

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1455 of 2015

IN

C. REV. 328 of 2012

- =====
1. The State of Bihar.
 2. The Commissioner-cum-Secretary, Department of Rural Development, Government of Bihar, Patna (Now Principal Secretary, Panchayati Raj Department, Government of Bihar, Patna).
 3. The Director, Directorate of Panchayati Raj, Government of Bihar, Patna.
 4. The District Magistrate, Gaya.
 5. The District Panchayat Officer, Gaya.
 6. The Block Development Officer, Gurua, District Gaya.
 7. The Block Development Officer, Mohanpur, District Gaya.
 8. The Block Development Officer, Konch, District Gaya.
 9. The Block Development Officer, Imamganj, District Gaya.

.... Respondents Appellant/s

Versus

1. Mahendra Das S/o Sri Ganesh Das Resident of Village Punhi Dharahara, under Gram Panchayat and Post Office Ondwa, Police Station and Block Mohanpur, District Gaya.
2. Ramkrit Das S/o Shree Dulahi Das Resident of Village Sheora (Total Ramchak) under Panchayat (Sheora), Post Office Fulwaria, Police Station and Block Dumaria, District Gaya.
3. Shyam Nandan Das S/o Late Mungeshwar Rabidas Resident of Village Simari, under Gram Panchayat Ram Dohar, Post Officer Maigra, Police Station and Block Dumaria, District Gaya.
4. Suresh Kumar S/o Late Baidnath Paswan Resident of Village Mahadeopur, under Gram Panchayat Lodipur, P.O. Guraru, Police Station Konch, Block Guraru, District Gaya.
5. Birendra Singh S/o Shri Kameshwar Singh Resident of Village Pakahi, under Gram Panchayat Bajipur, P.O., Police Station and Block Belaganj, District Gaya.
6. Rishideo Paswan S/o Shri Jhakhar Paswan Resident of Village Parina, under Gram Panchayat Dhamna, Post Office Patluka, Police Station and Block Barachatti, District Gaya.
7. Surendra Paswan S/o Shri Sitaram Paswan Resident of Village and Panchayat Sabasin Dighora, Police Station and Block Tikari, District Gaya.
8. Moti Gahlaut s/o Shri Bilas Gahlaut Resident of Village and Gram Panchayat Khatnahi, P.O. Anti, Police Station and Block Konch, District Gaya.
9. Ram Naresh Das S/o Shri Panchu Das Resident of Village Karhani (Tola Bagha Kola), under Gram panchayat and Post Office Pipari, Police Station and Block Dumaria, District Gaya.
10. Indradeo Choudhary S/o Shree Choudhary Resident of Village Ore, under Gram Panchayat Sheikhpura Nihampur, Post Office Neori, Police Station and Block Belaganj, District Gaya.

.... Respondent/s

with

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Letters Patent Appeal No. 1362 of 2015**IN****C. REV. 327 of 2012**

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1. The State Of Bihar
 2. The Commissioner-cum-Secretary, Department of Rural Development, Government of Bihar, Patna (Now Principal Secretary, Panchayati Raj Department, Government of Bihar, Patna)
 3. The Director, Directorate of Panchayat Raj, Government of Bihar, Patna.
 4. The District Magistrate, Madhepura.
 5. The District Panchayat Officer, Madhepura
 6. The Block Development Officer, Madhpura, District Madhepura.

.... Appellant/s

Versus

Birendra Kumar, son of Sri Raghuni Ram resident of village, Post Office and Panchayat at Dhurgaon, Police Station Block and District-Madhepura.

.... Respondent/s

With

Letters Patent Appeal No. 1271 of 2015**IN****C. REV. 366 of 2012**

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1. The State Of Bihar
 2. The Commissioner-cum-Secretary, Department of Rural Development, Government of Bihar, Patna (Now Principal Secretary, Panchayati Raj Department, Government of Bihar, Patna).
 3. The Director, Directorate of Panchayati Raj, Government of Bihar, Patna.
 4. The Deputy Commissioner, Katihar.
 5. The District Panchayat Officer, Katihar.
 6. The Block Development Officer, Azamnagar, District- Katihar.
 7. The Block Development Officer, Amdabad, District- Katihar.
 8. The Block Development Officer, Manihari, District- Katihar.
 9. The Block Development Officer, Barshai, District- Katihar.
 10. The Block Development Officer, Kadwa, District- Katihar.
 11. The Block Development Officer, Korha, District- Katihar.
 12. The Block Development Officer, Balrampur, District- Katihar.

.... Appellant/s

Versus

1. Proshan Kumar Roy, son of Sri Kulesh Chandra Roy, resident of Gram Panchayat Choulhar, Post Office- Azamnagar, Police Station and Block- Azamnagar, District- Katihar.
2. Abdul Rauf, son of Md. Idris, resident of Panchayat Dakra English, Police Station and Block- Amdabad, District- Katihar.
3. Vimal Kumar Pandey, son of Gopal Chandra Pandey, resident of Gram Panchayat Dilarpur, Police Station and Block- Manihari, District- Katihar.
4. Shish Mohammad, son of Wazit Ali, resident of Gram Panchayat Roshnamal, Police Station and Block- Amdabad, District- Katihar.
5. Atul Chandra Das, son of Jag Bandhu Das, resident of Gram Panchayat

Shiwanandpur, Police Station and Block- Barshahi, District- Katihar.

6. Mashroor Alam Sattir, son of Sheikh Nuruddin, resident of Gram Panchayat Rauniya, Police Station and Block- Kadwa, District- Katihar.

7. Md. Ishrail, son of Akbar Ali, resident of Gram Panchayat Kheria, Police Station and Block- Korha, District-Katihar.

8. Sheikh Mojibur Rahman, son of Sheikh Fajlur Rahman, resident of Gram Panchayat Gwal Toli, Police Station and Block- Barshai, District- Katihar.

9. Niranjan Kumar Yadav, son of Nand Lal Yadav, resident of Gram Panchayat Kalyangaon, Police Station and Block- Balrampur, District- Katihar.

10. Ranjit Roy, son of Chulai Roy, resident of Gram Panchayat Bighor, Police Station and Block- Barshai, District- Katihar

11. Uma Kant Das, son of Shree Khetish Chandra Das, resident of Gram Panchayat Shikarpur, Police Station and Block- Barshai, District- Katihar.

12. Prakash Chandra Poddar, son of Fudan Poddar, resident of Gram Panchayat Bhelaganj, Police Station and Block- Kadwa, District- Katihar.

13. Md. Ishar Shamsh, son of Shamshul Hoda, resident of Village Deo, under Gram Panchayat Siktia, Police Station and Block- Azamnagar, District- Katihar

14. Gopal Krishna Roy, son of Indra Mohan Roy, resident of Gram Panchayat Baliabelon, Police Station and Block- Kadwa, District- Katihar.

15. Bidyadhar Ghosh, son of Shree Bhuwan Mohan Ghosh, resident of Village-Kushaha, under Gram Panchayat Alampur, Police Station and Block- Azamnagar, District- Katihar.

.... Respondent/s

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Appearance :

For the Appellants : Mr. Harish Kumar, G.P.-32

For the Respondents : Mr. Jitendra Kumar Roy

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

JUDGMENT AND ORDER

C.A.V.

(Per: HONOURABLE JUSTICE SMT. ANJANA MISHRA)

Date: 27-10-2016

The present *intra* Court appeals seek to assail the common order, dated 08.04.2015, whereby the learned single Judge has reviewed his earlier order, dated 20.12.2011, and, while recalling the order, set aside Memo No. 164, dated 09.02.1998, and has also, in consequence thereof, set aside the order, dated 08.03.1998, of termination of the



writ petitioners-respondents herein, which had been issued, in the light of Memo No. 164, dated 09.02.1998. This apart, while reviewing the earlier order, dated 20.12.2011, the learned single Judge has directed that "*the writ petitioners will be entitled to all consequential benefits on account of their being confirmed on the post of Dalpati from the retrospective date and having subsequently been confirmed and validly appointed to the post of Panchayat Sewak.*"

2. The brief facts, which gave rise to the writ applications filed by the erstwhile *Dalpaties*, and the consequent Review applications, out of which the present appeals, arise are as follows:-

- i. On 23.08.1993, after the 73rd Constitutional Amendment, Bihar Panchayati Raj Act, 1993 (Act, 1993 for brevity) was enacted repealing the erstwhile existing Panchayati Raj Act, 1947;
- ii. On 12.08.1993, the Director, Panchayati Raj, sent a wireless message to all District Panchayati Raj Officers, prohibiting further appointments of *Dalpaties* and Panchayat Sewaks;
- iii. On 27.06.1994 (Annexure-5 to the writ



application), the Director, Panchayati Raj, issued letter, vide Memo No. 3188, withdrawing the ban imposed against the appointment of *Dalpaties* and clause (g) of the said letter stipulates that appointment be made as per the old fixed procedure;

Thereafter, the petitioners were appointed by the Executive Committee of Gram Panchayat after 23.08.1993, but prior to 24.02.1997;

Thereafter, came the Bihar Panchayati Raj (Amendment) Act, 1995, which was made effective which vide Letter No. 164/Panchayati Raj, dated 09.02.1998 was made effective from 23.08.1993 itself. Under the 1993 Act, as originally enacted, there was no provision for village Volunteer Force or for a *Dalpati* as its head, which was, later on, rectified by the Bihar Panchayati Raj (Amendment) Act, 1995 (1995 Amendment, for brevity) which inserted Section 32A, which came into force as per the aforesaid letter from 23.08.1993



itself. Section 32A containing the provisions regarding Gram Raksha Dal (Village Volunteer Force) and Section 1(2) thereof provided that the Amendment would have retrospective effect from 23.08.1993 (i.e., the date, when 1993 Act came into force);

- iv. On 09.02.1998 (Annexure-1/A to the writ application), the Commissioner-cum-Secretary, Rural Development Department, issued a Circular/Letter declaring as invalid and illegal all appointments of *Dalpaties* made after 23.08.1993 (i.e., the date on which the 1993 Act came into force) and, consequently, gave direction to cancel all appointments of *Dalpaties* made after 23.08.1993. Further, under the order, dated 27.06.1994, withdrawing the ban imposed vide wireless communication No. 4379, dated 12.08.1993, aforementioned, was also directed to be treated as ineffective;
- v. On 28.04.1998, pursuant to the

aforesaid direction as contained in the Circular/Letter, dated 09.02.1998, the services of the writ petitioners were terminated;

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- vi. On 21.08.1998, the petitioners-respondents herein filed C.W.J.C. No. 7062 of 1998 in this High Court.
 - vii. The learned single Judge, upon hearing the parties, set aside the Circular/Letter, dated 09.02.1998, as well as the consequential order, dated 28.04.1998, and held that the petitioners shall be entitled to all consequential benefits on account of their having been confirmed on the post of *Dalpati* from the retrospective date. It is significant to mention that such appointees were subsequently confirmed and validly appointed to the post of Panchayat Sewak, as such, they were also entitled to the consequential benefit.
 - viii. On 25.07.2012, the State of Bihar filed Civil Review No. 328 of 2012 seeking review of the judgment and order, dated



20.12.2011, passed in C.W.J.C. No. 7062 of 1998 (and other analogous petitions), on the ground, *inter alia*, that the binding precedent of this Court rendered by a Division Bench in the case of ***Rohtas Zila Gram Raksha Dal Sangh Vs The State of Bihar and others*** on 02.08.2001, wherein each and every aspect of the matter was dealt with and the Circular/Letter, dated 09.02.1998, had been held to be valid, was not taken note of. Further, the judgment of the Division Bench was also upheld by the Supreme Court in Civil Appeal Nos. 7992-8028 of 2001 vide order, dated 18.07.2006, meaning thereby that decision of the Division Bench in ***Rohtas Zila Gram Raksha Dal Sangh*** (supra) had not been brought to the knowledge of the Single Judge, the judgment/order of the Single Judge was *per incurium*.

3. In the writ application, the appellants herein (who were respondents in the writ petition), had contested



the writ petition by contending that with the enactment of 1993 Act, old Bihar Panchayati Raj Act, 1947 (Bihar Act 7 of 1948) stood repealed as provided under Section 157 of the 1993 Act. The further case of the appellants herein (i.e., respondents in the writ application) was that in the light of the power conferred by Section 27 of the Bihar Panchayati Raj Act, 1947 (hereinafter referred to as 'the Act 1947'). Bihar Panchayat Village Volunteers Rules (hereinafter referred to as 'the Rules, 1949) was framed and enacted. Therefore, with the repeal of Act 1947, all Rules, framed thereafter including Rules, 1949, automatically stood repealed in view of the provisions as contained in Section 157 of the Act, 1993, and any appointment, made pursuant to the Rules 1949, after enactment of Act, 1993, was *ab initio void* and illegal. Thus, the appointment of *Dalpatis* of the writ application, having been made after the amendment Act, 1993, such appointments could not be sustained in the eyes of law.

4. It was also contended by the writ petitioners (i.e., the respondents herein) that the order, dated 24.02.1997, passed by the Supreme Court does not have any bearing on the facts and circumstances of the present case as it related to removal of the elected representatives of Panchayat Raj institutions and not to the appointments of the *Dalpaties*.



5. The learned single Judge, vide his order, dated 20.12.2011, after hearing the parties, set aside the Circular, dated 09.02.1998, as well as the order, dated 28.04.1998, and held that the petitioners would be entitled to all consequential benefits on account of their being confirmed on the post of *Dalpati* from retrospective date and in pursuance of such appointments since they were subsequently confirmed and finally appointed to the post of Panchayat Sewak.

6. Learned counsel, appearing for the appellants, submits that it was against the aforementioned order that the review application was preferred by the appellant, State of Bihar. In the said application for Review, while citing the judgment of the Division Bench in the case of ***Rohtas Zila Gram Raksha Dal Sangh*** (supra), it was averred that this Court clearly dealt with each and every aspect of the issue and had decided against the writ petitioners. The aforesaid judgments were upheld by the Supreme Court in Civil Appeal No. 7992-8028 of 2001, vide order, dated 18.07.2006. However, since the same could not be brought to the notice of the learned single Judge, the said judgment, under review, is *per incurium* and calls for appropriate modification.

7. The learned single Judge, having considered



the judgment rendered by the Division Bench of this Court, modified the order passed in the writ application and recalled the order setting aside Memo No. 164, dated 09.02.1998. However, once again, the Court set aside the order of termination, dated 28.03.1998, issued in the light of the direction of the State Government under Memo No. 164, dated 09.02.1998 and he further clarified and held that the writ petitioners would be entitled to all the consequential benefits on account of their being confirmed on the post of *Dalpati* from retrospective dates since they had been subsequently confirmed and validly appointed to the posts of Panchayat Sewak. Hence, the present Appeals.

8. We have heard Mr. Harish Kumar, learned Counsel, appearing on behalf of appellant, State of Bihar, and Mr. Jitendra Kumar Roy, learned Counsel, appearing on behalf of the respondents, we have perused the materials on record including several orders passed by this Court in various writ applications, which have been adjudicated upon by various Benches. The same are being summarized in order to arrive at the logical conclusion.

- i. In C.W.J.C. No. 1997 of 2000 (***Ramdas Thakur Vs. State of Bihar and others***), this Court, vide order, dated 01.08.2005, held that "*they should be appointed by direct*



recruitment to the post of Secretary of every Gram Panchayat and not by way of Dalpaties as per, provisions of Section 32 of Bihar Panchayat Act, 1993" (Annexure-1 to the Memo of Appeal).

- ii. In CWJC No. 8954 of 2002 (***Dinesh Kumar Mandal Vs. State of Bihar and others***), seeking similar relief, the writ application was dismissed vide order, dated 14.08.2002 (Annexure-2 to the Memo of Appeal).
- iii. LPA No. 475 of 2006 (***State of Bihar and Others Vs. Radhey Shyam Dubey and another***), a Division Bench of this Court held that *"if the post of Panchayat Sewak do not exist they may not bound to fill up the post"* (Annexure-3 to the Memo of Appeal).
- iv. In a subsequent litigation, bearing C.W.J.C. No. 7498 of 2004 (***Umesh Prasad Yadav and others Vs. State of Bihar and others***), this Court, vide its order, dated 18.04.2006, held that *"the post of Sewak as was available before the 1993 Act came into force was a post created by the legislature. The legislature itself has abolished that post and*

has created a new post of Secretary by the 1993 Act. Once, the legislature has touched a legislative field, the executive is not entitled to touch that field (Annexure-4 to the Memo of Appeal).

- v. Subsequently, in C.W.J.C. No. 14561 of 2003 and its analogous cases, vide order, dated 03.01.2006, a Division Bench directed the respondents, *'to consider the case of the petitioners for appointment to the post of Panchayt Sewak, only if the government decides to make such appointments in future.*
- vi. It is pertinent to mention here that since 2006, the Government has not made any appointment to the post of Panchayt Sewak as the same was not permitted under the provisions of 1993 Act, which came into force on 23.08.1993, wherein there was no post with the nomenclature of "Panchayat Sewak." (Annexure-5 to the Memo of Appeal).
- vii. Thereafter, in C.W.J.C. No. 1021 of 2000 (***Sanjay Kumar Vs. State of Bihar and others***), this Court, vide order, dated 03.03.2006, held that *"if despite there being*



no direction of the Government to make such appointment, those appointments are being made, the appointing authorities as well as the appointees are exposing themselves to very many complications, including criminal proceeding against them." (Annexure-6 to the Memo of Appeal).

9. Thus, the appellants herein (i.e., the respondents of the writ application), contended that in such a background of litigation, it can be safely stated that the order passed by the learned single Judge was not sustainable.

10. Learned counsel, appearing on behalf of the appellants, further averred that the judgment, under appeal, could also be assailed as being against the provisions of Section 33 of the 2006 Act, which deals with the provisions of Gram Raksha Dal and *Dalpati*, which, in the interest of justice, are quoted hereunder:-

"Section 33

"For general watch and ward and for meeting emergent event like fire, flood, breach of embankment, collapse of bridge, outbreak 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 village between the age of 18 to 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. It is, thus, clear from perusal of Section 33 that the Gram Raksha Dal is a volunteer force set up in consonance with the fundamental duties as enshrined in Part IV A of the Constitution of India. It is submitted that out of the eleven fundamental duties mentioned under Article 11-A of the Constitution of India, the following two fundamental duties are core to the concept of constituting Gram Raksha Dal at the Panchayat level:-

- a. To defend the country and render national service when called upon to do so.*
- b. To safeguard public property and to abjure violence.*

12. Thus, the members of the Gram Raksha Dal, having age group of 18-30 years, do render national service, as provided in Article 51-A of the Constitution of India, but the members of the Gram Raksha Dal did not get any *honorarium* for rendering volunteering service, whereas *Dalpati* get a token *honorarium*. However, it does not mean that they have any claim to employment.

13. We also accept the submission of learned



counsel for the appellants that the appointment of *Dalpatis* used to prevail under the Act of 1949 and the Rules framed thereunder; but with the amendment in the Bihar Panchayat Raj (Amendment) Act, 1995, by which Section 32-A has been incorporated with effect from 23.08.1993, thus, the letter, dated 27.06.1994, which speaks about old procedure of appointment, is, in the teeth of legislative pronouncement, redundant and any appointment, made on the post of *Dalpati*, subsequent to the 23.08.1993 under the Rules 1949, would be *ab initio void* and illegal. No appointment to the post of *Dalpati* was permissible after the enactment of Act, 1993. Consequently, the post of Panchayat Sewak also ceased to exist after 23.08.1993. We further agree with the contention that the Executive Committee of the Gram Panchayat, which was endowed with the power of appointment of *Dalpatis*, also stood denuded of its authority by Section 32-A of the Act, 1993. This aspect of the matter was dealt with in several writ applications by this Court earlier. It is also contended that any executive order, issued by the Directorate of Panchayat Raj, vide letter, dated 27.06.1994, was *per se* illegal as it was contrary to the legislative enactment as there is no provision in the Act, 1993, to constitute an Executive Committee of Gram Panchayat for appointing *Dalpaties*. We find considerable force in the submissions so made on behalf of

the appellants.

14. In any event, the executive instructions cannot override legislative pronouncements. It is lastly, contended that over and above all, the issue at hand has already been set at rest as circular, issued, under Memo No. 164, dated 09.02.1998, was upheld by the Division Bench of this Court and had attained finality before the Apex Court too.

15. We have, thus, no hesitation in holding that the order, under appeal, could not have been passed setting aside the letter contained in Memo No. 164, dated 09.02.1998, and also the order, dated 28.04.1998, nor could the learned single Judge have held that the petitioners shall be entitled to all consequential benefits on their having been confirmed on the post of *Dalpati* with effect from the retrospective date and, having subsequently been confirmed and validly appointed to the post of Panchayat Sewak.

16. However, in the Review Application, the learned single Judge, upon hearing the review petitioners/appellants, not only recalled the order, whereby Memo No. 164, dated 09.02.1998, and also order, dated 28.03.1998, whereby the termination order of the writ petitioners had been passed, but went on to hold that the writ petitioners would be entitled to all consequential benefits on their being confirmed on the post of *Dalpatis* from

retrospective date and, having been subsequently confirmed and validly appointed to the post of Panchayat Sewak. This is in our considered view, not sustainable and cannot, therefore, survive.

17. We, accordingly, set aside the order, dated 08.04.2015, passed by the learned single Judge. We have also, thus, no hesitation in holding that the orders, passed in the respective writ applications out which these appeals emanate, fit to be faulted. The same orders are, thus, set aside.

18. In the result, these appeals are allowed.

(Anjana Mishra, J)

I. A. Ansari, CJ : I agree.

(I. A. Ansari, CJ)

Saif/-

AFR/NAFR	N.A.F.R.
CAV DATE	24.02.2016
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