads as under:

6. Scheduled Areas--(1) In this Constitution, the expression "Scheduled Areas" means such areas as the President may by order declare to be Scheduled Areas.

(2) The President may at any time by order-

(a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area;

(aa) increase the area of any Scheduled Area in a State after consultation with the Governor of that State;

(b) alter, but only by way of rectification of boundaries, any Scheduled Area;

(c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area;

(d) rescind, in relation to any State or States, any order or orders made under the paragraph, and in consultation with the governor of the State concerned, make fresh order redefining the areas which are as to be Scheduled Areas,

and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order.

In this context, we may refer to Article 243-M, which provides that nothing in the said part shall apply to the Scheduled Areas referred to in Clause (1) and the Tribal areas referred to in Clause (2) of Article 244. The provision of 1996 Act (Act 40 of 1996) deals with extension of provisions of Part IX of the Constitution relating to the Panchayats to the Scheduled Areas. Section (2) reads as under:

2. Definition--In this Act, unless the context otherwise requires, "Scheduled Areas" means the Scheduled Areas as referred to in Clause (1) of Article 244 of the Constitution.

Section 4 of the Act of 1996 carves out exceptions and modification to Part IX of the Constitution.

11. Section 129-E of the 1993 Adhityam reads as under:

Section 129-E--Reservation of seats-(1) The reservation of seats for Scheduled Tribes in every Panchayat in Scheduled Area shall be in proportion to their respective population in that Panchayat:

Provided that reservation for Scheduled Tribes shall not be less than one-half of

the total number of seats:

Provided further that all seats of Sarpanch or President, as the case may be, of Panchayat at all levels in Scheduled Areas shall be reserved for members of Scheduled Tribes.

(2) The State Government may nominate persons belonging to such Scheduled Tribes as have no representation In a Panchayat in the Scheduled Areas at the intermediate level or in a panchayat In the Scheduled Areas at the district level.

Provided that such nomination shall be exceed one-tenth of the total members to be elected In that Panchayat.

(3) In a Panchayat In Scheduled Areas such number of seats shall be reserved for persons belonging to other backward classes, which together with the seats already reserved for Scheduled Tribes, and Scheduled Castes, if any, shall not exceed three-fourths of all the seats In that Panchayat.

On a perusal of the aforesaid provisions, it is clear as noon day that the concept of reservation would get attracted once there Is an order by the President declaring such area to be a Scheduled Area. Submission of Mr. Ruprah, learned Additional Advocate General and Mr. Kale, learned Senior Counsel is that there has been no declaration in respect of district Anuppur. Per contra, submission of Mr. A.M. Trivedi, learned Senior Counsel is that once there has been a notification of areas which are Scheduled Areas and they constitute a district and the State Government has reserved all the offices of the said Panchayats and Janapad Panchayats for Scheduled Tribes, and hence, a distinction cannot be drawn in respect of Zila Panchayat. In this context, we may refer with profit to Article 243-B, which reads as under:

Article 243-B. Constitution of Panchayats-

(1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part.

(2) Notwithstanding anything in Clause (1), Panchayats at the intermediate level may not be constituted in a State having a population not exceeding twenty lakhs.

12. Article 243-C of the Constitution deals with composition of Panchayats. Section 2 (xvii) of the Adhiniyam defines "Panchayat" as under:

(xvii) "Panchayat" means a Gram Panchayat, a Janpad Panchayat or a Zila Panchayat, as the case may be.

13. From the aforesaid, it is clear as crystal that there is a clear cut distinction between various categories of Panchayats at various levels. In the case of Samatha (supra), their Lordships opined that the word "regulate" used in A.P. Scheduled Area Land Transfer Regulation (1 of 1959) in respect of allotment of land to members of Scheduled Tribes in Scheduled Areas in Fifth Schedule vide

Clause (a) of sub-para (2) of Para 5 must be read as a whole to ensure regulation of the land only to and among the members of the Scheduled Tribes In the Scheduled Area and there Is implied prohibition on the State's power of allotment of Its land to non-tribal In the Scheduled Areas. In our considered opinion, the said decision Is of no assistance to the learned Counsel for the respondents.

14. In the decision rendered In Amarendra Nath Dutta (supra), the Full Bench of Patna High Court In paragraph 37 has held as under:

37. As I have already pointed out, the Amendment Act by its own terms and by its own force does not include any areas within the Scheduled Areas. Whether any particular area shall or shall not be included within the Scheduled Areas is a matter which remains within the discretion of the President even after the amendment. If a new area becomes a part of the Scheduled area, it is because in the exercise of the power under sub-paragraph (1) conferred upon the President by the Constitution makers themselves, the President has determined that it should be so. Therefore, the deprivation of the right to be governed by laws made by their elected representatives occurs primarily and directly due to the act of the President, in exercise of power conferred upon him by the original Constitution, and not by the Amendment Act. The Amendment cannot, therefore, be regarded as destroying or damaging the democratic form of Government.

The said enunciation of law, in our considered opinion, does not improve the case of the respondents. On the contrary, it interprets Part-C of Fifth Schedule in a manner, which does not subserve the cause of the respondents. In paragraph 40, their Lordships have held as under:

40. The power of redefining the Scheduled areas is a very general and wide power. The areas may be redefined by excluding areas which have been included and/or by including areas which were originally not included within the Scheduled areas, for, the power to redefine is simply the power to define once again. Clause (2) of paragraph 6 does not lay down the circumstances under which the President may rescind the previous Order or Orders made under Paragraph 6, nor does it impose any limitation or restriction on the said power of the President. How the areas should be redefined and, which areas should be included in Scheduled areas and which should be left out is apparently left to the absolute discretion of the President. Prima facie, therefore, the Order has been made within the scope of the powers conferred and does not violate any limitation or restriction imposed on the exercise of that power. It seems therefore, that the decision of the President regarding the areas, which are to form the Scheduled Areas, is not open to question and to judicial scrutiny.

It is discernible that the President by notification dated 20-2-2003 at Serial No. 13, which related to Madhya Pradesh, had substituted the entry as under:

13. Pushparajgarh, Anuppur, Jaithari, Kotma, Jaithpur, Sohagpur and Jaisinghnagar tehsils of Shahdol district.

What is contended by Mr. Trivedi is that when the Presidential Order included Anuppur in the Scheduled Area, the State Government cannot exclude it. The aforesaid submission, in our considered opinion, is unacceptable. What was included in the notification dated 20-2-2003, by which the President rescinded the Scheduled Area of Order of 1977, is a substitution. Anuppur which was a Tahsil has become a part of Scheduled Area. Anuppur was part of Shahdol district at the time of notification. The State Government has bifurcated District Shahdol into two districts Shahdol and Anuppur. It is propounded by Mr. Trivedi, if Anuppur is not regarded as a Scheduled Area, there will be a flagrant violation of the Constitutional Scheme. It is worthwhile to state here Anuppur which was included as a Scheduled Area as one of the Tahsils of district Shahdol and is still treated as a Scheduled Area and all Gram Panchayats and Janapad Panchayats of Anuppur Tahsil are reserved for Scheduled Tribes. Anuppur has at present become a District consisting of four Tahsils, namely Anuppur, Pushparajgarh, Jaithari and Kotma. The four Tahsils still maintain their status as Scheduled Areas but Anuppur, as a district, has not been regarded as a Scheduled Area. As has been stated earlier, the Zila Panchayat is meant for the district. It has a different entity.

15. The learned Counsel for the respondents would submit that the decision rendered in *Neeraj Kumar Sharma (supra)* would apply with full force to the instant case. In the aforesaid case, a Division Bench was interpreting Sub-section (2) of Section 3 of the M.P. Co-operative Societies Act, 1960 (for short the Act of 1960) and in that context, the Division Bench referring to the powers conferred by the First Schedule under the Act of 1960 expressed the opinion that the Deputy Registrar, Shahdol can exercise of the power of the Registrar u/s 49 of the Act of 1960 in Shahdol district which included the present district of Anuppur. In our considered opinion, the said decision was rendered in a different context altogether and that is of no assistance to the learned Counsel for the respondents.

16. On a reading of the Constitutional scheme, we are of the considered opinion the unless there is a declaration by the President in Part-C of the Fifth Schedule; an area cannot form a part of Scheduled Area. The constituents having already been declared Scheduled areas are maintained as such. The district has a different Unit for the purpose of election under Article 243-M of the Constitution. The concepts of Zila Panchayat and reservation are different things. It is not an arithmetical concept by which one can arrive at a conclusion that when all the tahsils constitute as a district, the district must be regarded as a Scheduled Area, specially, for the purpose of election of Zila Panchayat. We are not persuaded by the said argument of learned senior counsel for the respondents.

17. The learned single Judge has observed that the entire purpose of declaring the Scheduled Area is to comply with the Constitutional provisions of Article 244. It is within the discretion of the President. A positive act is required to be done. The Court cannot substitute the said action or issue a mandamus by taking

recourse to conceptual inference. What is urged by the learned Counsel for the respondents is that unless the office of the President of Zila Panchayat Anuppur is declared as reserved for Scheduled Tribes, the entire purpose of Section 129-E of the Adhiniyam shall be frustrated. We are afraid we cannot subscribe to the said view. Section 129-E cannot override the Constitution. It has to follow it till the district Anuppur as an area or unit is declared as a Scheduled Area for the purpose of election of Zila Parishad. In our considered opinion, it cannot be regarded as a Scheduled Area by deductive or syllogistic process.

18. At this juncture, we may note with profit that Mr. Ruprah, learned Additional Advocate General has submitted that the State Government has forwarded its recommendation to the Union of India. The Union of India has not been made a party. Be that as it may, as the State Government has already forwarded, it shall pursue the same with the Union of India and appropriate decision may be taken in that regard.

In view of the aforesaid premises, the writ appeals are allowed in part and the directions contained in Clauses (2) and (3) in paragraph 11 of the impugned order are set aside. There shall be no order as to costs.