

(2011) 03 MP CK 0034

Madhya Pradesh High Court (Gwalior Bench)

Case No: Writ Petition No. 1289 of 2011 (S)

Jai Prakash Batham

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision: March 24, 2011

Acts Referred:

- Constitution of India, 1950 - Article 14, 16, 16(2), 226, 227
- Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 - Section 69, 70, 86, 86(2)

Citation: (2011) ILR (MP) 1867 : (2011) 2 MPJR 143 : (2011) 2 MPLJ 392

Hon'ble Judges: A.K.Shrivastava, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

A.K. Shrivastava, J.

By this petition under Article 226/227 of the Constitution of India, the Petitioner has challenged the order dated 2-2-2011 passed by the Commissioner, Chambal Division Morena, whereby the appeal of Respondent No. 5 - Balram Sharma has been allowed by directing to appoint him on the post of Panchayat Karmi of Gram Panchayat Bargawan by further directing to confer secretarial powers of Gram Panchayat to him.

According to the Petitioner, he is the local resident of village Bargawan, Tehsil Karahal, District Sheopur, where he is having immovable/ancestral property. He has also filed a domicile certificate (Annexure P/2). Further it has been pleaded that the Petitioner is the member of Other Backward Class community and had secured 56.14% marks in the High School Examination and is also having qualification of Masters Degree in Arts. The certificates have been filed and they are collectively

marked as Annexure P/3.

The State Government, in exercise of power under Sections 69 and 70 of Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as "Adhiniyam") has framed a policy for appointment of Panchayat Karmi on 12-9-1995. A copy of the policy is marked as Annexure P/4. Thereafter, another policy has been framed on 27-1-2006 (Annexure P/5), whereby power of appointment of Panchayat Karmi has been delegated to Collector on account of failure of Gram Panchayat to make requisite appointment. In exercise of power u/s 86 of the Adhiniyam, the State Government has directed the Chief Executive Officer to appoint the Panchayat Karmi. According to the policy, the appointment of Panchayat Karmi should be made on merit and preferential right to appoint members of Scheduled Caste, Scheduled Tribes, Other Backward Classes and Women candidates, should be given. Under the policy, the procedure of appointment has been specified to the effect that appointment on vacant post of Panchayat Karmi shall be made by inviting applications or preparation of merit list. It also provides that on the basis of merit a list shall be prepared and it will be sent to the Collector for approval and after obtaining the approval, appointment order shall be issued to the meritorious candidates.

In pursuance to the said policy of the State Government, the Gram Panchayat i.e. Respondent No. 4 initiated the proceeding for filling up the post of Panchayat Karmi by issuing the advertisement on 20-7-2007 (Annexure P/6). In pursuance to the said advertisement, total 18 applications were received by the Gram Panchayat including the applications of Petitioner and Respondent No. 5. A meeting of Gram Panchayat was convened on 30-8-2007 and the applications were considered in respect of appointment of Panchayat Karmi, wherein the case of the Petitioner was turned down on the objection of some Panchas, who also disputed the domicile certificate of the Petitioner and found Respondent No. 5 to be resident of local place of village Kemari, Tehsil Sabalgarh, District Morena. A copy of the proceedings of the Gram Panchayat have been filed as Annexure P/7.

The Petitioner having aggrieved by the decision of Gram Panchayat, approached this Court by filing a writ petition bearing W. P. No. 5212/07 (S) and ultimately it was decided on 6-11-2009 (Annexure P/8).

According to the learned Counsel for the Petitioner, when Braj Bihari Sharma, who was Respondent No. 5 in that petition, did not succeed in the said Writ Petition, he hand in gloves with Respondent No. 5 and got the writ petition filed bearing number W. P. No. 5857/08(S). This Court vide order dated 6-11-2009 (Annexure P/8) decided both the writ petitions viz W. P. No. 5212/07(S) and W. P. No. 5857/08(S) by a common order and quashed the resolution of Gram Panchayat dt. 30-8-2007 (Annexure P/1) and also quashed the consequential order of appointment dt. 31-8-2007 as well as the order passed by the Collector dated 16-10-2007 and inter alia directed to hold fresh meeting and further directed that all the applications

received by the Gram Panchayat for the purpose of appointment of the post of Panchayat Karmi shall be considered and also directed to prepare a merit list which shall be based upon the merits and thereafter proper appointment order shall be issued. Eventually, the Gram Panchayat in compliance to the order passed by this Court, resolved to appoint Braj Bihari Sharma and the name of Daulat Singh was kept in the waiting list. Thereafter, the Collector while exercising the power conferred u/s 86(2) of the Adhiniyam, directed Respondent No. 3 Jila Panchayat Karahal to make appointment of Panchayat Karmi. In pursuance to the order of the Collector, Janpad Panchayat had appointed the Petitioner as Panchayat Karmi on 18-8-2010 and also notified the Petitioner as Panchayat Secretary vide order dated 25-8-2010.

Against the order of the appointment of the Petitioner, Respondent No. 5-Balram Sharma preferred an appeal before the Commissioner Chambal Division Morena, who allowed the appeal and by setting aside all the adverse orders and resolution, directed to appointment Respondent No. 5-Balram Sharma on the post of Panchayat Karmi and also to notify him as Panchayat Secretary.

In this manner, this petition has been filed by the Petitioner.

The contention of Shri D. P. Singh, learned Counsel for the Petitioner is that the Commissioner has failed to consider the document of domicile certificate of Respondent No. 5-Balram Sharma and without considering the same, on the basis of bogus document has given the finding in paras 4 and 5 of the impugned order, which is totally perverse and hence committed patent error of law. Further it has been contended that the appeal was proceeded *ex parte* against the present Petitioner and by recording the presence of his counsel, who was not at all engaged by the Petitioner, nor any Vakalatnama was filed on his behalf, allowed the appeal of Respondent No. 5-Balram Sharma and therefore, the impugned order is bad in law. Certain allegations are also made that the Reader of the Commissioner was very much interested in Respondent No. 5-Balram Sharma and he noted down the presence of the counsel and the Commissioner by affirming the illegal act of his Reader has marked the presence of counsel of Petitioner and therefore, entire proceeding before the Commissioner is vitiated.

Vehemently, it has been put forth by Shri D. P. Singh, learned Counsel for the Petitioner that Respondent No. 5 is not the local resident of area and is a resident of district Sheopur and therefore, for no rhyme or reason he is entitled for appointment on the post of Panchayat Karmi and therefore, the order of Commissioner runs de hors the policy of the State Government.

Combating the aforesaid submissions of learned Counsel for the Petitioner, Shri Gaurav Samadhiya, learned Counsel appearing for Respondent No. 5-Balram Sharma has submitted that the action of Gram Panchayat and the order of Collector was assailed by Respondent No. 5 - Balram Sharma by filing a writ petition before

this Court, which was registered as W. P. No. 5857/08 (S) and learned Writ Court vide its order dated 6-11-2009 quashed the resolution as contained in Annexure P/I dated 30-8-2007; quashed the consequential order of appointment dated 31-8-2007 and order of Collector dated 16-10-2007 was also quashed and directed the Gram Panchayat to consider all the applications afresh and prepare a merit list and on the basis of merits, proper appointment order may be issued and further directed that the policy of the State Government relating to the appointment of Panchayat Karmi dated 12-9-1995 should be taken into consideration along with provisions of the Adhiniyam.

By putting a deep dent on the case of the Petitioner, it has been put forth by Shri Gaurav Samadhiya, learned Counsel for the Respondent No. 5 that the name of Respondent No. 5-Balram Sharma is on the top of the merit list since he had secured highest percentage of marks 61.4% while the Petitioner-Jai Prakash Batham stood at S. No. 3 in the merit list as he secured 58% only. Hence, it has been put forth by the learned Counsel that the only eligible candidate for the appointment is Respondent No. 5 and none else. It has also been put forth by him that although the Petitioner is resident of local area of the Gram Panchayat, but even if for the sake of argument it is held that he is resident of Sheopur, since it is adjoining to the Gram Panchayat, his candidature cannot be sidelined looking to his meritorious career since he secured the top position in the merit list and hence it has been prayed that this petition, which is devoid of any substance be dismissed.

Having heard learned Counsel for the parties, I am of the view that this petition deserves to be dismissed.

So far as the contention of learned Counsel for the Petitioner that the Commissioner Chambal Division, Morena, acted in flagrant violation of law by deciding the appeal in the absence of Petitioner by incorrectly marking his presence through his counsel is concerned, this is a disputed question of fact and cannot be decided in this petition. In the absence of any material available on record, it is difficult to hold that the Revenue Commissioner, who is a very senior officer, would act on the insistence of his Reader and will mark the presence of counsel for Petitioner even if he was not present. Even if for the sake of argument, it is held that the Reader of the Commissioner was hand in gloves with Respondent No. 5 - Balram Sharma and marked the presence of Petitioner through his counsel deliberately, an application should have been filed by the Petitioner before the Commissioner because the said authority is the best person to check his own record in order to take out the grain from chaff, but this has not been done so far and therefore, in this petition under Articles 226 and 227 of the Constitution of India, no roving enquiry in the absence of any cogent material on record can be made to examine the hallmark of the contention of the learned Counsel for the Petitioner.

Even otherwise, looking to the directions given by this Court in earlier dated 6-11-2009, this Court finds that specifically this Court directed the Gram Panchayat

to consider all the applications and further directed to prepare a merit list and based upon the said merit list, proper appointment order shall be issued in the matter. Although, it was also directed that the policy dated 12-9-1995 to appoint a Panchayat Karmi shall also be kept in mind along with other provisions of the Adhiniyam, but according to me, the supreme consideration, which was adjudicated, was the merit list to appoint a candidate, who had topped the merit list. For better understanding, it would be apposite to quote relevant portion of the order of learned Writ Court dated 6-11-2009, which reads thus

Resultantly, the resolution as contained in Annexure P/I dated 30-8-2007 is hereby quashed and the consequential order of appointment dated 31-8-2007 and the order passed by the Collector dated 16-10-2007 are also hereby quashed. The writ petition is allowed with the following directions

- (a) The Respondent/Gram Panchayat shall hold a fresh meeting and shall consider all 17 applications received by the Gram Panchayat for the purpose of appointment to the post of Panchayat Karmi afresh.
- (b) The Respondent/Gram Panchayat shall prepare a merit list and based upon the merits, proper appointment order shall be issued in the matter.
- (c) The Respondent/Gram Panchayat shall also kept in mind the policy issued by the State Government relating to appointment of Panchayat Karmi dated 12th September, 1995 read with statutory provisions of Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 while issuing such an appointment order.
- (d) The aforesaid exercise of passing a fresh resolution and issuing consequential appointment order and order conferring secretarial powers, shall be concluded within a period of three months from the date of receipt of a certified copy of this order.

With the aforesaid, the writ petitions stand allowed. No order as to costs.

(Emphasis supplied)

This order was never challenged by the Petitioner by filing Writ Appeal and thus the findings and the writ, which was issued by the learned Writ Court in earlier round of litigation deciding the writ petitions of Petitioner as well as Respondent No. 5-Balram Sharma, had attained finality and it cannot be molded to take out any other meaning.

Rightly the decision of Supreme Court in Kailash Chand Sharma Vs. State of Rajasthan and Others, has been placed reliance by Shri Gaurav Samadhiya, learned Counsel for the Respondent No. 5 that the policy decision of the State Government has to pass the test of Articles 14 and 16 of the Constitution and if the decision is deviating from the normal and salutary rule of selection based on merit and is subversive of the doctrine of equality, it cannot be allowed to remain stand and it

should be free from vice of arbitrariness. The authenticity and the hallmark of the merit list Annexure P/9 has not been challenged and it is also a naked truth that Respondent No. 5-Balram Sharma is on the top of the merit list as he secured highest percentage of marks 61.4 % while the Petitioner had obtained 58% marks and his position is at S. No. 3 in the said list.

Shri D.P. Singh, learned Counsel for the Petitioner tried to somersault the argument put forth by Shri Gaurav Samadhiya, learned Counsel for the Respondent No. 5 and submitted that since Respondent No. 5 is not the resident of local area his candidature cannot at all be considered and to bolster his submission, learned Counsel has placed reliance on a Division Bench decision of this Court dated 11-7-2007 passed in Writ Appeal No. 421/2007, Smt. Sadhana v. State of M.P. and Ors. But, rightly it has also been placed reliance by Shri Gaurav Samadhiya, learned Counsel for the Respondent No. 5 by placing reliance on the said decision and by inviting my attention that the said decision is also not against him because in the said decision, Hon"ble the Chief Justice Shri A. K. Patnaik, as his Lordship then was, spoke for the Bench and held that merit is the sole criteria for the appointment and it cannot be superseded only on the basis that the meritorious candidate is not the resident of that locality, because it will be in contravention of the Article 16(2) of the Constitution of India. It would be condign to quote that portion of the order, which reads thus

The appointment of the Appellant has been set aside by the Collector not because she was not a resident of Village or Ward but because her name did not find place in the voter list. Hence the basis for appointment as Anganwadi Worker because of the bar under Article 16(2) of the Constitution does not arise for decision in this case.

In this decision also, the judgment of Supreme Court in Kailashchand Sharma (*supra*), which has been placed reliance by learned Counsel for the Respondent No. 5, was taken into consideration.

For the reasons stated hereinabove, I am of the view that even if it is held (although it is a disputed question of fact) that Respondent No. 5-Balram Sharma is not the resident of local area where the Gram Panchayat exists and is a resident of adjoining vicinity, as well as by taking into consideration that behind the back of the Petitioner, de hors the procedure of hearing of appeal, the Commissioner has allowed the appeal of Respondent No. 5 - Balram Sharma and directed him to be appointed on the post of Panchayat Secretary, it cannot be set aside because if it is set aside, it would allow to restore an illegal resolution and an illegal order of the Collector, which is contrary to the order passed by this Court on 6-11-2009 (Annexure P/8) and therefore, I am declining to exercise the writ jurisdiction as well as the power of superintendence under Article 227 of the Constitution of India. In this contest, I may profitably place reliance on the decision of the Supreme Court in the case of Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another, wherein in para 7 the Apex Court has held:

7. It was contended before the High Court that no appeal lay from the decision of the Prescribed Authority to the District Judge. The High Court accepted this contention. The High Court finally held that though the appeal laid before the District Judge, the order of the Prescribed Authority was invalid and was rightly set aside by the District Judge. On that ground the High Court declined to interfere with the order of the learned District Judge. It is true that there has been some technical breach because if there is no appeal maintainable before the learned District Judge, in the appeal before the learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Article 226 of the Constitution. The High Court had come to the conclusion that the order of the Prescribed Authority was invalid and improper. The High Court itself could have set it aside. Therefore, in the facts and circumstances of the case justice has been done though, as mentioned hereinbefore, technically the Appellant had a point that the order of the District Judge was illegal and improper. If we reiterate the order of the High Court as it is setting aside the order of the Prescribed Authority in exercise of the jurisdiction under Article 226 of the Constitution then no exception can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the Prescribed Authority has been set aside, no objection can be taken.

In the present case no injustice has been done and the Commissioner has set aside the improper order of Collector and illegal resolution, which was de hors the order of this Court dated 6-11-2009. I may also profitably place reliance on another decision of Supreme Court in the case of Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, wherein in para 17 it has been held by Supreme Court:

17. ...In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government dated April 18, 1963 ? If the High Court had quashed the said order, it would have resorted an illegal order - it would have given the Health Centre to a village contrary to the valid resolution passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case.

In Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others, the Supreme Court has held that the order of learned Member Board of Revenue directing action to be taken for refund of the excess payment was valid and proper, though he had no jurisdiction to pass the order. Supreme Court further held that in the event it is set aside it would amount to reviving an invalid order of payment of excess compensation to the Appellant. It would be fruitful to quote para 38 of the said decision, which reads thus:

For what has been stated above we hold that the order of the learned Member of Board of Revenue directing action to be taken for refund of the excess compensation was valid and proper though he had no jurisdiction to pass the order. In the event it is set aside it would amount to reviving an invalid order of payment of

excess compensation to the Appellant.

For the reasons stated hereinabove, this petition is dismissed with cost. Counsel fee Rs. 2500/- if pre certified.