
(2003) 09 PAT CK 0128
In the Patna High Court
Case No : CWJC No. 1019 of 2003

Bihar Mayor Council

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-09-2003

Acts Referred:

Patna Municipal Corporation Act, 1951 — Section 16, 19, 50

Citation : (2003) 3 BLJR 2012 : (2003) 4 PLJR 649

Hon'ble Judges : R.S. Dhavan, C.J.; S.K. Singh, J

Bench : Division Bench

Advocate : M.P. Gupta and Mihir Kr. Jha, S.K. Ghose, A.A.G. II and S.A. Hussain, SC6, for the Appellant; P.K. Shahi, Senior Standing Counsel G.G., for the Respondent

Judgement

Ravi S. Dhavan, C.J.

This petition raises two issues on the functioning of local self-government. In the present case, it is about the functioning of the Patna Municipal Corporation. The Patna Municipal Corporation functions under the Patna Municipal Corporation Act 1951.

2. On behalf of the petitioner arguments were submitted by Messrs M.P. Gupta, Advocate and Mihir Kumar Jha, Advocate, each of them had submitted separately. On behalf of the State the submissions were made by Additional Advocate General 2 Mr. S.K. Ghose, Senior Advocate, and Mr. S.A. Hussain, Standing Counsel No. 6. On the day orders were reserved, the Court passed an order recording a summary of the proceedings until final date of hearing. This order is reproduced:

"The Judgment on this case is being reserved today after having heard learned Counsel for the petitioner Mr. Mihir Kumar Jha and Counsel for the State Mr. S.A. Hussain, S.C. 6.

On the last occasion when this matter was listed, the Court had made it clear in

no uncertain terms that this case will not be adjourned no matter what happens. This was occasioned as the issue is on the mandate of the Constitution after 73rd and 74th amendments. The Constitution has already indicated that whatever laws which may exist (in any state), could at best continue for one year. Thereafter, every State was to fall in line with the mandate given in the Constitution. In the circumstances, the State of Bihar has had 9 years to fall in line.

The Court had taken adequate precaution in this case first issue notice of motion. Thereafter, noticing that the arguments were to the effect that certain provisions of the Patna Municipal Corporation Act 1951 are challenge as Ultra vires to the Constitution, the Court was obliged to issue notices to the Advocate General, Bihar. This was done on 12 March 2003. In a matter so serious as this in which notice has been issued to the Advocate General, the Court is constrained to observe that it had not the benefit of an address from the Advocate General, Bihar.

Thereafter, the Court was given to understand that necessary provisions of the Constitution of India Particularly under Chapter IXA (the Municipalities) have been taken into account and regard being had to the spirit of the Constitution that Municipalities and Panchyats be made effective self governing institutions changes are being made in the requisite Municipal Laws (Panchyats not excluded), and an exercise has been undertaken seriously. This aspect is on record also.

This matter has seen several adjournments.

Finding that nothing concrete was being reported to the Court and lest the provisions of the Constitution of India be not belittled at the hands of the State respondents, the Court required the Government of Bihar to place the entire records of the matter and a certiorari, accordingly, was issued. This was on 25 July, 2003 The occasion to issue a certiorari for the production of the records, was a consequence of the pleadings made by the Chief Secretary in an affidavit filed before the Court. Further, the Additional Advocate General-II appearing on that day made a submission that he would not be able to justify the affidavit filed by the Chief Secretary because he was faced with the provisions of the Constitution of India. It was desired by the Additional Advocate General-11 that the matter be placed on 31 July, 2003.

The petitioner protested that this adjournment was being sought only to purchase time on two grounds (a) the Session of the Legislature would be over by then and again this matter will go until the legislature convenes next and (b) the Chief Secretary was retiring.

With this order on record the Judgment is reserved on the issue."

3. The record of the State government was placed before the Court.

4. Upon hearing Counsel for the parties, perusing the pleadings exchanged in the

writ petition and after having also the record of the State Government as produced, learned Counsel for the parties were agreed that two issues do arise in this matter before the Court.

The two issues raised in the present case are (a) What should be the term of a Mayor at the Municipal Corporation? (b) The conflict of the functions and powers of a Chief Executive Officer, who holds an office for 5 years and the term is renewable.

5. The Mayor's tenure is only one year, while the Chief Executive Officer with a tenure of five years or more may only be removed by the State Government after consultation with the State Public Service Commission upon a resolution passed by the Patna Municipal Corporation or otherwise. The issue (a) concerns the Mayor. Issue (b) is about the Chief Executive Officer.

6. The first aspect is a necessary question after the amendments to the Constitution of India, 73rd and 74th amendments, which institute the Chapter on Municipalities as Chapter IXA. The tenure of self-Government institutions of which a Municipality or a Corporation is part, under the Constitution, has a life of 5 years. The Mayor is the head of a self-Government institution, a city corporation. Under the Act as it stands, at present, his tenure is less than the tenure of the corporation itself. But, by the Constitution the Mayor as a Chairperson is the elected head of a self government institution.

7. In so far as the second aspect is concerned the tenure of a Chief Executive Officer is such that it is secured and running into a conflict with the tenure of the Mayor, The two offices as structured at present make a conflict inevitable, the word used in the Constitution is "Chairperson" and is in the context of an elected office of a self government institution. There can be no Chairperson of a superseded local body. The Administrator or an executive officer is only a facilitator to an elected local body, or a substitute to fill the void if such a self-government body is superseded under law.

8. Thus the Mayor, as a Chairperson to an elected body is democratically superior to a Chief Executive Officer who is a "civil servant in a civic body. The Mayor cannot be put in a position of subjugation with a weak one year tenure.

9. The field of operations and the conflicting positions are at present being left for another occasion. The Court mentions this because if the function obligations and the powers of a Mayor are understood in the correct perspective, then, the Court expects that the State Government will rectify the position on its own before the Court has an occasion to look into it further on the second aspect.

10: The conflict is logical because the law has not taken into account the stipulation of the Constitution of India brought about by the amendments in restructuring the position of self-Government institutions as the 3rd tier of government.

11. The court, this, takes up the first aspect on what should be the tenure of a

Mayor of a Corporation. As a first step it must be understood that a Corporation is also Municipality. Article 243P defines a Municipality.

It says:

"(a) "Municipality" means an institution of self-Government constituted under Article 243Q".

12. This means that such of those institutions, which are referred to and are constituted under Article 243Q, are municipalities or partake the nature of a municipality. In this regard Article 243Q reads:

"(a) A Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area;

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part:

(2)

13. From the above, it is clear that a Municipal Corporation composed of a larger area is a Municipality and an institution of self-Government. Then, the Constitution also provides for the composition of Municipalities. This is an Article 243R. When we speak of a Mayor, then we are talking about a Chairperson of a Municipality. At present, the Court is not an any issue of an election to choose persons chosen to constitute a Municipality as provided under Article 243R. But, Article 243R requires the State Legislature of a State to provide for the manner of election of the Chairperson of a Municipality. This aspect is pointed out in Sub-clause (b) of Article 243R(2). This sub-clause taken with Sub-article (2) of Article 243R reads, in effect, that the Legislature of a State may, by law, provide the manner of election of the Chairperson of a Municipality. The Constitution does refer to a Chairperson of a Municipality to be elected, the context, refer to a Mayor, who is a Chairperson.

14. The next relevant provision of the Constitution is in the context of the question of what is the duration of the Municipality. Article 243U refers to the duration of Municipalities. This reads:

"243-U. Duration of Municipalities, etc.--(1)Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer:

Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in Clause (1)

(3) An election to constitute a Municipality shall be completed;

(a) before the expiry of its duration specified in Clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under Clause (1) had it not been so dissolved."

15. It will be noticed that there is no reference in the article to give any lesser or more tenure to a Chairperson of a Municipality. This Chairperson may be of a Municipality or it may be a Mayor of a Corporation. The tenure of a Municipality is 5 years. This tenure is compatible with the tenure of a State Legislature which is also for 5 years Article 172 and the tenure of the Parliament which is also for 5 years Article 82(2).

16. The Constitution of India does not mention that the Chairperson "of a Municipality at any level" will have a term more than the tenure of the Municipality itself. It also does not mention that the tenure will be less the tenure of the Municipality. The term of a Municipality is 5 years "unless sooner dissolved". The Constitution gives a clear guideline that a Municipality is to have a tenure of 5 years. At best, it may be stretched to a further period of 6 months within which elections must be held. In other words, any elected Member to the Municipality, and the Mayor is not an exception, will keep his term unless sooner curtailed by any other event or reason which visits the Municipality.

17. The circumstance by which a tenure of a Chairperson may come to an end prematurely could be a resignation tendered by him which is an act voluntary to any public office. The other circumstance could be a motion of no confidence which is part of the democratic process. Thus, it is not that the tenure of a Mayor cannot be shortened. It can. One by his volition, should he resign. The other is a motion of no confidence for a stated cause. The third can be an inherent disqualification which visits every elected office like a Member of Parliament or Legislature. The Constitution provides for "Disqualifications for membership of House of Parliament Article 102 and State Legislature Article 191. There are (a) holding an office of profit as referred to in the Article (b) if he is of unsound mind and stands so declared by a competent Court, (c) if he is discharged insolvent, (d) if he is not a citizen of India and (e) if he is so disqualified by or under any law made by Parliament. These factors curtail the tenure of a Member of Parliament or Legislature.

18. Disqualification for membership whether it is a member either house of Parliament (Article 102), a member of the State Legislature (Article 191), a member of the Panchayat (Article 243F), a member of the Municipality (Article 243 V), the provisions of the Constitution are in pari materia. In this regard in case of a disqualification for a member of Parliament or Legislature the provision for disqualification reads "if he is so disqualified by or under any law made by the Parliament". If the disqualification is in the context of a member of a Panchayat or a Municipality the Constitution declares "if he so disqualified or by under any law made by the Legislature of the State." For the Parliament and the Legislature the law has to be by an act of Parliament. If the disqualification is in the context of a member of a self government institution the law has to be by the Legislature of the State.

19. But, the Patna Municipal Corporation Act 1951 apparently gathered dust when the Constitution of India was being amended by the 73rd and 74th amendments which inserted Part IX and Part IXA, to the Constitution of India, the Chapters on Panchayats and Municipalities, respectively.

20. The area of conflict is the insecurity of the Mayor's office in an outdated law which has yet to be updated and fall in line with the amended provisions of the Constitution. This subjugation of a Mayor by a bureaucrat is the real cause for the conflict. In short, this is about a security of tenure with a Chief Executive Officer who can intimidate the Mayor that he can be bundled out of his office no sooner than the latter has come into it. A Chief Executive Officer can have a five year tenure which may be extended, so as to virtually give him a ten year term. The reality of the situation, as at present, is that a Mayor may not have even a five year tenure and yet be kicked out of his office even the very first year when he comes in or automatically see the cessation of his office after one year.

21. The areas of conflict need to be understood.

On the left hand side, below, is the law which gives a tenure to the office of a Mayor (or Deputy Mayor) and on the right hand side is the tenure of office of the Chief Executive Officer at the Patna Municipal Corporation:--

Section 19 Section 50

(19) Annual Election of Mayor and Deputy Mayor. ?

50. Appointment of Chief Executive Officer. ?

(1) The Corporation shall, at its first meeting each year elect from amongst the Councillors, a Mayor and a Deputy Mayor to hold office until the first meeting in the next following year.

(1) The Chief Executive Officer for the Corporation shall be appointed for a renewable period of five years by the State Government after consultation with the Public Service Commission and the Mayor.

(2) If any casual vacancy occurs in the office of Mayor or Deputy Mayor, the Cor-

poration shall, as soon as may be after the occurrence of such vacancy, elect a Councillor to fill such vacancy; and the Mayor or Deputy Mayor so elected shall continue in office for the unexpired term of his predecessor.

(2) The Chief Executive Officer may be removed by the State Government from office after consultation with the Public Service Commission if the State Government is satisfied, on a resolution passed by the Corporation or otherwise, that the Chief Executive Officer is incapable of performing the duties of his office or has been guilty of any misconduct or neglect which renders his removal expedient.

(3) Any Councillor who ceases to be a Mayor or Deputy Mayor shall be eligible for further election to either office.

(3) When the Chief Executive Officer is a member of a civil service or holds a lien on any civil post under the Government, he shall be liable to be recalled by the State Government at any time in the exigencies of public service of which the State Government shall be sole judge.

22. It must be remembered that Patna Municipal Corporation Act was enacted in 1951, 52 years ago. It does not take into account the position of a Chairperson of a Municipality. In accordance with the Constitution of India, Section 16 of the Patna Municipal Corporation Act, 1951 does mention that the Corporation, unless sooner dissolved under any law for the time being in force, shall continue for a term of five years from the date of appointment of its first meeting and no longer. This provision owes its existence to Article 243U of the Constitution.

23. The Patna Municipal Corporation Act, 1951 brings self-Government to the Corporation. The Corporation is defined in the Act itself, (Section 4) and referred to as The Patna Municipal Corporation. The strange part is that Section 4 which is the "Definition Clause", defines and refers to the Patna Municipal Corporation, but does not even refer to the elected head, the Chairperson or a Mayor.

24. The Act refers to and defines an "Administrator" who will be an officer who will come and sit over the Corporation if it is superseded. The Act defines a Chief Executive Officer. The reference to an "Administrator" and a "Chief Executive Officer" clearly are out of date. It only suggests that there is more emphasis on how to supersede an elected municipality or corporation than on running it as an institution of self-Government. What is the position of a Mayor under the Act? It has not even been defined.

25. Now what does the Constitution say about the corporate body with a common seal and perpetual succession be it a municipality or a corporation? The Constitution of India recognises the position of a Chairperson of a corporation and the manner of his election under Article 243R. The Constitution of India says that the duration of a municipality or a corporation is to continue for five years. The exception is that the municipality may be dissolved sooner than its tenure, if the law so permits.

26. The tenure of an elected representative to an institution of self-Government, the third tier of Government today, whether municipality or Panchayat has been provided by the Constitution to be five years. It is the tenure of an elected representative collectively returned to an office as a result of an election that the elected body has a tenure of five years. The pattern is the same whether it is the Parliament, the Legislatures or institutions of self-Government; all will have a tenure of five years. Can a Mayor have a lesser tenure? The Constitution of India does not seem to suggest it. The Constitution clearly shows the perspective that the tenure of an elected member to any tier of Government whether Parliament, Legislature, Municipality or Panchayat, it will be five years. The tenure of a Mayor in the spirit of the Constitution is co-terminus with the tenure of the municipality or corporation.

27. Merely because the State Legislature of Bihar forgot to define the Mayor in the very Act which constitutes the Patna Municipal Corporation as an incorporated corporation, cannot belittle the position of a Mayor. While the Act does not even recognise the Mayor and define his office, the Constitution overrides to eclipse the Act.

28. Some States of the nation have taken notice of the changes in the Constitution and have made the tenure of a Mayor co-terminus with the tenure of the Corporation or the elected body. The State of Punjab apparently has taken notice of the constitutional provisions and has clearly stipulated in the enactment that the term of office of a Mayor shall be co-terminus with the duration of the municipal corporation Section 24 of the Punjab Municipal Corporation Act, 1976. Tamil Nadu, in Madras City Municipal Act, 1919 has made an amendment, after the Constitution of India was amended, so as to give the Mayor a term of office of five years. Madras City Municipal Corporation Act, 1919. So has Uttar Pradesh F.U.P. Nagarmahapalika Adhiniyam, 1959. and West Bengal.

29. When a three tiered Government has been provided by the Constitution as a pattern, to ignore the constitutional provisions only gives rise to two presumptions that (a) the government in power is ignorant of them or (b) it does not care about the Constitution or would like to hold on to a misplaced power against the spirit of the Constitution. Self-Governing institutions in Bihar have already been damaged by prolonged and continuous supersession. While independence was sought to secure self government by throwing out the colonial power the administrators in democratic India worked for colonising self-Government institutions for themselves. Superseding local self-Government and putting administrators on them is a *sola topi* approach with plumes and features suggesting the pattern of a *saheb* and a native. There is no place for such a civil service under the Constitution of India. That civil service was the guardian of the empire. It should have gone with the *raj*. The Chief Executive Officer in a Municipality or a Corporation, is subservient to an elected body not parallel to it.

30. On a writ of certiorari the record of the State Government is before the Court. The Court is looking for an answer why it is taking the Government of

Bihar so much time to place self-Government institutions on a pattern which the Constitution of India has ordained. The life of the old laws relating to the governance of municipalities was only one year after the constitutional amendments took effect in 1994. When a Government attempts to make the Constitution of India suffer and so insult it then it is an obligation of the High Court an institution of the Constitution with powers of judicial review to checkmate the Government.

31. A note was put up for the Minister, Urban Development Department, by the Secretary, Urban Development Department, that the Patna Municipal Corporation Act, 1951 needs to be amended to fall in line with the Constitution of India and that in the States of Punjab, Kerala, Andhra Pradesh, West Bengal and Uttar Pradesh, also, the tenure of Mayor is five years in accord with tenure of the elected representatives themselves. The Minister also felt that this matter is serious enough and the Act should be amended immediately. The Minister agreed with the note of the Secretary. It was sent to the Chief Secretary recommending that the requisite changes be incorporated in the Patna Municipal Corporation Act taking into account the amendments which have been made to the Constitution of India by the 73rd and 74th Amendments. After the note of the Secretary, the Minister and the Chief Secretary. The Chief Minister recorded the following note on the file:--

"SAMPRATI WARTMAN PRAVADHAN KE ANUSAR KARWAI KI JAYE"

32. Unless someone has any other interpretation the net result is that the Hon'ble Chief Minister virtually recorded on an official file in the face of the amendments made to the Constitution of India that the present situation in accordance with the present law may continue. Then what would happen to the provisions of the Constitution of India? In so far as the existing laws relating to Municipalities are concerned, which are inconsistent with the provisions of the Constitution, in the present context Part IXA, could at best "continue to be in force untill amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier" Article 243ZF. The life of such laws was one year after the amendments. After one year these laws were dead. Is it that the Hon'ble Chief Minister was not advised on this? What does the State's legal department do? And, yet there are more and other dead laws which are inconsistent with the Constitution of India and relate to panchayats and Municipalities.

Article 243ZF reads:--

243-ZF. Continuance of existing laws and Municipalities-Notwithstanding anything in this part, any provision of any law relating to Municipalities in force in a State immediately before the commencement of the Constitution (Seventy-fourth Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force untill amended or repealed by a competent legislature or other competent authority or until the expiration of one year from

such commencement, whichever is earlier:--

Provided that all the Municipalities existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State.

33. Once the Secretary to the Government and the Minister In-charge of a portfolio and the Chief Secretary were advising the Hon"ble Chief Minister that the Constitution of India has brought about a change, to the effect, that the tenure of a Chair-person of local self-Government will be co-terminus with the tenure of a self-Government institution, which the Patna Municipal Corporation is, and also advised the Chief Minister that certain other State of the nation have amended their Acts, the subject cannot be locked up in a locker to be opened up at the will and pleasure of the State Government. Once the Constitution of India made it clear that old laws will not continue more than one year after the amendments to the Constitution took effect, to ignore the Constitution is a serious constitutional lapse.

34. Thus, the Patna Municipal Corporation Act, 1951 which has given annual term to the Mayor and the Deputy Mayor is against the spirit of the Constitution and inconsistent with the scheme of local self-Government after amendments were made to the Constitution of India. The term of any Councilor, of which a Mayor and a Deputy Mayor cannot be excluded from being members of the house which the Corporation is, the tenure of the councillors is co-terminus with the tenure of the municipality or the corporation. Any enactment which stipulates a lesser tenure is ultra vires to the Constitution. At present, the election of a Mayor and a Deputy Mayor is referred to in Section 19. Section 19 at. present lies thus:--

Section 19 of Patna Municipal Corporation Act, 1951

"Annual Election of Mayor and Deputy Mayor:--(1) The Corporation shall, at its first meeting each year elect from amongst the Councillors, a Mayor and a Deputy Mayor to hold office until the first meeting in the next following year.

(2) If any casual vacancy occure in the office of Mayor or Deputy Mayor, The Corporation shall, as soon as may be after the occurrence of such vacancy, elect a Councillor to fill such vacancy; and the Mayor or Deputy Mayor so elected shall continue in office for the unexpired term of his predecessor.

(3) Any Councillor who ceases to be a Mayor or Deputy Mayor shall be eligible for further election to either office."

35. There is no question of any annual election of a Mayor and a Deputy Mayor. That the office of the Mayor and Deputy Major will be until the first meeting in the next following year, is clearly repugnant to the spirit of the local self-Government.

In the circumstances, the heading of Section 19 which reads to suggest an annual election, the word "Annual" and in the next the phrase "to hold office until meeting of the next following year "are ultra vires to the Constitution and are struck off and deleted from the Act. Hereinafter this Section shall read to suggest that there is an election of a Mayor and a Deputy Mayor. The Mayor and the Deputy Mayor along with him shall have the tenure which is co-terminus with the life of the municipality or corporation unless their tenure is curtailed for any reasons which has been referred to and discussed in this judgment.

The petition succeeds with costs.

Shashank Kumar Singh, J.

I agree.