

(2022) 08 OHC CK 0223

In the Orissa High Court

Case No : Writ Petition (C) Nos. 17710, 9982 Of 2012 and 5268, 24862 Of 2013

Suryakanti Sahu

APPELLANT

Vs

State Of Odisha And Others

RESPONDENT

Date of Decision : 23-08-2022

Acts Referred:

Constitution of India, 1950 — Article 243(d), 243G
Orissa Grama Panchayats Act, 1964 — Section 122, 122(1), 122(2), 123, 133, 213
Orissa Gram Panchayat Rules, 1968 — Rule 212, 213, 214, 215, 216, 217, 219
Uttar Pradesh Panchayat Raj Act, 1947 — Section 25, 25B

Citation : (2022) 08 OHC CK 0223

Hon'ble Judges : Dr. S. Muralidhar, CJ; R.K. Pattanaik, J

Bench : Division Bench

Advocate : S.K. Dalai, Ishwar Mohanty

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ

1. These four writ petitions raise a common issue concerning the validity of the circulars/instructions issued by the State Government setting down the procedure for the appointment of Jogana Sahayak in a Gram Panchayat (GP).

The four writ petitions

2. W.P.(C) No.17710 of 2012 by an elected Sarpanch of the Sirijapali GP in Kalahandi District challenges the circulars dated 21st April 2012 and 27th April 2012 of the Food Supplies and Consumer Welfare Department, Government of Odisha setting down the procedure for appointment of Jogana Sahayak in a GP. The main ground of challenge is that the procedure set down in the impugned circulars are contrary to Article 243G of the Constitution of India and Rules 212 and 219 of the Orissa Gram Panchayat Rules, 1968 (OGP Rules).

3. While directing notice to issue in the said writ petition, this Court stayed the operation of the impugned circular dated 27th April 2012 for a period of two

weeks. On 17th July 2017, the following order was passed:

"Heard learned counsel for the parties.

The short question remains to be decided here is that in the event the Sub-Divisional Officer i.e. the Sub-Collector being the appellate authority following the provision contained Section 133 of the O.G.P. Act can he be the Chairman for the selection of "Jogana Sahayaka". Even though the period of Sarpanch is already over but looking to the allegation involving the impugned action and for the change in the situation in the meantime as the duty of the P.D.S. supply has already been vested with the Sarpanch, it appears, such question shall be decided provided the above situation still exists.

Learned State Counsel is not in a position to answer to the above question.

List this matter on 24th of July, 2017 along with its other connected cases listed today. Learned State Counsel is directed to obtain instruction in the matter in the meantime.

Interim order passed earlier shall continue till the next date."

By a subsequent order on 24th July 2017, the matter was directed to be placed before the Division Bench.

4. In W.P.(C) No.9982 of 2012 by Dharamu Sen Meher, a Sales Assistant working in the Gandabahali GP, District- Nuapada, the challenge is to a resolution dated 10th April 2012 of the Sarpanch of the said GP regarding the selection of Opposite Party No.5 as Jogana Sahayak of the said GP. In this writ petition, while issuing notice on 6th July 2012, an interim order was passed that any appointment made would be subject to the result of the writ petition.

5. As far as W.P.(C) No.5268 of 2013 is concerned, it is by the elected Sarpanch of Jaringi GP in Kalahandi District. Notice was issued in this petition on 18th April 2013 and although no specific interim order was passed on that date, on the next date i.e., 8th January 2014, it was mentioned "Interim order passed earlier shall continue till then (17th January 2014)", after which, the interim order was not continued.

6. In W.P.(C) No.24862 of 2013 by Jyotsna Sunani, the Jogana Sahayak of Jaringi GP, the prayer is for a direction to the District Panchayat Officer, Kalahandi (DPO) (Opposite Party No.3) and the Block Development Officer, Jungarh (BDO) (Opposite Party No.4) to act upon the resolution of the GP approving the appointment of the Petitioner as Jogana Sahayak under Section 213 of the Orissa Gram Panchayat Act, 1968 (OGP Act) and the OGP Rules. In this writ petition, notice was directed to issue on 20th December 2013 and no interim order was passed.

7. Pursuant to the notice issued, counter affidavit has been filed in W.P.(C) No.17710 of 2012 by the DPO Kalahandi and in W.P.(C) No.9982 of 2012 by the BDO, Sinapali, District-Nuapada.

8. At the outset, it requires to be noticed that para 5 of the letter dated 27th April 2012 of the Collector and District Magistrate, Kalahandi sets down the procedure for appointment of Jogana Sahayak as under:

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The GPs shall make a resolution in their meeting to appoint a Jogana Sahayak if they are dealing with at least Q.150.00 of PDS items (Rice, Wheat & Sugar) in a month. The resolution should also indicate the amount of honorarium for the Jogana Sahayak (between Rs.3500/- to Rs.4000/-). The resolution shall be sent to the concerned Block Development Officer. The Block Development Officer shall collect all such resolutions from GPs and make a common advertisement inviting applications from interested candidates. The eligibility condition shall be as under:

1. The Candidate should be a permanent resident of the GP.
2. He/She should be Graduate (+3).
3. He/She should be of age between 21 to 35 years.

The selection will be based on the career marking with weight-age for Matriculation being 30%, for (+2) being 30% & for (+3) being 40%. A committee under the Chairmanship of BDO with Marketing Inspector/Inspector Supplies as convener and concerned Sarpanch of GP as member will do the selection & provide the panel of 3 names to the Sub-Collector for approval. Upon approval by the Sub-Collector, the panel of names will be provided to the concerned GP for appointment of the 1st person (Scoring highest marks) as "Jogana Sahayak". If no graduate is available, then re-advertisement shall be made for selecting from amongst (+2) pass applicants of the concerned GP.

The resolution by GPS may be done by 15th of May 2012 and selection by Block may be completed by 15th of June 2012 and approval of Sub-Collector by 15th July 2012."

Case of the Petitioners

9. Mr. S.K. Dalai, learned counsel appearing for the Petitioners first referred to Article 243G of the Constitution of India which deals with the powers, authority and responsibilities of the Panchayat and reads as under:

"243G. Powers, authority and responsibilities of Panchayats: Subject to the provisions of this Constitution the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to;

(a) The preparation of plans for economic development and social justice;

(b) The implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.”

10. Mr. Dalai submits that “Public Distribution System (PDS)” figures in Serial No.28 of the 11th Schedule to the Constitution and therefore, comes directly within the purview of the GP. It is stated that inasmuch as the entire PDS is under the management of the GP, appointment to the post of Jogana Sahayak is also to be under the control of only the GP since there is a master and servant relationship between the Jogana Sahayak and the GP. In other words, the appointment should not be interfered with at any stage by the Collector or the BDO as that would impair the powers, authority and function of the GP.

11. The second ground of challenge is that under the OGP Act, the Sub-Collector is the appellate authority to hear the grievance of the employees of the GP against the order of the GP. However, here, he is the approval authority and party to the selection procedure. Therefore, he will not be in a position to hear the appeal against orders appointing Jogana Sahayak. It is accordingly submitted that the impugned circular is neither in consonance with the OGP Act and Rules thereunder nor Article 243G of the Constitution of India. Reliance is placed on the decisions in *Sri Adwait Chandra Jena v. Khandahata Grama Panchayat* 1998 (II) OLR 410; *U.P. Gram Panchayat Adhikari Sangh v. Daya Ram Saroj* (2007) 2 SCC 138 and *Fakirmohan Das v. Government of Orissa* 2008 (II) OLR 530.

Stand of the Opposite parties

12. In W.P.(C) No.17710 of 2012 by Suryakanti Sahu, the reply filed by the DPO at the outset points out that the writ petition is an outcome of mala fide action of the Petitioner “who being the Sarpanch of Sirjapalli Gram Panchayat has given appointment to her son-Pradeep Kumar Sahu as the Jogana Sahayak” in violation of the letters dated 21st April 2012 and 27th April, 2012. A copy of the letter dated 21st April 2012 addressed by the Commissioner-cum-Secretary to the Government, Food Supplies and Consumer Welfare Department, Government of Odisha to all Collectors has been enclosed. The subject matter of the said letter is “Promoting Institutions to become FPS Retailers & selection procedure for ‘Jogana Sahayak’.”

13. It is pointed out by the Opposite Parties that among the important decisions taken in the said circular dated 21st April 2012 was one concerning “New PDS regime” in para 3 which reads as under:

“3. New PDS regime:

With transportation cost being borne by the Government, the FPS shops can become viable if a minimum of 500 ration cards are tagged to a shop. Under Odisha PDS (Control) Order, 2008, an institutional agency like G.P. or SHG or Cooperative Body will be given preference over a private agency in issuing licence to deal with PDS items in a particular area. Therefore, the institution

should come forward to take over dealership in public interest. In an ideal situation there could be two institutional dealership in a G.P. to take care of the distance factor which the consumers have to travel to carry their entitlements. One of them could be the G.P. and the second one could be one WSHG or a Cooperative Organization. This will ensure better distribution & eliminate monopoly."

14. The Opposite Parties further submit that for better management of the system, and the licence being issued to the GPs themselves under the supervision of the Sarpanches, the Government decided to appoint a Jogana Sahayak in each GP. It is contended that the said procedure, selection criteria set out for the appointment of Jogana Sahayak is not contrary to Article 243G of the Constitution of India and Rules 212 and 219 of the OGP Rules. It is pointed out that the said Rules have no application to the appointment of Jogana Sahayak. It is further contended that the letter dated 27th April 2012 has only described the eligibility criteria and the procedure to be adopted for selection and appointment of Jogana Sahayak. It is pointed out that the honorarium to be paid to the Jogana Sahayak is out of the profits gained like commission of Rs.20/- per quintal and two gunny bags (per quintal) which will fetch Rs.20/- for delivering PDS items to ration card holders. It is pointed out that Jogana Sahayak is not to be paid remuneration from out of the funds of the GP and there is no master and servant relationship between the GP and Jogana Sahayak. The Jogana Sahayak is not treated as staff of the GP like Tax Collectors, Peon etc. to whom Rules 212 and 219 of the OGP Rules apply. Jogana Sahayak gets remuneration out of the profit acquired from the PDS operation only.

15. In W.P.(C) No.9982 of 2012, the BDO's reply states that after receipt of the guidelines set out in the circular dated 27th April 2012, a discussion was held at the monthly meeting of the GP of Gandabahali GP on 10th April 2012 and a resolution was passed to engage Opposite Party No.5 as Jogana Sahayak on the basis of his sincerity and eligibility. The Petitioner was removed from the post of Salesman with effect from 30th November 2004, by a resolution passed in a monthly meeting dated 20th October 2006 "due to his continuous absence from office and for non-discharge of duties." It is pointed out that he had initially being engaged on 26th December 2000 and subsequently, by a resolution of GP dated 20th October 2006, he was removed from the said post. All these reasons have been set out in the resolution passed. At the time of filing a reply, Gandabahali GP had only passed a resolution for engaging Opposite Party No.5 as Jogana Sahayak, but that resolution had not yet been officially forwarded to the proper authority for its confirmation.

16. Mr. Ishwar Mohanty, learned Additional Standing Counsel for the State in all these matters referred to the above counter affidavits and submitted that there had been no violation of Article 243G of the Constitution of India or Rules 212 and 219 of the OGP Rules by the impugned circulars dated 21st April 2012, and 27th April, 2012. He relies on the decisions in State of U.P. v. Zila Parishad,

Ghaziabad (2013) 11 SCC 783; *Nrutang Gram Panchayat v. State of Orissa* 2015 SCC Online Ori 375 and *Ricchpal Singh v. State of Rajasthan* 2005 SCC Online Raj 396.

Analysis and reasons

17. Article 243G of the Constitution of India which has been inserted by the Constitution (73rd Amendment Act 1992) states that there shall be a devolution of powers and responsibilities upon Panchayats with respect to (a) the preparation of plans for economic development and social justice; (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule. The entry at Sl. No.28 of the 11th Schedule specifies the "Public Distribution System". In other words, the powers and responsibilities in respect of the PDS vest with the elected GPs.

18. The short question therefore is whether for appointment to the post of Jogana Sahayak of a ration shop of PDS, the powers of the GP are in any way impaired by the impugned circulars dated 21st and 27th April 2012, issued by the Food Supplies and Consumer Welfare Department, Government of Odisha?

19. In *Sri Adwait Chandra Jena* (supra), the Division Bench of this Court was unable to come to a conclusion whether the post of Secretary of a GP was a "civil post" under the State Government and the matter was accordingly referred to a Larger Bench of this Court. The Full Bench in the aforementioned decision held that the Secretary "does not hold a civil post under the State Government" and "is not a Government servant". In doing so, this Court analyzed the provisions of Rules 212 to 217 of the OGP Rules which applied to different posts including Secretary. Reference was also made to Section 122 of the OGP Act which deals with Officers and Servants of Grama Sasan. The entire discussion was therefore about the Secretary to the GP and the Full Bench concluded in para 11 as under:

"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."

20. In the present case, we are concerned with the post of Jogana Sahayak and not the post of the Secretary, GP to whom the above Rules 212 to 217 of the OGP Rules apply. Therefore, the above decision is of no assistance to the Petitioners' contention that the procedure prescribed under the impugned circular for appointment of Jogana Sahayak is violative of either Article 243G of the Constitution or Rules 212 to 217 of the OGP Rules.

21. Turning next to the decision in U.P. Gram Panchayat Adhikari Sangh (supra), the Supreme Court was concerned with the application where tube well operators of the Irrigation Department of the State Government were transferred to the GPs as a result of devolution of powers, governmental functions on the GPs inter alia "relating to minor irrigation, water management and watershed development". On analyzing Section 25 B of the U.P. Panchayat Raj Act, 1947, it was concluded as under:

"47. Section 25, thus, clearly discloses that the transfer shall be made with such designation as may be specified in the Government Order; transfer and posting in Gram Panchayat shall be made by such authority in such manner, as may be notified by the State Government; the transferred employee to the Gram Panchayat shall be under the supervision and control of the Gram Panchayat; the service conditions of the employee shall be on the same terms and conditions and with the same rights and privileges as to retirement benefits and other matters, including promotion, as would have been applicable to him immediately before such transfer; while in service in the Gram Panchayat, they shall perform such duties as may be specified from time to time by the State Government."

22. On the facts of that case it was held that the expression 'transfer' used in Section 25 actually converted sending of the tube well operators on 'deputation' keeping their lien with the parent departments.

23. The Supreme Court also negated the contention that the State was incompetent to pass an order to transfer the tube well operators back to the Irrigation Department. The long and short of the above discussion is that in the above decision, the power of the State Government to deal with the service conditions of the tube well operators was affirmed. This decision is also, therefore, not helpful to the Petitioners.

24. The third decision cited by the Petitioners is Fakirmohan Das (supra) where it was held "The State Government has the authority to make provision for functioning of the Grama Panchayats and prescribing the categories of servants to function under it. Therefore, creating the post of Executive Officer as per amended provisions in Sub-Sections 1 and 2 of Section 122 are found to be within the jurisdiction and competency of the State Legislature."

25. The discussion in Fakirmohan Das (supra) was in the context of the amended Section 122 and 123 of the OGP Act with Section 122 dealing with the Executive Officer and 123 with the Secretary and other employees. The question was whether the Village Level Workers (VLWs) and the Village Agricultural Workers (VAWs) could be under the control of the State Government or exclusively under the control of the GPs. It was noted that Executive Officers of the GPs had been bestowed with all the responsibility relating to "maintenance of records, registers and cash" and therefore, the GPs could not function independently if their services were under the control of the State and not the GPs. It was held that the amended Section 122 takes away the power from the GPs and vests on the

Government and therefore, it is ultra vires to the Constitution.

26. In the present cases, we are not dealing with the appointment of Executive Officers of the GPs at all, but only a "Jogana Sahayak". The function of the Jogana Sahayak is in a very limited sphere of assisting in the running of the PDS. Once it has been purely explained by the Government in its counter affidavit that there is no master and servant relationship between the GP and the Jogana Sahayak, no parallel can be drawn either with the Secretary or a Sarpanch or an Executive Officer of a GP and a Jogana Sahayak. These are very different kinds of the posts. The Jogana Sahayak is not in any position of administrative control of the GP at all. That still vests on the Sarpanch, the Executive Officer of the GP.

27. In *State of U.P. v. Zila Parishad, Ghaziabad* (supra), while interpreting Article 243 G of the Constitution inserted by the 73rd Amendment to the Constitution, the Supreme Court while upholding the right of the State Government to eliminate or modify the authority who should take charge of the grant/cancellation of licences of fair price shops affirmed the observations of the Allahabad High Court, the decision which was under challenge before it and observed as under:

"23. The High Court has considered the nature of the aforesaid Constitutional provision and held as under:

"16. In our opinion, this provision is only an enabling provision, it enables the Legislature of a State to endow the Panchayats with certain powers.....Hence, the Legislature of a State is not bound to endow the Panchayats with the powers referred to Article 243-G, and it is in its discretion to do so or not. At any event there is no mention of the public distribution system in Article 243-G of the Constitution."

Thus, it is evident that the High Court has taken a view that the provision of Article 243-G is merely an enabling provision, and it is not a source of legislation. This view seems to be in consonance with the law laid down by this Court in *U.P. Gram Panchayat Adhikari Sangh & Ors. v. Daya Ram Saroj & Ors.*, (2007) 2 SCC 138, wherein an observation has been made that Article 243-G is an enabling provision as it enables the Panchayats to function as institutions of self-government. Further, this Court noted that such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, subject to such conditions as may be specified therein, with respect to the implementation of schemes for economic development and social justice as may be entrusted to them, including those in relations to the matters listed in the Eleventh Schedule. The enabling provisions are further subject to the conditions as may be specified. Therefore, it is for the State Legislature to consider conditions and to make laws accordingly. It is also open to the State to eliminate or modify the same.

15. Therefore, it is apparent that Article 243-G read with Eleventh Schedule is not a source of legislative power, and it is only an enabling provision that empowers a State to endow functions and devolve powers and responsibilities to

local bodies by enacting relevant laws. The local bodies can only implement the schemes entrusted to them by the State.”

28. In *Ricchpal Singh v. State of Rajasthan* (supra), the Rajasthan High Court upheld the validity of the changed procedure for the appointment of primary school teachers and held that the autonomy of the panchayat is not affected as the power of appointment was still with it. It was observed thus:

“29.though the underlying idea of Seventy-third Amendment in the Constitution by inserting Part IX may be to make Panchayats as vibrant units of Self-Government and local administration in the rural areas to strengthen the democratic institutions at the grass-root level. However, it is entirely dependent on the State Legislature. It further appears that the State Legislature has been reluctant to transfer real powers and have retained with them, or with their officials the powers of supervision, control, suspension, notification of functions, approvals of schemes and the like. Thus, it is incorrect to think that by use of expression "Self-Government" under Article 243(d), the Panchayati Raj has acquired the status as a sovereign body having both Constitutional and Statutory status at par with the Union or the State Government. In fact, the Indian Constitution clearly establishes the dual polity, a two-tier Government System with the Central Government at one level and the State Government at the other. Thus, we are of the view that the tall stand taken by the petitioners that the Panchayats have acquired the status of one of the forms of Government at par with the Union Government and the State Government, cannot be accepted. The use of words "Self- Government" has not made any substantial change with the words "Local Self-Government". It can only be said that the Constitutional amendments have set the tone & spirit and provide a springboard for action.”

29. The Rajasthan High Court in *Ricchpal Singh v. State of Rajasthan* (supra), further held as under:

“45.....It is of-course true that under the unamended provisions, the selection on the post of Primary School Teacher was to be made by the District Establishment Committee but now the same has been transferred to the R.P.S.C. As per the scheme of the Act, there is no change in the appointing authority. The power of appointment on the post of Primary School Teacher including the power to create posts, determine vacancies and give appointment is vested with the Panchayat. However, difference made is that under the unamended provisions, every District Establishment Committee was having their own procedure but now the same has been entrusted to the Constitutional body like R.P.S.C. The Commission shall conduct the examination and send the merit list to the respective Panchayats. The appointments are to be made as per the preference given by the candidates in the respective Panchayats. With a view to maintain purity and uniformity in the process of selection, it has always been considered to take a uniform written test. We need not emphasize that the role of a teacher is central to all process of formal education. Sub-standard teachers would be detrimental to our educational system.

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46. It is well settled that the State has a power to prescribe method of recruitment, qualifications both educational as well as technical for appointment or conditions of service to an office or a post under the State.Thus, it is incorrect to impute motives to the State that by impugned amendment, it intends to interfere with the autonomy of the Panchayats. The purpose appears to be to ensure purity & uniformity in the process of selection of Teachers Gr.III."

30. The aforementioned decision applies to the present context where we are concerned with the changed procedure in the appointment of Jogana Sahayaks where the selection is done by a Committee which then sends its recommendations to the GP for appointment of the person scoring the highest marks in the selection. Consequently, the Court does not consider the procedure for appointment of the Jogana Sahayak to be contrary to Article 243G of the Constitution of India or Rules 212 to 217 of the OGP Rules.

31. Further, that the selection is by a Committee under the Chairmanship of the BDO with the Marketing Inspector/Inspector of Supplies as a convener and the Sarpanch of the GP as a member. The participation of the Sarpanch of the GP is an important element. Three names are submitted to the Sub-Collector for approval. The mere fact that the Sub-Collector would approve a name of a person for approval of appointment as Jogana Sahayak will have nothing to do with his function as an appellate authority vis-à-vis the decisions of the GP generally.

The Court sees no conflict of interest with such function of the Sub-Collector. He will, in other words, not be disabled from continuing to be an appellate authority merely because he participated in a limited capacity in regard to the appointment of the Jogana Sahayak.

32. Consequently, the Court finds that no ground is made out for interference with the impugned circulars dated 21st April and 27th April 2012 of the State Government.

33. As regards appointment of Opposite Party No.5 in W.P.(C) No.9982 of 2012 as Jogana Sahayak, the Court finds no illegality committed in such appointment.

34. All these writ petitions are accordingly dismissed and the interim orders are vacated. There shall be no order as to costs.

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