

(2013) 08 OHC CK 0050

In the Orissa High Court

Case No : W.P.C. No"s. 14805/13, 15774/13, 15775/13, 15776/13, 16487/13, 16485/13, 16486/13, 6564/13, 9129/13, 12553/13, 6310/13, 5287/13, 5058/13, 4174/13, 6747/13, 16806/13, 16358/13, 14015/13, 14016/13, 4693/13, 4453/13, 6144/13, 6147/13, 5591/13, 5830/13, 7290

Bibhuti B. Pattnaik

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 06-08-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226, 243T(6), 243U
Orissa Municipal Act, 1950 — Section 11, 11(3), 12(2)
Orissa Municipal Corporation Act, 2003 — Section 64

Citation : (2013) 08 OHC CK 0050

Hon'ble Judges : C. Nagappan, C.J;I. Mahanty, J

Bench : Division Bench

Judgement

1. Challenge is made in all these writ petitions to the validity of Section 11 of the Orissa Municipal Act, 1950 (as amended by Orissa Act 9 of 2012) and the petitioners have also sought for a declaration that the said provision is violative of Articles 14 and 21 of the Constitution of India and contrary to the dictum of the Constitution Bench Judgment of Hon"ble Supreme Court in the case of Dr. K. Krishna Murthy and Others Vs. Union of India (UOI) and Another, Consequently, they have also sought for a declaration directing the opposite parties to conduct elections after preparing fresh reservation lists as mandated in the Judgment in the case referred to above. The main contentions raised in the batch of writ petitions are as follows:-

(i) In some of the Urban Local Bodies reservation for S.C., S.T. and OBC candidates exceeds 50% and the same is in violation of the dictum of the Hon"ble Supreme Court in the case of K. Krishnamurthy (supra) and since the exercise to determine the extent of reservation in consonance with the aforesaid judgment (proportionality) having not been undertaken, the extent of reservation

notified is liable to be set aside.

(ii) Though 2011 Census came to be published on 30.5.2013, the same was not taken into consideration for the purpose of reservation and on the contrary reservation has been done on the basis of population figure of 2001 census and hence the present notification is liable to be quashed.

(iii) In some of the writ petitions, it is asserted that reservation of minimum 27% seats for OBC in Municipal Bodies u/s 11(3) of the Orissa Municipal Act is not based on any data since there has been no enumeration of OBC in any census and therefore, violative of the principle of the Thumb Rule for reservation, under Article 243T(6) of the Constitution of India. It is further averred that the State has not carried out the impugned amendment in letter and spirit as per the direction of the Hon'ble Supreme Court in the aforesaid judgment, where the State was called upon to modify its legislation so as to suitably reduce the quantum of quotas in favour of the OBC, so that the vertical reservation in the category of S.C./S.T./O.B.C. does not exceed the ceiling limit of 50% when taken together.

(iv) In some of the writ petitions challenge is made to the impugned notification on the ground that in certain instances reservation for women exceeds the upper limit of 50% and hence bad in law.

2. The State has filed preliminary counter affidavit on 30.7.2013 while seeking the following liberty.

That it is humbly submitted that in case the Hon'ble Court feels inclined to adjudicate a specific writ application taking into consideration the peculiar facts and circumstances of that case, the Opp. Party reserves the right to file a detail counter affidavit in that particular case.

3. The State has sought to justify 27% of reservation for OBC by relying on Section 11(3) of the Orissa Municipal Act and further proceeded to state that in a given situation where population ratio of a Municipal area necessitates proportionate reservation of more than 23% seats for S.C. and S.T. when combined with the reservation of 27% for OBC, the total reservation is bound to be more than 50% and that being the mandate of the Statute, it is duty bound to follow the same. It is the further stand of the State that 2011 Census came to be published on 30.5.2013 whereas the State Election Commission required the State to complete the delimitation and reservation process by 31.1.2013, basing upon the population figure of 2001 Census. Therefore in order to complete the Statutory formality in time to conduct the election, the same was undertaken on the basis of the 2001 Census.

4. It is also stated by the State that the reservation for women within different categories is a horizontal reservation and therefore cannot be faulted with, though it exceeds 50% of the seats in a given Municipality. The last contention of the State is that term of the Urban Local Bodies in the State is going to be

completed by 30.9.2013 and hence any deviation in the conduct of the election will violate the mandatory provision of Article 243U of the Constitution of India.

5. The State Election Commission has also filed a preliminary counter affidavit, reserving its right to file a further affidavit. It is the stand of the Election Commission that the first meeting of 91 Municipal Bodies having been held on 30.9.2008, the elections are required to be held and new Bodies should be constituted before 29.9.2013, as mandated by Article 243-U of the Constitution of India. Therefore, the State Election Commission wrote to the Government of Odisha vide letter dated 3.10.2012 to complete the Delimitation and Reservation process positively by 31.1.2013, so that, the Commission would take further steps to complete the other statutory requirements like preparation of Electoral Roll, identification of polling station etc. to complete the general elections to Urban Local Bodies as per the Constitutional requirements.

6. Attention was also drawn to Annexure D/3 which is a letter dated 26.7.2013 addressed by the State Election Commission to the State Government, in pursuance of Section 12(2) of the Orissa Municipal Act, 1950 and Section 64 of the Orissa Municipal Corporation Act, 2003 recommending to the State Government to issue notification on 3.8.2013 calling upon all the Wards of Municipalities/Notified Area Council to elect the Councillors. It is further submitted that although the said notification is yet to be promulgated by the State, election to the Urban Local Bodies is imminent.

7. In view of the above, we are of the considered view that the questions of law raised in these writ petitions require serious consideration and have to be elaborately addressed and dealt with. As already stated, the opposite parties have only filed their preliminary counter affidavits and have sought for liberty to file detailed counter affidavit in individual writ petitions. Therefore, we deem it fit to admit all these writ petitions with liberty to the opposite parties to file detailed counter affidavits in individual writ petitions. Such counter affidavits shall be filed within a period of six weeks from today.

8. In so far as prayer for interim reliefs are concerned, in various cases, interim orders of stay have been passed and issue regarding the continuance thereof is required to be considered.

9. It is brought to our notice that a Division Bench of this Court vide order dated 06.01.2012 in W.P.(C) No. 31979 of 2011, where challenge to similar reservation for OBC under the Panchayat Act was challenged, dismissed a batch of Misc. Cases by a detailed order after considering the Constitution Bench judgment of the Hon'ble Supreme Court in K. Krishna Murthy (supra). We have carefully gone through the said order, which has been passed by a Division Bench of this Court presided over by Hon'ble Chief Justice V. Gopala Gowda (as his Lordship the then was). The said Division Bench of this Court, after considering the Constitution Bench judgment of the Supreme Court and various constitutional provisions, found no justification for continuance of the interim order passed therein and

vacated the same. It is also brought to our notice that challenge to the said order was made before the Supreme Court by the petitioners therein in S.L.P.(C) Nos. 2403-2404 of 2012, which came to be dismissed vide order dated 30.01.2012.

10. In this respect, we may refer to the judgment of the Hon''ble apex Court in the case of Kishansing Tomar Vs. Municipal Corporation of the City of Amedabad and Others, particularly to the observations made at paragraphs 19 & 22 of the report, which are extracted herein below:

19. From the opinion thus expressed by this Court, it is clear that the State Election Commission shall not put forward any excuse based on unreasonable grounds that the election could not be completed in time. The Election Commission shall try to complete the election before the expiration of the duration of five years'' period as stipulated in clause (5). Any revision of electoral rolls shall be carried out in time and if it cannot be carried out within a reasonable time, the election has to be conducted on the basis of the then existing electoral rolls. In other words, the Election Commission shall complete the election before the expiration of the duration of five years'' period as stipulated in clause (5) and not yield to situations that may be created by vested interests to postpone elections from being held within the stipulated time.

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22. In our opinion, the entire provision in the Constitution was inserted to see that there should not be any delay in the constitution of the new municipality every five years and in order to avoid the mischief of delaying the process of election and allowing the nominated bodies to continue, the provisions have been suitably added to the Constitution. In this direction, it is necessary for all the State Governments to recognise the significance of the State Election Commission, which is a constitutional body and it shall abide by the directions of the Commission in the same manner in which it follows the directions of the Election Commission of India during the elections for Parliament and the State Legislatures. In fact, in the domain of elections to the panchayats and the municipal bodies under Part IX and Part IX-A for the conduct of the elections to these bodies they enjoy the same status as the Election Commission of India.

It would be important also to note herein the another judgment of the Supreme Court in the case of Lakshmi Charan Sen and Others Vs. A.K.M. Hassan Uzzaman and Others, wherein the Constitution Bench of the Hon''ble Supreme Court in paragraph 28 has made the clear pronouncement in this regard. The relevant portion of the said paragraph is extracted below:

...Secondly, though the High Court did not lack the jurisdiction to entertain the Writ Petition and to issue appropriate directions therein, no High Court in the exercise of its powers under article 226 of the Constitution should pass any orders, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked. The imminence of the electoral process is a factor which

must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution...

Having regard to the constitutional mandate and judicial pronouncements discussed above, we deem it fit to vacate the interim orders granted in some of the writ petitions, since we are of the considered view that there ought not to be any interim order which would have the effect of postponing an election which is imminent. Accordingly the interim orders granted in the writ petitions stand vacated. Consequently, we are also not inclined to pass any interim order in this matter and accordingly the Misc. Cases seeking interim relief stand rejected. The State authorities as well as the State Election Commission are at liberty to proceed further with the election process.