

(2010) 01 PAT CK 0033
In the Patna High Court

Central Bihar Chamber of Commerce

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-01-2010

Acts Referred:

Citation : (2010) 01 PAT CK 0033

Final Decision : Dismissed

Judgement

Shiva Kirti Singh, J.—This writ petition, labelled as a public interest litigation was filed on 4th July, 1998 questioning the legal authority of Administrator, Gaya Municipal Corporation to impose any tax on and after 20.10.1993 and on that ground the subsequent revision of municipal taxes on the basis of 1993 Rules framed by the Sate Government, was also impugned. As the list of petitioners shows, the present lis is espoused by two residents of Gaya, one of Patna and by Central Bihar Chamber of Commerce. On 19.4.1999, the matter was heard by a learned single Judge as a purely municipal corporation matter and interim order was passed to the effect that until further orders, the realization of tax in question at the revised rate may not be implemented but the petitioners must go on paying tax at the pre-revised rate. On 2.8.1999, the attention of learned single Judge was drawn to paragraph 3 of the writ petition wherein the petitioners had claimed that the matter be treated as public interest litigation. In that view of the matter, the writ petition was ordered to be listed before a Division Bench. On 4.4.2001, the Division Bench noticed the issue relating to imposition of taxes and the contention on behalf of the petitioners that there should be no taxation without democratic representation in the municipal corporation of Gaya. For raising that plea, petitioners relied up on Article 265 of the Constitution which embodies a fundamental principle of democratic governance that no tax shall be levied or collected except by authority of law. The grievance of the petitioners was specific that since the establishment of the Gaya Municipal Corporation through a notification dated 18.11.1983, there had been no election held to elect representatives of the people to the municipal corporation resulting in running of the corporation through an Administrator. The

Division Bench widened the issue through subsequent orders so as to remind the State Government of its obligation to hold elections for various municipal bodies and corporation throughout the State. In that process, it took notice that Administrators were functioning in the municipal bodies on the basis of "transitory provision" of the Patna Municipal Corporation Act 1951 and such provisions needed to be reviewed in the light of 73rd and 74th Amendments to the Constitution of India leading to insertion of Part IX and Part IX A with effect from 1.6.1993. This Court noticed the inaction on the part of the State Government and its authorities in complying with the letter and spirit of the constitutional provisions relating to municipalities, particularly in Article 243U. The Division Bench also noticed provisions in Article 243ZF which permit continuance of existing laws and municipalities inconsistent with the provisions of Part IX of the Constitution only till amendment or repeal by a competent Legislature or other competent authority or until the expiration of one year, whichever is earlier.

2. The subsequent orders passed in this case reveal the slow and steady progress made towards holding elections for the municipal bodies in the State of Bihar ultimately took place in the year 2002. This was on account of categorical and clear stand of the Court that rule by Administrator cannot be permitted indefinitely so as to negate grassroot democracy through elected municipal bodies. In that sense, with elections in 2002, the public interest espoused through this writ petition was served. But the issue of legality and validity of the revised rate of municipal taxes remained to be decided. On 30.9.2002, nobody appeared for either of the parties, perhaps, due to strike by the lawyers as indicated in the order itself. The case was admitted for hearing. It has now been heard in detail.

3. On behalf of the petitioners Mr. Ram Balak Mahto, Senior Advocate has placed reliance upon the provisions in Article 243ZF of the Constitution to submit that since its enforcement the Administrator lost the legal right to continue as Administrator of the Gaya Municipality because the transitory provision in Section 545 of the Patna Municipal Corporation Act, 1951 (hereinafter referred to as "the Act") itself lost its validity on account of being inconsistent with provisions in Part IX A of the Constitution of India. For easy reference, Article 243U and Article 243ZF and Section 545 of the Act are quoted herein below:

243U. 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 under 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.

243ZF 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 until 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."

545. Transitory provisions.-(1) The State Government may, by notification, appoint for such period not exceeding one year, from the date of the commencement of this Act as may be specified in the notification, a person to be called the Administrator to exercise, perform or discharge the powers, duties and functions which are conferred or imposed by or under this Act on the Corporation the Standing Committee and the Chief Executive Officer, and the Administrator shall be deemed to be the Corporation for all or any of the purposes of this Act:

Provided that the period of appointment of the Administrator specified in the notification under this sub-section may be extended by the State Government by a like notification for a period not exceeding six months at a time but in any case not exceeding one hundred and sixty eight in all for reasons to be specified in the notification.

(2) The Administrator or any other officer or officers appointed, by rules made u/s 540 or otherwise, by the State Government in this behalf shall prepare a register of electors and shall hold an election of Councillors in accordance with

the provisions of this Act in the rules made thereunder.

(3) The Administrator shall cease to hold office on the day the notification u/s 15 is published in the official Gazette and shall from that date be deemed to be the Chief Executive Officer, until a Chief Executive Officer is appointed u/s 50.

(4) All municipal officers and servants in the employment of the Administrator at the commencement of this Act shall be officers and servants employed by the Corporation under this Act as if they had been appointed under Sections 54, 55 and 56.

(5) Notwithstanding anything contained in this Act or any rule or bye-law made thereunder, the condition of service, pay and allowances existing in respect of all permanent officers and servants of Patna City Municipality and the Patna Administrator Committee on the day immediately before the commencement of this Act shall be deemed to be their existing conditions of service pay allowance under this Act on the day this Act comes into force.

4. A plain reading of Article 243U makes it clear that this Article contemplates various situations where a Municipality is already duly constituted and is functional. Clause (3) of that Article contains a mandate to hold election for constituting a Municipality before the expiration of the duration of the Municipality given in Clause (1), i.e. five years from the date appointed for its first meeting and no longer. There is a further mandate that the election should be before the expiration of six months from the date of dissolution of the Municipality. Without making a distinction as to whether a Municipality is being represented by an Administrator under transitory provisions, the constitutional scheme noticed above clearly specifies the maximum period as five years for continuation of the existing Municipality and a further period of six months from its dissolution on account of the constitutional provisions. Hence, the provisions of reservation etc. had to be worked out by all concerned and duration of the municipalities existing prior to the constitutional amendment, noticed above, had to be limited to a period of five years only and fresh election as per constitutional scheme, had to be completed within 5 1/2 years. This period of 5 1/2 years, from coming into force of constitutional amendments on 1.6.1993, lasted till 1st December, 1998. This is the obvious outcome of the provisions in Article 243U, as noticed above.

5. Article 243ZF is the second plank on which the petitioners have rested their case. According to learned senior counsel for the petitioners, the provisions of Section 545 of the Act were inconsistent with the various provisions in Part IX A of the Constitution and therefore, they could be enforced only for a period of one year from 1.6.1993. As a result, according to petitioners, since 1.6.1994 Section 545 containing a provision for appointment of Administrator, ceased to be valid law and as a consequence, the Administrator of Gaya Municipal Corporation lost power and jurisdiction to levy any municipal tax at revised rates which were introduced in the year 1996 with effect from 1.1.1997.

6. On behalf of the State and its authorities as well as Gaya Municipal Corporation, the arguments were advanced by learned Additional Advocate General III, Mr Lalit Kishore, Senior Advocate. He first referred to various sections of the Act such as Sections 5, 6, 8, 123, 130 and 138 of the Act for two purposes. First, to make a distinction between a municipal corporation as a perpetual body since its incorporation and the corporation constituted through the process of election for all the seats of municipal councilors. His submission was that once a corporation is incorporated u/s 5, even if its constitution u/s 8 is delayed or improper the corporation as an incorporate will continue to exist because it has perpetual succession as a body corporate and its assets and liabilities cannot vanish in thin air. It was further submitted as a necessary corollary that the continuation of Municipality under Article 243U is applicable to the constituted Municipality and not to Municipality as a body corporate. It was pointed out that dissolution of a Municipality in the context of municipal laws cannot mean dissolution of the corporation as a body corporate and, therefore, it must mean dissolution of the corporation as constituted through election. A subtle distinction was sought to be made between the corporation as a body corporate and the corporation as a municipal authority constituted through election to all the seats of municipal councilors.

7. On behalf of the petitioners it was submitted that such fine distinction is not required to be made and in order to give effect to the constitutional provisions brought into effect in the year 1993 through Part IXA, the municipalities are required to be reconstituted de novo and then fresh elections must be held in accordance with constitutional provisions.

8. Having given anxious consideration to the rival views noticed above, we find merit in the submissions advanced by learned Additional Advocate General. The constitutional amendments, particularly in Article 243ZF make it clear that existing laws and municipalities are to continue so long as they are not inconsistent with the provisions of Part IX A of the Constitution. In that view of the matter, in our view, there is no need to go to the extent of holding that the municipalities duly incorporated under valid laws shall lose the legal sanction behind their incorporation. If such a view is taken then all municipal laws will have to be amended to take care of assets and liabilities of the municipalities/ municipal corporations otherwise the properties would be rendered without any owner on account of legal death of a de jure person without provisions for any succession. Such view is unwarranted.

9. Since we have come to the conclusion that the Municipality as a body corporate would continue to exist without any time limit and only its constitution is required to be redone in accordance with new constitutional provisions of Part IXA, the provision for Administrator as an interim or transitory measure must continue. Hence, the transitory provisions providing for an Administrator contained in Section 545 of the Act may require some regulation or reading down but it cannot be held to be inconsistent with the provisions of Part IXA of the

Constitution of India. If one is permitted to borrow the phrase of political thinkers, the existence of Administrator is still required to take care of Municipal Corporation as a body corporate during period of dissolution etc., as a "necessary evil".

10. As a result of aforesaid deliberations, even the second plank upon which the petitioners rested their submission that Section 545 itself lost its force after one year from 1.6.1993 is found to be without any substance. It is not possible to hold that Section 545 is inconsistent with the constitutional provisions in Part IXA of the Constitution and it has lost its validity after 1.6.1994.

11. The next submission raised on behalf of the petitioners is based upon an analysis of Section 545 of the Act itself. This provision has undergone several amendments, the last being through Amendment and Validating Act of 1993 (Bihar Act 22 of 1993). This validating Act was published in the Bihar Gazette on 26.8.1993 i.e. after the constitutional amendment came into force on 1.6.1993. As a result of this amending and validating Act, Section 1 of Bihar Act 8 of 1985 was amended so as to make the Patna Municipal Corporation Act applicable to all the Municipal Corporations of the State of Bihar with effect from 1.1.1981 and such applicability was to remain in force till 1994. It was further provided through amendment that the period of "one hundred and sixty eight" shall be substituted for the words "one hundred and fifty six" in the proviso to Section 545(1) of the Act. Mr Ram Balak Mahto, Senior Counsel tried to persuade us to hold that after 1994 the provisions of the Patna Municipal Corporation Act including Section 545 would cease to be applicable to Gaya Municipal Corporation because the figure 1994 was not modified subsequently. On the other hand, learned Additional Advocate General drew our attention to the fact that the Bihar Act 22 of 1993 was not only an amending Act but also a validating Act and the figure 1994 was for validating certain actions which had already taken place prior to coming into force of the Act but so far as applicability of the provisions of the Patna Municipal Corporation Act to the other municipal corporations of the State of Bihar is concerned, it was pointed out that the provisions of Bihar Municipal Corporation Act, 1978 as amended in 1982 contain an enabling provision whereunder the State Government may by notification in the official Gazette extend to the corporation established under this Act, all or any of the provisions of the Patna Municipal Corporation Act, 1951 and the rules framed thereunder. Learned Additional Advocate General also pointed out that the period of one hundred and sixty eight months in all, as mentioned in the proviso is over and above the period of original appointment of the Administrator which is one year under main provision of Sub-section (2) of Section 545. Hence, according to Additional Advocate General, the total period permissible for the Administrator u/s 545, after amendment of 1993, was one year plus one hundred and sixty eight months (14 years) on account of original tenure plus permissible extension in all. On that basis according to the State, the Administrator for the Gaya Municipal Corporation could hold office validly for a period of 15 years as a transitory measure after Gaya Municipal Corporation was incorporated in November 1983.

In other words, till November 1998, the acts of the Administrator, Gaya Municipal Corporation were fully legal and valid, without any necessity to defend such acts on the basis of De-facto doctrine.

12. On this issue also we find ourselves in agreement with the submissions advanced by learned Additional Advocate General. It is not possible to hold that after 1994, the provisions of the Act ceased to apply to other Municipal Corporations in the State of Bihar including Gaya Municipal Corporation. The figure "1994" introduced in place of 1993 by Bihar Amendment Act 1993 were only in relation to validating certain past transactions and did not have the effect of limiting the amendment in Section 545 of the Act only till 1994. It is also clear that at least during the relevant period in the year 1996 when impugned notification contained in Annexure-6 to the writ petition, was published and office order was issued by the Administrator on 22.12.1996 (Annexure-E to the counter affidavit) to make the new rates of tax applicable from 1st January, 1997, he had a tenure which was within the permissible period under provisions of Section 545 of the Act. Hence, the impugned action of the Administrator is found to be valid in law because it is not possible to hold that at the relevant time the Administrator of Gaya Municipal Corporation had no power to hold the post of Administrator and/or that his actions were without power/authority or jurisdiction.

13. Another point was argued by learned Additional Advocate General as an alternative submission to meet the eventuality if we had come to an opinion that the Administrator had lost his power and jurisdiction after 1.6.1994. For meeting that eventuality he raised the plea of De- facto doctrine to support the official acts done by the Administrator in the colour of his office till the elections were held in 2002. Since we have already held that the Municipal Corporation of Gaya as a body corporate continued in existence till holding of the subsequent elections under the orders of this Court, and in view of our earlier findings that Section 545 of the Act continues to be in force, it is not necessary for us to consider the alternative submission noticed above. However, since that issue was raised and argued by both the parties, we feel that it would be in the interest of justice to mention at least in brief the arguments of both the parties and our views on this issue also.

14. Learned Additional Advocate General placed reliance upon a judgment of Andhra Pradesh High Court in the case of Immediseti Ramkrishnaiah Sons, Anakapalli and Others Vs. State of Andhra Pradesh and Another, and a judgment of the Supreme Court in the case of Gokaraju Rangaraju Vs. State of Andhra Pradesh, in support of his alternative plea based upon the De-facto doctrine. Those judgments related to validity of acts which were done by members of a market committee (in the case of I.R. Sons) and by a Sessions Judge whose appointment was subsequently declared as invalid (in the case of Gokaraju) . The De-facto doctrine was applied by the courts to save the actions and decisions of the committee and the Judge. On the basis of those judgments it has been urged that acts of the officers de facto performed by them within the scope of their

official authority, in the interest of the public or third person and not for their own benefits, are generally valid and binding as acts of officers de-jure. It was further submitted that the Administrator had continued under the orders issued by the State Government in purported exercise of statutory power and hence, the Administrator cannot be described as a mere intruder or usurper and in fact, he held office under the colour of lawful authority. It was pointed out that even the writ petitioners did not challenge his other acts and agreed to pay the municipal taxes at pre-revised rates.

15. On the other hand, learned senior counsel for the petitioners placed reliance upon a judgment of the Supreme Court in the case of Harivansh Lal Mehra Vs. State of Maharashtra, to point out that no tax or duty can be levied except by authority of law. Hence, it was urged that in matters relating to rate of tax, De-facto doctrine cannot have any application. He also placed reliance upon judgment of the Supreme Court in the case of Union of India and Another Vs. Charanjit S. Gill and Others, to submit that in the said case since a fit person was not appointed as a Judge-Advocate, the Supreme Court held that the proceedings of the Court-martial were not valid and could not be saved on the plea of De-facto doctrine. The submission needs scrutiny. In that case, the relevant rules were noticed by the Supreme Court. In paragraph 16, the Court referred to Rule 103 of the Rules and came to hold that if a fit person possessing requisite qualifications and otherwise eligible to form part of the General Court-martial is appointed as a Judge-Advocate and later some invalidity is found in his appointment, the proceedings of the Court-martial cannot be declared invalid but if the appointee does not possess the requisite qualification then the defect was not curable under Rule 103 of the Rules. Again in paragraph 25, the Court clarified that the judgments rendered by the Court martial which had attained finality would be protected on the basis of De-facto doctrine and could not be reopened.

16. In our view, the principle of law laid down in the case of H.L. Mehra (supra) is not relevant in this case because the authority of law required for levy of tax or duty must flow from some provision of valid law laid down by the Legislature. Learned Additional Advocate General has rightly pointed out that such authority of law to impose tax or duty is available to the Municipal Corporation u/s 123 of the Act. So far as judgment in the case of Union of India v. Charanjit S. Gill (supra) is concerned, that case is merely a further elucidation and clarification of the well established principle relating to de facto doctrine that the officer in question should not be a mere intruder or usurper. A person who was not having the minimum requisite qualification to hold the office has rightly been treated as a usurper in the aforesaid judgment and it was pointed out that had the defect been of a different nature and not relating to fitness, the matter would have been different. In our view, nothing further need be said on the issue relating to de facto doctrine.

17. In the facts of the case, particularly considering the limited challenge to the

authority of the Administrator, in our view, the De-facto doctrine was also available to save his action in revising the municipal taxes on the basis of principles settled by the State Government through 1993 Rules. The validity of those Rules has been upheld by the Supreme Court in its judgment in the case of State of Bihar and Ors. V. Sachidanand Kishore Prasad Sinha and Ors. 1995 (1) PLJR 86 (SC).

18. We have been taken through relevant pleadings to show that the elected Municipal Corporation was constituted in the year 2002 and it has also approved the scheme for revision of municipal taxes which has been challenged by the petitioners and yet another newly constituted Municipal Corporation has again approved the same in the year 2005. It is also admitted at the bar that only few persons taking the shelter of interim order of this Court are not paying municipal taxes at the revised rate and clearly in their cases also only realization was stayed and not the assessment.

19. Considering the entire facts and circumstances and particularly the approach necessary in public interest litigation, we are of the considered view that this writ petition has no merits and does not warrant any further intervention of this Court. It is, therefore, dismissed but without any order as to costs.

Shyam Kishore Sharma, J.

I agree.