

Raja Bahadur K. C. Deo Bhanj

Vs

Raghunath Misra and Others

Civil Appeal No. 480 of 1958

(Syed Jafar Imam, S. K. Das, J. L. Kapur JJ)

18.12.1958

JUDGMENT

IMAM, J. -

The appellant and the respondent No. 1 were, amongst others, candidates for election to the Orissa Legislative Assembly from the Daspalla double-member constituency in which a seat was reserved for a scheduled caste candidate. We are not concerned with the election of the scheduled caste candidate. For the general seat the election was contested by the appellant, respondent No. 1 and respondent No. 3. The appellant obtained 17,700 votes, respondent No. 1 15,568 vote and respondent No. 3 3,589 votes. The election was held on February 27, 1957, and the appellant was declared elected on March 5, 1957.

Respondent No. 1 filed an election petition questioning, on various grounds, the election of the appellant. The Election Tribunal dismissed the petition holding that no grounds had been established to invalidate the election. Respondent No. 1 appealed to the High Court of Orissa against the order of the Election Tribunal.

One of the grounds, amongst the many grounds, taken by Respondent No. 1 to invalidate the election of the appellant was that the nomination of respondent No. 3 was improperly accepted as he was disqualified from contesting the election being a Sarbarakar of the 10 villages in the district of Nayagarh mentioned in the schedule to the petition. The High Court held that the office of Sarbarakar was an office of profit under the State Government of Orissa. Respondent No. 3 was accordingly disqualified from being a member of the Assembly. It, however, held that the acceptance of the nomination of respondent No. 3 had not materially affected the election of the returned candidate under clause (d) of sub-section 100 of the Representation of the People Act, 1951, hereinafter referred to as the Act.

Three grounds were urged before the High Court in support of the contention that the appellant had been guilty of corrupt practice. One was that of bribery; the second was that the appellant and his agents had published a pamphlet, Exbt. 8, containing statements which were false and which he knew or believed to be false in relation to the personal character and conduct of respondent No. 1 and in relation to his candidature; and the third was the obtaining and procuring by respondent No 1 of assistance for the furtherance of the prospects of his election from Sarpanches of certain Grama Panchayats. With regard to the first two grounds the High Court held that the same had not been established. With reference to the third ground the High Court was of the opinion that a Sarpanch of the Grama Panchayat, though not a Government servant appointed by the Government, was none the less a person in the service of the Government as he performed many of the governmental duties

and was also removable by the Government and such a person came within the provisions of section 123(7)(f) of the Act. A Sarpanch exercised under the Orissa Grama Panchayats Act, 1948, hereinafter referred to as the Orissa Act, mostly governmental functions like collection of taxes, maintenance of public accounts, etc. It thought that if such a person was not brought under section 123(7)(f) there would be "a lot of undue influence exercised on the voters by these persons who in the village exercised a lot of influence considering the nature of their powers and the ideas of the village people". The High Court accordingly allowed the appeal and set aside the appellant's election but was of the opinion that although its finding resulted in the appellant being disqualified for membership of Parliament and the Legislature of every State for six years under section 140 of the Act, this was a fit case for the removal of the disqualification by the Election Commission under section 144 of the Act.

The appellant applied to the High Court for a certificate that this was a fit case for appeal to this Court. The certificate was granted, but one of the learned Judges was in some doubt whether this was a case in which the provisions of Article 133(1)(c) of the Constitution applied. On behalf of respondent No. 1 an objection had been taken that Article 133(1)(c) of the Constitution did not apply and the High Court could not have certified that this was a fit case for appeal to this Court. It seems to us unnecessary to decide whether in a case of this kind the provisions of Article 133(1)(c) applied because, in our opinion, even if they did not apply and the High Court could not have issued a certificate, this was just the kind of case where we would have granted special leave to appeal under Article 136 of the Constitution because the appeal raised a point of law of considerable public importance. In order to remove all doubts in the matter, we grant the appellant special leave to appeal against the decision of the High Court of Orissa and proceed to deal with the appeal on that basis.

The Act was amended in 1956. Before the amendment the relevant portion of section 123 for the purpose of this appeal was contained in sub-section (8) which was as follows :

"(8) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the connivance of a candidate or his agent, any assistance for the furtherance of the prospects of the candidate's election from any person serving under the Government of India or the Government of any State other than the giving of vote by such person.

Explanation - For the purposes of this clause -

(a) a person serving under the Government of India shall not include any person who has been declared by the Central Government to be a person to whom the provisions of this clause shall not apply;

(b) a person serving under the Government of any State shall include a patwari, chaukidar, dafedar, zaidar, shanbagh, karnam, talati, talari, patil, village munsif, village headman or any other village officer, by whatever name he is called, employed in that State, whether the office he holds is a whole-time office or not, but shall not include any person (other than any such village officer as aforesaid) who has been declared by the State Government to be a person to whom the provisions of this clause shall not apply."

After the amendment the relevant portion of section 123 is in sub-section (7) which reads as follows

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"(7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person, any assistance (other than giving of vote) for the furtherance of the prospects of that candidate's election, from any person in the service of the Government and belonging to any of the following classes, namely :-

(a) gazetted officers;

(b) stipendiary judges and magistrates;

(c) members of the armed forces of the Union;

(d) members of the police forces;

(e) excise officers;

(f) revenue officers including village accountants, such as, patwaris, lekhpals, talatis, karnams and the like but excluding other village officers; and

(g) such other class of persons in the service of the Government as may be prescribed.

Explanation - (1) In this section the expression "agent" includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

(2) For the purposes of clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if he acts as an election agent, or polling agent or a counting agent of that candidate."

There is a material difference between the phraseology of section 123(8) before it was amended and section 123(7) as now contained in the Act. Under the former provision there was a prohibition against obtaining any assistance for the furtherance of the prospect of a candidate's election from any person serving under the Government of India or the Government of a State other than the giving of a vote by such person. The Explanation, however, gave authority to the Central Government to declare any person serving under it to be a person to whom these provisions would not apply. In other words, unless there was such a declaration these provisions covered every person serving under the Government of India. Clause (b) of the Explanation further widened the meaning of any person serving under the Government of a State by including the persons specified therein and any other village officer, by whatever name he may be called, employed in that State, but the State Government was authorized to declare that any such person, other than any such village officer, to be a person to whom these provisions did not apply. The language of the provisions of section 123(8) covered a wide field and referred to every person serving under the Government of India or a State unless such person was declared to be one to whom the provisions would not apply. After the amendment, however, the provisions of section 123(7) are narrower in scope. These provisions apply to any person in the service of the Government belonging to the classes specified in clauses (a) to (g) and none else. For the purpose of this appeal it is clause (f) which will have to be considered, as the other clauses cannot in any case apply.

The principal question for consideration is whether a Sarpanch of a Grama Panchayat constituted under the Orissa Act is a person in the service of the Government of the State of Orissa and belongs to the class specified in clause (f) of section 123(7).

Obviously, two things will have to be established before the provisions of section 123(7)(f) can apply to a Sarpanch of a Grama Panchayat constituted under the Orissa Act : (1) That such a person is in the service of the Government and (2) that he comes within the class specified in clause (f). It would not be enough to establish any one of these conditions. It is necessary, therefore, to decide, in the first instance, whether a Sarpanch of a Grama Panchayat under the Orissa Act is a person in the service of the Government of the State of Orissa. For this purpose, it will be necessary to consider whether any of the provisions of the Orissa Act relating to the Grama Panchayat and the duties to be discharged by the Sarpanch indicate that the Sarpanch is in the service of the Government, because independent of those provisions there is no material upon which any such conclusion can be arrived at.

It was urged on behalf of the appellant that under the Orissa Act a Grama Sasan can be constituted by notification by the State Government. The Grama Sasan is to be a body corporate having perpetual succession and a common seal with power to acquire and hold property, to transfer any property held by it and to enter into contracts and to do all other things necessary for the purpose of carrying out the provisions of the Orissa Act and to sue and be sued in its corporate name. For every Grama Sasan there shall be a Grama Panchayat and the functions of the Grama Sasan shall be exercised, performed and discharged by the Grama Panchayat. The Executive power of the Grama Panchayat shall be exercised by the Sarpanch elected under section 10, who shall act under the authority of the said Grama Panchayat. The Grama Sasan shall elect, in the prescribed manner, from amongst its members an Executive Committee which will be known as the Grama Panchayat and the Grama Panchayat shall elect, in the prescribed manner, a Sarpanch. The appointment of a Sarpanch therefore, was not by the Government. The Sarpanch was elected by the Grama Panchayat which in turn was elected by the Grama Sasan and the Grama Sasan consisted of a village or a group of contiguous villages and its members were the population residing in the Grama. As the appointment of the Sarpanch is not by Government, this would be one of the factors in holding that the Sarpanch was not in the service of the Government. Under section 8, the Sarpanch has to act under the authority of the Grama Panchayat. Prima facie, this would also be a factor to discountenance the theory that a Sarpanch was in the service of the Government. Another factor which would militate against the theory that a Sarpanch was in the service of the Government was that he received no remuneration from the Government. The power to remove a Sarpanch by the State Government is stated in section 16 but the removal can only be for negligence, inefficiency or misbehaviour. This restricted power of removal was not a conclusive factor on the question whether a Sarpanch was in the service of the Government. It was accordingly urged that three important factors to be taken into consideration in deciding whether a person was in the service of the Government, namely, appointment of the person, such a person to act under the authority of the Government and one who received remuneration from Government were lacking in the case of a Sarpanch. The restricted power of removal by the Government was not a conclusive factor. Instances were not lacking in the Municipal Acts of various States where the State Government had vested in it the power of removal of a Chairman of the Municipality, but it could not be said that the members of the Municipality or their Chairman were in the service of the Government.

On behalf of respondent No. 1 it was urged that the expression "in service of Government" had a wider concept than the expression "serving under the Government". Exercise of Governmental functions would amount to being in Government's service. A Sarpanch could be equated with a

patwari, lekhpal, talati, karnam, etc., and it was not necessary to consider whether he was in service of Government because the word "and" before the words "belonging to any of the following classes" should be read as "or". He referred to the various provisions of the Orissa Act in support of his submission that a Sarpanch must be regarded as one in service of Government. Under section 10(2) the District Magistrate was to decide the manner in which the local area of any Grama Sasan shall be divided into electoral wards and the number of members to be returned for each of such wards. Under sub-section (4) of this section the number of members of a Grama Panchayat shall be fixed by the District Magistrate. Under sub-section (6) if in an election the requisite number of members of a Grama Panchayat is not elected, the State Government shall appoint persons to fill up the vacancies and the Grama Panchayat so constituted, consisting of elected and appointed members, shall elect a Sarpanch from amongst its members. Under sub-section (8) the State Government was empowered by notification for sufficient cause to extend the term of office of any Grama Panchayat for a period of one year. Under section 11 the State Government may by notification direct that general election of members of a Grama Panchayat be held at any time before the expiration of the term of office of such members including its Sarpanch. Under section 14 the State Government is authorized to decide any dispute or difficulty arising out of the interpretation of any of the provisions of the Orissa Act or any rule made thereunder or any difficulty which arises in the working of the Act. Under section 16 the State Government is empowered to remove a Sarpanch on the ground of negligence, inefficiency, or misbehaviour. Under section 17 a Sarpanch shall give effect to the decision of the Grama Panchayat; provided that if in his opinion any such decision is subversive of peace and order in the locality or results in manifest injustice or unfairness to an individual or body of individuals or a particular community or is generally against public interest, he shall refer the matter to the Sub-divisional Magistrate and thereafter act according to such directions as he may receive from such Magistrate. Under sub-section (2) of this section, the Sub-divisional Magistrate may, on his own motion or on the representation by the Sarpanch, set aside a decision of the Grama Panchayat, if he finds that the decision is of the nature as stated above. Under sub-section (3) of section 18 the Sub-divisional Magistrate may nominate any member of the Grama Panchayat to carry on the duties of the Sarpanch till a new Sarpanch is elected on the resignation of the former. Under section 22 a Grama Panchayat may, if a majority of its members so decide, with the previous approval of the Government and if the Provincial Government so direct undertake within its area the control and administration of and be responsible in the matters mentioned in clauses (a) to (y). Clause (x) refers to the doing of anything the expenditure on which is declared by the Provincial Government or by a District Board with the sanction of the Provincial Government to be an appropriate charge on the Grama Sasan's funds. Even in the matter of appointing staff to a Grama Panchayat, under section 32 the Grama Panchayat has to prepare a scheme containing its proposals for the employment of whole-time or part-time staff, for their salaries and allowances and shall submit the same to the prescribed authority who shall have the power to approve or modify or reject the scheme. Section 35 refers to the liability of the members of the Grama Panchayat or of any Joint Committee or any other Committee constituted under the Orissa Act and provides for the institution of suits against them for loss, waste or misapplication of any property belonging to the Grama Panchayat as the result of direct consequence of his neglect or misconduct while a member of the Grama Panchayat, Joint Committee or other Committee. Under sub-section (3) the Provincial Government has the power to institute such a suit on its own initiative. Under section 36 all members of the Grama Panchayat shall be deemed to be public servants and in the definition of "legal remuneration" in section 61 of the Indian Penal Code, the word "Government" for the purpose of this section shall be deemed to include a Grama Sasan or a Grama Panchayat. Under section 44(2) a Grama Panchayat with the previous sanction of the State Government may impose a tax, toll, fee or rate on matters referred to in clauses (a) to (n). Under sub-section (4) the District

Magistrate is authorized to review or revise the tax, toll, fee or rate imposed by Grama Panchayat. Under sub-section (5) the district Magistrate may by an order in writing require the Grama Panchayat to levy or increase any tax, toll, fee or rate specified in sub-section (2) subject to the conditions and restrictions contained therein, if in his opinion the income of the Grama Panchayat is or is likely to be inadequate for the proper discharge of the duties imposed under section 21 or undertaken under section 22. Under section 97 the District Magistrate is authorized to exercise general powers of inspection, supervision and control over the performance of the administrative duties of the Grama Panchayat. Section 98 contains the general powers of the District Magistrate and section 99 contains the emergency powers of the District Magistrate in relation to a Grama Panchayat whereby he may by an order in writing prohibit the execution or further execution of a resolution or an order passed or made by it. Under section 117-A the State Government may delegate any of its powers, except the power to make rules, to be exercised or discharged by any officer subordinate to State Government. It was urged on behalf of respondent No. 1 that the above provisions of the Orissa Act clearly made the Grama Panchayat come under the control and supervision of the State Government and that the duties and functions of the Grama Panchayat to be performed by its Sarpanch were governmental duties. It was further urged that in considering whether a Sarpanch was a person in the service of Government the essential elements to be borne in mind were the control and supervision over him by the State Government and its power to remove him from his office. Neither the absence of appointment by the State Government nor the non-payment of remuneration by it would be factors indicating that he was not in the service of the Government.

In our opinion, there is a distinction between 'serving under the Government' and 'in the service of the Government', because while one may serve under a Government, one may not necessarily be in the service of the Government; under the latter expression one not only serves under the Government but is in the service of the Government and it imports the relationship of master and servant. There are, according to Batt (On the Law of Master and Servant), two essentials to this relationship : (1) The servant must be under the duty of rendering personal services to the master or to others in his behalf and (2) the master must have the right to control the servant's work either personally or by another servant or agent and, according to him, "It is this right of control or interference, of being entitled to tell the servant when to work (within the hours of service) or when not to work, and what work to do and how to do it (within the terms of such service), which is the dominant characteristic in this relation and marks off the servant from an independent contractor, or from one employed merely to give to his employer the fruits or results of his labour. In the latter case, the contractor or performer is not under his employer's control in doing the work or effecting the service; he has to shape and manage his work so as to give the result he has contracted to effect. Consequently, a jobbing gardener is no more the servant of the person employing him than the doctor employed by a local authority to act as visiting physician to its fever hospital". None of the provisions of the Orissa Act suggest that as between the State Government and the Grama Panchayat and its Sarpanch any such relationship exists. It is true that the State Government, the District Magistrate and the Sub-divisional Magistrate have been given certain powers of control and supervision over the Grama Panchayat but those powers of control and supervision are in relation to the administrative functions of the Grama Panchayat and the Sarpanch. The Grama Panchayat is an autonomous body exercising functions conferred under the statute. It can hardly be said that the Grama Panchayat in so functioning is in the service of the Government. Its administrative functions are akin to the functions generally performed by Municipalities and District Boards. It would be a conception hitherto unknown to suppose that any Municipality or District Board was in the service of the Government merely because it exercised administrative functions and to some extent was

under the control of the Government. Co-operative societies generally are very much under the control and supervision by the State Government or one of its officers authorized in that behalf. It would be difficult to accept the suggestion that because of that a Co-operative society and its members must be regarded as in the service of the Government. Even with respect to companies, progressively, legislation has been giving power to the Government to control and supervise them. Under section 259 of the Indian Companies Act, 1956, in certain circumstances, any increase in the number of its directors must be approved by the Central Government and shall become void if it is disapproved. Under section 269, in the case of a public company or a private company which is a subsidiary of a public company, the appointment of a managing or whole-time director for the first time after the commencement of this Act in the case of an existing company, and after expiry of three months from the date of its incorporation in the case of any other company, shall not have any effect unless approved by the Central Government; and shall become void if, and in so far as, it is disapproved by the Central Government. Under section 408 the Government has the power to prevent mismanagement in the affairs of the Company and under the proviso in lieu of passing any order under sub-section (1) the Central Government may, if the company has not availed itself of the option given to it under section 265, direct the company to amend its Articles in the manner provided in that section and make fresh appointments of directors in pursuance of the Articles as so amended, within such time as may be specified in that behalf by the Central Government. Section 409 empowers the Central Government to prevent change in the number of directors likely to affect the company prejudicially. It could not be said, because of these provisions, that a company was in the service of the Government. It seems to us, therefore, that the mere power of control and supervision of a Grama Panchayat exercising administrative functions would not make the Grama Panchayat or any of its members a person in the service of the Government. Even if it could be said that the Grama Panchayat in the exercise of its administrative functions exercised duties in the nature of Governmental duties it could not thereby be said that its Sarpanch was in the service of the Government. So far as the Sarpanch is concerned, he is merely the executive head of the Grama Panchayat which carries out its functions through him. He is not appointed by the Government. He is not paid by the Government. He does not exercise his functions as one in the service of the Government and he can only be removed on the ground of negligence, inefficiency or misbehavior. We have been unable to find a single provision of the Orissa Act from which we could say that a Sarpanch is a person in the service of the Government. Reference had been made on behalf of the respondent No. 1 to section 31 of the Orissa Act which authorizes the Grama Panchayat to enter into a contract with the State Government to collect all or any class of taxes or dues payable to the Government at a prescribed percentage as collection charges. As the Grama Sasan is a body corporate and the Grama Panchayat is its executive authority, the statute enabled the Grama Panchayat by provisions of section 31 to enter into a contract with the State Government to collect its taxes and its dues. It cast no obligatory duty upon the Grama Panchayat to collect such taxes or dues of the Government. No provision of the Orissa Act has been placed before us by which the State Government could order a Grama Panchayat to collect its taxes or its dues. Further-more, under clause (b) to section 31, a Grama Panchayat is authorized to enter into similar contracts with proprietors or land holders to collect their rents. The provisions of section 31 militate against the theory that the Grama Panchayat is in the service of the Government. There would be no occasion for such a provision if the Grama Panchayat was in the service of the Government in which case it would have to carry out the orders of the Government to collect its taxes or its dues.

Even if on a reasonable construction of the provisions of the Orissa Act it could be held that a Sarpanch of the Grama Panchayat was a person in the service of the Government, it would have to be further held that he was of the class of officers mentioned in section 123(7)(f). Clause (f), in the

first instance, speaks of a person in the service of the Government who is a revenue officer and then further extends the class to village accountants. The words "such as patwaris, lekhpals, talatis, karnams and the like" are merely descriptive of the words "Revenue officers including village accountants". Under clause (f) it is essential that a person in the service of the Government must be a revenue officer or a village accountant, by whatever name such officer or village accountant may be described. The exclusion of every other village officer from the provisions of clause (f) compels the conclusion that before this clause can apply to a Sarpanch of the Grama Panchayat under the Orissa Act it must be proved that he is either a revenue officer or a village accountant. The mere fact that under section 31 of the Orissa Act a Grama Panchayat is enabled to enter into a contract with the State Government to collect its taxes or its dues cannot convert a Sarpanch into a revenue officer. No doubt a Grama Panchayat would have to supervise and maintain village and field boundary marks and village records if required to do so by the State Government under section 21(r) of the Orissa Act. In the present case there is no proof that the Grama Panchayats in question were required to do any such thing by the Government. It is significant that under section 54(1)(xiv) of the Orissa Act it is a choukidar appointed under that Act by the District Magistrate on whom a statutory duty is cast to keep watch over boundary marks and report to the Grama Panchayat any loss or damage caused to the boundary marks defining villages. The Grama Panchayat, however, has not been assigned positively any functions under the Orissa Act which are discharged by a revenue officer. The provisions of section 21(r) would not by itself convert a Sarpanch of a Grama Panchayat into a revenue officer. Similarly, there is no provision of the Orissa Act which shows that a Sarpanch is a village accountant. It had been suggested on behalf of respondent No. 1 that if it could be established that a Sarpanch was revenue officer or a village accountant, then the very fact that he was such a person made him a person in the service of the Government. It is doubtful whether any such necessary conclusion arises, but there is no need to make further reference to this submission as, in our opinion, a Sarpanch of the Grama Panchayat under the Orissa Act is neither a revenue officer nor a village accountant.

It follows, therefore, that in the present case the two essential elements that a Sarpanch must be a person in the service of the Government and that he belongs to the class mentioned in clause (f) of sub-section (7) of section 123 have not been established. Even if one of them had been established and not the other the provisions of section 123(7) would not apply to such a person. In our opinion, the High Court erred in supposing that because a Sarpanch of a Grama Panchayat under the Orissa Act exercised governmental duties he must be regarded as a person in the service of the Government. The High Court did not give any clear finding that a Sarpanch, even if a person in the service of the Government, was either a revenue officer or a village accountant. In our opinion, the provisions of section 123(7) do not apply to him. Therefore, it cannot be said that any corrupt practice under section 123 had been established in the case and the election of the appellant could not be set aside on the only ground on which his election had been set aside by the High Court. The appeal is accordingly allowed with costs and the election petition of respondent No. 1 is dismissed.

Appeal allowed.

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