

INSIGHT

Judicial Setback for Panchayats and Local Bodies

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The Supreme Court's rulings in the Member of Parliament Local Area Development Scheme case and the Arkavathy Layout in Bangalore case could have alarming consequences for panchayat raj and municipal bodies. Since the Court has upheld the validity of MPLADS, the preference of MPs for an executive role rather than for law-making may now well be reinforced. With these two judgments the political leadership will not be required to assign the functions and finances to the local bodies. State agencies not answerable to the elected local bodies may then take over the functions in the panchayat and the municipal domain.

Among the slew of judgments delivered on the eve of justice K. Baskrishnan's retirement as Chief Justice of the Supreme Court (sc) two have serious consequences for the panchayat raj and urban local bodies. One ruling is about the Member of Parliament Local Area Development Scheme (MPLADS) and the other concerns what is known as the Arkavathy Layout (Bangalore) case. Both have had a long history.

In 1999, Biju Singh of the Janam and Kallanur National Panthers Party challenged the constitutional validity of the MPLADS scheme in court. Similar writ petitions relating to the same subject were filed in some of the high courts. The sc had all of them transferred to itself. A three-judge bench headed by the then Chief Justice Y K Sabharwal heard the matter extensively in 2006. Since the case also raised questions about the separation of powers between the union and the states and the interpretation of Article 253 relating to grants from union to certain states and Article 284 about expenditure which can be defrayed in the absence of a specific law, the matter was referred to a Constitution Bench in July 2006. The judgment of a five-member bench headed by Chief Justice Baskrishnan gave its verdict on 6 May this year.

The MPLADS Scheme

The MPLADS scheme, credited to the innovative skills of the P V Narasimha Rao government, was launched in December 1993. According to the Ministry of Statistics and Programme Implementation, it was meant to provide a mechanism for Members of Parliament (mps) to recommend works of developmental nature for creation of durable community assets and for provision of basic amenities including community infrastructure based on locally felt needs. Initially the entitlement per

MP was Rs 1 crore per year. The amount was doubled from 1997-98 onwards though ardent demands are now being made to further increase it. Till 2008-09, a total of Rs 16,442 crore have been released and as many as 4,86,106 works have been sanctioned. Table 1 (p 44) indicates the sector-wise distribution of works for the country. The state-wise break-up of these figures are given in the annual report of the ministry for 2008-09.

Thankfully, the 4 May judgment of the sc summarises its conclusions. In regard to Articles 275 and 282, the Court has held that both the union and states have the power to make grants for a public purpose irrespective of whether the subject matter falls in the Seventh Schedule containing the union, state and concurrent lists. The Court held that since the funds for the MPLADS scheme formed part of the Appropriation Act which itself is a part of the budgetary process, a separate law is not required to be made by Parliament or legislature. The Court's view, generous as it may seem, is that

the Indian Constitution does not recognise strict separation of powers. The constitutional principle of separation of powers will only be violated if an essential function of one branch is taken over by another branch leading to a removal of checks and balances.

Facts of the Matter

For the purpose of this paper we will focus on three other findings contained in the judgment. One is the Court's view that though mps have been given a "nominally executive function", their role is limited to recommending works and implementation is the responsibility of the district authorities. There is no removal of checks and balances since these are duly provided and the guidelines of the scheme have to be strictly adhered to. A careful scrutiny of the guidelines as also the information about the process of implementation as available through government reports indicates that the role of the mps is much more than recommendatory in nature. It is the mps who decide on the type and specific schemes to be taken up, it is the mps who decide on the allocation of the full estimated cost of the work and it is the mps

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who decides on the location of the scheme. All that the district authority (district collector, magistrate or deputy commissioner) as the case may be has to do, is to decide upon which organisation will execute the scheme. Though panchayats and municipalities may be preferred, it is not incumbent on the district authority to choose them. On behalf of the government, it was argued before the Court that if the district authority finds that the scheme recommended by the mp cannot be executed because of some technical or other difficulties, he has to inform the mp within 45 days. The guidelines do not allow the district authority to reject the recommendation. There is no information about how many of the recommended schemes have indeed been returned to the mp because they could not be executed.

The annual report contains information for each of the states and for each Lok Sabha and Rajya Sabha mp. Table 2 gives the total number of schemes recommended and sanctioned for some of the major states. It is interesting to note that in the case of Himachal Pradesh, the number of works completed is 1,884 which is more than the 1,775 schemes sanctioned and much more than the 1,314 schemes recommended. In the case of Delhi, as against 321 schemes recommended, 219 were sanctioned and 353 were completed. The inference is that in many cases the recommendation of the mp was either promised or conveyed orally to the district officer. The Comptroller and Auditor General (cag) of India had drawn attention to the

MPLADS Performance Appraisal Report of 2006 to the fact that schemes were being executed without recommendation.

The annual report also provides information pertaining to nominated members. Interestingly, out of 32 members nominated to the Rajya Sabha over the past few years to no, present as well as former members, have made no recommendation under the scheme.

Accountability

The Supreme Court has found that Panchayat raj institutions, municipal as well as local bodies, have also not been denuded of their role or jurisdiction by the scheme as the plan has been accorded to them by the guidelines in the implementation of the scheme.

The types of schemes to be taken up under the MPLADS programme are principally those falling within the 11th and 12th Schedules of the Constitution describing the functional domains of the panchayats and nagarpalikas. Drinking water, sanitation including public toilets, roads and pathways, animal care or local public facilities are functions to be performed by the local bodies. The various panchayat and municipal laws in different states have invariably assigned these tasks to the local bodies. The decision about the choice of schemes to be taken up in this regard, their location, the amount to be spent and the manner of execution are all matters to be decided by and within local bodies. Indeed that is the very purpose of giving constitutional recognition to these bodies as "institutions of self-government". They should not be dependent either on the recommendation of an mp or the choice of a district officer. No information is available in the ministry's annual report or other reports to indicate the number of schemes executed by the panchayats and municipalities. Even assuming that the number is significant, pointing out the execution of a scheme cannot be regarded as a substitute for what the local bodies are required and entitled to perform under law. Construction of a toilet cannot and should not be the matter of an mp's benevolence or a district officer's discretion. It is the duty of the local body and the money available should be provided to that local body for that purpose. Accepting the Scheme

Court's view that the panchayats and municipal bodies have not been denuded of their role is to accept passively a subordinate and subservient position for the local bodies. The third aspect that a regime of accounting is available within the scheme, to say the least, is an extraordinarily generous opinion. The elaborate accounting procedures and mechanisms contained in the guidelines are about the accountability of the district authority. It is he who has to maintain proper accounts, cash books, bank books, etc. It is his job to maintain mp-wise figures for the works, get the accounts quickly finalised, furnish the utilisation and audit certificates and also to reply to the audit objections and settle them. This elaborate procedure is no different from the accounting requirements which the district authority or any other government official in the district is required to adhere to. It is not the mp but the district officer carrying out the will and recommendation of the mp, who is held accountable.

Sample audit reports by the cag in 1998 and 2000 indicate the kind of abuses which have taken place under the MPLADS scheme: illegible schemes, public expenditure on private assets and so on. The so-called accountability regime within the MPLADS neither extends to the mps, nor does it extend to the district authority. Table 2 Schemes Recommended and Sanctioned for Some of the Major States

| State | Recommended | Sanctioned | Completed |
|----------------|-------------|------------|-----------|
| Andhra | 7099 | 6,705 | 6,984 |
| Assam | 6,273 | 3,486 | 2,777 |
| Bihar | 5,142 | 5,134 | 3,157 |
| Chhattisgarh | 2,381 | 1,657 | 1,572 |
| Gujarat | 7,985 | 6,652 | 7,582 |
| Haryana | 2,803 | 2,515 | 253 |
| Himachal | 1,824 | 1,775 | 1,882 |
| MP | 2,477 | 2,158 | 2,019 |
| Rajasthan | 2,751 | 1,778 | 1,525 |
| Karnataka | 3,983 | 1,615 | 1,015 |
| Kerala | 4,389 | 4,563 | 1,415 |
| Madhya Pradesh | 2,155 | 2,057 | 6,054 |
| Maharashtra | 6,621 | 1,396 | 1,712 |
| Manipur | 192 | 261 | 298 |
| Orissa | 5,299 | 4,985 | 4,247 |
| Punjab | 4,103 | 4,391 | 3,762 |
| Tamil Nadu | 4,484 | 3,423 | 3,565 |
| West Bengal | 4,254 | 4,114 | 4,585 |
| Uttar Pradesh | 7,899 | 2,662 | 6,132 |
| West Bengal | 5,018 | 4,118 | 4,111 |
| Delhi | 323 | 329 | 313 |

Source: MPLADS Scheme Annual Report 2008-09, Ministry of Statistics and Programme Implementation, Government of India, New Delhi.

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does it limit their personal freedom to choose a location or scheme to be financed from public funds. As Ezra Senhayan (2005), the veteran parliamentarian has pointed out in his exhaustive paper on urban areas "instead of controlling the government and taking remedial measures to correct the irregularities of the administration, the mers wrongly accepted a wrong scheme and became a part of the mep administration set up itself".

The RDA Case

The Arkavathy Layout is one of the larger town planning schemes undertaken by the Bangalore Development Authority (BDA), covering more than 3,000 acres. In 2004, several hundred land owners moved the Karnataka High Court seeking to quash the acquisition of land for the project. In April 2005 a single judge (Gopala Gowda J) of the high court held that the project suffered from various discrepancies. Immediately the Court also held that pursuant to the 74th Constitutional Amendment vesting the powers of planning in a municipal corporation, district planning committee and a metropolitan planning committee, the BDA itself had no locus standi to undertake such a large project. Aggrieved by this is filed an appeal which was heard by a division bench of the Karnataka High Court presided over by the then Chief Justice (N K Sood) J of the Court. This division bench did not agree with the single judge's finding that the BDA has no jurisdiction. Holding that the BDA Act is a law relating to panchayats and municipalities but a special legislation operating altogether in a different and specific field, the division bench held that "none of the provisions of the BDA Act were inconsistent with Part IX and IXA of the Constitution". The bench however gave some specific directions to the BDA to carry out some modifications in the acquisition proceedings. The matter: our petitioners then filed appeals before the Supreme Court in 2006. The batch of special leave petitions was heard on a continuous basis during March 2007. The judgment was reserved but was delivered only in May 2008.

In its judgment, the Supreme Court upheld the decision of the division bench of the Karnataka High Court about the BDA Act operating in a different field unrelated

to Part IXA of the Constitution. In its view the "development scheme" formulated for Bangalore metropolitan area by the BDA has nothing to do with the "development plan". Ques has to be drawn by the municipality or by the metropolitan planning committee and the two should not be confused with each other. "Neither urban town planning nor regulation of land use and construction is similar to the 'development' as contemplated in BDA Act that is carrying out building, engineering operation in or over or under land". The Court, did not agree with the petitioners that the BDA Act is a law relating to municipalities and therefore it has to be examined to ascertain inconsistency, if any, with the provisions of Part IXA of the Constitution.

Semantics

It may be mentioned that the definition of the word 'development' has been carried over from colonial days and used in almost all laws in the country under which improvement trusts and later on in the development authorities or corporations that were set up. This definition runs as follows:

development with its grammatical variations, means carrying out of building, engineering, or other operations in or over or under land or the making of any material change in any building or land and includes redevelopment.

This definition has been lifted and applied in its entirety in most urban planning laws of the country. This is so in the case of Karnataka as well as the Town and Country Planning Act of 1976, the BDA Act of 1976, the Bangalore Metropolitan Region Development Act of 1983 and the Karnataka Urban Development Authorities Act of 1987. After the 74th Constitutional Amendment Act came into force, the Karnataka Municipal Corporations Act of 1976 was amended to enable the creation of a Metropolitan Planning Committee. The Karnataka Town and Country Planning Act of 1976 was also amended to designate the BDA as a local planning authority. The BDA was further required to submit any development scheme or plan it makes for official approval through the Bangalore Metropolitan Region Development Authority.

As regards the nexus between the BDA and the Bangalore Municipal Corporation (BMC), it may be stated that the area of the BDA's jurisdiction is itself based on the delineation of the city as defined for the BMC. There are a number of provisions in the BDA Act which underscore the substantive relationship between the BDA and the municipal corporation. For instance, under Section 17 of the BDA Act, upon completion the BDA has to send its schemes to the municipal corporation for views. Any betterment tax collectible by the BDA from development schemes in which the corporation may have made a contribution, are to be credited to the corporation's funds. Under Section 29, before handing over completed schemes to the municipal corporation, the BDA can levy some taxes. Under Section 30 the streets, and layouts developed by the BDA have to be handed over to the corporation. There are a number of other provisions in the law and the rules which reiterate this relationship. Yet the division bench of the Karnataka High Court and the apex Court have held that the BDA Act is not "relatable" to the corporation.

Effects of the Rulings

The BDA's Improvement Trust and the Calcutta Improvement Trust dating back to 1901 were the precursors of the attempt to take away a part of the municipal domain and vest it in a special body. But the relationship between the city corporation and improvement trusts continued in matters of planning, financing as well as operation and maintenance of the improvement schemes. Development authorities as parastatal organisations became a favoured approach after independence. The Delhi Development Authority act up in 1955 was the first. In 1972, the Calcutta Metropolitan Development Authority emerged to mobilise funds for a large-scale programme for the city's infrastructure. But the Calcutta Corporation and other municipal bodies in the area were very much in the picture in preparing and executing schemes which were funded by the development authority. Similar authorities followed in Chennai, Mumbai, Bangalore, Hyderabad, etc. There were also other parastatal organisations for water supply and

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sewerage, redevelopment of slums, transport, housing, etc.

Intent of the 74th Amendment

When the Constitutional Amendment for Parts IX and IXA were in draft, Parliament was well aware of the fact that in many urban areas there were numerous parastatal organisations and several laws. The Joint Parliament Committee specifically recommended the insertion of Article 243A in the case of Part IX and 243A in the case of Part IXA so that existing state laws relating to panchayats and municipalities are reviewed by the state legislature within a period of one year for necessary modifications or repeal. No other part of the Constitution carries such a specific stipulation calling upon the states to undertake such a review. Its purpose was to better understand the conflicts in the existing regime of laws and ensure legislative action to harmonise the legal provisions.

Of all the various state laws and parastatal organisations existing in Indian cities, the development authorities are perhaps the most ubiquitous and most directly concerned with city governments. If as a result of the Supreme Court judgment, these are to be treated as not relating to the municipalities that would be a significant undermining of the functional domains of the city governments. If the same arguments are applied to other areas like water supply, transport, sanitation, drainage, low income settlements, environment, etc, the functional domain of the panchayats and municipalities will be reduced drastically.

In such a case the panchayats and the urban local bodies, notwithstanding the constitutional recognition and elaborate stipulations of reservation for women, scheduled castes (SCs), scheduled tribes (STs) and Other Backward Classes (OBCs) will remain as empty shells without substance. The concept of decentralisation and multi tier governance will cease to be relevant. Apart from Articles 243A and 243A the other provisions in Part IX and IXA relating to the powers and responsibilities of the panchayats and urban local bodies will become superfluous.

Fears Come True

Such a serious situation was indeed anticipated and found eloquent expression in the dissenting judgment of justice Gode

Raguram in the Rang Reddy District Sarpanch case¹ in Andhra Pradesh. Dissenting from the majority judgment of the bench presided over by the chief justice which held that it was not obligatory on the part of a state government to assign functions, Raguram J held that this would reduce Parts IX and IXA of the Constitution to a dead letter. He stated that this would make Parts IX and IXA of the Constitution "surplusage". Potentially he asked whether a written Constitution can have a "surplusage" at all.

Now that a Constitution Bench of the apex court has found Section 16 to be valid, there is little recourse left on the legal front. The political effect may well be to reinforce the preference of the BDA for an executive role rather than for law-making. The BDA has already been adopted for the benefit of SLAs and SLAs in several states. While the BDA and the SLA zealously guard their respective presence in Parliament and the state assemblies, both are more than happy to demand that they be allowed entry into a city council or tillia parishad with voting rights. Indeed this has been specifically provided in several states. The cumulative effect is that instead of multi tier governance, panchayats and local bodies are reduced to subordinate entities dependent on the state and the union for their survival and for the patronage of BDA and SLAs.

Oddly enough while the judiciary in the Arkavathy case has made a painstaking identification of the BDA as a distinct body unrelated to municipalities and Part IX and IXA of the Constitution, the government of Karnataka itself has been acting differently. The recommendation of an expert committee² chaired by the space scientist Kasturirangan that the BDA be divested of its planning and regulatory functions which will be transferred to the Bangalore Corporation and BDA has been accepted and necessary legislation is under preparation. The draft Urban Development Policy of 2009 published by the government also calls for major restructuring of the BDA. One hopes that the Supreme Court's decision does not prompt a reopening of the whole question.

Without doubt, the findings of the apex Court in both the *Surpana* and the *Arkavathy* case will be agreeable to many sections of the political leadership. After creating the panchayats and municipalities with all the features of reservation through an elaborate and extensive mechanism of State Election Commissions, the state political leadership could claim that the mandate of decentralisation has been fulfilled. Yet, conveniently it will not be required to assign the functions and finances to enable these bodies to become institutions of self-government. State agencies not amenable to the elected local bodies will take over the functions in the panchayat and the municipal domain. The 74th and the 73rd Amendments heralded as the decentralisation dream will remain a revolution only on paper. After all it is so much easier to declare victory rather than engage in a battle for empowerment.

NOTES

1. *Surpana* is a Union of India and Others, Versus Bharatpur District Sarpanch and Others, Judgment of the Bench comprising M. Karimuddin C.J., J. Chelva, P. Sathyan, and J. K. Jaisankar 22.11.2009.
2. *Surpana* and Others vs State of Karnataka and Others, Versus Union of India and Others, Judgment of Karnataka High Court dated 10.01.2010, Justice V. Ramakrishna.
3. With regard to the role of BDA, Bangalore Development Authority vs. Corporation, Judgment of the Division Bench of Karnataka High Court dated 11 November 2009, N K Sood Chief Justice and Kumar J.
4. *Surpana* and Others vs Bangalore Development Authority, Civil Appeal No. 100 of 2009, Judgment of the Supreme Court Bench consisting of Justices C. J. Chelva, P. Sathyan, and J. K. Jaisankar dated 11 February 2010, 11.02.2010.
5. Report of the Joint Committee on the Constitution 74th Amendment Bill, on June 1999 and Report of the Joint Committee on the Constitution 73rd Amendment Bill, July 1993.
6. Rang Reddy District Sarpanch Association vs. Government of Andhra Pradesh (2009) AIR 2009, Judgment of a Division Bench Chief Justice D. V. Subrahmanyam, Justice N. K. Jaisankar and Justice P. Sathyan.

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