

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Appeal No.621 of 2015**

1. Smt.Sarswati Bai w/o Aatma Ram Aged about 48 years, Res-
ident of Village-Bodhara, Gram Panchayat-Bodhara, Post-Dhaneli,
Police Sttion & Tahsil-Gurur, District Balod (CG)
2. Smt.Aroopa Sahu W/o Kunjlal, Aged about 40 years, Resident
of village Bohara, Gram Panchayat Bohara, Police Station & Tah-
sil -Gurur, District-Balod (CG)

---- Appellants**Versus**

1. State of Chhattisgarh through its the Secretary, Panchayat Avam
Samaj Kalyan Vibhag, Mahanadi Bhawan, New Raipur, District-
Raipur (CG)
2. The Collector, District Balod (CG)
3. The Chief Executive Officer Zila Panchayat-Balod, District-Balod
(CG)
4. The Chief Executive Officer, Janpad Panchayat-Gurur, District-
Balod (CG)
5. The Secretary, Gram Panchayat-Bodhara, Police Station/Tahsil
Gurur, District-Balod (CG)
6. The Secretary, Gram Panchayat-Bohara, Police Station/Tahsil-
Gurur, District-Balod (CG)
7. Kamtaram Sahu S/o late Manrakhan Sahu, Aged about 57 yers,
residence of Gram Panchayat-Bohara, Police Station/Tahsil-Gu-
rur, District-Balod (CG)

---- Respondents

For Appellants	:	Mr.Ravi Maheshwari, Advocate
For Res.No.1 and 2:		Mr.Y.S.Thakur, Dy.Advocate General
For Res.No.3 to 7	:	None present

Hon'ble Shri Deepak Gupta, Chief Justice
Hon'ble Shri Justice Sanjay K. Agrawal

Judgement on Board**Per Deepak Gupta, Chief Justice****11/07/2016**

1. The interesting question which arises in this writ appeal is as follows:-

“What is the procedure to be followed when nobody contests the election from the category for which the post is reserved.”

2. Factual matrix of the case is as follows:-

Elections were held to fill up the posts of Gram Panchayat in the State of Chhattisgarh in 2015. We are concerned with the election of Sarpanch in Gram Panchayat Bodhara, which was reserved for woman belonging to Scheduled Tribe category. However, no woman belonging to Scheduled Tribe category filed the nomination paper to contest the post of Sarpanch. Therefore, no election was held to fill up the post of Sarpanch which post was to be filled up by direct election from the electors. However, all other posts of 'Panchas', who are elected by direct election from amongst the election, were duly filled up. This led to a very unusual situation where there was elected Panchayat, but there was no Sarpanch of the Panchayat.

3. The Panchayat in its wisdom took a view that Section 38 of the C.G. Panchayat Raj Adhiniyam, 1993 (henceforth “Adhiniyam of 1993”) would be applicable and they elected one of the lady 'Panchas' Saraswati Bai belonging to OBC category as their Sarpanch. However, the Chief Executive Officer of Janpad Panchayat, Gurur passed an order on 6.7.2015, in which it was mentioned that the post of Sarpanch could not be filled up by

election from amongst the 'Panchas' and in terms of Rule 3(2) of the Chhattisgarh Panchayat (Powers and Function of Sarpanch and Up-Sarpanch of Gram Panchayat, President and Vice-President of Janpad Panchayat and Zila Panchayat) Rules, 1994 (henceforth "Rules of 1994"), it is the Up-Sarpanch, who shall carry on the work of Sarpanch till the election is held to fill up the post of Sarpanch.

4. Herein it would be pertinent to mention that Up-Sarpanch is also elected by indirect election from amongst the panchas and not directly by electors.
5. To appreciate the issue as to how such post of Sarpanch, which is lying vacant not because of any vacancy having been caused, but because there was no person willing to contest the post from amongst category for which the post was reserved has to be filled up, it would be relevant to make reference to certain provisions of the Act and the Rules.
6. Section 38 of the Adhiniyam of 1993 reads as follows:-

“38. Filling up of vacancies.”-(1) (a) In the event of death, resignation, no confidence motion, or removal of an office bearer of a Panchayat or on his becoming a member of State Legislative Assembly or a member of either House of Parliament before the expiry of his term, a casual vacancy shall be deemed to have occurred in his office and such vacancy shall be filled as soon as may be by election in accordance with the provisions of the Act and the rules made thereunder;

(b) in the event of occurrence of a casual vacancy in

the office of the Sarpanch of a Gram Panchayat, the Secretary of the Gram Panchayat, as the case may be, shall cause to be called a special meeting of the Panchayat immediately, but not later than fifteen days from the date of receipt of information from the prescribed authority regarding the vacancy and the members shall elect from amongst themselves a person to hold the office temporarily till a new Sarpanch, as the case may be, is elected in accordance with the provisions of this Act and the rules made thereunder and such officiating Sarpanch, as the case may be, shall perform all the duties and exercise all the powers of Sarpanch, during the pendency of election:

Provided that if the office of the Sarpanch is reserved for the member of Scheduled Castes or Scheduled Tribes or other Backward Classes or for a woman, the officiating Sarpanch shall be elected from amongst the members belonging to the same category;

Provided further that where the office of Sarpanch is reserved for a woman belonging to Scheduled Castes or Scheduled Tribes or other Backward classes, and there is no other woman belonging to that category who can be elected to officiate as Sarpanch, any other woman belonging to the other reserved categories may be elected to officiate as Sarpanch during the casual vacancy.

(c) If the out-going office bearer fails to hand over any record, article, money or property of the Panchayat forthwith to his successor the prescribed authority may by order in writing direct him to do so and on his failure to comply with such direction the prescribed authority may proceed against him in accordance with Section 92 and take necessary steps to prosecute him under Section 98.”

7. Rule 89 of the C.G. Panchayat Nirvachan Niyam, 1995 (henceforth “Rules of 1995”) reads as follows:-

“Casual vacancies in Panchayats.”-(1) When any vacancy occurs due to any reason such as death, disqualification, resignation, absence without leave, setting aside of election etc. of a member of a Panchayat, or Sarpanch the Secretary of the Gram Panchayat or the Chief Executive Officer of the Janpad Panchayat or the Zila Panchayat as the case may be, shall inform the District Election Officer about such vacancy within seven days from the date of its occurrence.

(2) the District Election Officer shall ensure due observance of sub-rule (1) and send to the Commission, in the first week of every month a consolidated statement of vacancies in the various Panchayats of the District, whereupon, the Commission shall take necessary action to fill the vacant seats and the provisions of these rules shall, mutatis-mutandis apply to fresh poll taken to fill such seats.”

8. A bare reading of Section 38 of the Adhiniyam of 1993 clearly shows that when the vacancy of office bearer of Panchayat occurs on account of death, resignation, no-confidence motion, removal from office or office bearer being elected as a member of Legislative Assembly or either House of Parliament, it would be deemed that such a vacancy is a casual vacancy. It is further provided in clause (b) of Section 38 of the Adhiniyam of 1993 that when such a casual vacancy occurs with regard to office of Sarpanch of Gram Panchayat, then the Secretary of the Gram Panchayat shall call a special meeting of the Panchayat within fifteen days of the knowledge of occurrence of a casual vacancy. In such a meeting, members of Panchayat are to elect one of the Panchas from amongst themselves to hold the office of Sarpanch

temporarily till the post of Sarpanch is filled up in accordance with the Rules. First proviso to clause (b) of Section 38 of the Adhiniyam of 1993 lays down that in case the post of office of Sarpanch is reserved for Scheduled Castes or Scheduled Tribes or Other Backward Classes or for a woman, then the officiating Sarpanch shall be elected from amongst the members belonging to the same category, therefore, if the Sarpanch, who was holding the office belonging to the Scheduled Castes and post was reserved for him, then this section enjoins that the person, who holds the post temporarily from amongst the Panchas, should also belong to the Scheduled Castes, similarly in case of Scheduled Tribes, Other Backward Class and for a woman. The purpose is that the reservation which has been made for a particular class is given effect to notwithstanding the fact that the person who was elected from that class has either resigned or has died or for any other reason, the vacancy is occurred. Woman has also been treated as a class so if the post is reserved for woman, then only some other woman can be elected to hold the post of Sarpanch temporarily in terms of Section 38 of the Adhiniyam of 1993. There is a second proviso to clause (b) of Section 38 and this deals with woman belonging to the reserved category such as Scheduled Castes, Scheduled Tribes and Other Backward Class and this provides that if there be no other woman belonging to the category for which the post was reserved, then also a woman belonging to other reserved category may be elected, meaning thereby that a woman

belonging to the general category cannot be appointed as temporary Sarpanch. The only time when we can visualize such a thing happening is if there is no other woman belonging to the reserved category functioning as a panch or none of the woman from the reserved category elected as panch, are willing to act as Sarpanch.

9. Coming to Rule 89 of the Rules, 1995 which deals with the filling up of casual vacancies in Panchayats. Clause (1) of Rule 89 of the Rules of 1995 deals not only with casual vacancies arising out of death, disqualification, resignation, absence without leave, setting aside of election. The use of the word 'etc' after setting aside of the election clearly envisages that the Rule Making Authority in its wisdom while framing the rules was aware that there could be vacancies of other types also and with regard to these vacancies it was held that as soon as such vacancy occurs, the Secretary of the Gram Panchayat or the Panch shall inform the District Election Officer about such vacancy within seven days from the date of its occurrence. Thereafter the District Election Officer is to send it to the Commission, in the first week of every month a consolidated statement of vacancies in the various Panchayats of the District and thereafter duty is cast upon the Commission to take necessary action to fill up the vacancies. Sub-rule (2) clearly provides that these Rules i.e. Rules of 1995 shall 'mutatis-mutandis' apply to fresh poll conducted to fill up such vacancies.

- 10.** Coming to Rule 3 of the Chhattisgarh Panchayat (Powers and Function of Sarpanch and Up-Sarpanch of Gram Panchayat, President and Vice-President of Janpad Panchayat and Zila Panchayat) Rules, 1994 (henceforth “Rules of 1994”), it would be apposite to make reference to Rule 3 of the Rules of 1994, which reads as follows:-

“3. Powers and Functions of Sarpanch and Up-Sarpanch of Gram Panchayat.-(1) The Sarpanch shall be directly responsible for carrying out or getting to be carried out:-

(a) xxx xxx xxx

(2) In the absence of the Sarpanch, the powers and functions of the Sarpanch shall be exercised and performed by the Up-Sarpanch.

(3) xxx xxx xxx.”

- 11.** Rule 3 (2) of the Rules of 1994 envisages that when the Sarpanch is absent, then in his absence all the powers and functions of the Sarpanch shall be exercised and performed by the Up-Sarpanch.
- 12.** Learned Single Judge has held that the action of the Chief Executive Officer of Janpad Panchayat, Gurur is based on this Rule. Learned Single Judge has also held that applying this Rule the action of the Chief Executive Officer is legal and justified.
- 13.** Writ Petitioner i.e. Smt.Saraswati Bai belongs to Other Backward Class category. No lady belonging to the Scheduled Tribe category contested the post of Sarpanch in the Gram Panchayat Bodhara. She was elected a 'Panch' as a woman belonging to

OBC category i.e. Other Backward Class in terms of Section 38 of the Adhiniyam of 1993. The other 'Panchas' elected her as Sarpanch against the vacant post. After the Chief Executive Officer of Janpad Panchayat, Gurur passed an order on 6.7.2015, the petitioner filed the writ petition challenging the said order and the same was disposed off upholding the contention of the State that Rule 3 (2) of the Rules of 1995 would be applicable. Learned Single Judge also gave a direction that the elections be conducted within six months.

- 14.** By means of this writ appeal, Smt.Saraswati Bai, who was elected as Sarpanch by the panchas, has challenged the judgment of the learned Single Judge.
- 15.** We have already made detailed reference to the legal provisions and this case is totally based on legal provisions. We have been unable to trace out any legal provisions in the Act or the Rules dealing with the situation like the present one where no person from amongst the reserved category of woman (Scheduled Tribe in this case) was willing to contest the election to the post of Sarpanch. It is not for us but for the State to decide whether the Rules should be amended or not, but we would definitely recommend that the State may consider making some provisions in the Rules to deal with such a situation. If no person from a particular category for which the post of Sarpanch is reserved files nomination by the last date of filing of nomination form, then the Election Commission within next 3-4 days should have the power

to reserve this post from some other category. It may be true that the process of election may become slightly inconvenient, but this would avoid further complications and difficulties.

- 16.** As far as the present case is concerned, we are clearly of the view that Gram Panchayats are the bedrock of our democratic system. There can be no dispute with the proposition that democracy is part of the basic structure of the Constitution. The preamble to the Constitution itself makes that it shall be a Democratic Republic. Therefore, the endeavour of the Court always has to uphold the system, which is more democratic especially when there are no direct Rules on the issue.
- 17.** We do appreciate that Section 38 of the Adhiniyam of 1993 is headed 'filling up of vacancies'. We also appreciate that vacancy occurs only once the post is filled up. However, we see no reason why the principles enunciated in Section 38, which are very democratic, should not apply to a case like the present one where no person from the category for which the post was reserved has filed nomination paper to contest the post of Sarpanch of Gram Panchayat. It goes without saying that Panchayat cannot be left headless. It must have a Sarpanch and the only issue is who should function as Sarpanch till fresh election takes place to fill up the post of Sarpanch.
- 18.** For the very same reason why we have held that Section 38 may not directly deal with the situation of this type, we are also clearly of the view that Rule 3(2) of the Rules of 1994 would be wholly

inapplicable. In fact, Rule 3(2) deals with the situation not where there is a casual vacancy for the post of Sarpanch, but probably deals with a situation where the Sarpanch is absent. This means that the Panchayat had a duly elected Sarpanch and when this Sarpanch is not present, then the functions of the Sarpanch shall be performed by the Up-Sarpanch. We are not in the agreement with the proposition that this Rule governs the filling up of the post of Sarpanch for which no elections were held due to lack of proper nomination. Rule 89 of the Rules of 1995 may definitely deal with a situation of this type because the word 'etc' has been used after five words i.e. death, disqualification, resignation, absence without leave and setting aside of election. This in our opinion would cover up even a situation where the post of Sarpanch is lying vacant because of no person having fought the election. In such a situation, it is the duty of the Secretary of the Gram Panchayat to refer the matter to the District Election Officer, who in turn, will refer to the Election Commission and the Commission, in our opinion, shall take necessary action to fill up the vacant post within six months because that is the period prescribed under the Act and the Rules for holding normal election to fill up these posts. Since these Rules apply mutatis-mutandis even to fresh polls which take place in terms of Rule 89 of the Rules, 1995, the period of six months would also apply here.

19. This brings us back to Section 38 of the Adhiniyam of 1993. This

is an Act framed in furtherance of Chapter IXA of the Constitution of India. Even if there would be conflict between Rule 3 of the Rules of 1994 and provisions of the Act, it is this Act which will prevail and therefore, we have no hesitation in coming to the conclusion that if in such a situation like the present one where no lady belonging to the Scheduled Tribe category filed nomination paper and consequently post of Sarpanch could not be filled up, then the only course left was to call for a meeting of the 'Panchas' and in this meeting, the Up-Sarpanch may exercise the powers of the Sarpanch. However, in this meeting another woman either belonging to the Scheduled Tribe category or in the absence of such a woman, a woman belonging to the Scheduled Caste category or Other Backward Class category had to be elected from amongst the panchas as Sarpanch of Gram Panchayat. There is no other course available. However, we would like to make it clear that the person so elected shall hold the post of Sarpanch temporarily till the Commission conducts the election as required under Rule 89 of the Rules of 1995.

- 20.** In view of the above discussion, we are constrained to hold that we cannot agree with the finding given by the learned Single Judge. We accordingly allow the writ appeal and set aside the judgment dated 27.10.2015 passed by the learned Single Judge in W.P. (C) No.1424 of 2015 and direct that till the elections are held, the appellant, who was duly elected from amongst the panchas, shall function as Sarpanch of Gram Panchayat

Bodhara. We further direct the Commission to ensure that the direction of the learned Single Judge to hold elections, if already not complied with, is duly complied with latest by 7th November, 2016.

Sd/-
(Deepak Gupta)
Chief Justice

Sd/-
(Sanjay K.Agrawal)
Judge

B/-