

(1997) 08 KAR CK 0011

In the Karnataka High Court

Case No : Writ Petition No. 15380 of 1997 connected with Writ Petition No. 15982 of 1997

B.A. Hasanahba and Others

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 29-08-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 213, 356, 356 (1)
Karnataka Agricultural Produce Marketing (Regulation) Act, 1966 — Section 11, 126, 126 A, 39, 41

Citation : AIR 1998 Kar 91 : (1998) ILR (Kar) 85

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : Sri K.S. Desai, Sri Harsha Desai, Sri Ko. Channabasappa and Sri Vijayakumar, for the Appellant; Sri R.I. D'Sa, Government Advocate and Sri B.G. Sreedharan, for the Respondent

Judgement

1. Issues of far reaching significance have fallen for decision in these two writ petitions which effectively concern the fate of the Agricultural Produce Market Committees (hereinafter referred to as the "APMCs") in the State of Karnataka. The question that has ultimately crystalised centres around the issue as to whether motivated nominations to elected bodies made in sufficient number as to alter the structure and decision making power of that institution can legitimately be justified as being within the framework of the democratic process and the subsidiary question that has arisen is as to whether an Ordinance issued at a point of time after the election process has been concluded is liable to judicial review and if so, to what extent.

2. There is not much dispute with regard to the factual position because these two writ petitions are effectively representative in character insofar as they concern as many as 134 APMCs in the State. According to the petitioners, these bodies carry out very important functions relating to a sizeable sector of the agricultural and trader community. They deal in transactions worth crores of

rupees and it is their case that the functioning of these bodies is required to be essentially left to the aforesaid strata of citizens whose interests they concern. It is pointed out that the elections to these bodies had not been held for about one decade and according to the petitioners, several efforts were made including obtaining judicial directions for purposes of ensuring that the elections were held and finally, in the year 1997, a decision was taken to this effect. The elections commenced on 1-3-1997 and ended with the declaration of results on 2-5-1997. The results were notified in the Gazette on 5-5-1997. The petitioners have placed before the Court an indication of the relative strength which they have compiled on a partywise basis because, like all elections these were also fought on a party affiliation basis. According to the figures placed before the Court, the Congress (I) secured 658 members, the Janata Dal 490 members and others 100 members. In terms of percentages, it works out that the Congress (I) had approximately 49% of the candidates with the Janata Dal securing about 36% of the candidates. Normally, I would not have even reproduced these figures but I have done it for a limited purpose because the learned Counsels appearing on both sides have advanced certain arguments in this regard and it could therefore be useful to have the factual data at hand. The petitioners state that u/s 39 of the Act the elected committee is deemed to have assumed office immediately on the declaration of the results in the Gazette and the next stage was that u/s 41 the two office-bearers namely the Chairman and Vice-Chairman would have been elected and the APMCs would have started functioning. The legislature was not in session at this stage and the petitioners allege that taking advantage of this fact, the Government hurriedly promulgated the Ordinance on 21-5-1997, whereby Section 11 of the Act was amended and sub-section (ix) was introduced which reads as follows:

"Three members shall be persons nominated by the State Government who shall have right to vote in all the meetings of the Market Committee and shall hold office at the pleasure of the State Government".

The Ordinance in question is a very short one and significantly enough, there is no statement of objects and reasons. I refer to the last aspect of the matter because one of the heads of challenge presented before me is on the ground of arbitrariness and the petitioners' learned Counsel have submitted that it is well-settled law that if an order or a statute is silent in material particulars that it is impermissible to seek to bolster it up at a later point of time by setting out plausible grounds or reasons.

3. The petitioners have challenged the validity and the vires of the Ordinance and this Court after notice to the Government and after hearing the learned Advocate-General on behalf of the Government as also the petitioners learned Counsel admitted the petitions and granted a blanket stay of the operation of the Ordinance. The Government carried the matter in appeal and the Appeal Court slightly modified the interim order passed by this Court to the extent that the Government was permitted to go ahead and make the nominations but it was

clarified that the elections to the post of Chairman and Vice-Chairman shall not be held and that the interim relief as granted by this Court subject to the aforesaid modifications would continue. The State has filed its objections and the petitions being of immense importance insofar as it was pointed out to this Court that despite the provisions of Section 39 of the Act, that the elected bodies had virtually been put into cold storage and could not function because of the pendency of the litigation, which was why the petitions were taken up for out of turn hearing. Before proceeding, I need to record here that this Court is deeply indebted to the four learned Counsels who have argued the case with a degree of thoroughness and competence particularly with regard to the relatively delicate and complicated points of law involved in these cases.

4. The principal ground of attack that has been presented by the petitioners is that the action is motivated and bristles with mala fides. Learned Counsels have concentrated on a two pronged thrust. In the first instance, they pointed out that the elections to these bodies were held and completed by the first week of May, 1997 and that according to them, the State Government agitated by the outcome of the elections insofar as, according to the learned Counsel, the ruling party did not secure the anticipated majority. It is their case that at this late stage, when by virtue of the provisions of Section 39 of the Act the duly elected members had already assumed office and the bodies ought to have started functioning, that the State Government in order to stall this operation hurriedly promulgated the Ordinance in question whereby 3 members were sought to be nominated by the State Government and inducted on to every APMC with voting rights. What learned Counsels have demonstrated is that as a result of this operation which according to them was synonymous with adding weight to the opposite end of a sea-saw, that there would have been an immediate complete change of equation and total swing in the opposite direction towards the ruling party whereby effectively the percentage would jump from 36% to 51% by adding the 402 nominated members, giving them a distinct majority both in matters of electing the office-bearers as also with regard to decisions which would have to be taken and would necessarily be carried by those in majority. On the basis of this material, learned Counsels have alleged that the action was highly motivated. The second limb of the argument proceeded on the footing that if at all there was any bona fide behind the nominations, as has been now pleaded to be the case before this Court, that the Government during the long period of time when the decision was being finalised to hold the elections could have indicated that for good reasons it was considered necessary to nominate a certain number of persons. I have already indicated that the Ordinance was promulgated at a point of time after the election results were known and learned Counsels have repeatedly emphasized this fact in support of their argument that it is the timing of the action which is the strongest indication of mala fides. The subsidiary argument canvassed in support of the aforesaid one is that u/s 11 of the Act, it is clearly provided that the APMC shall be an elected body and there is only one ex officio nomination that is required to be made out of the total strength of 15.

Learned Counsel submitted that where the statute very clearly provides for a process of election that it is in consonance with the democratic principles and set up, and that if it can be demonstrated that the Ordinance has the effect of interfering with this process, that they are entitled to challenge the action inter alia on the ground that it is ultra vires of not only the parent statute but basically the provisions of Article 14 of the Constitution. While advancing their submissions on the point of arbitrariness, the learned Counsel has drawn my attention to the wordings of the Ordinance which I have reproduced above whereby no norms or guidelines or indications have been set out as to who precisely would be nominated to these bodies. The criticism followed, insofar as learned Counsel submitted that there is no guarantee that persons who are possessed of the requisite experience in the field of activity and business relating to Market Committees would be nominated and furthermore, they have submitted that the wordings of the Ordinance leaves the field wide open for misuse of power and for making political appointments. As far as this last aspect of the matter goes, they have submitted that any such exercise of power would not only be counter-productive but would be totally and completely obstructive to the functioning of the APMCs.

5. Shortly before the petitions came up for hearing, one significant development took place. Again, I would not have referred to this even indirectly but for the fact that the petitioners' learned Counsel have tendered to the Court a transcript of the proceeding of the House and have relied on it very heavily in the course of their arguments. In support of their contention that the power to nominate is politically motivated and that this power would be used for making political appointments, they have relied on certain passages from the debate that ensued in the House and in particular, on statements made by the Hon'ble Chief Minister wherein he has stated that even though he fully subscribes to democratic norms, that it was necessary to do this for purposes of furthering the ruling party's interest. Learned Counsels have pointed out to me that irrespective of what may have been set out in the pleadings before this Court, that this statement constitutes an unequivocal admission that the sole object of bringing out the Ordinance was in order to ensure that the ruling party despite not having secured a majority in the elections still alters and offsets the result of those elections by exercising the power of nominating its own candidates.

6. The Government while defending its action has set out very convincing grounds in support of the action. It has pointed out that the APMCs. are very important bodies insofar as they virtually handle crores of rupees worth of agricultural produce of all categories on a day-to-day basis. They have large premises and market yards, that they virtually control the interests of the agriculturists and those who trade and deal in agricultural produce, that on the other hand, they are also incharge of funds running into staggering amounts, that they deal in premises and large finances of the Government and that to this extent it was considered very necessary that the Government must ensure necessary supervision and control in the working of these bodies which was why

it was thought fit to nominate three persons. I hardly need to deal with these grounds but I shall do so for the reason that the petitioners' learned Counsels are right when they pointed out to me that the structure and scheme of the APMC under the Act is very clearly defined insofar it is almost a 100% elected body barring one ex officio member who is nominated. This presupposes the fact that the essential norms of democratic functioning are inbuilt in this process insofar as members who constitute agriculturists, traders and businessmen and whose interests are controlled by this body are the persons who decide who will be their representatives through a democratically held election. The Act itself prescribes that the first Market Committee shall be a wholly nominated body which is undoubtedly for good reasons but once this process is over, the constitution of the Market Committee has to be through elections. What is sought to be done through the Ordinance is that this process is sought to be completely and totally nullified by nominating as many as 3 persons. It is true that the learned Counsel who represented the Government vehemently argued that 3 out of a total number of 18 is an insignificant number and that it cannot and will not alter or upset the balance. I have already indicated that this is not the right perspective of the matter because these elections have been fought on a party basis and where the percentages are 36 and 49%, the addition of 3 persons would completely swing the balance in favour of the ruling party and the petitioners' learned Counsels are therefore justified when they pointed out to me that what appears to be a seemingly innocent operation is in fact a devious device to totally nullify the electoral process. Viewed out at this angle, there is no option except to categorise the action as a total and complete sabotage.

7. Mr. D'Sa, learned Government Counsel tried to emphasise that the object of the nominations is well intentioned and that the purpose was in order to provide representation to weaker sections and women. This is nothing but an afterthought and runs counter to the Chief Minister's admission but is a specious and untenable contention because these categories are already catered for in the original constitution and any further additions to these special categories would again completely upset the constitution of the Committee and would also result in reverse discrimination vis-a-vis the other categories of members. Mr. D'Sa then tried to convince the Court that there may be desirable persons who cannot come through the election process because of several limitations and that they could be nominated. This can never be accepted because the basic fabric of a democratic set-up presupposes the ability to emerge through an electoral process. On the contrary, nominations could in all probability result in back-door entry of undesirable candidates who could never otherwise have got elected. Again, what the Ordinance provides for is an unspecified tenure -- not coextension with the normal life span of the elected members. Nothing could be more dangerous because it leaves the door wide open for the Government to destabilize the working of the committee through frequent changes but the even more alarming result of such a seemingly innocuous provision would be that the nominated members whose existence depended on the "pleasure of the

Government" would virtually be absolute pawns, dancing like puppets to the tune of "His Master's Voice". As the Ordinance is framed, it lacks even a modicum of a guarantee that the power of nomination will be used correctly or responsibly. I need to add here that the power of nomination, even in cases where it is permissible can only be exercised in small doses, for purposes of enhancing the constitution of a body by inducting persons of outstanding merit and expertise whose contribution is of proven significance. Where the objective is to pack a committee and offset the electoral results, it would be downright mala fide.

8. In this context, I need to also observe that having regard to the statement made by the Hon'ble Chief Minister which has been relied on by the petitioners learned Counsel heavily in support of their arguments, it would be impossible to accept the grounds that have been put forward by the State Government in defence of the action. I do concede as pointed out by the learned Senior Government Counsel that these are very important bodies and that therefore, a responsible Government is very much concerned about the manner in which they function. This being the objective, nothing prevented the Government from taking whatever steps earlier within the framework of law that they considered necessary in order to safeguard the interests of the members as also of the Government. Having regard to what has subsequently been accepted and admitted, it would be very clear that this is not the objective in promulgating the Ordinance there is an additional reason for this because I have carefully evaluated the further submission canvassed by the learned Senior Counsel who represented the Government when he pointed out to me the provisions of Section 126 and Section 126-A of the Act and he contended that despite these provisions being on the statute book, that the power that flow from those provisions are not sufficient for the Government to effectively exercise the requisite supervision and control over the functioning of these bodies which was why it was considered very necessary to resort to the process of making nominations. I am unable to accept this argument for the simple reason that the Market Committees effectively have the status of a body corporate and that the Secretary of the Committee cannot give effect to any resolution or decision that is against the provisions of law without obtaining the requisite approval and sanction of the Director. The Government itself has an inbuilt safety mechanism whereby all resolutions and decisions are required to be approved of by the Director. The Director is a sufficiently highly placed and responsible Government Officer and the working experience has shown that the Directors have invariably corrected numerous wrong decisions of the Market Committees and have refused to accord sanction to those which do not qualify for approval. It is therefore fallacious to argue that within the framework of the statute the Government did not have the capacity to supervise, monitor and control wherever necessary and that the nominations had to be resorted to for this purpose. Having dealt with the aspect of timing of the action, there is little doubt in my mind that it was hopelessly ill-timed and furthermore, the challenge on the ground of mala fides will also have to be upheld.

9. In the course of his submissions, the learned Senior Government Counsel, advanced the argument that the Ordinance promulgated under Article 213 of the Constitution has effectively been challenged on the ground that no conditions existed that would justify the exercise of emergency powers by the Governor and he also submitted that as far as this area of challenge is concerned that it is hardly justiciable. I shall deal briefly with the legal position but the argument advanced by the learned Counsel is by and large correct except for one small limitation insofar as the Supreme Court while going into the scope of judicial review in relation to situations of this type where a Governor promulgates an Ordinance or where the President exercises his powers under Article 356 of the Constitution, has laid down more than once that whereas a Court would be very slow in going behind these aspects of the matter, that do exist a small class of cases or in fact perhaps a microscopic view where the Courts would be required to look into that aspect of the matter for purposes of satisfying itself that the conditions requisite for the exercise of power were existent or that there is a very strong case of mala fides with regard to the end process of the action namely the Ordinance or the order passed. One needs to hasten to point out that the Governor or the President, as the case may be, is only acting on the advice of the Council of Ministers and that undoubtedly being high Constitutional dignitaries they do have power to invariably scrutinise the proposed course of action and if the consent is thereafter accorded, that it would invariably be respected and the earlier view was that it was totally and completely beyond question. That doctrine of absolute immunity has now been slightly watered down and therefore it would not be open to the learned Senior Government Counsel particularly on the facts of the present case to contend that the right of judicial review does not extend to an examination of the action.

10. In the course of their submissions, the petitioners learned Counsel submitted that an Ordinance is effectively an emergency measure and they have very elaborately and vehemently submitted that in the present situation there was no emergency of any type. They have demonstrated that the decision to hold the APMC election was carefully thought out and an elaborate process which spread over several months, that the elections were held in normal course and that there was no conceivable ground on which the duly elected candidates could have been stopped from assuming office or the bodies could have been stopped from functioning and that in this background, within the framework of law it was not permissible to alter the Constitution of the already elected bodies through any amendments even assuming they were legal and permissible. In this background, they have submitted that the timing of the Ordinance and the recording of satisfaction that the circumstances justified the promulgation of an Ordinance at that point of time is rendered bad in law. To my mind, this is a grey area, because as pointed out to me earlier the Governor was acting on the material put up to him and the advice of the Council of Ministers and ultimately takes a decision with regard to whether in his considered view the circumstances justified the action at that point of time. In the statement of defence, it has been

pointed out that the Government was of the view that it was very necessary before the APMC started functioning to graft on 3 persons as the elections were to be held and the bodies were to start functioning thereafter and that since the assembly was not in session that an Ordinance was inevitable. If on the basis of this material the Governor was of the view that an Ordinance is justified, it would hardly be open having regard to the law on the point for this Court to go behind that satisfaction. On the facts of the present case, I do not consider it necessary because the petitioners are entitled to succeed on merits and therefore, this aspect of the matter does not assume any importance.

11. The challenge before me is to an Ordinance and the assembly is now in session and as is the requirement of law the Ordinance is required to be replaced through a Bill which would ultimately turn into an Act and the learned Senior Government Counsel states that having regard to the passage of time and fact that the Government has now tabled a Bill before the assembly which will be taken up for consideration very shortly, that it is wholly and completely unnecessary for this Court to examine any aspect of the present challenge insofar as the Ordinance has exhausted itself. He points out to me that the exercise would be rendered academic and that therefore the Court should not embark on it. This submission has been vehemently opposed by the petitioners' learned Counsel, who contend that the action itself was mala fide and they pointed out that had the petitioners not challenged the action before this Court and stopped it, that it would have been given effect to and that the damage would have been irretrievable. They submit that as invariably happens an Ordinance is replaced by an identical amendment and that the petitioners would be driven from pillar to post by having to once again recommence the entire exercise and to this extent therefore they submit that it is imperative for the Court to decide the matter on merits. I am in agreement with the submissions for an additional reason that an Ordinance unlike an Act is required to be very very carefully scrutinised by a Court if it is challenged because an Ordinance is an unfettered, unbridled power to promulgate provisions which have the effect of law without their going through the constitutionally prescribed process. When a Bill is introduced, it is required to be debated by the House and it is open to scrutiny. It is open to examination by all the elected representatives and more importantly by the opposition. There are numerous instances where a Bill may be withdrawn but in the case of several others need has arisen for serious reconsideration, modification and redrafting and the end result that ultimately emerges is a carefully considered and purified act whereas in the case of an Ordinance, it takes effect in the form in which the Government prepares it. To this extent therefore it is extremely important that in the cases where an Ordinance is challenged particularly on the ground of mala fides or on grounds of vires that a Court must examine it and perhaps with a higher degree of meticulousness than it would in the case of any other enactment. History has shown that there have been scores of instances where Ordinances have contained hurriedly drafted out provisions, several of them have turned out to be

draconian, which have been promulgated overnight and in this background, the scrutiny of an Ordinance is something which a Court must undertake with a higher degree of care and caution.

12. In the course of their submissions, the petitioners learned Counsel drew my attention to the decision of the Supreme Court in *A.K. Roy v Union of India and Another*, wherein the Supreme Court came down heavily on that class of Ordinances which are promulgated to subserve political ends. The Court had occasion to consider in detail the ambit and scope of Article 213 of the Constitution and in particular the question as to whether the aspect of satisfaction is justiciable and the Court laid down very clearly that the 38th Amendment which basically gave rise to the view that it is not justiciable was thereafter deleted in 1978 by the 44th amendment to the Constitution after which it would be permissible in appropriate cases for the Court to examine this question. I need to refer to another decision of the Supreme Court in the case of *Dr. D.C. Wadhwa and Others v State of Bihar and Others*, wherein the Court was dealing with the concept of colourable exercise of power while examining a series of Ordinances that had been promulgated and repromulgated and the Court laid down the very very important principle that promulgation of an Ordinance intended to short circuit the legal process as prescribed under the Constitution is illegal. I would go to the extent of saying that this principle could better be defined as enunciated that an Ordinance is an emergency or a stop-gap measure and the power is required to be used for purposes of subserving, conserving and enhancing the constitutional process and should not be and cannot be used for purposes of bypassing it. The Supreme Court in the case of *S.R. Bommai and Others v Union of India and Others*, was dealing with a more or less analogous power to that which is vested in the Governor of a State namely the power of President of India under Article 356(1) of the Constitution. The Supreme Court was at pains to reiterate several times in the course of that judgment that two of the essential characteristics of the Indian Constitution are that it is built around the democratic process and the principle of Federalism and while examining the question of whether the aspect of satisfaction of the President was open to judicial review, the Apex Court settled the law on the point laying down that it is not immune from judicial review.

13. I have already held that the action was ill-timed, that the challenge to the action on the ground of mala fides is well founded insofar as it totally and completely subverts the electoral process whereby the APMCs. are required to be constituted by elected representatives and not nominated persons" and furthermore, that having regard to the principles enunciated by the Courts from time to time and in particular, the law as laid down in *Roy's*, *Wadhwa's* and *Bommai's* cases, *supra*, that the action runs contrary to the democratic process and to the extent that on the present set of facts it virtually nullifies the effect of the elections, that it would have to be held that it has resulted in a sabotage of the democratic process.

14. As a necessary consequence of these findings, the Ordinance in question is required to be struck down. The petitions accordingly succeed. It is pointed out to me that by virtue of the interim order passed by the Division Bench, that the Government has already made certain nominations but this action is by virtue of the powers that flow under the Ordinance. The Ordinance itself having been struck down, those powers would automatically be quashed. Learned Counsel representing the petitioners have pointed out to me that under the scheme of the APMC Act, the members having been elected, Section 39 prescribes that they are required to assume office and start functioning immediately on the results of the elections being declared in the Gazette. That process has been completed on the 2nd of May, 1997. Having regard to that position, the APMCs. in question shall proceed forthwith to hold the elections to the post of Chairman and Vice-Chairman.

15. The petitions are accordingly allowed. Rule is made absolute to this extent. In the circumstances of these cases, there shall be no order as to costs.

16. The learned Senior Government Counsel states that this is an important decision and that the Government is required to consider the judgment carefully before deciding on the future course of action and he therefore prays for continuance of the earlier interim order until a copy is received and it is considered. The petitioners learned Counsels have opposed the continuance of the interim order. What they have pointed out is that already almost three months have gone and that the working of all the APMCs. in this State is at a standstill. I consider the request of the Government reasonable. A copy of the judgment will be made available to all the learned Advocates in the course of the next 2 or 3 days. The interim order shall therefore continue for one week from the date of receipt of the judgment.