

(1993) 04 OHC CK 0001

In the Orissa High Court

Case No : Original Jurn. Case No's. 3218, 3280, 3296 and 3378 of 1993

Kailash Chandra Dandapat and Others etc.

APPELLANT

Vs

Secretary, Birabhadraswar Weavers' Co-operative Society
Ltd. and Others

RESPONDENT

Date of Decision : 29-04-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

Citation : AIR 1994 Ori 1

Hon'ble Judges : L. Rath, J;A.K. Padhi, J

Bench : Division Bench

Advocate : K.C. Lenka, M.K. Mallick, S.N. Kar and H.M. Dhal, for the Appellant;

Final Decision : Dismissed

Judgement

L. Rath, J.—This batch of cases raises the question of entertainment of petitioners under Articles 226 and 227 of the Constitution of India to challenge the process of election to the committee of management of different co-operative societies to have become vitiated either on account of illegal rejection of nomination papers or for illegal preparation of voter lists of the different constituencies for the purpose of election or for the illegal formation of constituencies. The facts pleaded by petitioners are of palpable illegality in rejection of the nomination papers or of valid members being left out from being included in the voter lists as a consequence of which they are deprived of contesting or voting in the election and therefore the entire election process to have become vitiated. A further allegation is made that different constituencies required to be formed were not done and instead were merged together to constitute a single constituency. The submission of the learned counsel for the petitioners is also that Section 28-B of the Orissa Co-operative Societies Act (hereinafter referred to as "the Act") is ultra vires as it prohibits any challenge to the election process before the election is actually held and results are declared.

2. Before such questions are taken up for consideration, a brief statement

regarding the provisions of the Act as they now stand is necessary to be referred to. Prior to 11-10-1983, the election to the committee of management of the co-operative societies or of its office bearers was available to be challenged in a two-fold process, one by filing appeal before the Registrar u/s 109(I)(e-I) of the Act and the other by filing dispute before the Registrar u/s 68, Explanation-IV. Because of such alternative procedures under the Act and confusion prevailing as to which of the forums to be availed of when in respect of the disputes, the matter was clarified by this Court in Kapilendra Pothal Vs. Dy. Registrar, Co-operative Societies, Balasore Division and Others, that all grievances arising in the election process prior to the declaration of the results could be raised only in appeal u/s 109(I)(e-I) and that all disputes arising thereafter were to be raised as disputes under the provisions of Section 68 of the Act. On 11-10-1993 Section 109(I)(e-I) was repealed by Orissa Act 19/83 and thereafter this Court has held in some cases that pre-election disputes are to be challenged in revision before the Registrar u/s 112 of the Act. While this position was continuing, Orissa Act 28 of 1991 was brought in on 31-12-1991 making extensive amend merits to the statute inter alia inserting a new Section 28-B that notwithstanding anything contained in the Act and the Rules, the election process of a society, once started, shall not be held up, and no matter relating to election of the President or members of the committee of management shall be called in question before any authority under the Act until the declaration of the results of the election. By the same Act, a separate forum was also created u/s 67-B making provision for constitution of a tribunal to decide the disputes arising in connection with election of the office bearers of a society. Section 68 was also substituted by a new section in which, inter alia, the old Explanation-IV does not find place. Orissa Act 28/91 in Sub-sections (1) and (2) of Section I thereof provided that the said Act shall come into force on such date as the State Government may, by notification, appoint and different dates may be appointed for different provisions of the Act. By notification on 9th September, 1992 published in the Extraordinary Orissa Gazette of September 10, 1992 the different provisions of the Act including Section 1 and Section 21 which inserted Section 28-B have been brought in force, but Section 37 of the Act which introduced Section 67-B has not been enforced. The net result therefore is that while the prohibition of challenge to the election process during the election has been brought into force, the provision to constitute the tribunal to decide election disputes after the election has not yet been brought into force.

3. The question whether the right to contest an election and the procedure and process involved in conduct of the election can be subjected to proceedings under Articles 226 and 227 of the Constitution of India, and even if such proceedings are possible to be entertained, yet the propriety of their entertainment has often engaged the attention of the Courts including the Apex Court and this Court. The question had an in-depth examination in (1992) 2 OriLR 90 (Maheswar Tripathy v. State) in connection with election of Gram Panchayats and Panchayat Samitis. In the case, an examination of a large body

of decisions of the Supreme Court as also some decisions of this Court including the Full Bench decision in Mahendar Prasad Rout Vs. The Election Officer and Others, , the conclusions were reached as outlined in para 17 of the judgment as follows :--

"(1)The right to stand for election is a creature of a statute, and so must be subject to limitations imposed by it.

(2) If the statute provides only one remedy, that remedy being an election petition to be presented after the election is over, remedy at any intermediate stage would not be available.

(3) The word "election" has to be understood as including the stage of rejection or acceptance of nomination paper.

(4) If the alternative remedy fully covers the challenge to election, that remedy alone must be resorted to, even though in the case challenge is to the election of all the successful candidates.

(5) There may exist exceptional or extraordinary circumstances under which a High Court can be approached to challenge an election like the one at hand but improper acceptance or rejection of nomination papers in individual cases would not normally be such a circumstance.

(6) There would be hardly any room to entertain applications under Article 226 of the Constitution in matters relating to election. An exception can be when there is real and genuine challenge to the vires of a provision having intimate connection with the holding of election. This too would be permissible after the election is over."

In reaching the conclusions what weighed with the Court was that a right to election is not a civil right but is a right granted by a statute and hence where the statute itself provides the forum to adjudicate questions connected with it, infringement of the right granted can be assailed only in the designated forum and not by petitions invoking jurisdiction of the High Court under Articles 226 and 227 though of course an exception was made that in exceptional or extraordinary circumstances this Court can be approached, but improper acceptance or rejection of nomination papers in individual cases would not normally be such circumstances, The Court also considered the fact that in similar situations arising under the Representation of the People Act, 1951, similar infringements would not be available to be agitated in writ petitions though elections under that Act are more costly and laborious and that hence the law relating to elections to Gram Panchayats or Panchayat Samitis cannot be conceded to be different. It is hence logical to hold that a petition under Articles 226 and 227 would not lie because if the legislature creates a right and also creates the adjudicating body to decide disputes arising for infraction of the right, writ petitions in the High Court should not be entertained for relief against the infraction.

4. The learned counsel appearing for the petitioners urged that rejection of the nomination papers in the instant cases was palpably illegal and that on mere issue of notice the illegality would become apparent and hence they should not be made to wait till the election is over to challenge the election. The submission does not impress us since even in such cases relating to election to the Legislative Assembly or the Parliament, petitions under Articles 226 and 227 would not be entertainable and such objections to the election can only be raised in election cases filed under the provisions of the Representation of the People Act, 1951. It is true that so far as the elections under that Act are concerned the High Court has no jurisdiction to exercise its authority under Articles 226 and 227 because of Article 329(b), but even then, the provision of Section 28-B makes the legislative intention loud that it does not want the election, taken in its wider sense of this entire election process culminating in a candidate being declared elected as explained in *Election Commission of India Vs. Shivaji and Others*, is to be interfered with till the results are declared. Though it would not be a case of want of jurisdiction on the part of the High Court, yet the Court would decline to exercise it because of the reasons emphasised by the Supreme Court in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, as:

"The points which emerge from this decision may be stated as follows :-- (1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. (2) Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."

A passage which was also extracted in *Maheswar Tripathy's* case (1992 (2) OLR 90) (*supra*). Moreover, it was expressly held in the same *Maheswar Tripathy's* case that illegal acceptance or rejection of nomination papers would not be an extraordinary ground to challenge the election in a writ petition.

5. Next is the question regarding illegality in preparation of the electoral rolls and clubbing of constituencies in violation of the relevant provisions. These also are undoubtedly process of election and hence come under the provisions of Section 28-B as being excluded from interference by the authorities under the Act. Though Section 67-B providing for constitution of the tribunal has not been brought into force, so also Section 38 of the amending Act, substituting Section 68 has not been brought into force for which reason election disputes are maintainable under the unamended Section. Section 68 in its Explanation-IV as stood prior to the amendment provided that any dispute arising in connection with election of any officer of a society shall be a dispute within the meaning of Section 68. A dispute in connection with "election of any officer of the society" is wide in its ambit and should take within its scope all sorts of disputes arising out of the election process which has ultimately resulted in the election of the officers

of the society whose election is sought to be challenged. If voters' list has been illegally prepared, or constituencies have been constituted in a manner not permissible in law and thereby the resultant situation is that the election of the officer has become vitiated or that the persons who were otherwise eligible to be candidates but have not been able to contest, all such disputes are within the cognisance of the Registrar as an election disputes under Explanation-IV. Even when a tribunal is constituted u/s 67-B, the provision is the same as u/s 67-B(1) and the tribunal is to try any dispute arising in the matter of election of an office bearer of the society. There is thus a complete remedy available to the petitioners to challenge the election when it is over.

6. The other question that remains to be considered is the question of vires. Mr. Kar and Mr. Mallik who have urged the question have not been able to substantiate the question except raising the same. Mr. Kar submits that the provision is ultra vires of Article 14 of the Constitution. Mr. Lenka supplements the submission saying that the purpose of the relevant provision being election to the committee of management, the purpose is defeated by enactment of the provision like Section 28-B which restricts the option to challenge the election in an unreasonable manner and even disarms the Registrar of his revisional powers to give relief during the election process.

7. A challenge on the ground of ultra vires is easier made than established. A charge of the statutory provision being ultra vires on the ground of discrimination is not made out because there is no pleading to such effect. It is contended that the recourse to Article 14 of the Constitution is invited because of the blanket prohibition made which is arbitrary and hence unreasonable. We are not persuaded by the submission as we do not find any arbitrariness in Section 28-B. All that the legislature has said is that the election process once started must be allowed to complete its course and the process is challengeable only after the results are declared. The anxiety of the legislature is that the election process should not be permitted to be frustrated by resorting to other quasi judicial forums and not allow the election to be held. It is not that the law has not devised a forum for challenging the election. The complete machinery has in fact been provided. If denial of any right to challenge the election to the Legislative Assemblies and the Parliament except by filing election cases under the provisions of the Representation of the People Act, 1951 is not arbitrary and discriminatory and is not ultra vires, there is hardly any reason why the same provision made in respect of any other election would be held as suffering from these vices. Moreover Section 70(1) of the Act empowers the Registrar or any other person to whom the dispute is transferred to pass such interlocutory orders, during the pendency of the case, as may be necessary in the interest of justice. Section 67-B in Sub-section (2) makes the same provision for the Tribunal also. There is hence adequate alternative remedy available for redress of the grievance.

8. The charge of ultra vires can also be examined from a different aspect so as to

illustrate the fallacy of the submission. As has been noticed above, the right of election to the committee of management is a right created by the statute. Taking a hypothetical case, this right itself is taken away by the statute and instead it is provided that the committee of management is to be filled up only by way of nomination by an officer of the Government or by the Government from amongst the members of the society, the provision itself does not become ultra vires as doing away with the process of election. Creation of the co-operative societies being the purpose of the statute, it is best known to the legislature as to how the societies are to be managed. An election to the committee of management is not an inherent or fundamental right so that the committee of management must be filled up by that process alone. Hence, if such a provision would not be ultra vires, it would not stand to reason to hold that when an

election is provided for, the challenge to the same being provided to be made strictly regulated in accordance with the statute would become ultra vires.

9. In that view of the matter, we do not find any merit in these petitions which are therefore dismissed.

A.K. Padhi, J.

10. I agree.