
(1992) 04 SHI CK 0014

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 245 of 1991 and C.M.P. No. 1243 of 1991

Kailash Nath Sood and Others

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 03-04-1992

Acts Referred:

Census Act, 1948 — Section 3

Himachal Pradesh Municipal Corporation Act, 1979 — Section 14, 33, 34, 403, 7

Himachal Pradesh Municipal Corporation Election Rules, 1985 — Rule 4

Citation : AIR 1993 HP 37 : (1993) 1 ShimLC 253

Hon'ble Judges : V.K. Mehrotra, J; Kamlesh Sharma, J

Bench : Division Bench

Advocate : K.D. Sood, for the Appellant; Chhabil Dass, General and Satish Thakur, for the Respondent

Judgement

V.K. Mehrotra, J.—The H. P. Municipal Corporation Act, 1979 (Act No. 9 of 1980) (briefly, "the Act") was enacted to "provide for the establishment of Municipal Corporation for certain cities in the State of Himachal Pradesh". It came into force on October 18, 1980. Section 4 provides for constitution of a Corporation.

2. Om Parkash Sood and one more resident of Shimla, both registered voters in the electoral rolls for the Shimla Assembly Constituency, approached this Court through C.W.P. No. 210 of 1984 for a direction in the nature of mandamus to the State to establish a Corporation for Shimla after holding a general election therefor. This Court directed the State to constitute the Shimla Municipal Corporation on or before May 30, 1985. The order is reported as Om Prakash Sood and Another Vs. State of Himachal Pradesh and Another, The matter was taken to the Supreme Court by the State. The Supreme Court disposed it of on April 23, 1985 in Civil Appeal No. 2071 of 1985. The time for constitution of the Corporation was extended till March 31, 1986 by the order of the Supreme Court which is reported as State of H.P. v. Om Parkash (ILR 1985 HP 9). Further extension in time was granted by the Supreme Court by a later order dated February 24, 1986 (reported as State of H.P. v. Om Parkash Sood ILR 1986 HP

(SC) 37). This was till May 15, 1986. The Municipal Corporation of Shimla was then constituted, after holding a general election therefore as envisaged by S. 14(1) of the Act, through a notification dated May 29, 1986 published in the H. P. Gazette (Extraordinary) of that date.

3. Section 7 provides for the term of office of Councillors. It says :

"7. Term of office of Councillors-- (1) Save as otherwise provided in this section, the term of office of an elected Councillor shall be five years and shall commence on the date of publication of the result of his election u/s 16.

Provided that the Government may, by notification in the official Gazette, extend for reasons to be specified in the notification, the term of office of all the Councillors by such period as it thinks fit, so, however, that the total period so extended shall never exceed one year.

Provided further that while a proclamation of emergency under Clause (i) of Article 352 of the Constitution is in operation, the Government may extend the aforesaid term for a period not exceeding six months from the date of operation of such proclamation."

4. Section 5(2) enables the Government to fix the number of elected Councillors for a Corporation from time to time but its proviso says that the total number of elected Councillors would not increase twenty one. The proviso also says that the total number of elected Councillors would be fixed on the basis of one Councillor for a population of not less than three thousand.

5. By the H. P. Municipal Corporation (Amendment) Ordinance of 1985 an Explanation was added in Section 5(2) which said that:

"In this Sub-section the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published".

6. u/s 8(1) a city is to be divided, for the purpose of election of Councillors, into single member wards in such manner that the population of each of the wards, so far as practicable, be the same throughout the city.

7. Section 14(1) provides that a general election of Councillors shall be held for the purpose of constituting the Corporation u/s 4 and Section 14(2) says that a general election shall also be held for the purpose of filling the vacancies arising by efflux of time in the office of the Councillors and such an election shall be held and completed before the expiry of the term under Sub-section (1) of Section 7.

8. After the constitution of the Shimla Municipal Corporation through the notification of May 29, 1986 no further elections have so far been held as required by Section 14(2) of the Act,

9. Dr. Kailash Nath Sood and five other persons, who claim to be permanent residents of Shimla and electors in the various wards of Municipal Corporation,

Shimla, came to this Court on May 27, 1991 through the present writ petition (C.W.P. No. 245 of 1991) with the prayer that the respondents, the first two of whom are the State of Himachal Pradesh and the Shimla Municipal Corporation, be directed to initiate the process of election to the Shimla Municipal Corporation and hold elections with a time bound programme. Also, to extend the term of office of Councillors till such time that elections to the Municipal Corporations were not held and direct the respondents to constitute the newly elected Municipal Corporation of Shimla, after fresh elections, before 29th May, 1992. They expressed an apprehension in the writ petition that the State Government, for the reasons mentioned by them in the writ petition, did not appear to be interested in holding elections in due time.

10. On being called upon by this Court to do so, the respondents filed some affidavits in reply. The details of the averments made in these affidavits, or those filed on behalf of the petitioners in reply to them, need not detain us. We may only notice the fact that on July 2, 1991 a statement was made before this Court by the learned Advocate General in regard to the holding of elections to the office of Councillors of Municipal Corporation, which has been recorded by us, as part of the detailed order passed on that date, in those words:

".....A statement has been made before us by the learned Advocate General, who appears both for the State of Himachal Pradesh and the H. P. Tourism Development Corporation, that the process of holding election of Councillors of the Municipal Corporation has commenced and it is expected that it will be over by the end of November 1991 so that it would be possible for the new Councillors, as successors to the present ones, to take oath of allegiance by December 1, 1991. As such, according to the statement of the learned Advocate General new Councillors would be elected and compliance of Section 7(1) read with Sub-Section (5) of the H. P. Municipal Corporation Act would be possible by that date. We have no reason to doubt, in view of the statement made by the learned Advocate General, that the process for the new Councillors to take office in place of the present ones would be completed by December 1, 1991."

In our order of that date we also mentioned that:

"In view of the aforesaid statement, it is obvious that the present writ petition, in so far as it relates to the primary relief sought in it, has been rendered infructuous. We may notice the submission of Shri K.D. Sood, appearing for the petitioners, that unless the first two respondents are directed, by a time bound order, to hold fresh elections to the Municipal Corporation of Shimla, there is possibility of the respondents sitting over the matter, at this stage.

At present, there is nothing on the record of this petition which may persuade us to take the view that the statement made by the learned Advocate General would not be respected by the respondents. In any case, if the petitioners, or any one of them, is able to place necessary facts before this Court to show that the first two respondents are not taking requisite steps with earnestness to ensure the

elections of new Municipal Councillors so that they can take the oath of allegiance by December 1, 1991 at the latest, u/s 7(5) of the Municipal Corporations Act, it will be open to such of the petitioners to approach this court by way of a miscellaneous application for revival of the present petition in that regard....."

11. On November 2, 1991, an application dated October 31, 1991 (C.M.P. No. 1243 of 1991) was made on behalf of the State Government u/s 151, C.P.C. for extension of time limit to implement the order dated July 2, 1991. The reasons for which extension was being sought are mentioned in paragraphs 4, 5 and 6 of this application. They are:

"That out of 21 total existing wards of Municipal Corporation, Shimla, three (3) specific wards (Wards Nos. 4, 10 and 17) stand exclusively reserved for SC's candidates on the basis of 1981 Census figures. Since the housewise population figures (with details of SC's etc.) of 1991 Census shall not be available to the Government till the middle of the year 1992, therefore, the work of fresh delimitation of wards afresh cannot be carried out in accordance with the true spirit of provisions of Sections 8 and 5 of the Municipal Corporations Act, 1979. The State Government feels that this is the right time to go ahead with the work of delimitation of wards on the basis of 1991 Census because if it is not done before the Municipal Corporation polls, the very purpose of delimitation will be defeated.

That in addition to delimitation of wards, there have been certain proposals regarding inclusion of certain suburbs of Shimla Town within the Municipal Corporation limits, particularly, Kasumpti Residential Colony Area, Shimla Development Authority Colonies below Brockhurst and at B.C.S. in the Kasumpti Zonal Central Housing Colony Area at Sanjauli, Kasumpti Bazar and Totu Bazar areas etc. in order to get them better civic amenities from the Corporation. The State Government is considering the feasibility of inclusion of these areas within the Municipal Corporation limits and have to take a decision in the matter considering the various aspects of the case. If these areas are included within Municipal Corporation limits the boundary limits of Municipal Corporation, Shimla, will have to be extended which would result in redefining of wards. In that event the people of these areas will also get representation in the Shimla Municipal Corporation.

That the Government is of the view that in order to hold elections to the Municipal Corporation, Shimla fresh delimitation of wards on the basis of 1991 Census will be a necessary and desirable pre-requisite. For other Municipal Committees also the Government has taken a conscious and deliberate decision to hold elections to them only after the population figures including that of S.Cs. of Census 1991 are available and delimitation done in these Municipalities accordingly."

12. The prayer which has been made in the application is that, inasmuch as, the

Government proposed to hold election to the Municipal Corporation Shimla, after fresh delimitation on the basis of 1991 Census, which could take another one year, it may be allowed to hold elections by December 1992.

13. The petitioners oppose the prayer and have filed a reply traversing the various grounds brought out in the application. In the reply it has been pointed out that at the electoral rolls of all the twenty one wards were finalised in July 1991; the dates for holding elections were fixed and even symbols for use in the election of the Municipal Corporation were specified. Appended to the reply is the press note of June 24, 1991 by the Deputy Commissioner calling upon all the persons who had attained the age of 18 years as on 1st January 1991 and were ordinarily residing in the constituencies or wards or otherwise eligible for registration of their names for giving necessary information when house to house enumeration work is undertaken with effect from 25th June, 1991 to 14th July, 1991. Also, a copy of the notification dated October 10, 1991 whereby the various symbols which were earmarked for national parties had been notified.

14. The State Government put in another affidavit sworn by the Commissioner-cum-Secretary of the Local Self Government Department on March 25, 1992 wherein it has been said that the requisite formalities to hold elections continued from June 1991 to 25th October, 1991 but the election process had been deferred, on account of the Government decision concerning fresh delimitation of wards on the basis of 1991 Census figure. It has also been disclosed in this affidavit that the Deputy Director Census HP had informed the Government through his letter of September 24, 1991 that the Census figures regarding Scheduled castes, Scheduled tribes and other categories would be made available in the month of December 1992 and further that the work of fresh delimitation of wards could only be taken up thereafter in consonance with the true spirit of the provisions of Sections 5 and 8 of the H.P. Municipal Corporations Act only on receipt of those figures.

15. When the matter was argued before us it was emphasised by the learned Advocate General that the petitioners had no cause for anxiety inasmuch as the term of the Councillors would continue until the date fixed for the meeting at which their successors were required to take oath of allegiance. The State Government was not likely to pass any order contrary to it so that there should be no apprehension in the mind of the present Councillors that their term would come to an end before the fresh elections were held.

16. The petitioners have urged with some emphasis that the basic reason which has prompted the State Government to drag its feet in the matter of holding fresh elections was only to ensure that the term of office of the present Councillors came to an end and the affairs of the Corporation were looked after by the Municipal Commissioner who was an officer directly under the control of the Government. It was further canvassed on their behalf that Section 7(1) contemplated a term of five years for an elected Councillor which could be extended by the State Government only to a maximum period of one year under

the first proviso to that section. The maximum period, thus, contemplated was of six years and no more. What was emphasised also before us was that u/s 14(2) there was a mandate which required holding of general election for filling vacancies in the office of the Councillors which was to be completed before the expiry of the term under Sub-section (1) of Section 7. The State was, therefore, not entitled to any extension of time for holding and completing general election for filling the vacancies in the office of the election Councillors beyond May 28, 1992.

17. When we were hearing this matter on March 27, 1992 Shri Chhabil Das, learned Advocate General, stated that:

"The Government shall permit the existing Councillors to continue in office till next elections are held in terms of Sub-Section (5) of Section 7 of the H.P. Municipal Corporation Act. The Government will, however, be at liberty to take such action as it may deem fit under other provisions of the Act as and when the necessary so arises."

18. There has been considerable debate before us whether the maximum term for an elected Councillor contemplated by the Act is six years or that the term can stand extended, without any limit as to time, on account of the provision in Section 7(5) that

"an outgoing Councillor shall, unless the Government otherwise directs, continue in office until the date fixed for the meeting at which his successor is required to take oath of allegiance."

Learned Advocate General has taken the stand that the various Sub-sections of Section 7, read harmoniously, lead to the conclusion that the term of an elected Councillor continues till his successor-in-office is elected irrespective of the expiry of the term envisaged for him in Section 7(1). The only exigency in which the unlimited term envisaged by Section 7(5) could come to be curtailed would be an order by the State Government to that effect. Since in the present case, says the Advocate General, the State Government is committed not to do so, the elected Councillors will continue till their successors are elected at a general election and take oath of allegiance. He has drawn our attention to the opening words of Section 7(1) to the effect that "save as otherwise provided in this Section" the term of office of an elected Councillor shall be five years which, under the proviso, could be extended to a maximum period of one year. The opening words of Section 7(1) bring in the provision of Section 7(5) which gives an unlimited term to the Councillors till their successors are elected.

19. The construction for which the learned Advocate General has canvassed may lead to various difficulties. Firstly, the provision of Section 14(2) which envisages a general election being held and completed before the expiry of the term under Sub-section (1) of Section 7 may get negated and, secondly, the State Government may, at its will, continue a set of election Councillors in office indefinitely by not holding general election to bring in their successors in office

for various reasons. The time limit contemplated by Section 7(1) has, we feel, been incorporated to obviate perpetuation in office of a particular set of elected Councillors without seeking a fresh mandate from the electors. Section 7(5) has been enacted with a view to avoid an interregnum when there is no elected Councillor in office, except where the Municipal Corporation stands superseded u/s 403. Sub-Section (5) of Section 7, as it were, is a provision giving lease of life to the outgoing Councillors for the short period during which the Councillors who have been elected afresh (which may include some of the outgoing ones as well) have not yet taken the oath of allegiance u/s 34 of the Act.

20. The Municipal Corporation under the Act, is envisaged as a democratic set up where bulk of the Councillors are chosen by direct election on the basis of adult suffrage from various wards in which the city is to be divided in accordance with the provisions of the Act. The electors have been given the right to choose their Councillors at regular intervals to ensure their accountability to them. The Municipal Corporation is an institution of Local Government as envisaged by entry 5 of List II to the VII Schedule of the Constitution. Such an institution, under the Scheme of our Constitution, as well as historically in our country, must necessarily be such where its affairs are entrusted to persons, like elected Councillors, who have to seek periodical mandate for their continuance in office from the electors of that area. Any interpretation given to the provisions of the H. P. Municipal Corporation Act must be consistent with this concept of Local-self Government. Thus viewed, we feel, the only meaning which can reasonably be given to Section 7(5) is that the induction of newly elected Councillors, including the taking of oath of allegiance by them, should be so timed as to ensure that an outgoing Councillor does not exceed the period of six years in office as provided in Section 7.

21. The Legislature was clearly conscious of this aspect when it enacted the provision for the holding and completion of a general election for the purpose of filling the vacancies arising by efflux of time in the office of Councillors before expiry of the term under Sub-section (1) of Section 7 in Section 14(2) of the Act. Such a provision is clearly mandatory. (In re : Presidential Election 1971 AIR SC 1682).

22. It is true that the delimitation of wards u/s 8 into single member wards is to be made in such manner that the population of each of the wards is, as far as practicable, the same throughout the city. Similarly, under Rule 4(e) of the H.P. Municipal Corporation Election Rules 1985 (framed in exercise of powers u/s 33 of the Act) "wards in which seats are reserved for the Scheduled Castes shall be located, as far as practicable, in those areas where the proportion of their population to the total population of the Corporation is the largest". Giving effect to the provisions contained both in Section 8(2) and Rule 4(e) may require availability of necessary figures with the Government which normally is available in consequence of Census. Yet, elections to the Municipal Corporation cannot be deferred indefinitely in the hope of getting the latest figures in consequence of

the Census operations held recently. The Census Act, 1948, which enables the Central Government to take Census whenever it may consider it necessary or desirable to do so, does not provide for a time limit for completion of the operations and for publication of the report of Census in any particular manner or within a specified time. The reports of Census operations are, as a matter of practice, being published by the Director of Census of the Government of India in the form of District Census Handbooks. This has been stated to us by the learned Advocate General after obtaining instructions from the Deputy Director of Census of Himachal Pradesh. It has also been stated by the learned Advocate General that no such publication has so far been made, after the Census operation in the year 1991, in respect of Shimla city. This too has been stated on the basis of the instructions given to him by the Deputy Director of Census Himachal Pradesh.

23. Some amendments were made in the H.P. Municipal Corporations Act by the H.P. Municipal Corporation (Amendment) Ordinance 1985. We have seen that one such amendment was in Section 5 wherein an explanation was added in Section 5(2) which provided that population, for the purpose of Section 5(2), while fixing the total number of elected Councillors for a Corporation, would mean "the population as ascertained at the stage of preceding Census of which the relevant figures have been published".

24. On the basis of this explanation it was suggested that, inasmuch as, the last preceding Census was in the year 1991, the fixation of the total number of elected Councillors should be permitted to be made on the basis of the relevant figures found therein which would also have a bearing on the determination of the question about reservation of wards for Scheduled Castes candidates u/s 8(2). This aspect of the matter has lost much of its importance, firstly, because so far there has been no publication of the relevant figures found in consequence of the Census held in the year 1991 and, secondly, because the total number of wards for Municipal Corporation Shimla is already twenty-one which is the maximum number of such wards contemplated by Section 5(2) itself. We may add that while enacting the H. P. Municipal Corporation (Amendment) Act, 1986, which replaced the Ordinance, the explanation has not been incorporated by the Legislature in Section 5(2). To that extent there is a departure made in the Act from the Ordinance.

25. Even in the absence of the Explanation, the number of wards and reservation of some wards for Scheduled Castes has to be made on the basis of the figures available to the Government. In the present case, we are told, the relevant figures obtained from the published report of the Census operations of 1981 were taken into account. Those figures were published in the year 1986.

26. In the view that we have taken we find it difficult to accede to the prayer made by the State, through its Advocate General, for extension of time for holding the general election to fill the vacancies in the office of the Councillors, which are to arise by efflux of time, and its completion beyond May 28, 1992. The application of the State shall stand allowed in part. The first two respondents

(the State of Himachal Pradesh and the Municipal Corporation, Shimla) shall ensure that the elections are held and completed by May 28, 1992.

27. DASTI copy on usual terms.