Ramnath Paswan and Others Vs Setaur Rahaman and Others

Court: Calcutta High Court

Date of Decision: Sept. 7, 2007

Acts Referred: Companies Act, 1956 â€" Section 108, 629A
West Bengal Panchayat (Constitution) Rules, 1975 â€" Rule 3, 3(1), 3(3), 3(6), 3(7)
West Bengal Panchayat Act, 1973 â€" Section 12, 13, 213A

Citation: (2008) 1 CHN 765 : 112 CWN 381

Hon'ble Judges: Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Shaktinath Mukherjee, Asoke De, M.S. Chakraborty and A. Banerjee, for the Appellant; Partha Sarathi Deb Burman, for Respondent Nos. 1 to 7, 12 and 13, Tarak Nath Ghosh and Sakti Pada Jana, for the Respondent

Final Decision: Allowed

Judgement

Bhaskar Bhattacharya, J.
This mandamus appeal is at the instance of the private respondents in a writ application and is directed against

the order dated August 3, 2007 passed by a learned Single Judge of this Court by which His Lordship allowed the writ application by setting aside

the notice dated 26th February, 2007 issued by the prescribed authority for election in order to fill up post of Pradhan of the Harischandrapur-II

Gram Panchayat who was earlier removed on requisition.

2. The facts giving rise to filing of the writ application out of which the present mandamus appeal arises may be summed up this:

(a) The writ petitioners, seven in number, are the members of a Gram Panchayat and they disputed the legality of the notice dated 26th February,

2007 issued by the prescribed authority and the Block Development Officer for convening a meeting of the concerned Gram Panchayat to be held

on 6th March, 2007 for election of the Pradhan of the concerned Gram Panchayat. The only ground on which the notice had been challenged is

that the same had been issued in contravention of the provisions contained in Rule 6 of the West Bengal Panchayat (Constitution) Rules, 1975

(hereinafter referred to as the rules).

(b) A requisition meeting was held on September 14, 2006 at the instance of the present appellants and a resolution for removing the Pradhan,

namely, Smt. Tahera Khatoon was carried by the majority members of the Gram Panchayat. The prescribed authority, consequently, issued a

memo dated 21st September, 2006 declaring that the Pradhan stood removed from her office.

(c) In the meeting held on 14th September, 2006, by which the Pradhan was removed, three members of the Gram Panchayat cast their votes

defying the whip of the recognised political party which set them up for election to the concerned Gram Panchayat and accordingly, on receipt of a

complaint, the prescribed authority had subsequently initiated proceeding u/s 213A of the West Bengal Panchayat Act.

(d) In the meantime, the prescribed authority directed the Pradhan to hand over charge to the Upa-Pradhan of the Gram Panchayat on 9th

October, 2006 and in terms of the provisions contained in Rule 6 of the aforesaid rules, a casual vacancy in the office of Pradhan of the concerned

Gram Panchayat had to be filled up by the election within 30 days from the date of occurrence of such vacancy or within such further time as

allowed by the District Panchayat Election Officer by calling a meeting of all the members of the Panchayat who are eligible to participate.

(e) The members of the Gram Panchayat, at whose instance Smt. Tahera Khatoon was removed from the office of the Pradhan, had moved the

prescribed authority vide their notice dated 13th November, 2006 whereby they had demanded for taking appropriate steps for filling up the

vacancy in the office of the Pradhan. In spite of service of such notice, the proscribed authority did not take action and feeling aggrieved thereby,

the present appellants filed a writ application before this Court being W.P. No. 25165 (W) of 2006 and a prayer was made for a direction upon

the prescribed authority for holding fresh election of the Pradhan of the Gram Panchayat.

(f) When the said writ application came up for hearing before a learned Single Judge of this Court, the proceedings for disqualification of those

three members of the Gram Panchayat u/s 213A were pending and accordingly, the learned Single Judge disposed of the said writ application by

order dated 15th December, 2006 by holding that ""the prescribed authority should conclude the proceeding u/s 213A of the Act in terms of the

appellate forum before holding the election for Pradhan"" and ""the election of the Pradhan should be made immediately after the conclusion of the

said proceeding"".

(g) The proceeding for disqualification initiated u/s 213A of the Act culminated in declaration by the prescribed authority that the members against

whom the proceedings were initiated ceased to be members of the Gram Panchayat and such order was passed by the prescribed authority on 5th

January, 2007. The said order, however, was set aside in appeal by an order of the appellate authority dated 14th February, 2007 and the

appellate order had been challenged in a writ application being W.P. No. 3600 (W) of 2007 which is pending. There is, however, no interim order

staying the operation of the appellate order in the said pending writ application.

(h) In the meantime, the prescribed authority issued a notice on 26th February, 2007 for the election of the Pradhan of the Gram Panchayat and in

fact, a meeting had already been held and a new Pradhan was elected but no effect thereto could be given because of interim order passed in the

writ application out of which the present mandamus appeal arises.

(i) Ultimately, the learned Single Judge, by the order impugned herein, has set aside the notice issued by the prescribed authority on the ground that

the same was illegal as the District Panchayat Election Officer had not given him permission to issue such notice.

3. Being dissatisfied, the appellants who were the private respondents before the learned Single Judge have come up with the present mandamus

appeal.

4. Mr. Shakti Nath Mukherjee, the learned senior Advocate appearing on behalf of the appellants, has raised two-fold submission in support of

the present mandamus appeal.

5. First, Mr. Mukherjee has contended that on a conjoint reading of Section 13 of the West Bengal Panchayat Act and Rule 6 of the West Bengal

Panchayat (Constitution) Rules, 1975, it will appear that the Act has made it mandatory to fill up the post of the Pradhan, once the Pradhan is

removed from his office and such election consequent to removal should be made in accordance with the Rule prescribed namely the provision of

Rule 6 of the West Bengal Panchayat (Constitution) Rules, 1975. Mr. Mukherjee contends that Rule 6 authorises the prescribed authority to hold

election within 30 days as mentioned therein and does not authorise the prescribed authority to hold election within 30 days as mentioned therein

and does not authorise the prescribed authority to prolong the holding of election unless the District Panchayat Election Officer authorises him to

do so. According to Mr. Mukherjee, the object of taking leave of the District Panchayat Election Officer, if election is held beyond 30 days, is to

put restriction upon the prescribed authority so that the election is not postponed for indefinite period at the whim of the prescribed authority. Mr.

Mukherjee, therefore, contends that the provision for taking permission from the District Panchayat Election Officer before issuing the notice of

election beyond one month was a precautionary one and will be mandatory only if the prescribed authority proposes to take a decision not to call a

meeting within the time fixed by the Rule; on the other hand, Mr. Mukherjee continues, if pursuant to the decision of this Court the meeting could

not be held till the disposal of the proceedings u/s 213A of the Act, and after the decision is given, the prescribed authority gives notice for

election, no further permission is necessary from the District Panchayat Election Officer for holding such meeting simply because one month has in

the meantime expired.

6. Secondly, Mr. Mukherjee contends that in this case, in a previous writ application this Court having already intervened and specifically directed

that fresh election should not be held so long the proceeding u/s 213A of the Act is not disposed of by the appellate authority, with further direction

that immediately after such decision, the election should be held, there is no further necessity of taking permission from the District Panchayat

Election Officer for complying with the direction of this Court.

7. Mr. Mukherjee, therefore, contends that the learned Single Judge, in this case, erred in law in setting aside the election already held pursuant to

the direction given by this Court in the previous writ application. In support of his contention. Mr. Mukherjee relies upon the decision of the

Supreme Court in the case of AIR 1972 1935 (SC) .

8. Mr. Deb Burman, the learned Advocate appearing on behalf of the writ petitioners/respondents, on the other hand, has opposed the aforesaid

submissions advanced by Mr. Mukherjee and has contended that the prescribed authority gets jurisdiction to issue notice for election beyond the

period of one month from the vacancy occurred due to removal only if the sanction is given by the District Panchayat Election Officer and,

therefore, in the absence of such permission from the District Panchayat Election Officer, the prescribed authority could not call the meeting of

election and the election held in the absence of such permission of the District Panchayat Election Officer was without jurisdiction and, therefore,

the learned Single Judge rightly set aside the election held pursuant to the notice issued by the prescribed authority without taking such permission.

According to Mr. Deb Burman, the provision of Rule 6 is mandatory and for violation of such mandatory provision, the learned Single Judge has

rightly set aside the election. In support of such contention Mr. Deb Burman relies upon the decision of the Supreme Court in the case of

Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, . He also refers to the decision of the Supreme Court in the case of Mannalal

Khetan and Others Vs. Kedar Nath Khetan and Others, .

9. Therefore, the question that falls for determination in this mandamus appeal is whether the holding of election in the case before us without taking

consent from the District Panchayat Election Officer invalidated the election.

10. In order to appreciate the question involved herein, it will be profitable to refer to Section 13 of the West Bengal Panchayat Act and Rule 6 of

the West Bengal Panchayat (Constitution) Rules, 1975 and those are quoted below:

13. Filling of casual vacancy in the office of Pradhan or Upa-Pradhan.-In the event of removal of a Pradhan or an Upa-Pradhan u/s 12 or when a

vacancy occurs in the office of a Pradhan or an Upa-Pradhan by resignation, death or otherwise, the Gram Panchayat shall elect another Pradhan

or Upa-Pradhan in the prescribed manner.

Rule 6. Resignation of and filling up of casual vacancy in the office of the Pradhan and Upa-Pradhan of a Gram Panchayat, Sabhapati and Sahakari

Sabhapati of Panchayat Samiti or Sabhadhipati and Sahakari Sabhadhipati of Mahakuma/Zilla Parishad.-(1) As soon as may be but not later than

thirty days from the date of any casual vacancy in the office of Pradhan or Upa-Pradhan, Sabhapati or Sahakari Sabhapati or Sabhadhipati or

Sahakari Sabhadhipati by reason of death, resignation, removal or otherwise, or within such further time as may be allowed by the District

Panchayat Election Officer for reasons to be recorded by him in this behalf, the prescribed authority referred to in Sub-rule (1) of Rule 3, Sub-rule

(1) of Rule 4, Sub-rule (1) of Rule 5, or Sub-rule (1) of Rule 5A shall call a meeting of all the members eligible to participate under Rule 3, Rule 4,

Rule 5 or Rule 5A, as may be appropriate, for the election of a Pradhan or Upa-Pradhan, a Sabhapati or a Sahakari Sabhapati, a Sabhadhipati or

a Sahakari Sabhadhipati, as the case may be, by fixing a date, place and time and causing a written notice to this effect in Form 1 to be served on

each such member at least seven days before the date fixed for such meeting.

(1A) Such meeting shall be presided over by such officer as may be authorised by the prescribed authority in Form 2 and such officer shall not be

entitled to vote at the election.

(2) On the date of the meeting if there is no quorum, as provided in Sub-rule (3) of Rule 3, Sub-rule (3) of Rule 4, Sub-rule (3) of Rule 5 or Sub-

rule (3) of Rule 5A, the Presiding Officer shall adjourn the meeting. The adjourned meeting shall be held on such date, place and time as may be

fixed by the prescribed authority and the provisions regarding notice to members referred to in Sub-rule (1) shall apply:

Provided that no quorum shall be necessary for an adjourned meeting.

(3) The Presiding Officer shall then conduct the election of the Pradhan or Upa-Pradhan, Sabhapati or Sahakari Sabhapati, Sabhadhipati or a

Sahakari Sabhadhipati, as the case may be, in the same manner as laid down in Sub-rules (6), (7), (8) and (9) of Rule 3 and Sub-rules (6), (7) and

(8) of Rule 4 as far as applicable.

(4) The papers relating to an election to fill a casual vacancy shall be kept in safe custody by the prescribed authority for six months after which

they may be destroyed.

11. After hearing the learned Counsel for the parties and after going through the aforesaid statutory provisions, we find that the object of those

provisions is to ensure quick filling up of the posts mentioned therein in the event of the vacancy of the posts mentioned therein. The Rule 6 has

vested the power of calling the meeting of election upon the prescribed authority but at the same time, the said rule has taken care to see that such

power is not abused by restricting the time-limit for calling the meeting of election ordinarily within one month unless the District Panchayat Election

Officer permits him to defer the meeting by a reasoned order. The first question before us is if for any reason, the meeting is not held within one

month and thereafter, the meeting is called by the prescribed authority pursuant to the order passed by this Court and the election is held without

taking the permission of the District Panchayat Election Officer, whether the election would be vitiated for non-compliance of the provision

contained in Rule 6.

12. In order to ascertain whether a particular statutory provision is mandatory or directory, the tests to be followed are now well-settled.

13. The intention of the legislature in enacting the provisions is the first and foremost factor to be considered. If the provisions are procedural in

nature, the presumption is that those are generally directory unless the provisions are couched in a negative form and a consequence is indicated for

non-compliance of such provision. If an the procedural provision, the word used is ""must"", instead of ""shall"", the provisions should be held to be

mandatory in nature. The exceptions to the abovementioned rule are the cases where either ""no notice"" or ""no opportunity"" or ""no hearing"" has

taken place causing injury or prejudice to the aggrieved person for non-compliance of such provision. In the case before us, the Rule 6 is

undoubtedly a procedural provision for giving effect to the provision contained in Section 13 of the Act and the same is not in a negative form and

at the same time, no consequence is indicated for non-compliance of the provision. The intention of the legislature is to compel the prescribed

authority to hold election within one month after the post has fallen vacant and only in exceptional cases, to permit prolongation of the same beyond

that period and that too, after taking permission from the higher authority based on a reasoned order. Therefore, the provision should be held to be

directory and in case of violation of a directory provision, the outcome cannot be a nullity unless prejudice is caused to an aggrieved party for

deviation from the provision.

14. In this connection, it will not be inappropriate to refer to the following observations of the Supreme Court in the case of State Bank of Patiala

and others Vs. S.K. Sharma, :

A substantive provisions has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of

prejudice would not be applicable in such case. In the case of violation of a procedural provision, the position is this: procedural provisions are

generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in

his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases

falling under "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from

the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and

effectively.

15. As pointed out earlier, we have also relied upon the following observations of the Apex Court in the case of Lachmi Narain and Others Vs.

Union of India (UOI) and Others, :

The primary key to the problem whether a statutory provision is mandatory or directory, is the intention of the law-maker as expressed in the law,

itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and

strongly in imperative words, such as the use of "must" instead of "shall", that will itself be sufficient to hold the provision to be mandatory, and it

will be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of

peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory (Crowford, the Construction of

Statutes pp. 523-524).

16. We, therefore, find that the learned Single Judge erred in law in holding that the provision of Rule 6 is mandatory and for mere non-compliance

of such provision, the decision taken in the meeting should be quashed.

17. The other point raised by Mr. Mukherjee is full of substance. In the earlier writ application, a learned Single Judge having directed the State-

respondents not to hold election till the disposal of the proceedings u/s 213A of the Act by the appellate authority and to hold election immediately

after such decision and none of the parties having challenged the said decision by preferring any appeal, the same has attained finality and is binding

upon the parties. Therefore, the prescribed authority had no other option but to issue a notice for election after the decision of the appellate

authority in the proceedings u/s 213A of the Act and there was no necessity of complying with the requirement of Rule 6 by approaching the

District Panchayat Election Officer for a permission to hold election by giving a reasoned order.

18. We now propose to deal with the decisions cited by Mr. Deb Burman.

19. In the case of Bhavnagar University (supra), the Supreme Court reiterated the well-settled principles to be followed while interpreting a

statutory provision in the following way:

It is the basic principle of construction of statute that the same should be read as a whole, then chapter by chapter, Section by Section and words

by words. Recourse to construction or interpretation of statute is necessary when there is ambiguity, obscurity, or inconsistency therein and not

otherwise. An effort must be made to give effect to all parts of statute and unless absolutely necessary, no part thereof shall be rendered surplusage

or redundant.

True meaning of a provision of law has to be determined on the basis of what provides by its clear language, with due regard to scheme of law.

Scope of the legislation on the intention of the legislature cannot be enlarged when the language of the provision is plain and unambiguous. In other

words statutory enactments must ordinarily be construed according to its plain meaning and no words shall be added, altered or modified unless it

is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest

of the statute.

It is also well-settled that a beneficient provision of legislation must be liberally construed so as to fulfil the statutory purpose and not to frustrate it.

20. In the said decision, the Apex Court at paragraphs 42 to 45 of the judgement (of AIR) made observations approving the following tests which

we have borne in mind for the purpose of deciding whether a provision is mandatory or not:

We are not oblivious of the law that when a public functionary is required to do a certain thing within a specified time, the same is ordinarily

directory but it is equally well-settled that when consequence for inaction on the part of the statutory authorities within such specified time is

expressly provided, it must be held to be imperative.

In Sutherland, Statutory Construction, 3rd Edition, Vol. 3 at p. 102 the law is stated as follows:

...unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time must be considered a limitation

of the power of the officer.

At p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the

opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory

or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall

follow non-compliance with the provision. At p. 111 it is stated as follows:

As a corollary of the rule outlined above, the fact that no consequences of non-compliance are stated in the statute, has been considered as a

factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive.

[See also Crawford on Statutory Construction, Article 269 at p. 535]. In Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others,

, it was held as under:

1952 Cr. LJ 955 para 7

Generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the

provisions of statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would

work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not

promote the main object of the Legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect of them

not affecting the validity of the acts done.

In Craies on Statute Law VIII Edn. at page 262, it is stated thus:

It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be

construed.... That is each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to

the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called

imperative or only directory.

21. The principles laid down in the said decision therefore, really goes against the writ petitioners.

22. In the case of Mannalal Khetan (supra), the other decision cited by Mr. Deb Burman, the Supreme Court was considering the question

whether the provisions contained in Section 108 of the Companies Act was mandatory. In answering such question in affirmative, the Court

approved the following tests as decisive:

In Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur, this Court referred to various tests for finding out when a provision is mandatory or

directory. The purpose for which the provision has been made, its nature, the intention of the legislature in making the provision, the general

inconvenience or injustice which may result to the person from reading the provision one way or the other, the relation of the particular provision to

other provisions dealing with the same subject and the language of the provision are all to be considered. Prohibiting and negative words can rarely

be directory. It has been aptly stated that there is one way to obey the command and that is completely to refrain from doing the forbidden act.

Therefore, negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. (See Maxwell on

Interpretation of Statutes 11th Edn. p. 363 seq.; Crawford Statutory Construction, Interpretation of Laws p. 523 and Seth Bikhraj Jaipuria Vs.

Union of India (UOI),

The High court said that the provisions contained in Section 108 of the Act are directory because non-compliance with Section 108 of the Act is

not declared an offence. The reason given by the High Court is that when the law does not prescribe the consequences or does not lay down

penalty for non-compliance with the provisions contained in Section 108 of the Act the provision is to be considered as directly. The High Court

failed to consider the provision contained in Section 629A of the Act. Section 629A of the Act prescribes the penalty where no specific penalty is

provided elsewhere in the Act. It is a question of construction in each case whether the legislature intended to prohibit the doing of the act

altogether, or merely to make the person who did it liable to pay the penalty.

(Emphasis Supplied by us)

23. As pointed out above, the High Court in that case, wrongly held that there was no penalty for non-compliance of the provisions but in fact

Section 629A provided penalty in general terms when there is no specific penalty provided elsewhere in the Act. Therefore, the principles laid

down in the said decision are in no way conflict with the ones followed by us in this case.

24. The decisions cited by Mr. Deb Burman are, therefore, of no assistance to his clients.

25. On consideration of the entire materials on record, we find that the learned Single Judge wrongly proceeded as if the provision contained in

Rule 6 for taking permission from the District Panchayat Election Officer was a mandatory provision and for non-compliance of the same, the

process of election was vitiated. His Lordship also overlooked the fact that the earlier decision given by this Court in this case was binding against

the parties and the prescribed authority was under no obligation to take further permission from the District Panchayat Election Office for holding

such election.

26. We, therefore, set aside the order passed by the learned Single Judge and dismiss the writ application filed by the private respondents before

us.

The appeal, accordingly, is allowed. There will be, however, no order as to costs.

Rudrendra Nath Banerjee, J.

27. I agree.