

(1991) 05 PAT CK 0016

In the Patna High Court

Case No : C.W.J.C. No. 6514 with 6547 of 1990

Janak Yadav

APPELLANT

Vs

State of Bihar and Others
 Abinash Chandra Pathak
and Others Vs State of Bihar and Others

RESPONDENT

Date of Decision : 08-05-1991

Acts Referred:

Bihar and Orissa Municipal Act, 1922 — Section 13(2), 13(3), 15, 17, 20

Citation : AIR 1992 Patna 51 : (1991) 39 BLJR 1138 : (1991) 2 PLJR 392

Hon'ble Judges : Sachchidanand Jha, J; Binod Kumar Roy, J

Bench : Division Bench

Advocate : Shyama Prasad Mukherjee and Hemendra Prasad Singh and Bishundeo Prasad Yadav, in C.W.J.C. No. 6514/90 and Ramchandra Jha and Santosh Kumar Jha, in C.W.J.C. No. 6547/90, for the Appellant; Shyama Prasad Mukherjee and Hemendra Prasad Singh and Bishundeo Prasad Yadav, in C.W.J.C. No. 6547/90, Dayanand Singh, Standing Counsel, Uday Chand Prasad and Nirmal Kumar, Radha Mohan Prasad, Govt. Pleader, Tarun Kumar Sinha, Jr. Counsel to Govt. Pleader and Ramchandra Jha and Santosh Kumar Jha in C.W.J.C. No. 6514/90, for the Respondent

Judgement

S.N. Jha, J.—C.W.J.C. No. 6514 of 1990 has been filed on behalf of the sole petitioner Janak Yadav (hereinafter referred to as "the petitioner") claiming to be duly co-opted Commissioner and duly elected Chairman of Chapra Municipality (hereinafter referred to as the Municipality) for quashing the decision of the Collector, Saran as Communicated by the Deputy Collector Incharge General Section in his letter dated 5-10-1990 (Annexure-1) directing Shri S.S. Prasad, Executive Magistrate, Sadar, Chapra to take necessary steps for the co-option of the local Legislator as commissioner of the Municipality under the provisions of Bihar and Orissa Municipal Act, 1922 (hereinafter referred to as "the Act"), as also for quashing the consequential notice dated 6-10-1990 (Annexure-2) issued under Rule 57 of the Bihar Municipal Election and Election Petition Rules, 1953. C.W.J.C. No. 6547 of 1990 has been filed by four persons (who have also filed intervention Petition in C.W.J.C. No. 6514 of 1990 and will be referred to as

intervenors in this Judgment) for issuance of a writ in the nature of quo warranto questioning the competency of the aforesaid Janak Yadav (impleaded as respondent No. 3 in this case) to continue as the Chairman of the said Municipality. These two writ petitions have been heard together and are being disposed of by this common judgment as the facts and the points arising for consideration are the same in both the cases.

2. In the Chapra Municipality, the total number of Municipal Commissioners is 36 out of which 32 are to be elected and the rest are to be co-opted from amongst six constituencies as mentioned in Sub-section (2) of Section 13 of the Act. On 26-2-1989 the general election in respect of 32 Ward Commissioners was held and 32 persons were elected as Commissioners. A meeting of the elected Municipal Commissioners thereafter was held on 31-3-1989 in which four persons, including the petitioner, were co-opted as Commissioner of the said Municipality. It may be stated here that at the relevant time the petitioner was a member of the Bihar Legislative Assembly and he was co-opted from the category of "Local Legislator" as mentioned in Clause (VI) of Section 13(2) of the Act. Thereafter, as contemplated by Section 14 of the Act, the names of all the elected and co-opted Commissioners including the petitioner were published in the official Gazette. On 7-4-1989 a meeting was held of the elected and co-opted Commissioners in the premises of the Municipality in terms of the provisions of Section 20 of the Act to elect the Chairman and other office bearers. It is said that the petitioner was elected as Chairman by defeating the nearest rival by a margin of 8 votes. Thereafter, the election of the petitioner as Chairman was duly notified in the official Gazette.

3. According to the case of the petitioner, the term of the office of the petitioner as the Chairman of Municipality is of five years subject to the provisions of Section 30 read with Sections 33, 34 and 35 of the Act and unless and until he is removed from the aforesaid office in accordance with the relevant provisions, the State Government or the Collector of District have no jurisdiction to remove the petitioner from the office of the Chairman and/ or to take steps for co-option of another person in his place as the Commissioner and therefore, the impugned action purporting to take steps for co-option of another person in his place is illegal and without jurisdiction. "

4. Although no counter affidavit has been filed in behalf of the Municipality, it would appear from the case of the intervenors as stated in the writ application filed in C. W. J. C. No. 6547 of 1990 that a General Election for the Bihar Legislative Assembly was held in February, 1990 in which the petitioner, who was earlier representing the Chapra Assembly Constituency, lost and ceased to be the member of the Legislative Assembly. According to the intervenors, with the cessation of the term of Membership of the Legislative Assembly, the Membership of the Municipality as the co-opted Commissioner representing the "Local Legislator" category as enumerated u/s 32(2)(vi) of the Act also comes to an end and therefore, there has to be a fresh co-option of the newly elected local

Legislator from the aforesaid category. Accordingly, it is said that on 12-4-1990 the newly elected Member of the Legislative Assembly from Chapra Assembly constituency sent a letter to the Collector, Saran impressing upon him the need to hold a meeting for fresh co-option from the aforesaid category as the petitioner, in these circumstances, had forfeited his right to continue as the co-opted Commissioner. According to them further, since the petitioner has ceased to be the co-opted Commissioner in the eye of law, he cannot also continue as the Chairman of the Municipality because only an elected or co-opted Commissioner is eligible for election as the Chairman.

5. The petitioner has come to this court challenging the impugned order and the notice (Annexure-1 and 2) on the ground that in absence of any provision in regard to automatic cessation of the term of the office as the co-opted Commissioner and the elected Chairman consequent upon end of the term of the Membership of the Assembly, the petitioner cannot be deemed to have ceased to be the co-opted Commissioner or the elected Chairman and the category of the local Legislator cannot be deemed to have become vacant. On the other hand, on the ground, as stated above, that the petitioner has ceased to be the co-opted Commissioner and also as the Chairman pursuant to his losing the Assembly Election giving rise to vacancy in the aforesaid office, the other writ petition has been filed by the intervenors for issuance of an appropriate writ that the petitioner is no longer competent in law to function as the Chairman of the said Municipality.

6. The question for consideration to these two applications is whether with the end the term of office as Legislator, the Membership of the person concerned of the Municipality also automatically comes to an end. It would be appropriate at this stage to notice the relevant provisions of the Act having bearing on the question aforesaid.

7. Section 13 of the Act provides that the State Government shall, by notification in the official Gazette, fix the number of the Commissioners who shall be elected in the prescribed manner comprising not less than 30 or more than 36 out of which, one fifth of the number of the elected Commissioners, subject to a maximum of four, have to be co-opted by the elected members from the following categories of persons (i) Woman, (ii) Scheduled castes, (iii) Scheduled Tribes (In Municipalities where the population of Scheduled Tribes exceeds three per cent according to the latest published Census report) (iv) Backward Classes, Annexure-1, (v) Minority, (vi) Local Legislator. Section 20 provides for the manner in which the Co-option of the Commissioners as required under Sub-section (2) of Section 13, referred to above, is to be made. Section 14 lays down, inter alia, that the names of Commissioners elected or co-opted shall be published in the official Gazette. Section 29 Provides for the tenure of office of the Chairman, Vice-Chairman, President and the Municipal Commissioner. Sub-sections (1) and (2) of Section 29, having bearing on the question involved, may be quoted in extenso :--

"(1) Save as otherwise provided in this Act -

(a) an elected Commissioner shall hold office for five years commencing from the date of the general election of Commissioners in the Municipality;

(b) a commissioner co-opted u/s 14 shall hold office for five years and such co-option shall be deemed to have been made on the date of aforesaid general election:

(c) a Chairman, whether elected or appointed, Vice-Chairman and a President, if any, shall hold office for five years from the date of his election or appointment, as the case may be or for the residue of the term of office of the Commissioners whichever be less.

(2) The term of office referred to in Subsection (1) shall be deemed to include any period which may elapse between the expiry of the said period of term and the date of the first meeting of the body of Commissioners newly elected and co-opted. Provided that the Commissioners, Chairman, Vice-Chairman and President, if any, shall cease to hold office after six months from the date of expiry of their terms unless extended by the State Government for a further period, not exceeding six months, and thereafter the State Government shall make such arrangement for the administration of the Municipality till the first meeting of the newly elected and co-opted Commissioners as it deems fit and proper : Provided further that if on the date of Promulgation of the Bihar Municipal (Second Amendment) Ordinance 1977 a period of five years and three months or more has already elapsed after the date of the last election, the term of office of the Commissioner, Chairman, Vice-Chairman and President, if any shall be deemed to continue for another three months unless the State Government extend the period up to a maximum of six months, but in any case the total period of their term of office shall not exceed six years from the date of last election or co-option, as the case may be." Sections 30, 32, 33, 34 and 35 have to be read together, as providing for the manner in which the vacancy in the office of any commissioner, Chairman, Vice-Chairman or President may occur and the mode and manner in which such vacancies are to be filled up. Specific reference to these provisions will be made in this judgment at the appropriate place later.

8. Mr. Shyama Prasad Mukherji, learned counsel appearing on behalf of the petitioner has submitted that once a person is co-opted from one of the categories mentioned in Section 13(2), he cannot be removed except in the manner prescribed under Sections 34 and 35. He also submitted that in absence of any provision in the Act, the end of the term of office as the Legislator will not ipso facto amount to cessation of the terms of office as the co-opted Commissioner or the Chairman. Consequently, even if the person concerned has lost the election for the Legislative Assembly and has ceased to be the local legislator, his office as the co-opted Commissioner or the Chairman cannot be deemed to have automatically become vacant and therefore, the authorities have

no jurisdiction to take steps for filling up any such alleged vacancy whatsoever. According to learned counsel, in terms of Clause (b) of Section 29(1) of the Act, the term of office of the co-opted Commissioner is of five years from the date of general election of the Commissioner in the Municipality and during this period no vacancy in the office can be said to occur except by reason of the death, resignation or removal of the persons concerned. He also submitted that eligibility for co-option from the category of the local legislator has to be determined with reference to the date of co-option and once co-opted the term has to be reckoned as comprising a period of five years.

9. Mr. Ram Chandra Jha, learned counsel appearing on behalf of the intervenors could not point out any provision in the Act whereunder it can be said that after co-option of the local legislator as Commissioner of the Municipality from that category is notified in the official Gazette u/s 14, the term could be interrupted in the event of his ceasing to be the local legislator. He however, referred to the provisions of Sub-section (3) of Section 13 in support of his contention that the Co-opted Commissioners also are subject to the same disabilities as those of the elected Commissioners. He, however, could not point out any such disability, like in the instant case, other than Section 17. Section 17 provides for the qualification of the election of the Commissioner and says that no person shall be qualified for election as a Commissioner if he is an undischarged insolvent or not entitled to vote in such election. The qualifications for being voters are mentioned in Section 15 which prescribes that, apart from such rules as may be framed prescribing qualifications and disqualifications of voters, no person shall be entitled to be required as a voter who (a) has not attained the age of 21 years (b) is not a citizen of India and (c) is of unsound mind so declared by a competent court. In other words, in terms of Section 13(3), the only disabilities which the co-opted commissioners may be said to suffer are those mentioned in Sections 15 and 17. There is no indication in these provisions that subsequent cessation of the office as the legislator during the five years tenure will amount to a disability within a meaning of Section 13(3). In my opinion, the term "disability" as occurring in that provisions refers to the time of election and not thereafter. The interpretation as sought to be by Mr. Ram Chandra Jha is in direct conflict with the provisions of Section 29(I)(b) which, as noticed above, provides that a commissioner co-opted u/s 14 shall hold office for a period of five years from the date of the general election in the Municipality in question.

10. I have already indicated above the provisions in regard to subsequent vacancies in the office of any Commissioner Chairman, Vice-Chairman or President, and the mode and manner to fill up the same. Section 30, on which also reliance was placed by Mr. Jha, reads as follows :---

"If any Commissioner, Chairman, Vice-Chairman or President, is by reason of his death, resignation, removal or otherwise, unable to complete his full term of office, or if a Chairman or Vice-Chairman avails himself of leave granted u/s 27, the vacancy so caused shall be filled by the election, co-option or appointment as

the case may be, of another person, and the person, so elected, co-opted or appointed, shall fill such vacancy for the unexpired remainder of the term for which commissioner Chairman Vice-Chairman or President would otherwise have continued in office or during his absence on leave, as the case may be.

(2) the provisions of Section 20 shall apply to the election of a Chairman under this Section."

It would appear from the above provision that if the Chairman, Vice-Chairman, President or any Commissioner, is by reason of death, resignation or removal or otherwise, unable to complete his full term of office, the vacancy so caused shall be filled by the election or co-option, as the case may be of another person. Learned Counsel argued that vacancy in terms of S. 30 will occur in the office not only by death, resignation or removal but otherwise also and according to him, the term" or otherwise occurring in the provision is of very wide amplitude and covers all other kinds of situations, including the one in the instant case.

11. Having given my anxious consideration to the aforesaid arguments, I find myself unable to agree with the same. It is well settled that expression "or otherwise" has to be understood in the context in which it is need i.e. ejusdem generis. In the present case the said expression has to be understood to mean a situation in which the person concerned has become incapacitated from functioning for the post like continued illness for a long period, Physical disability etc. In the case of Sayyeduz-zafar v. The State of Bihar reported in (1991) 1 PLJR 26 this Court had the occasion to consider the meaning of similar expression occurring in Section 37D of the Act which provides that:--

"During any absence on leave or otherwise of the Executive Officer for a period exceeding fifteen days at a time the State Government may appoint a person to act as the Executive Officer,"

The submission was made that the State Government in exercise of power conferred u/s 37D(1) can appoint a person as the Executive Officer even if the post is vacant since this will amount to absence otherwise within the meaning of the said provision. It was held that the provision shall be applicable only when the post of the Executive Officer is not vacant and the Executive Officer is on leave or otherwise absent and not performing his duty as such during which period, by way of stop-gap arrangement appointment of another Executive Officer can be made by the State Government. The same principle of ejusdem generis was applied in interpreting of the aforesaid provisions. As such, in my opinion, expression "or otherwise" occurring in Section 13(1) would not cover a case of the present nature. In absence of any provision, it has to be held that a local Legislator not suffering from any disability within the meaning of Section 17 read with Section 15 of the Act, if he is duly co-opted as Commissioner and such co-option is duly notified in the official Gazette his term of the office shall be reckoned and be continued for full term of five years, subject, of course, to any intervening circumstance such as mentioned in S. 30 namely death, resignation

or removal or any other situation akin to that, in the manner prescribed in Sections 33, 34 and 35 respectively. If on the date of co-option the person concerned was duly elected legislator being member of either State legislature or Parliament, simply because he has lost the Assembly seat at any subsequent election and has thus ceased to be the Legislator, his term of office as co-opted Commissioner will not come to an end. The position will be different if the said election to the State legislature or the Parliament, as the case may be, itself is declared to be null and void by a competent court. 12. The question that next arises for consideration is whether even if it be assumed that with the ceassation of the Status of the local Legislator the term of office as the co-opted commissioner also comes to an end, whether it can be said that the person concerned will also cease to be the Chairman of the Municipality. In this connection the provisions of Sub-section (2) of Section 20 of the Act may be pointedly noticed :--

"(2) Save as is otherwise provided in this Act, the elected and co-opted Commissioners shall elect, by name one of their number or some person qualified to be of their number to be the Chairman."

It would appear from the aforesaid provision that at the time of election of the Chairman, the Electrol College consisting of the elected and co-opted Commissioner may elect either one of them (Commisioners) or some person qualified to be the Commissioner, as the Chairman. It would, thus appear that the choice in the matter of election of the Chairman is not confined to only the members i.e. the Commissioners of the Municipality but a person, who is not a member i.e. Commisisoner may also be elected. In this connection, the provisions of Section 22 may also be noticed. The said provision, inter alia, deals with the status of the elected Chairman, "if not already Commissioner of the Municipality". This also supports the contention that a non member also be elected as the Chairman and when so elected, shall have, during the term of his office, all the rights and privileges of the Commissioner of the Municipality in question.

13. In that view of the matter, it has to be held that the petitioner, cannot be said to suffer from any legal incompetency so as to disentitle him to continue and function as the Chairman of Chapra Municipality, notwithstanding that he ceased to be the local Legislator since March, 1990. Whatever be said about its legal effect, he does not forfeit his right to continue as the Chairman even if it be assumed that he ceased to be a co-opted Commissioner.

14. For the reasons stated above, no writ of quo warranto, as prayed for in C.W.J.C. No. 6547 of 1990, can be issued. In view of my finding above that, in absence of any provision to the contrary, the term of the petitioner as the Co-opted Commissioner of the Municipality will not come to an end till the expiry of a period of five years from the date of general election of the Commissioners in the said Municipality merely because he ceased to be local legislator subsequently since March, 1990 it has to be held that the impugned order of

notice as contained in Annexures 1 and 2 in C.W.J.C. No. 6514 of 1990 are not in accordance with law.

15. In the result, C.W.J.C. No. 6514 of 1990 is allowed and the impugned communication (Annexure-1) and the notice (Annexure-2) are quashed C.W.J.C. No. 6547 of 1990 is dismissed. There shall be no order as to costs in both the writ petitions.

Binod Kumar Ray, J.

16. I agree.