

(1982) 03 CAL CK 0045
In the Calcutta High Court

In Re: Sm. Ranu Sengupta and Others

Date of Decision : 25-03-1982

Acts Referred:

Bengal Municipal Act, 1932 — Section 56A
Constitution of India, 1950 — Article 226, 245

Citation : AIR 1982 Cal 420 : 86 CWN 598

Hon'ble Judges : G.N. Ray, J

Bench : Single Bench

Advocate : Braja Gopal Chakraborti, for the Appellant; A.P. Chatterjee, D.C. Chakraborty and Ashit Kumar Goswami for Respondent Nos. 1 and 2, Mukul Prakash Banerjee and Monjula Chaudhuri for Respondent Nos. 3 to 32, for the Respondent

Judgement

G.N. Ray, J.—The petitioners in the instant writ petition are Midwives working in the Howrah Municipality. An order of transfer of the petitioners to different wards of the Howrah Municipality was passed by the President of the Howrah Municipality on June 3, 1980 and in the instant writ petition, the legality and validity of the said order of transfer has been challenged by the petitioners on the allegation that the constitution of a committee to administer the affairs of the Howrah Municipality u/s 56A of the Bengal Municipal Act was illegal and void and as such the members of the said illegal committee had no jurisdiction to assume their offices and discharge their duties and functions as members of the said committee. Consequently, the order of transfer passed by the President of the said Committee was illegal and void. It appears that the Howrah Municipality was governed under the provisions of the Bengal Municipal Act, 1932. A new Act, namely, Howrah Municipal Act, 1965 was enacted by the State Legislature making the Howrah Municipality a Corporation and elections were held in respect of the said Howrah Municipality since converted to a Corporation sometime in May, 1967. But the Corporation could not be constituted because the said Howrah Municipal Act was challenged before this Court in a writ proceeding whereupon a Rule being Civil Rule No. 548 (W) of 1967 was issued by this Court and an interim order was also passed by this Court. It appears that Howrah

Municipal Act, 1965 was thereafter repealed and in the year 1974, electoral rolls of the Municipality had also been prepared. As the State Government contemplated for an establishment of a Municipal Corporation for the city of Howrah and adjoining areas, a comprehensive bill, namely, the Howrah Municipal Corporation Bill, was drafted by the Legislative Department of the State. A draft bill for the amendment of the Bengal Municipal Act was also taken. Simultaneously a draft bill for amending Calcutta Municipal Act was also made. It appears that the Bengal Municipalities Amendment Bill was passed by the West Bengal Legislative Assembly and the assent of the said Bill was given by the President of India on 1st Jan., 1981 and the new Act has now come into force. Under the provisions of the said amended Act, elections in 87 Municipalities out of 93 Municipalities in the State of West Bengal have already been held. As the earlier election of the Howrah Municipality was abortive, the State Government in order to run the administration of the Howrah Municipality appointed an Executive Officer u/s 67A of the Bengal Municipal Act sometime in the middle of 1967 and such appointment was extended from time to time. It is the case of the State Government in the instant Rule that as it was contemplated to introduce a comprehensive bill relating to the Howrah Municipality, no election could be held in respect of the Howrah Municipality before the proposed bill was enacted and the assent of the President was received. But in 1977, the State Government thought it desirable that instead of administering the Municipality with the help of an Executive Officer, an Advisory Committee should be appointed and according to the State Government, such Advisory Committee was constituted under Notification dated 30th Aug., 1977. It appears that the Constitution of the Advisory Committee was challenged and the State Government rescinded the said Notification appointing an Advisory Committee. Thereafter, with a view to have popular voice in the civic administration, pending regular election, the State Government issued notification dated 28th Feb., 1978 appointing a committee of 30 members under the provision of Section 56A of the Bengal Municipal Act, 1932. It appears that one Sri Sureswar Dutta challenged the validity of the said notification appointing a committee of 30 members in the Constitutional Writ Jurisdiction of this Court in Matter No. 336 of 1978. The said Rule was disposed of on 30th Jan., 1979 and the decision of the said case has since been reported in (1979) 1 Cal LJ 565. It appears that no appeal was preferred against the said judgment but the time to hold election as contained in the operative part of the said judgment was extended from time to time by the trial Court. Ultimately an appeal was preferred against the order extending the period to hold election up to 31st Jan., 1981 and the Court of Appeal held that after the disposal of the Rule the trial Court had no jurisdiction to extend the period as referred to in the operative part of the judgment. It appears that the previous committee appointed u/s 56A of the Bengal Municipal Act was cancelled and by Notification dated 1st Aug., 1980 another committee u/s 56A was constituted and it may be noted in this connection that in the subsequent committee under the said notification dated 1st Aug., 1980 most of the members of the previous committee were included.

2. The petitioners in the instant Rule contend that the impugned order of transfer is unreasonable, mala fide and capricious and as such even on merits, the said order of transfers cannot be sustained in law. The petitioners also contend that as the constitution of the committee u/s 56A was illegal and without jurisdiction the said committee had no authority to assume the office and administer the affairs of the Howrah Municipality. Accordingly, the order of transfer passed by the President of the said Committee is per se illegal and void. The petitioners have therefore also prayed for a writ in the nature of quo warranto directing the respondents Nos. 3 to 32, namely, the members of the Committee appointed u/s 56A in Aug., 1980 to vacate the office and not to hold the office and administer the affairs of the Howrah Municipality.

3. Mr. Chakraborti, the learned counsel appearing for the petitioners, has contended that Section 56A of the Bengal Municipal Act is ultra vires the Constitution and also the Bengal Municipal Act. It is contended that the provision of Section 56A is a colourable piece of legislation attempted to achieve something indirectly which it cannot achieve directly. It is also contended that the provision of Section 56A is arbitrary as no guideline has been laid down either for ascertaining the reasons for the constitution of a Committee or the selection or choice of the members of the committee by nomination. The learned counsel has also contended that the provision of Section 56A is liable to be struck down because no time limit has been fixed for the tenure of the Committee to be appointed u/s 56A. As a result, the ratepayers of the Municipality may be perpetually denied of their right to vote and elect their own representatives for the administration of the Municipality. Mr. Chakraborti has further submitted that provision of Section 56A of the Bengal Municipal Act is a direct negation of the principles of the parent Act, namely, the Bengal Municipal Act and It destroys the integral scheme enshrined in the main Act. It is also contended that the provision of Section 56A has created a double standard for the administration of the Municipality one by the elected representatives for a limited period and another by the nominated members u/s 56A for an indefinite period. He also submits that Section 56A suffers from the vices of excessive delegation of unguided, uncontrolled and uncanalised power to the executive which enables the executive Government to abdicate its basic statutory duty contrary to the other provisions of the Bengal Municipal Act. It is also contended in this connection that the Legislature itself cannot abdicate its constitutional responsibility by conferring an unguided power on the executive. Mr. Chakraborti has also submitted that the Notification appointing a committee u/s 56A is bad because the selection of the members of the committee has been made with no intelligible differentia, thereby offending Article 14 of the Constitution. Mr. Chakraborti has submitted that under the provisions of the Bengal Municipal Act the tenure of the Commissioners of the Municipality is fixed by the provision of the Statute, but the period of tenure of the Committee to be appointed u/s 56A has not been fixed and the State Government, if it so desires, can go on extending the period of tenure of the committee thereby depriving the

ratepayers to hold the election and select their representatives for administering the affairs of the Municipality. It has also been contended by Mr. Chakraborti that about the selection of the members of the committee there is no guideline and the State Government has been given an absolutely free hand in selecting the members of the Committee according to its own choice. Such unguided and uncanalised power given to the Executive must be held to be bad on the vice of excessive delegation. Mr. Chakraborti has submitted that unfortunately since 1967, the popular representatives elected by the ratepayers of the Municipality could not hold their office and administer the affairs of the Municipality. The State Government appointed executive Officers u/s 67A of the Bengal Municipal Act and got the Municipality administered by such executive officers from time to time. He submits that simply because the State Government felt that a more comprehensive Act relating to the affairs of the Howrah Municipality should be passed by the State Legislature and simply because such a bill was introduced in the Legislative anvil, there was no reason to hold back the election of the Municipality on the basis of the existing Act and the appointment of the Committee u/s 56A on the plea that the election of the Municipality could not have been held is devoid of any substance. As such, even assuming that the provision of Section 56A is not ultra vires, there was no reasonable ground for appointment of the Committee u/s 56A and the purported notification appointing a committee u/s 56A must be held to be a colourable exercise of power. Mr. Chakraborti has submitted that in the writ proceeding initiated at the instance of Sri Sureswar Dutta as referred to hereinbefore, this Court specifically observed that within a specified time the election of the Municipality must be held and the committee should not be allowed to function beyond the prescribed period. The State Government in order to circumvent the said direction given by this Court again appointed a Committee u/s 56A on 1st Aug., 1980 by cancelling the previous committee. Although the previous committee was cancelled and a new committee was sought to be set up by notification dated 1st Aug., 1980, in reality, the State Government retained the same old committee because excepting about 4 members, all the members of the previous committee were included in the new committee. Such action on the part of the State Government, according to Mr. Chakraborti, is nothing but fraud on the statute and a glaring example of colourable exercise of power,

4. So far as the merits of the impugned order of transfer are concerned, Mr. Chakraborti has contended that the services of the petitioners are transferable but any order of transfer must be subject to the convenience of the concerned members of the staff on one hand and public interest on the other. It is contended by the petitioners that orders of transfers are always passed long ahead of the actual date of transfer. But in the instant case the impugned order of transfer was passed on June 3, 1980 and the transfer was sought to be given effect to immediately, Such order of transfer in the middle of year was made only to ensure great hardship and inconvenience of the petitioners without any administrative necessity. It is also contended by the petitioners that the

petitioners were asked by the other impugned order consequent to the order of transfer namely order dated July 7, 1981 to shift to Giribala Memorial Free Primary School situated in Ward No. VIII although it was not physically possible for the petitioners to render public services in different wards while staying in Ward No. VIII together. It is contended by the petitioners that services of the Midwives are to be rendered round the clock and there should not be any communication gap between the public who require the services of the petitioners as Midwives and the petitioners. It is also contended by the petitioners that there is no transport facility to cover the distance between different wards and the petitioners being ladies, it will be unsafe to move around through different wards particularly at night and if prompt services cannot be given by the petitioners, the very purpose may be frustrated and at times their delayed arrivals may prove fatal.

5. Mr. Mukul Prokash Banerjee, the learned counsel appearing for the respondents Nos. 3 to 32, namely, the members of the impugned committee appointed u/s 56A of the Bengal Municipal Act, contends in the first place that the Committee u/s 56A was appointed under Notification dated 28th Feb., 1978. Thereafter, such committee u/s 56A had continued all along and the administration of the Municipality was made by the Committee appointed u/s 56A. The petitioners being employees of the Municipality were under the administrative control of the members of the committee appointed u/s 56A ever since 1978 but at no point of time the petitioners challenged the authority of such committee to hold the office. It is only in 1981 that the instant writ petition was filed by the petitioners. Accordingly, there is an inordinate delay in moving the writ court and on that score alone the writ petition should be dismissed. He submits that the power of the High Court to issue writ under Article 226 of the Constitution is discretionary and if there is no satisfactory explanation for the inordinate delay the High Court may reject the petition, more so if the High Court is of the opinion that the issue of the writ as played for will lead to public inconvenience and interference with rights of others. For this contention, Mr. Banerjee has referred to the decision of the Supreme Court made in the case of Ashok Kumar Mishra and Others Vs. Collector, Raipur and Others, . Mr. Banerjee also contends that as the State Government contemplated to amend the provisions of the Bengal Municipal Act and as it was contemplated to constitute the Howrah Municipality differently and to hold elections after the amendment of the Act, the State Government was quite justified in not holding the elections earlier. He submits that no useful purpose would have been served in holding an election of the Howrah Municipality under the existing Act and thereafter to scrap the election when the proposed amendment was effected. Accordingly the affairs of the Municipality had been administered by an executive officer appointed u/s 67A. Subsequently the State Government thought it desirable to have the affairs of the Municipality administered not by a single individual namely the Executive Officer but a member of local persons and for the said purpose a committee u/s 56A was appointed in 1978. Mr. Banerjee submits that although in the writ

proceeding initiated by Sri Sureswar Dutta, this Court observed that the election should be held at an early date, such election could not be held for reasons beyond the control of the State Government and in deference to the observation and direction of this Court made in the said decision in Sureswar Dutta's case, the earlier committee appointed u/s 56A was dissolved by the State Government and a new Committee was formed. It is immaterial if in the new Committee, a large number of the members of the earlier committee were included. Mr. Banerjee has contended that every Government has a right to appoint members of the committee according to its own choice and in the absence of any material establishing want of good faith on the part of the Government in the selection of the personnel of the committee, the constitution of the committee cannot be held to be bad. For this contention, Mr. Banerjee has referred to a decision of the Delhi High Court made in the case of Durga Chand and Another Vs. Administrator and Others, . Mr. Banerjee also submits that the power u/s 56A can be exercised not only where the order of the Court stands in the way of holding election but also in a case where election cannot be held for other reasons and "other reasons" referred to in Section 56A are not similar to the reasons of pendency of legal proceedings or injunctions issued , therein. He also contends that if the decision of the constitutional question is not absolutely necessary, the writ court will not decide such question. For this contention, he refers to a decision of the Supreme Court made in the case of Union of India (UOI) and Others Vs. C. Damani and Co. and Others, . Mr. Banerjee also contends that a prayer for a writ of quo warranto must fail if an authority of law can be shown for the purpose of assumption of office. It is not necessary to examine any further the validity of the law on the basis of which the authority is assumed. Such question may be gone into if the writ for mandamus or certiorari is to be issued. For this contention, Mr. Banerjee relies on a decision of the Kerala High Court made in his case of Alex Beets Vs. M.A. Urmese and Another, . In this connection, Mr. Banerjee has also referred to the decision of the Supreme Court made in the case of Abdul Rahiman Khan Vs. Sadasiva Tripathi, where the Supreme Court has held that the scope of quo warranto is very limited namely whether or not the appointment in question is by a proper authority and in accordance with the law. If there is an express statute governing such appointment, such appointments will be a sufficient answer to the motion for a writ of quo warranto even if the order of appointment is otherwise bad being violative of Article 16 of the Constitution. Hence, invalidity though may be heard in a motion for a certiorari or prohibition cannot be heard in a writ of quo warranto.

6. Mr. Chatterjee, the learned Senior Standing Counsel appearing for the State respondents, has supported Mr. Banerjee in the aforesaid contentions raised by him. He has also submitted that it is incorrect to contend that there is no guideline in the matter of selection of committee members u/s 56A and the provisions of Section 56A suffer from the vice of excessive delegation of unguided, uncontrolled and uncanalised power. For appreciating the scope and import of Section 56A and the contention of respective parties, the provisions of

Section 56A are set out hereunder:--

56A. Appointment of Committee in case of failure of or delay in holding general election-- (1) Whereafter the expiry of the term of office of the Commissioners of a Municipality under Sub-section (1) or Sub-section (5) of Section 56, the State Government is of opinion that by reason of the order of a court preventing the holding of a general election of Commissioners in the Municipality or setting aside such election or for any other reason, there is no likelihood of a new body of Commissioners being formed within a reasonable time to take over municipal administration, the State Government may, if it thinks fit so to do in the public interest, by order, appoint a committee consisting of the same number of members as the Commissioners of the Municipality to take charge of the administration of the affairs of the Municipality in accordance with the provisions of this Act and the rules and bye-laws made thereunder.

(2) No person shall be appointed as a member of the committee if he is subject to any of the disqualifications mentioned in Section 22. * * *

Referring to the provisions of Section 56-A, Mr. Chatterjee submits that the discretion of the State Government is controlled in various ways. The number of the members of the Committee and the disqualification of such members have been provided for and the circumstances under which appointment of the committee can be made have also been indicated. Even assuming that there might have been further guidelines for a better exercise of the power, it cannot be said that there is no guideline whatsoever for the purpose of exercising power u/s 56A and as such Section 56A is liable to be struck down on that score. Mr. Chatterjee has also contended that the petitioners have failed to produce any material to show that the members of the committee appointed u/s 56A belong to a political party or simply on political consideration other eligible persons have been left out. In order to bring home of a case of mala fide action, sufficient materials must be disclosed by the petitioners. He submits that out of 30 members of the committee, 14 are the members who were elected earlier but because of the challenge of the said election in a court of law, they could not assume office as Commissioners. Mr. Chatterjee also submits that Section 56A does not evade the spirit of the Act but it really provides for administration by the members of the public at a point of time when for circumstances indicated in Section 56A, it is not possible to hold election of the Municipality and/or to get the Municipality administered by the elected Commissioners. He also submits that right to be elected is not a fundamental right but such right is governed by the Statute. Hence, if a right which is created by the Statute is taken away by the Statute itself, no objection can be raised. Mr. Chatterjee also submits that Section 56A is not bad but the same has been enacted to tide over the exigencies when the elected Commissioners cannot administer the affairs of the Municipality but at the same time there is a necessity of administration of the Municipality by a democratic body. Mr. Chatterjee contends that if exercise of power u/s 56A has not been made properly then such mala fide exercise of

power may be quashed but the contention of the petitioners that Section 56A is ultra vires and as such assumption of powers by the respondents Nos. 3 to 32 is illegal and without jurisdiction, is wholly untenable. Mr. Chatterjee has submitted that legislative enactment involves different stages and it is often time consuming. He has also drawn the attention of the Court that in the instant case although the West Bengal State Legislature passed the Amendment Act the same could not be operative because it took quite long time for getting the assent of the President. On instruction, Mr. Chatterjee has submitted that the State Government has no intention to hold back the election of the Commissioners of the Howrah Municipality under the provisions of the amended Act. A supplementary affidavit has also been filed on behalf of the State respondents and it has been contended therein that the State Government intends to hold election of the Howrah Municipality as early as practicable under the provisions of the amended Act, but such holding of election will take a few months for complying with various formalities and the reasons for such time to hold the proposed election have also been explained in the supplementary affidavit.

7. In reply to the contention raised by Mr. Banerjee and Mr. Chatterjee, appearing for the respective respondents, Mr. Chakraborti contends that if the provision of a Statute has a possibility to be abused or misused by the concerned authority because of unguided and uncanalised power given therein, the said provision is liable to be struck down even if the action actually taken under the said Statute is quite reasonable and the concerned authority has in fact acted with prudence. He contends that unguided discretion patently violates the doctrine of equality. Mr. Chakraborti also submits that it is true that the presumption is in favour of constitutionality of a legislative enactment and it has to be presumed that the Legislature understood and appreciated correctly the needs of the people. But when on the face of it, there was no classification at all and no attempt has been made to select any individual or group with reference to any differentiating attribute peculiar to that individual or group and not possessed by the others, this presumption will be of little or no assistance. For this contention, he refers to the decision of the Supreme Court made in the case of *Waryam Singh and Another Vs. Amarnath and Another*, . Mr. Chakraborti contends that the provision of Section 56A is a colourable piece of legislation and it is not correct to contend that the provision is legal and valid. He contends that colourable legislation is a legislation which the legislature has enacted by transgressing its legislative powers in a covert or indirect manner and it adopts a device to outstep the limits of its power. He submits that under the provisions of the Bengal Municipal Act, the Commissioners of the Municipality have a fixed tenure and the extension of such tenure is also fixed by the provisions of the Statute. The affairs of the Municipality cannot be administered by the elected Commissioners beyond the term of their tenure but by the provisions of Section 56A, the State Legislature in an indirect manner had provided for administration of a Municipality by some persons without any time limit. This is a device to outstep the limits of its powers. For this contention, Mr. Chakraborti refers to a

decision of the Supreme Court made in the case of P. Vajravelu Mudaliar Vs. Special Deputy Collector, Madras and Another, . Mr. Chakraborti has also contended that there is no question of acquiescence or estoppel in the instant case so far as the petitioners are concerned. It is nobody's case that the petitioners had the occasion to know the invalidity of the constitution of the Committee but even after coming to know of such illegality of the constitution of the committee, the petitioners accepted the said committee and submitted to its jurisdiction. Mr. Chakraborti also contends that in a writ of quo warranto mere delay should not be fatal if the assumption of office is illegal and without authority of law. The moment such illegal assumption of jurisdiction is established, such person should be prevented from assumption of office by the appropriate writ in the nature of quo warranto.

8. After giving my anxious consideration to the respective submissions made by the learned counsel for the parties, it appears to me that Section 56A of the Bengal Municipal Act is not a colourable piece of legislation. The said provision has been incorporated in order to tide over exigencies or circumstances where the election of the Municipality cannot be held or the elected Commissioners cannot discharge their duties and functions. It also appears to me that there is indication in Section 56A as to where and under what circumstances the Committee u/s 56A is to be appointed. The number of the members of such committee and their disqualification have also been prescribed. In my view, the learned standing counsel is justified in his contention that a better guideline might have been given in the matter of exercise of power u/s 56A but it cannot be contended that the provision is wholly uncontrolled or uncanalised and as such the same is liable to be struck down. It also appears to me that Section 56A has been incorporated in the statute for tiding over the exigency created under certain circumstances when the elected Commissioners cannot hold the office and there is difficulty in holding election. As the duration of such exigency cannot be precisely anticipated no period for which the committee constituted u/s 56A will continue, has been prescribed. If the exigency for which the committee was constituted comes to an end and there is no impediment to hold regular election or assumption of office by the elected Commissioners, then there will be no occasion for continuance of the Committee u/s 56A. The continuance of the Committee beyond any period of exigency may be questioned and in an appropriate case such continuance may be a case of mala fide exercise of power. But Section 56A does not become invalid for not mentioning the tenure of the Committee. It may be noted that the fixation of tenure of the Committee constituted u/s 56A may defeat the very purpose of Section 56A. I am also inclined to accept the contention raised by Mr. Banerjee appearing for the respondents Nos. 3 to 32 that the provision of Section 56A is an answer to the assumption of power by the respondents Nos. 3 to 32 and a prayer for writ of quo warranto must fail. If the statutory authority for assumption of office u/s 56A is established. For the purpose of a writ of quo warranto. It is not necessary to investigate the legality or validity of the provisions of the Statute under which

the assumption of office is made and such investigation may be made for the purpose of issuing writs in the nature of mandamus or certiorari. About the selection of personnel of the members of the committee. It does not appear to me that the petitioners have produced any material on the basis of which it can be held by this Court that the State Government has acted mala fide and/or in abuse of the powers given u/s 56A in selecting the members of the committee. It appears that 14 members were elected as Commissioners of the Municipality in the earlier election which was held illegal by a court of law. In a democratic set up a Government elected by one or a few political parties may reasonably select persons professing faith in the political party or parties by which the Government is formed and such selection is not per se illegal or bad. If, however, it can be shown that the Government in selecting personnel or in the matter of exercising discretion has left out the eligible candidates simply on the score of political affiliation and has selected persons who are not otherwise suitable, there may be occasion to presume mala fide action. It may be noted here that a Government although elected by one or few political parties nevertheless remains a Government of all the people of the State and as such it has a basic duty to represent the cause of the State in an unbiased manner. In the aforesaid circumstances, it does not appear to me that the provision of Section 56A of the Bengal Municipal Act is illegal or unconstitutional and the challenge of the petitioners in this regard must fail. So far as the merits of the case are concerned, it may be noted that the Municipality has specifically contended before this Court that at night no Midwives will be required to attend any call and transport to any from the patient's house from the residence of the Midwives will be arranged by the Municipality. It has been specifically submitted by the learned counsel appearing on behalf of the Municipality that when a call for a Midwife is received at the Municipality's office, the Municipality sends Ambulance Car with necessary assistants to pick up the particular Midwife and takes her back from the patient's house. The learned counsel for the respondents Nos. 3 to 32 has also submitted that the question of personal hardship of any of the petitioners can always be considered if a representation to that effect is made and the case of such hardship is brought home. In the aforesaid circumstances, it does not appear to me that the transfer of Midwives from one ward to other and the allotment of residential accommodation to them at a particular place are illegal and mala fide on the face of them. Accordingly, no interference is called for and this Rule fails and is discharged. It is, however, reasonably expelld that the respondents Nos. 3 to 32 should give anxious consideration to personal problems and/or hardship of the petitioners who have rendered long useful service to the Municipality and whose services may still be utilised by the municipality very effectively. There will be no order as to costs in this Rule.