



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.07.2020

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P (MD)No.7444 of 2020

and

WMP (MD)No.6903 & 7138 of 2020

Ramu

... Petitioner

Vs.

1.The Secretary to Government,
Municipal Administration and
Water Supply Department,
Secretariat, Chennai - 600 009.

2.The District Collector,
Sivagangai District, Sivagangai.

3.The Block Development Officer,
Thiruppuvanam,
Sivagangai District.

4.The Assistant Director, (Panchayats),
Sivagangai District.
(R4 is suo motu amended as per
order dated 21.07.2020)

... Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned tender notification of the third respondents, dated 01.07.2020 in Na.Ka.No.A2/2225/2019 and quash the same and consequently direct the third respondent to include the works mentioned by the petitioner in his representation dated 28.05.2020 and pass such further or other orders as this Court may deems fit in the circumstances of the case and thus render justice.

For Petitioner : Mr.G.Prabhu Rajadurai
for Mr.J.Anandkumar

For R1, R2 & R4: Ms.S.Srimathy,
Special Government Pleader

For R3 : Ms.J.Padmavathi Devi
Special Government Pleader

**ORDER**

The petitioner is an elected ward member of Thiruppuvanam Panchayat Union. It is in Sivagangai District. He challenges the tender notification bearing Na.Ka.No.A2/2225/2019 dated 01.07.2020 issued by the Block Development Officer, Thiruppuvanam. He alleges that the choice of tender works has been influenced by political considerations. The more important ones are to be carried out in the wards that have elected the candidates belonging to the party ruling the State. Out of seventeen members in the panchayat union, nine belong to the opposition parties. One independent ward member is also with them. The party ruling the State could not secure a majority in this panchayat union. Hence, the officials are not convening the meetings for holding elections for the posts of Chairman and Vice-chairman. Taking advantage of the situation, the third respondent has issued the impugned tender notification bypassing the local body.

2.The respondents have filed counter affidavits controverting the aforesaid allegations. Their stand is that a communication was issued by the third respondent vide Na.Ka.No.A2/2225/2019 dated 22.05.2020 to all ward members requesting them to identify the welfare works to be carried out in their respective wards. In response thereto, the petitioner herein submitted letter dated 28.05.2020 identifying as many as three works. Similar applications were given by the other ward members also. These works were to be carried out by utilizing the fund allocation made by the 15th Finance Commission. The applications submitted by the petitioner as well as the other ward members are being processed. The works that are the subject matter of the impugned tender notification are to be carried out under the general fund of the panchayat. Proposals for getting administrative sanction for these works were periodically submitted from March, 2020 to the second respondent. Sanction had also been accorded by the second respondent. The works mentioned in the impugned tender notification have no nexus with the 15th Finance Commission fund.

3.The learned Special Government Pleader contended that this Court ought not to interfere with the impugned tender process. She questioned the locus standi of the petitioner who is labouring under the impression that issuance of the impugned notification constitutes rejection of his request made vide letter dated 28.05.2020. The immediate execution of the works is necessary for the welfare of the general public. There is statutory backing traceable to Section 86 and Section 203 of the Tamil Nadu Panchayats Act, 1994 (hereinafter referred to as "the Act"). That apart, the third respondent is very much authorised to discharge the functions of the panchayat union in his capacity as the Special Officer appointed under Section 261-A of the Act.



4. I carefully considered the rival contentions. In my view, the locus standi of the petitioner cannot be questioned. He is an elected ward member. He can certainly call the local administration to account, more so when the matter pertains to his panchayat union. Prof. Upendra Baxi recently wrote thus :

"Whenever I read the German thinker Rainer Frost who urges that underlying all human rights is the right to justification of any state action, I am reminded of the great achievement of the Indian Supreme Court whose jurisprudence of administrative law has always been to extol "the duty to give reasons". The close relation between administrative law, constitutional law, and environmental law in India has now matured into a wider judicial doctrine insisting as a backbone of democratic public accountability that all power is held as a public trust, and administrative action must always be accompanied by the reasoned elaboration of executive action."

Since the tender works are to be performed out of the general fund of the panchayat, the third respondent is obliged to satisfy this Court about his statutory authority to issue the impugned notification.

5. After an initial attempt to defend the case in the light of Section 203 of the Act which confers emergency power on the District Collector, the Special Government Pleader fairly submitted that she is not pursuing that line of argument. She sought to take shelter behind Sections 86 and 261-A of the Act. I am afraid that there is an inherent contradiction in this stand. Section 86 of the Act reads as under :

"86. Emergency powers of Executive Authority and Commissioner.- The Executive Authority or the Commissioner may in cases of emergency direct the execution of any work or the doing of any act which requires the sanction of the Village Panchayat or the Panchayat Union Council, as the case may be, and the immediate execution or doing of which is, in his opinion, necessary for the health or safety of the public, and may direct that the expenses of executing such work or doing such act shall be paid from the Village Panchayat Fund or the Panchayat Union Fund, as the case may be:

Provided that -

(a) he shall not act under this section in contravention of any order of the Village Panchayat or the Panchayat Union Council prohibiting the execution



of any particular work or the doing of any particular act; and

(b) he shall report the action taken under this section and the reasons therefor to the Village Panchayat or the Panchayat Union Council at its next meeting."

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Section 261-A of the Act reads as under :

"261-A. Transitory provision.-

(1) Notwithstanding anything contained in this Act, or in any other law for the time being in force, the Government may, by notification, appoint Special Officers to exercise the powers and discharge the functions of the village panchayats, the panchayat union councils, or the District Panchayats, as the case may be, until the day on which the first meetings of the Village Panchayats, the Panchayat Union Councils, or the District Panchayats, as the case may be, are held after ordinary elections to the said panchayats after the date of commencement of the Tamil Nadu Panchayats (Amendment) Act, 2017 or upto the 30th day of June 2020, whichever is earlier."

Section 261-A of the Act will come into play only if there is no duly elected local body. On the other hand, Section 86 presupposes the existence of a functioning local body whose meetings are regularly held. Hence Section 86 & 261-A of the Act cannot go together.

6. The power under Section 86 of the Act can be invoked only in cases of emergency. The Commissioner must also opine that the execution of the work is necessary for the health or safety of the public. In the case on hand, neither of the requirements are satisfied. A mere look at the nature of the works is enough to show that they are not emergent. Even according to the respondents, proposals were submitted way back in March, 2020. The tender notification was originally issued on 09.06.2020. Since the said tender process could not take off, a second notification was issued on 01.07.2020. The tender was to be opened on 10.07.2020. Oxford Advanced Learner's Dictionary (9th Edition) defines "emergency" as a sudden, serious and dangerous event or situation which needs immediate action to deal with it. The records produced before me do not indicate anywhere that the third respondent had contemporaneously opined in the files or anywhere that the works are emergent in nature and that their immediate execution is necessary for the health or the safety of the public. Such a justification cannot be formulated subsequently in pleadings or during arguments before the Court. The impugned action has to be justified only on the strength of the original position. As

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observed by the Supreme Court of the United States in **Department of Homeland Security vs. Regents of University of California (June, 2020)**, considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply 'convenient litigating positions'. Permitting agencies to invoke belated justifications, on the other hand, can upset the orderly functioning of the process of review forcing both litigants and courts to chase a moving target. I, therefore, hold that Section 86 of the Act will not come to the rescue of the respondents.

7.The learned Special Government Pleader contended that inasmuch as the Chairman and Vice-chairman of the panchayat union council have not been elected, the Block Development Officer can very well continue to act as its Special Officer. According to her, the first meeting of the panchayat has not been held so far. The meeting held on 06.01.2020 for administering oath to the members cannot be termed as the first meeting of the panchayat.

8.The object behind the incorporation of Section 261-A can easily be understood. Article 243E of the Constitution of India states that every panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. Section 18(1) of the Act also states that every Panchayat Union Council, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting after each ordinary election and no longer. If election for the panchayat union council is not completed and the panchayat union council is not reconstituted, there will be vacuum. Law abhors vacuum. Therefore, the legislature has provided for appointment of a Special Officer who will step in and act for and in the place of Panchayat Union. Of course, the appointment of a Special Officer cannot be for an indefinite period. It is only till the first meeting of the panchayat union council is held.

9.The question that arises for my consideration is whether the meeting held on 06.01.2020 for administering oath to the elected ward members can be considered as the first meeting or not. There is nothing technical about this expression. It has to be construed in its plain meaning. As pointed out by the learned counsel appearing for the petitioner, according to the programme of election issued by the Tamil Nadu Election Commission and published in the Tamil Nadu Government Gazette No.455 dated 09.12.2019, 06.01.2020 is the date on which the first meeting of the newly elected ward members shall be held for assumption of office by taking oath or affirmation.



10. Rule 70-A of the Tamil Nadu Panchayats (Election) Rules, 1995 would shed more light on this issue. It reads as under :

"70-A. Oath or Affirmation by the President /

Member.- (1) In the first meeting of the Panchayat after an ordinary election or after a causal election,-

(a) the President of Village Panchayat shall make and subscribe an Oath or Affirmation before the Returning Officer or Assistant Returning Officer;

(b) the members of the Village Panchayat shall make and subscribe an Oath or Affirmation in the presence of the President of the Village Panchayat;

(c) the senior member of Panchayat Union Council or the District Panchayat, as the case may be, nominated by the respective Returning Officers, shall make and subscribe an Oath or Affirmation before such Returning Officers; and

(d) the other members of the Panchayat Union Council or the District Panchayat, as the case may be, shall make and subscribe an Oath or Affirmation in the presence of the senior member, so nominated, of the Panchayat Union Council or the District Panchayat, as the case may be."

A mere reading of the Rule 70-A (c) and (d) would indicate that the meeting in which the members of the panchayat union council take oath is the first meeting. Elections of Chairman and Vice-chairman will take place only thereafter. For electing the Chairman of Panchayat Union Council, the Assistant Director of Rural Development or any other officer equivalent in rank will be the Returning Officer and she has to give at least seven clear days notice to all ward members for the meeting. As per Rule 91 of the Tamil Nadu Panchayats (Election) Rules, 1995, after the declaration of the results of the election of Chairman, the meeting of the Ward members for the election of Vice-Chairman of Panchayat Union Council shall be convened on the notified date and presided over by the very same returning officer. Even a casual look at the statutory scheme set out in Tamil Nadu Panchayats (Election) Rules, 1995, would clearly show that the first meeting is the one when the members take oath or affirmation and the election to the post of Chairman and Vice-chairman take place subsequent to the first meeting. I, therefore, hold that the third respondent cannot take advantage of the non-election of the Chairman and Vice-chairman.



11. The Nani A. Palkhivala Memorial Trust has recently brought out "**A Festschrift in Honour of Nani A. Palkhivala**". Apart from essays & reminiscences, the book contains articles written by the young Nani. Commenting on the immortal novelist Charles Dickens, Nani says "*The sun does set, but Dickens believed that somewhere, the sun was still shining - and he was right.*" The third respondent may be imbued with dickensian optimism. But optimism and assumption are no substitute for legal authority. His appointment as Special Officer for the panchayat union had a built-in sun-set clause. Such clauses provide for automatic termination. Life cannot continue beyond the event or date specified originally. Section 261-A stipulates that the Block Development Officer will be the Special Officer for the panchayat union till the first meeting is held after the election or 30th June, 2020 whichever is earlier. The election was held in December, 2019. The votes were counted on 02.01.2020. 06.01.2020 was the first meeting. The sun had set on the said date for the Special Officer. The belief of the third respondent that even thereafter, he is entitled to continue to function as Special Officer is unfounded. Section 261-A is a transitory provision. "Transitory" means "not permanent". The term of the third respondent as Special Officer came to an end on 06.01.2020.

12. Section 112 of the Act sets out the duty of the panchayat union council to provide for certain matters. It is a long catalogue of works. If a duly elected local body is bypassed, it cannot discharge the functions statutorily mandated. The ground projected by the respondents is not only unsustainable but also flimsy. As per Section 52 of the Act, the role of chairman is only to convene the meetings of the panchayat union council. If the offices of the Chairman or the Vice-chairman are vacant, the Revenue Divisional Officer shall be ex-officio member and chairman of the panchayat union council [vide Section 54(2)].

13. Article 40 of the Constitution of India mandates that the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. The Hon'ble Supreme Court in the decision reported in **(2012) 7 SCC 550 (Village Panchayat, Calangute Vs. The Additional Director of Panchayat-II and Ors)** observed as follows :

"21. The Preamble, Part IV and Part IX of the Constitution must guide our understanding of the Panchayati Raj institutions and the role they play in the lives of the people in rural parts of the country. The conceptualization of the Village Panchayat as a unit of self government having the responsibility to promote social justice and economic development and as a

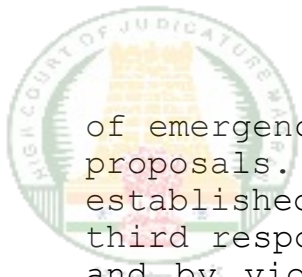


representative of the people within its jurisdiction must be borne in mind while interpreting the laws enacted by the State which seek to define the ambit and scope of the powers and the functions of Panchayats at various levels.

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22. An analysis of Article 40 and Articles 243 to 243O shows that the framers of the Constitution had envisaged Village Panchayat to be the foundation of the country's political democracy - a decentralized form of Government where each village was to be responsible for its own affairs. By enacting the Constitution (Seventy-third Amendment) Act, Parliament has attempted to remedy the defects and remove the deficiencies of the Panchayati Raj system evolved after independence, which failed to live up to the expectation of the people in rural India. The provisions contained in Part IX provide firm basis for self-governance by the people at the grass root through the institution of Panchayats at different levels. For achieving the objectives enshrined in Part IX of the Constitution, the State Legislatures have enacted laws and made provision for devolution of powers upon and assigned various functions listed in the Eleventh Schedule to the Panchayats. The primary focus of the subjects enumerated in the Eleventh Schedule is on social and economic development of the rural parts of the country by conferring upon the Panchayat the status of a constitutional body. Parliament has ensured that the Panchayats would no longer perform the role of simply executing the programs and policies evolved by the political executive of the State. By virtue of the provisions contained in Part IX, the Panchayats have been empowered to formulate and implement their own programs of economic development and social justice in tune with their status as the third tier of government which is mandated to represent the interests of the people living within its jurisdiction. The system of Panchayats envisaged in this Part aims at establishing strong and accountable systems of governance that will in turn ensure more equitable distribution of resources in a manner beneficial to all."

14. The respondents 2 to 4 have not kept in view the constitutional objective as adumbrated above. A duly elected local body has been treated as non-existent and totally ignored in the process of decision-making. While the District Collector is the authority competent to accord administrative sanction for tender works valued more than Rs.50,000/-, the proposals must emanate from the local body concerned. If there is no elected local body, the Block Development Officer can submit proposals. Unless it is a case



of emergency, it is the local body that must deliberate and make the proposals. The learned counsel for the petitioner has convincingly established that the impugned tender notification was issued by the third respondent by usurping the role of the Panchayat Union Council and by violating the provisions of the Tamil Nadu Panchayats Act, 1994. The third respondent cannot invoke either Section 86 or Section 261-A of the Act to sustain the impugned tender notification which clearly lacks jurisdiction. It is quashed. The writ petition stands allowed. There shall be no order as to costs. Connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

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/ /2020

Sub Assistant Registrar(CS)

Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

- 1.The Secretary to Government,
Municipal Administration and
Water Supply Department,
Secretariat, Chennai - 600 009.
- 2.The District Collector,
Sivagangai District, Sivagangai.
- 3.The Block Development Officer,
Thiruppuvanam, Sivagangai District.
- 4.The Assistant Director, (Panchayats),
Sivagangai District.

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21.07.2020

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