

(2009) 08 PAT CK 0064
In the Patna High Court
Case No : LPA No. 789 of 2006

The State of Bihar and Others		APPELLANT
	Vs	
Subhash Chandra Shukla and Others		RESPONDENT

Date of Decision : 11-08-2009

Acts Referred:

Bihar Panchayat Raj Act, 1947 — Section 26
Bihar Panchayat Raj Act, 2006 — Section 32, 33

Citation : (2009) 4 PLJR 569

Hon'ble Judges : S.K. Katriar, J; Jyoti Saran, J

Bench : Division Bench

Advocate : P.K. Shahi and S.K. Ghosh, for the Appellant; Jitendra Kumar Roy, Rajesh Kumar Singh and M.S. Madhup, for the Respondent

Judgement

S.K. Katriar & Jyoti Saran, JJ.—This is an appeal under Clause 10 of the Letters Patent of the High Court of Judicature at Patna. The appellants are aggrieved by the order dated 20.1.2005, passed by a learned Single Judge of this Court, in CWJC No. 6243 of 2000 (Subhash Chandra Shukla & Ors. vs. State of Bihar & Ors.), whereby the writ petition has been allowed and it has been directed as follows:- "...In the event recommendations of the Selection Committee dated 6.1.2000 is approved by the Commission the District Magistrate, Siwan, should proceed and make appointment on the post of Panchayat Sewak (Secretary) in the light of the approval granted by the Staff Selection Commission over the recommendation dated 6.1.2000 within a period of two months from the date of receipt of the approval of the Commission."

We shall draw the basic facts from the writ proceedings except by specific reference from elsewhere. According to the writ petition, by order dated 24.6.89 (Annexure-1), the State Government took a policy decision that Dalpatis would be appointed as Panchayat Sewaks in the undivided State of Bihar. The decision was taken under the Bihar Panchayat Raj Act, 1947 (hereinafter referred to as the "1947 Act"). The 1947 Act was repealed, and replaced, by the Bihar

Panchayat Raj Act, 1993 (hereinafter referred to as the "1993 Act"). 1993 Act was repealed, and replaced, by the present Bihar Panchayat Raj Act, 2006 (hereinafter referred to as the "2006 Act"). By order dated 9.7.96 (Annexure-2), the State Government had directed for preparation of seniority list of Dalpatis for appointment as Panchayat Sewaks. By order dated 20.8.98 (Annexure-4), it had issued orders for creation of 843 posts of Panchayat Sewak (Secretary). In view of the order dated 9.7.96 (Annexure-2), the seniority list of Dalpatis was prepared district-wise. The seniority list of the district of Siwan is at Annexure-3. Consequent upon the preparation of the seniority list of Dalpatis, the State Government issued order dated 23.12.99 (Annexure-5), to proceed with the selection of Panchayat Sewak from amongst the Dalpatis as per the said order dated 24.6.89, read with the order dated 15.6.94. 1.1) The writ petition further states that the Selection Committee met on 3.1.2000, and was adjourned after discussion of the issues. The Selection Committee again met and selected 23 Dalpatis for appointment on 6.1.2000 (Annexure-6). By order dated 27.7.2001, the State Government decided that Panchayat Sewaks appointed under the 1947 Act shall be treated as Panchayat Secretary under the 1993 Act. The State Government promulgated the Bihar Staff Selection Commission Rules, 2003, by notification dated 31.5.2003, wherein provision has been made for selection of Panchayat Sewaks by the Commission. The State Government issued order dated 15.7.2003, addressed to the District Magistrates, to have the list prepared for the sake of appointment of Panchayat Sewaks ratified by the Commission. By order dated 29.10.2003 (Annexure-D to supplementary counter affidavit), the State Government issued orders putting a complete ban on appointment of Class-III employees. The State Government promulgated the Bihar Gram Panchayat (Appointment, Powers and Duties of Secretary) Rules, 2003, which was notified on 15.1.2004 (Annexure-2 to the LPA). By order dated 23.8.2004 (Annexure-8), the ban on appointment of Class-III employees was lifted. The inaction thereafter on the part of the authorities of the State Government in completing the selection process initiated for appointment of Panchayat Sewaks from Dalpatis despite the decision of the Selection Committee dated 6.1.2000 (Annexure-6) led to the said CWJC No. 6243 of 2000.

2. While pressing this appeal Mr. S.K. Ghosh, learned Additional Advocate General submitted that the post of Panchayat Sewak has been abolished in the 1993 Act, and the position continues in the 2006 Act. Therefore, there is now no question of appointment of Dalpatis to the post of Panchayat Sewak. He relies on the following judgments:--

(i) Judgment dated 3.1.2006, passed by a Division Bench in CWJC No. 14561 of 2003, wherein taking note of submission of State that post of Panchayat Sewak is no longer in existence under 1993 Act, and 2006 Act, and thus no direction can be issued for appointment of Dalpatis to the post of Panchayat Sewak, the Court issued direction for consideration of cases of petitioner if in future they decide to appoint Panchayat Sewaks.

(ii) Judgment dated 18.7.2006, passed by the Supreme Court in Civil Appeal No. 7992-8082 of 2001 (Rohtas Zila Gram Raksha Dal vs. State of Bihar), wherein it has been held that in view of abolition of the post of Panchayat Sewak, the Dalpatis cannot aspire to become Secretary of the Gram Panchayat.

(iii) Judgment dated 3.3.2006, passed by a learned Single Judge in CWJC No. 1021 of 2000, wherein it has been held that, in view of abolition of the post of Panchayat Sewaks, Dalpatis cannot be appointed as Panchayat Sewaks. The same was upheld by a Division Bench by order dated 10.1.2007, passed in LPA No. 279 of 2006.

2.1. He also submitted that, in view of the statutory provisions, any order or communication of the State Government detracting from the statutory position, may be ignored. He next submitted that the provisions of Section 32 and Section 33 of the 2006 Act state the duties and functions of the Panchayat Secretary and Dalpatis, respectively, and the latter cannot be appointed as Panchayat Secretaries. He next submits that the decision of the State Government to appoint 531 Panchayat Secretaries from amongst the Dalpatis was taken because of the various orders of the courts which have attained finality. He relies on the judgment of a Division Bench of this Court in Rohtas Zila Gram Raksha Dal vs. State of Bihar (AIR 2002 Pat 1), and upheld by the Supreme Court in the aforesaid judgment dt. 18.7.2006.

2.2. We also note the submission of Mr. P.K. Shahi, the learned Advocate General, that the State Government has agreed to fill up 531 posts of Panchayat Secretaries from amongst Dalpatis because of the orders of courts which have attained finality. He also submitted on instruction that the State Government shall frame one or two exhaustive set(s) of Rules under the 2006 Act for effective implementation of the provisions of the Act, possibly the second set exclusively devoted to election purposes.

3. Learned counsel for the respondents (writ petitioners) submits that the post of Panchayat Sewak has, under the 1993 Act, as well as under the 2006 Act, not been abolished, but only the nomenclature has been changed to Panchayat Secretary. The submission is, therefore, that the claims of the Dalpatis for promotion to the post of Panchayat Sewak-since redesignated as Panchayat Secretary-can-not be spurned on the hyper-technical argument of change of nomenclature. Selection of Panchayat Secretary from amongst Dalpatis cannot be confined to 531 posts. He also submitted that, in the absence of statutory rules, the Government can issue administrative instructions for effective implementation of the Act. He relies on the judgment of the Supreme Court in the case of B.N. Nagrajan vs. State of Mysore (AIR 1966 SC 1943).

4. We have perused the materials on record and considered the submissions of learned counsel for the parties. It appears that Section 26 of 1947 Act provided for the formation of a village volunteer force under the command of a Dalpati. Section 26 as it finally stood, after undergoing amendments from time to time in

so far as relevant for the present purpose, was as follows:--

"26. Village Volunteer Force---For general watch and ward for meeting cases of emergency like fire, breaking of an embankment or dam, out-break of epidemic, and occurrence of burglary, dacoity (and for maintenance of peace and tranquility), the Executive Committee may organize a village volunteer force {to be called Gram Raksha Dal in Hindi) under the command of (Vihit Riti Se Niyukt Ek Dalpati) by the Executive Committee, and all able bodied males of the village between the ages of 18 and 30 years shall be members of the said force:

(Provided that xxxxxxxxx)"

Section 26 of 1947 Act thus provided that the appointment of Dalpati was to be made in the "prescribed manner" but clearly stated that the Executive Committee of the Gram Panchayat shall be the appointing authority for the Dalpati.

Executive Committee of the Gram Panchayat was defined in S. 2(e) of the 1947 Act as follows:--

"(e) "Executive Committee" means that the Executive Committee of the Gram Panchayat consisting of the Mukhiya elected under S. 11 and the members (elected) under S. 12."

The mode of recruitment of Dalpati was prescribed under R. 4 of the Bihar Panchayat Village Volunteer Force Rules, 1949, framed under S. 27 of 1947 Act. Rule 4 in so far as relevant for the present purpose was as follows:--

4. (1) Subject to the approval of the District Panchayat Officer, the Executive Committee shall, for the purpose of commanding the force, appoint a Chief Officer from amongst the members of the force.

It was under the aforesaid provisions that the appointment of Dalpatis used to be made in this State.

5. A fundamental change was brought about by the 73rd Amendment of the Constitution which came into force with effect from 24.4.1993. The 73rd Amendment inserted Part-IX in the Constitution on the subject of Panchayats. Articles 243-F and 243-N of Part-IX are as follows:--

"243-F. Duration of Panchayats, etc.--(1) Every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Panchayat at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in CI. (1).

(3) An election to constitute a Panchayat shall be completed--

(a) before the expiry of its duration specified in CI. (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Panchayat would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Panchayat for su(sic) period.

(4) A Panchayat constituted upon the dissolution of a Panchayat before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Panchayat would have continued under CI. (1) had it not been so dissolved.

"243-N. Continuance of existing laws and Panchayats.--Notwithstanding anything contained in this part, any provision of any law relating to panchayats in force in a State immediately before the commencement of the Constitution (Seventy-third Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier:

Provided that all the Panchayats existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State.

6. Following the 73rd Constitutional amendment, the Legislature of this State enacted the 1993 Act, received the assent of the Governor, and came into force with effect from 23.8.1993. Section 157 of 1993 Act repealed 1947 Act, with certain saving clauses of which Clauses (e) and (f) being relevant are reproduced below:--

"(e) Notwithstanding such repeal, anything contained or any action taken in exercise of any power conferred by or under such Act shall be deemed to have been done or taken in exercise of the powers conferred by or under this Act, as if this Act were in force on the day on which such thing or action was done or taken.

(f) Notwithstanding such repeal the Gram Panchayats, Panchayat Samitis, Zila Parishad, which were validly constituted under the repealed Acts, shall continue to function till the constitution and the first meeting of the Gram Panchayat, Panchayat Samiti and Zila Parishad under this Act."

Section 151 of the 1993 Act empowered the State Government to make Rules relating to the method of recruitment and the terms and conditions of service of the employees of the Panchayat.

7. 1993 Act as originally enacted did not make any provision for village volunteer force or for a Dalpati as its head. The omission was perhaps due to some mistake which was rectified by the Bihar Panchayat Raj Act (Amendment) Act, 1995

(Bihar Act 14 of 1995). Section 5 of the Amendment Act, incorporated Section 32A in the 1993 Act, containing provisions regarding Gram Raksha Dal (village volunteer force). Section 1(2) of the Amendment Act provided that the introduction of S. 32A shall be deemed to have come into force from 23.8.1993, i.e. the date on which the parent Act had come into force. Section 32A reads as follows:--

"32A Organisation of Gram Raksha Dal.--For general watch and ward and for meeting emergent events i.e. fire, breaking of an embankment or bridge, outbreak of epidemic and to encounter burglary or dacoity etc. to perform such duties imposed by the Government from time to time and for maintenance of public peace and order, a Gram Raksha Dal shall be organized under a Dalpati, appointed in the prescribed manner, for every Gram Panchayat and all able-bodied person of a village between the age of 18 and 30 years shall be members of the said Dal. The Government may make rules for the organization, duty and utilization of Gram Raksha Dal."

It is relevant to state that in S. 32A of the 1993 Act, there is no mention of the Executive Committee of the Panchayat as the appointing authority for recruitment of Dalpati, possibly for the reason that there is no Executive Committee in the scheme of Panchayats under 1993 Act.

8. In the light of the legislative changes noted above, certain directions were issued by the Directorate, Panchayati Raj, Govt. of Bihar, from time to time. On 12.8.1993, the Director had sent a wireless message to all District Panchayat Raj Officers prohibiting further appointments of Dalpatis in view of the Bill that had been prepared and later became the 1993 Act. A question then arose regarding payment and allowances to the Dalpatis who had been appointed earlier. The Director by his letter dated 27.12.1993, made it clear that there was no legal impediment in making payment to the Dalpatis appointed earlier as their appointment was expressly saved by Cl. (e) of S. 157 of the 1993 Act. Later, by circular letter dated 27.6.1994, the Director purported to withdraw the ban imposed against the appointments of Dalpatis.

9. In the meanwhile orders were passed by this Court in a number of cases, both by a Division Bench and by the Hon'ble Judges sitting singly, that no appointment of Dalpatis could be made after coming into force of 1993 Act with effect from 23.8.1993. These orders were passed mainly on the grounds that no Rules were framed either under S. 32-A, or S. 151 of the 1993 Act, laying down the mode of recruitment of Dalpatis. Some such orders are dated 17.7.1996 passed in CWJC No. 5600 of 1996, dated 1.10.1996 passed in CWJC No. 10492 of 1994, dated 7.5.1997 disposing of CWJC Nos. 325 and 432 of 1996 and dated 24.6.1997 passed in CWJC No. 3109 of 1996 and two other cases. [These orders are mentioned reported in the judgment of Dhawan, C.J., and Alam, J. in the case of Rohtas Zila Gram Raksha Dal (supra)].

10. S. 32 and S. 32A of 1993 Act are reproduced hereinbelow for the facility of

quick reference:--

"32. Staff of Gram Panchayat-- (1) There shall be a Secretary in every Gram Panchayat who shall be appointed by the State Government.

(2) The Secretary shall be in charge of the office of the Gram Panchayat and shall perform all the duties and exercise all the powers imposed or conferred upon him by or under this Act or any rules or bye-laws made thereunder.

32A. Organisation of Gram Raksha Dal,--For general watch and ward and for meeting emergent events like fire, flood, breach of embankment, collapse of bridge, out-break of epidemic, to encounter burglary or dacoity etc. or in order to perform such other duties that may be imposed by the Government from time to time and for maintenance of public peace and order, a Gram Raksha Dal shall be organized under a Dalpati, appointed in the prescribed manner, for every Gram Panchayat and all able-bodied persons of a village between the age of 18 and 30 years shall be members of the said Dal. The Government may make rules for the organization, duty and utilization of Gram Raksha Dal."

11. S. 32 and S. 33 of 2006 Act are reproduced hereinbelow for the facility of quick reference:--

"32. Staff of Gram Panchayat.-- (1) There shall be a Panchayat Secretary in Gram Panchayat to be appointed in the manner as may be prescribed.

(2) The Panchayat Secretary shall be in charge of the office of the Gram Panchayat and shall perform all the duties and exercise all the powers imposed or conferred upon him by or under this Act or any rules or bye-laws made thereunder or under any other Act or Rules for the time being in force.

(3) Subject to such rules as may be made by the State Government in this behalf, a Gram Panchayat may from time to time engage such number of paid or honorary functionaries or professionals as may be required by it for carrying out its functions.

33. Organisation of Gram Raksha Dal.--For general watch and ward and for meeting emergent events like fire, flood, breach of embankment, collapse of bridge, out-break of epidemic, to encounter burglary or dacoity etc. or in order to perform such other duties that may be imposed by the Government from time to time and for maintenance of public peace and order, a Gram Raksha Dal shall be organized under a Dalpati, appointed in the prescribed manner, for every Gram Panchayat and all able-bodied persons of a village between the ages of 18 and 30 years shall be members of the said Dal. The Government may make rules for the organization, duty and utilization of Gram Raksha Dal."

12. It is evident on a plain reading of the relevant provisions of the 1993 Act as well as the present 2006 Act, that all able-bodied persons of a village between the age of 18 and 30 years shall be members of the Dal. The same shall be headed by a Dalpati. The organization, utilization, and duties and functions of

Gram Raksha Dal and the Dalpati shall be provided in the Rules. It is evident on a plain reading of Section 33 of the two Acts, which are identical, that the Dal is an amorphous body of all able-bodied persons of the Panchayat between the age of 18 and 30 years to take care of general watch and ward and for emergent situations illustratively mentioned therein. It has been held by one of us sitting singly (S.K. Katriar, J.), in the judgment in the case of Vijay Shanker Pathak Vs. The State of Bihar and Others , that a Dalpati is not the holder of a civil post. The provisions of Section 32 have to be read in juxtaposition wherein it is provided that there shall be a Panchayat Secretary under Gram Panchayat to be appointed by the State Government. Section 32 of the 1993 Act provides that the Secretary of every Gram Panchayat shall be appointed by the State Government and he shall perform the duties, and exercise powers conferred upon him, under the Act or any Rules or bye-laws made thereunder. We notice a significant change in Section 32 of the 2006 Act which provides that there shall be a Panchayat Secretary in Gram Panchayat to be appointed in the manner as may be prescribed. This envisages promulgation of Rules thereunder. The State Government has indeed issued 2003 Rules, which provides the duties and functions of the Panchayat Secretary. Furthermore, the Staff Selection Commission Rules (SSC Rules, in short) provide for appointment of the Panchayat Sewaks by the Staff Selection Commission. It is relevant to state that the SSC Rules were issued on 31.5.2003, and yet used the expression "Panchayat Sewak", though the expression "Panchayat Sewak" does not occur in 1993 Act. We wish to emphasize that the nature of duties and functions of Panchayat Secretary is vastly different from that of a Dalpati. The duties and functions of Gram Raksha Dal, and for that matter, of the Dalpati is confined to general watch and ward and the emergent duties illustratively mentioned "therein. A Gram Raksha Dal seems to be in the nature of a rudimentary police force. It does not seem to have been provided with any teeth. The duties and functions of the Panchayat Secretary are vastly much more than the Dalpati, and the Secretary is indeed the in-charge of the vast responsibilities of the Panchayat. He is indeed the chief executive of the Panchayat. Policing and general administration are two different concepts of governance. We, therefore, cannot conceive of a situation, that a Dalpati by virtue of his position as such can be considered for promotion and appointment as Panchayat Secretary, unless so provided in no uncertain terms by the Legislature. We have not so far heard of a member of the Indian Police Service to be appointed as the Chief Secretary of a State Government. In view of the position of the Gram Raksha Dal and the Dalpati in the enactment(s) under consideration almost no case at all is made out for appointment of Panchayat Secretary from amongst the Dalpatis. We are, therefore, clearly of the view that in view of the legal position obtaining as on date, a Dalpati cannot as a matter of right be considered for appointment as Panchayat Secretary. In that view of the matter, we also reject the contention advanced on behalf of the writ petitioners that it will be open to the State Government to fill up the posts of Panchayat Secretaries from the open market, only if not available from amongst the Dalpatis.

13. In view of the foregoing discussion, we do not wish to examine the question whether or not the Panchayat Secretary is the successor-in-office of Panchayat Sewak,

14. We, however, note the submission of the learned Advocate General that the State Government is promise-bound to appoint 531 Panchayat Secretaries from amongst Dalpatis for the reason that the same is being done in compliance of the orders of the Court which have attained finality. The orders of the learned Single Judges in those writ petitions have not been brought to our notice, let alone those being the subject matter of the present appeal. We are in no position to appreciate the circumstances which persuaded the courts to pass orders to the effect that those petitioners, who were working as Dalpatis, shall be considered for appointment/promotion as Panchayat Sewaks. It is a possible situation, only to illustrate it in a hypothetical manner, that the State Government may have taken the decision to appoint Panchayat Sewak. Panchayat Secretary from amongst Dalpatis to meet the emergent situation on account of the vast number of vacant posts of Panchayat Sewak/Secretary in the State of Bihar.

15. In view of the mandate of the Constitution, the Act has to be effectively implemented without any loss of time. A workable system had to be put in place. Learned Advocate General has further submitted that the figure of 531 has been arrived because those Dalpatis had approached this court by way of various writ petition and orders have been passed in their favour. Let it be made clear that such an action may not necessarily have our stamp of approval, but we permit the State Government to so appoint/promote them because the various orders of this court have attained finality. We wish to further clarify that only those Dalpatis, not exceeding 531 persons, would be appointed/promoted to the post of Panchayat Sewak/Secretary in different Panchayats of the State whose names have been approved by the Staff Selection Commission. Those of the present writ petitioners who had approached this court earlier, orders have been passed in their favour, and are within 531 Dalpatis, shall be similarly treated. We further clarify that in so far as appointment/promotion of 531 candidates is concerned, the State Government shall not keep in mind the distinction, if any, between Gram Panchayat Sewak/Panchayat Secretary. The question whether or not the State Government wishes to make a distinction between the two posts will depend on the Rules that it is required to frame.

16. We wish to clarify one thing more. The judgment by one of us (S.K. Katriar, J.) in the case of Vijay Shankar Pathak vs. State of Bihar, has been referred to hereinabove. We have relied upon that judgment for the limited purpose of disposal of the present appeal. It should not be taken to have necessarily been approved by the present Division Bench for two reasons, namely, correctness of the same does not directly arise for our consideration and, secondly, because the same has been rendered by one of us. It is a possible situation that an appeal against that judgment may be pending in this Court. It will, therefore, be open to the parties to challenge the correctness of the judgment in Vijay Shankar Pathak

vs. State of Bihar, in an appropriate proceeding.

17. During the course of submission, a large number of orders by the State Government and its functionaries were brought to our notice. The same were required to be issued because of absence of exhaustive Rules under the Act. Enforcement of Rules for effective implementation of the provisions of an enactment provides clear guidelines to the authorities administering the Act, and also to the courts disposing of litigations. We also emphatically note that, on our request, the learned Advocate General has sought instructions from the State Government whether or not it is willing to frame exhaustive Rules for effective implementation of 2006 Act. We also impressed upon the learned Advocate General that great importance is being attached to the institution of Gram Panchayat because it nurtures the grass-root democracy and is sanctioned by Part-IX of the Constitution of India which is headed "The Panchayats". The learned Advocate General has, on instructions from the State Government, submitted that a policy decision has been taken to frame exhaustive Rules under the 2006 Act. It has tentatively been decided to frame two sets of Rules, one of which shall be for election purposes, the other set of Rules shall incorporate the provisions with respect to all the remaining items, and the existing Rules shall be repealed. As prayed, four months is granted to the State Government to frame exhaustive Rules under the Act. For this purpose, put up on 16.12.2009 (Wednesday), in chambers, if not sitting together. We request the learned Advocate General to appear in the matter personally on the next occasion.

18. The appeal is accordingly disposed of. The impugned order of the learned Single Judge is accordingly modified. There shall be no order as to costs. Let a copy of this judgment be handed over to Mr. S.K. Ghosh, learned Additional Advocate General No.-II.