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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
ABHAY S. OKA; J., RAJESH BINDAL; J.
10.05.2023
CIVIL APPEAL NO. 3117/2009 WITH CIVIL APPEAL NO. 4071/2009 (IX)
DHANRAJ *versus* **VIKRAM SINGH & ORS.**

Constitution of India, 1950 - In the absence of specific pleadings, a writ court cannot get into the issues of repugnancy or lack of legislative competence. Unless the statutory provision is declared unconstitutional, its implementation cannot be stopped.

For Appellant(s) Mr. Nishant Ramakantrao Katneshwarkar, AOR Mr. Sachin Patil, Adv. Mr. Sanjay Khrde, Adv. Ms. Chandan Ramamurthi, AOR

For Respondent(s) Mr. Tushar Mehta, Solicitor General Mr. Siddharth Dharmadhikari, Adv. Mr. Aaditya Aniruddha Pande, AOR Mr. Bharat Bagla, Adv. Mr. Sourav Singh, Adv. Mr. Nitin Meshram, Adv. Mr. Ritesh Patil, Adv. Mr. Rishi Raj Singh, Adv. Mr. Saurabh Singh, Adv. Mr. Ranbir Singh Yadav, AOR Mr. Shantanu M Adkar, Adv. Ms. Rekha Rani, Adv. Ms. Bharti Tyagi, AOR Mr. Amrish Kumar, AOR Mrs.Aishwarya Bhati, A.S.G. Mrs.Deepabali Dutta, Adv. Mr. B.k Satija, Adv. Mrs.Chitrangada Rashtrawara, Adv. Mr.Jitendra Kumar Tripathi, Adv.

J U D G M E N T

The challenge in these appeals is to the judgment of the Division Bench of the High Court in a writ petition filed by the 6th and 7th respondents invoking Article 226 of the Constitution of India. Prayer (b) of the writ petition filed by 6th and 7th respondents was the only substantive prayer which reads thus:

"The petitioners seek directions to respondents to follow rotation policy for the general elections to Panchayats in the State of Maharashtra to be held in the year 2007, in compliance with the Maharashtra Zilla Parishad and Panchayat Samitis (Manner and Rotation of Reservation of Seats) Rules, 1996.)".

The entire petition proceeds on the footing that in the local body elections which were round the corner, the apprehension of the 6th and 7th respondents was that the provisions of the Panchayat (Extension of Scheduled Areas) Act, 1996[1] will not be given effect to by the State Election Commission.

In paragraph 10 of the writ petition, there is a vague averment that Sections 12(2) and Section 58(1b) of the Zilla Parishad and Panchayat Samiti Act, 1961[2] are not in consonance with parts IX and X of the Constitution of India.

It is necessary to quote the operative part of the impugned judgment which reads thus:

"14. Our conclusions based on the reasons discussed hereinabove, can be summarised as follows;

(1) Second proviso to each of Sections 12 (2) (b) and58 (1-B) (b) of ZPPS Act are in conflict with first proviso to Section 4 (g) of PESA .

(2) Second proviso to each of Sections 42 (4) (a) and67 (5) (a) of ZPPS Act are in conflict with the second proviso to Section 4 (g) of PESA.

[1] "PESA"
[2] "The Act of 1961"

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(3) Proviso to Rule 4 (2) of 1996 Rules is also in conflict with first proviso to Section 4(g) of PESA

(4) It is desirable for Law Departments of State and Union to have a dialogue to remove the discrepancy.

(5) Till the time discrepancy is removed, provisions of ZPPS Act I 1996 Rules to the extent of repugnancy with PESA, as indicated hereinabove, will have to be ignored for practical application.

(6) It is not possible to treat Scheduled Area and other part from the same Panchayat, as separate zones, controlled by PESA and ZPPS Act, for the purpose of elections to Panchayats.

(7) State Election Commission cannot deny responsibility of implementation of PESA in the field.

In view of conclusions hereinabove, the writ petition will have to be and is accordingly allowed.

Rule, which was made returnable forthwith by consent of the parties at the commencement of the arguments, is made absolute, by directing Respondent nos.l and 2 to implement the provisions of PESA for the elections of Panchayats at all levels in the districts of Dhule and Nandurbar."

After having heard the learned counsel appearing for the parties, we are of the view that the entire exercise undertaken by the High Court of going into the issue of validity of the provisions of the 1961 Act and the rules framed thereunder was uncalled for. The reason is there was no challenge to the validity of the provisions of the 1961 Act in the writ petition.

The High Court records that there is a conflict between certain provisions of the 1961 Act and Section 4(g) of PESA. It is also observed that there is a conflict between proviso to Rule 4(2) of the 1996 Rules framed under the 1961 Act with Section 4(g) of PESA.

Surprisingly, the High Court expressed a view that the law departments of the State and the Union should have a dialogue to remove the discrepancies. Further, the Court directed that till the discrepancies are removed by the legislatures, the provisions of the 1961 Act and the 1996 Rules framed thereunder to the extent of repugnancy with PESA shall be ignored "for practical application". Thereafter, the High Court proceeded to issue a Writ of Mandamus directing the State to implement the provisions of PESA for the elections of Panchayats at all levels in the districts of Dhule and Nandurbar.

The law is well settled. There is always a presumption of constitutionality in favour of a statutory instrument. Secondly, in the writ petition, there are no pleadings to show in what manner there is a repugnancy between the relevant provisions of the 1961 Act and Section 4(g) of PESA. Thirdly, there is no challenge to the provisions of the 1961 Act and the rules framed thereunder in the writ petition. Therefore, obviously, the State had no notice of the contentions which were raised at a time of hearing of the writ petition regarding the validity of the 1961 Act. Even a notice was not issued to the Advocate General of the State.

Learned counsel appearing for the 6th and 7th respondents submits that the State legislature lacks legislative competence to enact the relevant provisions of the 1961 Act and the rules framed thereunder.

His second submission is that it was not necessary for the writ petitioners to incorporate a specific challenge to the statutory provisions of the State enactment. If during the course of hearing the Court finds that the legislature lacked competence, it can always go into the issue of validity of the enactment. Thirdly, he submits that in view of

Article 144 of the Constitution of India, this Court should do substantial justice. Lastly, he submits that if hypertechnical approach is adopted by this Court, the object for which certain provisions were incorporated in the Constitution for the benefit of the Scheduled Tribes, will be completely defeated.

With greatest respect to the learned counsel for the original writ petitioners, we cannot accept any of these submissions. There is not even a whisper of a challenge incorporated in the writ petition to the 1961 Act and the rules framed thereunder. The State was not called upon to answer the issue of either repugnancy or lack of legislative competence. Moreover, there was no notice issued to the Advocate General of the State.

In absence of specific pleadings, a Writ Court ought not to have gone into the issues of repugnancy or lack of legislative competence. Learned counsel appearing for the writ petitioners (6th and 7th respondents) relies upon various decisions of this Court including the landmark decision in the case of *S.P. Gupta vs. Union of India*[3].

We are of the view that in absence of any specific challenge to the validity of the statutory provisions, the High Court ought not to have undertaken the exercise of going into the question of repugnancy. We fail to understand the propriety of the observation that the law departments of the State and the Union should have a dialogue to remove the discrepancy. Moreover, the High Court has not proceeded to strike down the relevant provisions which were held to be repugnant to PESA. It only directs that till the discrepancy is removed by the legislature, certain provisions of the 1961 Act and the rules framed thereunder shall be ignored. Such approach by the writ Court is not at all called for. Without holding that the statutory provisions are not constitutionally valid, the High Court could not have issued a direction not to implement the statutory provisions.

We may note here that Proviso to Rule 4(2) of the 1996 Rules framed under the 1961 Act has already been repealed.

As a last ditch effort, the learned counsel appearing for the writ petitioners submits that by setting aside the impugned judgment and order, an order of remand may be made so that the petitioners will be able to apply for amendment for incorporating a proper challenge. It is not possible to accept this submission at this stage in a writ petition filed 15 years back.

The Writ Petition is of the year 2008 and looking to the pleadings in the writ petition, it was filed only to take care of the elections which were round the corner. Moreover, considering the prayer made in the writ petition, now we cannot permit the writ petitioners to enlarge the scope of the writ petition.

We may also note here that without there being any pleadings, the writ Court has gone into the various factual aspects such as, category of Panchayats, etc. This exercise was not supported by the pleadings.

Accordingly, the appeals are allowed, the impugned judgment and order dated 31.10.2008 is set aside and writ petition No.4860/2008 filed by 6th and 7th respondents is accordingly dismissed. There shall be no order as to costs.

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[3] AIR 1982, SC 149