
(2014) 12 OHC CK 0068

In the Orissa High Court

Case No : Writ Petition (Civil) No. 23778 of 2014

Ajaya Kumar Mohapatra

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 22-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 243Z, 243ZK, 243ZK(2), 243ZT
Orissa Co-operative Societies Act, 1962 — Section 19(2), 3

Citation : (2015) 119 CLT 418 : (2015) 1 OLR 953

Hon'ble Judges : Biswanath Rath, J

Bench : Single Bench

Judgement

Biswanath Rath, J

1. By filing this writ petition, the petitioners have assailed the validity of the notification dated 18.11.2014 under Annexure-1 as being illegal, arbitrary and violative of provision of Orissa Co-operative Societies Act and Rules made there under. Petitioners while assailing the order under Annexure-1 also seeks direction for allowing only the eligible voters as on date of publication of the election notifications dated 17.10.2014 and 27.10.2014 thereby eliminating the voters who have been included on their deposit being made following the notification under Annexure-1 that too after the publication of notification for election vide Annexure-4 on 27.10.2014 under Rule 4(1) of the Orissa Co-operative Societies (Elections to the Committees) Rules, 1992.

2. In challenging the impugned order vide Annexure-1, the learned Senior counsel submitted that issuance of the aforesaid notification in purported exercise of power under Section 19(2) of the Orissa Co-operative Societies Act, 1962 hereinafter called as "the OCS Act" conferring voting rights on the members after the commencement of the poll process is in utter disregard of the statutory rules contained in Rule 6(1) (a) of the Orissa Co-operative Societies (Elections to the Committees) Rules, 1992 hereinafter referred to as "the Rules, 1992". Learned senior counsel submitted that the subject Co-operative was

inserted in Part IX-B of the Constitution i.e. from Articles 243ZH to 243ZT. In view of the Constitutional scheme, the superintendence, direction and control of the preparation of electoral rolls for and the conduct of all elections to a Co-operative Society shall vest in such an authority or body, as may be provided by the Legislature of a State by law. In referring to Section 28AA of the OCS Act, learned senior counsel submitted that the superintendence, direction and control of the preparation of the electoral rolls for and the conduct of all elections to a Co-operative Society has vested in the State Co-operative Election Commission consisting of a State Co-operative Election Commissioner appointed by the Governor. In the above premises, learned senior counsel submitted that in view of the power vested in the State Co-operative Election Commissioner and further after the notification for the election was brought out the Registrar had no power or authority to intervene in the election process in any manner, the power available to a Registrar under Section 19(2) of the Act cannot be stretched to this extent and as such the issuance of the order vide Annexure-1 introducing inclusion of additional voters to the voter list after the publication of the election notification is per se bad. Further referring to provisions contained in Sub-rule 1(a) of the Rule 6 of the Rules, 1992, learned senior counsel submitted that the voters for the purpose of the election notified will be the persons/members as on the date of publication of the date of election and are the only qualified voters and Registrar by introducing the notification under Annexure-1 has made an attempt to interfere in the election process tried to create new voters after the cutoff date and thus claimed the same is prohibited under law. In substantiating his case, the learned senior counsel appearing for the petitioner cited a decision as reported in A.I.R. 1995 Orissa 23 and submitted that law is well settled as decided in the above decision giving scope to the writ court for interfering in a election dispute concerning Cooperative Societies.

3. On the other hand, learned Government Advocate on his appearance apart from filing a counter submitted that since the process of election has already commenced following provisions under Section 28B of the Act, this Court should not interfere in the election process. The Government Advocate appearing for the State Co-operative Department submitted that inclusion of the voters or either non-inclusion in the present election process is a disputed question of fact and as such, these disputes cannot be adjudicated upon in a writ petition under Article 226 of the Constitution of India. In substantiating introduction of the notification under Annexure-1, learned senior counsel submitted that, attempt of the State to include the voters pursuant to notification vide Annexure-1 is a constructive attempt of the Government in the premises of less number of voters in various Societies and in apprehension of depriving larger sect of voters who are found to be ineligible to vote as on the date of the election notification. Learned senior counsel further submitted that preliminary voter list as required under law has already been published on 18.12.2014 i.e. 40 (forty) days prior to the date of election and the petitioner has a scope for submitting a objection to the same as provided under Sub-section 5 of Section 6 of the Rule, 1992. If he has any

objection in the preparation of the provisional electoral roll, it is open to him to file objection before the Election Officer in writing within four days from the date of publication of the said Electoral Roll and such matter can be decided by the Election Officer after such inquiry as may deem necessary by passing an order within three days from the last date of receipt of objections.

Learned senior counsel further contended that the election is for all the Societies inside the State and this writ petition being filed at the instance of a particular Society, there should not be any interference in the writ particularly when there is no objection to the said notification by a large section of the Co-operative Societies. In substantiating his claim, learned Government Advocate referred to the decisions cited in the cases of Boddula Krishnaiah and another Vs. State Election Commissioner, A.P. and others, , Anugrah Narain Singh and Another Vs. State of U.P. and Others, , Election Commission of India Through Secretary Vs. Ashok Kumar and Others, and Abdulla Khan and Another Vs. State of Orissa and Others, .

4. It is, at this stage, necessary to make reference of the statutory provisions as contend in the Orissa Co-operative Societies (Elections to the Committees) Amendment Rules, 2014 which has been brought into force on 20th August, 2014. Rule 6 deals with electoral roll. Under Rule 6 (1) the Chief Executive of the Society shall prepare the provisional electoral roll for each Constituency incorporating therein in case of Primary Society, the name of individual members and head of the self-help Groups except the nominal member, who are members as on the date of publication of the Election notification under sub-rule (1) of rule 4 and are qualified to vote, with their address as entered in the Membership Registrar, along with their father/mother's or husband's names, as the case may be. In the circumstances it is here necessary to take note of following provisions relevant for the purpose of the case:-

Rule 3, sub-rule(1-a) of the amended rules reads as follows:

"(1-a) The State Government shall, by one or more notifications, publish, in the Odisha Gazette, the date or date as may be recommended by the State Co-operative Election Commission calling upon the Co-operative Societies to elect Members of the Committee of the Society in accordance with the provisions of the Act and the rules made thereunder."

Rule 3, sub-rule (2) reads as follows:

"The State Co-operative Election Commission shall, by general or special order, appoint one or more Election Officer and such other officer as presiding officer, pooling officer or any other officer as may be required for holding such election and such different officers may be appointed for different Societies from out of the officers and staff made available to him under sub-section (6) Section 28-AA and the officers so appointed shall perform the duties entrusted to them in accordance with the directive of the State Co-operative Election Commission:

Provided that appointment of such different Officers shall be published in the Odisha Gazette by the State Co-operative Election Commission and communicated to the said Officers, the Society concerned and the concerned person appointed under section 3 in whose local limit, the headquarters of the Society is located."

Rule 4(1) of the amended Rule reads as follows:

"(1) The Election Officer of the society shall fix the date of election of the members of the committee, on the recommendation of the State Co-operative Election Commission, by publication of a notification at least two months prior to the date of election so fixed and the Chief Executive of the Society, by whatever designation called, publish the same either in the daily newspaper having wide circulation in the area of operation of the society or in the notice board of the society, its branches, if any, the officers of the Gram Panchayat, Panchayat Samiti, Tahasildar, Sub-Collector, Collector, Deputy Registrar of Co-operative Societies and Assistant Registrar of Co-operative Societies in the area of operation of the society or by beat of drums in the aforesaid area, by whatever mode, he may deem proper, in consultation with the Election Officer."

Similarly, Rule 6 of the amended rules reads as follows:

"(1) The Chief Executive of the society, subject to the directions of the State Co-operative Election Commission, shall prepare the provisional electoral roll for each Constituency incorporating therein:-

(a) In case of Primary Society, the name of individual members and head of the Self-Help Groups except the nominal members, who are members as on the date of publication of the notification under sub-rule (1) of rule 4 and are qualified to vote, with their address as entered in the Membership Registrar, along with their father/mother's or husband's names, as the case may be, sex and other particulars regarding whether they belong to the Scheduled Caste, Scheduled Tribe or Other Backward Classes; and

(b) In case of Central or Apex Society, the name of the members of the Electoral College as on the date of publication of notification for election under sub-rule (1) of rule 4 and are qualified to vote, with their address along with their father/mother's or husband's name as the case may be, sex along with the name of the Society, Body Corporate or Local Authority to which he represents in the Electoral College and whether he belongs to Scheduled Castes, Scheduled Tribes or Other Backward Classes."

5. Reading of Rule 4 of the amended rules makes it clear that the Election Officer of the Society shall fix the date of election of the Members of the Committee on the recommendation of the State Cooperative Election Commission by publication of a notification at least two months prior to the date of election so fixed and under Rule 6 provision has been made for preparation of the provisional electoral roll for each constituency taking into varieties of Members, who are Members as

on the date of publication of the notification under sub-rule (1) of Rule 4 and are qualified to vote being a valid voter as on the date of publication of the notification. In the present case, the notification for the election under Rule 4(1) of the Orissa Co-operative Societies (Election to the Committees) Rules, 1962 was brought by Election Commissioner by way of Gazette Notification dated 27.10.2014 (Annexure-4) declaring the election to be held on 18.1.2015. Thus following the provision as contained in sub-rule (1)(a) of Rule 6, the Members who are Members as on the date of publication of the notification under sub-rule (1) of Rule 4 are only qualified to vote and under Annexure-4, a notification by the State Co-operative Election Commission in exercise of power under Rule 4(1) of the Rules, 1992 was brought on 27th October, 2014.

6. Now coming to the Constitutional provisions as contained in part ix(b) of the Constitution of India. This Chapter deals with the Cooperative Societies. Article 243Z deals with number and terms of Members of Board and it's Office bearers. Similarly, Article 243ZK deals with election of Members of Board. Article 243ZK(2) deals with power of superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to a co-operative society shall vest in such an authority or body, as may be provided by the Legislature of a State by law. Similarly, Article 243-ZT provides provision of continuance of existing law.

The body of the Co-operative Society is formed following the provision under part-9(b) of the Constitution of India and in this context.

In the present context of the matter, it is also relevant to take note of Provision as contain in Section 28-AA of the Act.

"28-AA (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of all elections to a Co-operative Society shall vest in the State Co-operative Election Committee consisting of a State Co-operative Election Commissioner appointed by the Governor and shall hold office for a period of five years from the date of his appointment or he attains the age of sixty five years whichever is earlier."

xxx xxx xxx

(9) The preparation of electoral roll and the conduct of election to the office of the members of President to all societies shall be in accordance with the rules made in consultant with the State Co-operative Election Commission.

Section 28-AA makes provision for providing power of superintendence, direction and control of the preparation of the electoral rolls for and the conduct of all elections to a Cooperative Society shall vest in the State Co-operative Election Commission consisting of a State Cooperative Election Commissioner appointed by the Governor.

Above provisions provided for preparation of electoral roll and the conduct of election to the office of Members and the President to all Societies shall be in

accordance with rules made in consultation with the State Co-operative Election Commission. It is made hear clear that these rules are under reference of Orissa Co-operative Societies (Elections to the Committees) Rules, 1992 and following the provisions as contained in Rule 6(1-a) the election should be held taking into the Members as on the date of publication of the notification under sub-rule (1) of Rule 4, who are the only qualified voters.

7. Under the above circumstances, the Election Commissioner has his limited right in the matter of permission to State which right cannot be extended to the extent of inclusion of invalid voters by a circuitous manner after the notification for election is brought. It appears from the submission of the learned senior counsel for the State that the voters in process of getting in are all invalid voters as on the date of publication of Election notification. The notification under Annexure-1 not being inconsonance with Rule 1992 is to be declared illegal. After the commencement of election, State has also no authority to include voters in the provisional voter list unless such voters are excluded from the provisional voter list, the Election will become invalid as the final voters list will not be a valid one. In its counter, the State in submitting the requirement for inclusion of additional voters after the notification for election at para 5(i) submitted that they had undertaken a review of the election process and in such process it has come out from field officer that a huge and sizable number of members are going to be debarred from the election process and will loose their voting right in the concerned societies when they are members due to default in depositing the required amount within the specified time. From the above narrations, it appears that State and its agencies have attempted in interfering in the election process. All such actions taking place after the notification for election dated 27.10.2014 has no legal sanction being contrary to the provisions contained in Rule 1992. In view of clear provision contained at Rule 6(1)(a) of the Rule 1992 the election taking place under the notification dated 27.10.2014 must confined to the eligible voters as on the date of notification. This Court deprecates such illegal action of the State.

8. Now coming to consider the citations cited at the Bar at the instance of the Election Commission of India Through Secretary Vs. Ashok Kumar and Others, on the plea of High Court's jurisdiction to entertain petition under Article 226 of the Constitution of India and issue interim direction after commencement of electoral process first of all this Court is not passing any interim order staying the election process. Further looking to the submission of the learned State counsel that they have the permission to bring additional voters in the preliminary voter list for the Election purpose has the sanction of the Cooperative Election Commissioner. I find any such sanction by the Cooperative Election Commissioner is de hors Rule 6(1)(a) of the Orissa Cooperative Societies (Election to the Committees) Amended Rules 2014, the cited decision has rather application to the petitioner's case for the facts involved herein. Similarly so far as the decision cited by the State and as reported in Abdulla Khan and Another Vs. State of Orissa and Others, , this is a matter challenging exercise of power of Tribunal or any

authority exercising jurisdiction under Section 67-B and this Court hold that the Election Tribunal cannot interfere with the process of election and this decision has no application to the present case at all. So far as decision vide Boddula Krishnaiah and another Vs. State Election Commissioner, A.P. and others, , this is a case involving High Court's jurisdiction in giving a direction for participation of 20 persons who are found eligible to vote for exercising their franchise separately when the polls was already over. In view of the facts involved there, in this decision has no application to the present case. So far the decision cited by State vide Anugrah Narain Singh and Another Vs. State of U.P. and Others, is concerned, this is a case involving interfering in a Municipal Election taking place after long gaps of time. Interference of the Hon''ble Apex Court in the said matter was on two counts firstly High Court erred in staying the election process ignoring the fact that the election was taking place after 10 years gap and that the decision of Allahabad Bench was running inconsistent to the direction of Lucknow Bench in the same matter. Under the facts involved in the above decision and further in view no direction for staying the election process by this Court, I find the decision referred to hereinabove has no application to the present case.

9. Now coming to answer on the question to objection raised by the learned Government Advocate that in view of restriction contained in Section 28-B of the Act, the Election process since already commenced should not be interfered by this Court, I am to hold that in view of my finding that since the election process has already commenced with the Notification under Rule 4(1) of the 1992 Rules on 27.10.2014 State Government should not have interfered in the election process by attempting to regularize the invalid voters by bringing the notification dated 18.11.2014 (Annexure-1). State Government as an authority should not have contravened the provision as contained in Section 28-B of the Act. It is in this view of the matter, I also declare the notification vide Annexure-1 as bad in law and cannot be enforced.

10. Under the circumstances and in view of findings arrived at, while setting aside the Notification vide Annexure-1, this Court further hold that since the election notification as appearing at Annexure-4 was brought on 27th October, 2014, it is only the valid members as on the date of publication of the notification on 27th October, 2014 under Annexure-4 are the valid voters. Since the provisional voter list is already published on 18.12.2014 and in stage of filing of objection to such provisional electoral roll and can only be finalized after consideration of objection by the Election Officer, I direct Co-operative Election Commissioner to issue suitable direction to the Election Officers, who are in-charge of the finalisation of the voter list shall proceed for finalising the list after eliminating the voters included by virtue of illegal notification at Annexure-1 and publish the final voter list subject to however considering any other objections by any concern in the matter pending and publish the final voter list within the same time frame.

The writ petition succeeds. However, there shall no order as to cost.