

(2004) 10 AHC CK 0158
In the Allahabad High Court
Case No : C.M.W.P. No. 35404 of 2004

Khaliquz-Zaman

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 27-10-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 19(2), 21
Land Acquisition Act, 1894 — Section 40(1)
Penal Code, 1860 (IPC) — Section 124A
Prisons Act, 1894 — Section 30(2)
Uttar Pradesh Municipalities Act, 1916 — Section 104, 13B, 54, 54(1), 54(2)

Citation : (2005) 1 AWC 696 : (2005) 2 UPLBEC 1200

Hon'ble Judges : M. Katju, Acting C.J.; Sunil Ambwani, J

Bench : Division Bench

Advocate : A.A. Khan, for the Appellant; P.K. Misra, S.M.A. Kazmi, C.S.C., C.B. Yadav, C.S.C. and S.C., for the Respondent

Final Decision : Dismissed

Judgement

M. Katju, A.C.J.

1. This writ petition has been filed for a writ of certiorari to quash the election of Vice President of Nagar Palika Parishad, Amroha, J. P. Nagar held on 22.8.2004 in pursuance of the notification dated 26.7.2004, Annexure-1 to the writ petition. It has also been prayed that Section 54 of the U. P. Municipalities Act, 1916, be declared ultra vires Article 243R of the Constitution which was introduced by the 74th Constitutional Amendment.

2. We have heard the learned counsel for the parties.

3. A counter-affidavit has been filed in this case on behalf of the State Government. An affidavit of service has also been filed by the petitioner stating that the petitioner went to serve respondent No. 5 on 3.9.2004 in presence of witnesses but the respondent No. 5 refused to accept the notice. The petitioner then sent notice to respondent No. 5 through registered post and the notice was

also pasted on the door of the respondent No. 5 and was published in the Hindi newspapers "Swatantra Bharat" and "Amar Ujala" vide Annexure-3. In these circumstances we are deeming service of notice on respondent No. 5 to be sufficient.

4. It is alleged in paragraph 3 of the writ petition that the petitioner is duly elected member of Nagar Palika Parishad, Amroha, J. P. Nagar since 2000 and he has been functioning as such. A notification dated 26.7.2004 was issued by the State Election Commission, respondent No. 2, in exercise of powers under Article 243ZA read with Section 13B of the U. P. Municipalities Act directing all local bodies and Nagar Panchayats to hold election of the Vice President as per schedule mentioned in the notification. True copy of the notification dated 26.7.2004 is Annexure-1 to the writ petition.

5. In pursuance of the aforesaid notification issued by the respondent No. 2, the respondent No. 3, District Magistrate, J. P. Nagar issued notice dated 31.7.2004 for holding election to the post of Vice President of Nagar Palika Parishad, Amroha, vide Annexure-2 to the petition. Thereupon the election to the post of Vice President, Nagar Palika Parishad, Amroha, was held on 22.8.2004 and respondent No. 5 was elected as Vice President.

6. It is alleged in paragraph 7 of the writ petition that in the aforesaid election one nominated member, namely. Dr. A. Saifi cast his vote although it is alleged that his membership was cancelled by the Government on 17.8.2004, vide Annexure-3 to the writ petition.

7. It is alleged in paragraph 8 of the writ petition that the Executive Officer, Nagar Palika Parishad, Amroha, displayed the voters list dated 3.8.2004 of the members who were entitled to vote for the post of Vice President. It is alleged that the nominated members have also cast their votes in the election for Vice President and this has vitiated the entire election. True copy of the electoral list dated 3.8.2004 is Annexure-4 to the writ petition.

8. By means of the Constitution 74th Amendment, 1992, which came into force from 1.6.1993 Para IX-A was inserted in the Constitution in respect of the Municipalities.

9. Article 243R of the Constitution reads as follows :

243R. Composition of Municipalities.--(1) Save as provided in Clause (2), all the seats in a Municipality shall be filled by person chosen by direct election from the territorial constituencies in the Municipal area and for this purpose each Municipal area shall be divided into territorial constituencies to be known as wards.

(2) The Legislature of a State may, by law, provide,--

(a) for the representation in Municipality of--

(i) person having special knowledge or experience in Municipal administration :

(ii) the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area ;

(iii) the members of the Council of States and the members of the Legislative Council of the State registered as electors within the Municipal area ;

(iv) the Chairpersons of the Committee constituted under Clause (5) of Article 243S :

Provided that the person referred to in paragraph (i) shall not have the right to vote in the meetings of the Municipality ;

(b) the manner of election of the Chairperson of a Municipality."

10. In view of the proviso to Article 243R(2)(a)(iv) persons referred to in Clause (i) of Article 243R(2)(a) do not have the right to vote in the meetings of the Municipalities.

11. In order to make the provisions of the U. P. Municipalities Act in conformity with Part IX-A of the Constitution amendments were made in the U. P. Municipalities Act. Section 9 of the Act which was substituted by the U. P. Act No. 12 of 1994 reads as follows :

"Composition of Municipality. --(1) A municipality shall consist of President, who shall be its Chairperson, and--

(a) the elected members, whose number shall,

(i) in the case of a Nagar Panchayat, be not less than 10, and not more than 24, and

(ii) in the case of a Municipal Council, be not less than 25 and not more than 55 as the State Government may by notification in the Official Gazette specify ;

(b) the ex-officio members, comprising all members of the house of people and the State Legislative Assembly representing constituencies which comprise wholly or partly the Municipal area.

(c) the ex-officio members, comprising all members of the Council of States and the State Legislative Council who are registered as electors within the Municipal area.

(d) nominated members shall be nominated by the State Government by notification in the official Gazette, from amongst persons having special knowledge or experience in Municipal administration and whose numbers shall in the case of--

(i) Nagar Panchayat, be not less than two and not more than three,

(ii) Municipal Council be not less than three and not more than five ;

(e) The Chairperson of the Committee, if any, established u/s 104, if they are not members under any of the foregoing clauses :

Provided that the persons referred to in Clause (d) shall not have the right to vote in the meeting of the Municipality :

Provided further that any vacancy in any category of members referred to in Clauses (a) to (e) shall be no bar to the constitution or reconstitution of a municipality."

12. Section 54 of the Act as amended by U. P. Act No. 23 of 2001 reads as follows :

"54. Election term of office and resignation of (Vice President).--

(1) Every Municipality shall have a Vice President, elected as occasion arises, from amongst its elected members by the electorates consisting of President, elected members, ex-officio members and nominated members of the Municipality and the voting at such election shall be by secret ballot.

(1A) A person securing the highest number of votes in an election under Sub-section (1) shall be declared elected and in the case of equality of votes, the returning officer shall decide by lot and declare the person elected on whom the lot falls.

(2) The term of the Office of the (Vice President) of any description shall be one year from the date of his election or the residue of his term of office as a member of the Municipality, whichever is less.

(3) The (Vice President) wishing to resign may intimate in writing his intention to do so to the (President) and on his resignation being accepted by the (Municipality), he shall be deemed to have vacated his office.

(4) The election of the (Vice President) under Sub-sections (1), (2) and (3) shall be completed within three months from the date of the due constitution of the (Municipality) as notified u/s 56 or from the date of occurrence of the vacancy, as the case may be."

13. The submission of the learned counsel for the petitioner is that Section 54 (1) of the Act insofar as it permits the nominated members to cast their votes to elect the Vice President is contrary to the proviso to Article 243R(2)(a)(iv) as also the first proviso to Section 9 of the Act. It is alleged that since in the election of Vice President held on 22.8.2004, the nominated members were permitted to cast their votes the election is vitiated.

14. A counter-affidavit has been filed by the State Government and we have perused the same. In paragraph 6 it is alleged that every nominated member has got right to participate in the election and cast his vote in view of Section 54 of the U. P. Municipalities Act as amended by U. P. Act No. 23 of 2001. True copy of the Gazette notification issued on 6.10.2001 in respect of U. P. Act No. 23 of

2001 is Annexure-C.A. 2 to the counter-affidavit. It is alleged that Section 54 as amended is in accordance with Article 243R of the Constitution. Hence, the election was not vitiated. It is alleged that the bar created by the proviso to Article 243R(2)(a)(iv) relates to the meetings of the Municipality, The word "meeting" has to be understood in the light of Sections 86 to 88 of the Act. It is alleged that an election is not a meeting as referred to in Sections 86 to 88.

15. Sections 86, 87 and 88 of the U. P. Municipalities Act read as follows :

"86. Meetings of a (Municipality).-- (1) There shall be at least one meeting of the (Municipality) in every month to be held on a day fixed by regulation or of which notice has been given in a manner provided by regulation in this behalf.

(2) The President may convene a meeting whenever he thinks fit and shall, upon a requisition made in writing by not less than one-fifth of the members of the (Municipality) and served on the President or sent by registered post acknowledgement due addressed to the (Municipality) at their office, convene a meeting within a period of (fifteen days) from the date of the service or receipt of such requisition :

Provided that the President may, for reasons to be recorded, postpone a meeting other than a meeting convened on the requisition of members as above, by giving such notice as may be provided by regulation in this behalf.

(3) A meeting may be adjourned until the next or any subsequent day, and an adjourned meeting may be further adjourned in the like manner.

(4) Every meeting shall be held at the municipal office (If any) or other convenient place of which notice has been duly given.

(5) The President shall report to the District Magistrate the name of any member who has, without obtaining sanction from the (Municipality), absented himself from the meetings of the (Municipality) for more than three consecutive months or three consecutive meetings, whichever is the longer period.

87. Transaction of business at meetings.--Subject to any provision to the contrary made by regulation in this behalf, any business may be transacted at any meeting :

Provided that no business which is required to be transacted by a special resolution shall be transacted unless previous notice of the intention to transact such business has been given :

Provided also that nothing in this section shall apply to the motion that the (Municipality) shall adopt a resolution expressing no-confidence in the President or to a motion that the (Municipality) shall adopt a resolution calling upon the President to resign.

88. Quorum. --(1) It shall be necessary for the transaction of any business other than business which is required to be transacted by a special resolution that not

less than one-third of the total members of the (Municipality) for the time being shall be present.

(2) It shall be necessary for the transaction of business which is required to be transacted by special resolution that not less than one-half of such members shall be present :

Provided that, when it is necessary to postpone any business at a meeting for want of the prescribed quorum, the (President) after the transaction of such business can be transacted, shall adjourn the meeting to another date, and the business postponed for want of the prescribed quorum shall be transacted on such date, or in the event of a further adjournment of the meeting to a subsequent date, on such subsequent date, notwithstanding any deficiency in the number of members present.""

We have also perused the rejoinder-affidavit.

16. Learned counsel for the respondent submitted that an election is not a meeting of the Municipality and hence the proviso to Article 243R(2) has no application. He submitted that the word "meeting" has to be construed in the light of Sections 86 to 88 of the U. P. Municipalities Act and hence a meeting is a proceeding which takes place only after the Municipality is constituted. An election is a process prior to the constitution of the Municipality, and hence, it cannot be regarded as a meeting of the Municipality.

17. On the other hand, learned counsel for the petitioner relied on the decision of the Supreme Court in *Ramesh Mehta Vs. Sanwal Chand Singhvi and Others*, . That was a three-Judge Bench of the Supreme Court, and the judgment delivered by Hon''ble Kapadia, J., was on behalf of himself and Hon''ble V. N. Khare, C.J.I. We have carefully perused the aforesaid Judgment of Hon''ble Kapadia, J. In that judgment the old Section 65 of the Rajasthan Municipalities Act, 1959, prior to its amendment in 1994 and the new Section 65 has been quoted. The new Section 65 clearly provided that Chairman and Vice Chairman of the Municipal Board shall be elected by the elected members of the Board, whereas the old Section 65 merely states that the Chairman and Vice Chairman shall be elected by the members of the Board. We may contrast the language used in the new Section 65 of the Rajasthan Municipalities Act after its amendment in 1994 with the language used in Section 54 of the U. P. Municipalities Act.

18. It may be noticed that Section 54 (1) of the U. P. Municipalities Act states that the Vice President shall be elected from not merely elected members of the Municipal Board but also nominated members of the Municipal Board. Thus, there is a clear distinction between Section 54 (1) of the U. P. Municipalities Act and Section 65 of the Rajasthan Municipalities Act after its amendment in 1994. Hence, in our opinion the decision in *Ramesh Mehta's* case (*supra*) is clearly distinguishable. Moreover, that decision related to a no-confidence meeting, and in our opinion a no-confidence meeting is certainly a meeting (as it is held after the constitution of the Municipal Board), whereas an election is not, as it is a

process prior to such constitution.

19. It is well-settled that there is a presumption in favour of the constitutional validity of a Statute vide *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, ; *Madhu Limaye Vs. Sub-Divisional Magistrate, Monghyr and Others*, ; *P. J. Krishnalal v. Government of Kerala AIR 1995 SCW 1325* and *Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc.*, .

20. If two interpretations are reasonably possible the Court should take an interpretation which would uphold the constitutional validity of the statute even if that involves narrowing down the scope of the statutory provision.

21. In *Rt. Rev. Msgr. Mark Netto Vs. State of Kerala and Others*, a Constitution Bench decision of the Supreme Court read down a statutory provision so as to make it constitutional. In that case the constitutional question was whether Rule 12 (iii) of the Kerala Tax Rules, 1959, was violative of Article 30 of the Constitution. A plain and literal interpretation of the provision would make it violative of Article 30 of the Constitution, and hence, the Supreme Court narrowed down the scope of the said Rule so as to sustain its validity.

22. Similarly in *Sunil Batra Vs. Delhi Administration and Others etc.*, another Constitution Bench decision of the Supreme Court observed :

"Constitutional deference to the Legislature and the democratic assumption that people's representatives express the wisdom "of the community lead courts into interpretation of statutes which preserves and sustains the validity of the provisions."

23. There is always a presumption that the Legislature does not exceed its jurisdiction vide *Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc.*, ; *State of Bihar and others, etc. etc. Vs. Bihar Distillery Ltd., etc.*, .

24. It follows from the above principle that if one construction of the statute will make it ultra vires whereas another construction will sustain its constitutional validity the Court should prefer the latter on the ground that the Legislature is presumed not to have intended to exceed its jurisdiction vide *Hindustan Paper Corpn. Ltd. Vs. Government of Kerala and Others*, ; *State of Kerala Vs. M.K. Krishnan Nair and Others*, ; *Rauala Corporation v. Director of Enforcement AIR 1970 SC 494 (499)* ; *Jothi Timber Mart and Others Vs. Corporation of Calicut and Another*, ; *K.S. Venkataraman and Co. Vs. State of Madras*, ; *Corporation of Calcutta and Another Vs. Liberty Cinema*, ; *Tilkayat Shri Govindlalji Maharaj Vs. The State of Rajasthan and Others*, ; *Kedar Nath Singh Vs. State of Bihar*, ; *The State of Bihar and Others Vs. Charusila Dasi, and Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, .

25. It is a well-settled principle of interpretation that the general words in a statute may be construed narrowly in order to sustain its validity vide *New Delhi Municipal Committee Vs. State of Punjab, etc. etc.*, . Hence, if it is possible to

read a statutory language as subject an implied term to sustain its validity the Court should be very ready to make such an implication vide *A. G. Gambia v. Momodon Jobe* (1984) AC 689 (702) (PC) ; *Hector v. Attorney General of Antigua and Barbuda* (1990) 2 All ER 103, p. 107 (PC).

26. AIR 1941 72 (Federal Court) , the Federal Court upheld the validity of the Hindu Women's Rights to Property Act, 1947, by construing the word "property" as meaning "property other than agricultural land."

27. In that decision Gwyer, C.J., observed :

"If that word "property" necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature, but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other."

The learned Chief Justice further observed :

"There is a general presumption that a Legislature does not intend to exceed its jurisdiction, and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it."

28. The above rule was applied by the Supreme Court in *Kedar Nath Singh Vs. State of Bihar*, and the Supreme Court took a narrow construction of Section 124A of the Indian Penal Code so as to avoid making it violative of Articles 19(1) (a) and 19(2) of the Constitution.

29. Section 124A of the Indian Penal Code which relates to sedition makes a person punishable who by words either spoken or written or by sign or visible representations or otherwise, brings or attempts to bring into hatred or contempt, or excites disaffection towards the Government established by law."

30. A perusal of the above provision shows that if it is construed in a plain or wide manner it will violate Articles 19(1)(a) and 19(2) of the Constitution. Hence, the Supreme Court, in order to make the provision constitutionally valid, limited the scope "to acts involving intention or tendency to create disorder or disturbance of law and order or incitement of violence."

31. Sinha, C.J., speaking for the Court in that decision observed :

"It is well-settled that if certain provisions of law, construed in one way, would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction."

32. In *Sunil Batra v. Delhi Administration* (supra) the Supreme Court upheld the validity of Section 30(2) of the Prisons Act, 1894, which provides for solitary

confinement of a prisoner under sentence of death in a cell and Section 56 of the same Act, which provides for the confinement of a prisoner in irons for his safe custody, by construing these provisions narrowly so as to avoid their being declared invalid on the ground that they were violative of the rights guaranteed under Articles 14: 19 and 21 of the Constitution.

33. Similarly, in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, , a wide definition of the word "sale" in the Bihar Sales Tax Act, 1947, was restricted by construction to exclude transactions in which property was transferred from one person to another without any previous contract of sale, since a wider construction would have resulted in attributing to the Bihar Legislature an intention to legislate beyond its competence.

34. In *New Delhi Municipal Committee Vs. State of Punjab, etc. etc.*, , provisions in the municipal laws levying property tax on lands and buildings did not contain any exception in respect of the property of the State. These provisions were upheld by taking a narrow construction by excluding the property of the State since such property is exempted from taxation under Article 289 of the Constitution. Although the aforesaid provisions did not expressly exclude property of the State from taxation, yet by adopting a narrow construction the validity of the provisions was sustained.

35. In *Tilkayat Shri Govindlalji Maharaj Vs. The State of Rajasthan and Others*, , the words "affairs of the temple" occurring in Section 16 of the Rajasthan Nathdwara Temple Act were construed as restricted to secular affairs, as on a wider construction the section would have violated Articles 25 and 26 of the Constitution.

36. In *R.L. Arora Vs. State of Uttar Pradesh and Others*, the Supreme Court while construing Section 40(1)(aa) of the Land Acquisition Act, as amended by Act 31 of 1962 construed the words "building or work" to such building or work which would subserve the public purpose of the industry or work in which the company, for which acquisition is made, is engaged. A wider and literal construction pf the clause would have brought it in conflict with Article 31(2) of the Constitution, and hence, the narrower construction was adopted.

37. In *Indian Oil Corporation Vs. Municipal Corporation, Jullundhar and others*, , Section 23 of Punjab Municipal Corporation Act, 1976, which empowered the Corporation to levy octroi on articles and animals "imported into the city" was read down to mean articles and animals "imported into the municipal limits for purposes of consumption, use or sale," since a wide construction would have made the provision unconstitutional being in excess of, the power of the State Legislature conferred by Entry 52 of List II of 7th Schedule.

38. In *Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc.*, , the Supreme Court observed :

"It is also a cardinal rule of construction that if one construction being given the

statute will become ultra vires the powers of the Legislature whereas on another construction which may be open, the statute remains effective and operative then the Court will prefer the latter, on the ground that the Legislature is presumed not to have intended an excess of jurisdiction."

39. In *Corporation of Calcutta and Another Vs. Liberty Cinema*, the Supreme Court observed that a statute has to be read so as to make it valid and, if possible, an interpretation leading to a contrary position should be avoided. It has to be construed *ut res magis valeat quam pareat* (vide *Broom's Legal Maxims* (10th Ed.) p. 361, *Craies on Statute* (6th Ed.) p. 95, *Maxwell on Statutes* (11th Ed.) p. 221 and *Cooley's "Constitutional Limitations*). In the aforesaid decision the word "fee" in Section 548 of the Calcutta Municipality Act was read as meaning a tax, for any other reading would make the section invalid.

40. In *The State of Bihar and Others Vs. Charusila Dasi*, , the Supreme Court observed ;

"It is now well-settled that there is a general presumption that the Legislature does not intend to exceed its jurisdiction, and it is a sound principle of construction that the Act of a sovereign Legislature should, if possible, receive such an interpretation as will make it operative and not inoperative."

41. In view of the above we are of the opinion that the word "meeting" in the proviso to Article 243R(2) should not be interpreted to include an election otherwise Section 54(1) would become unconstitutional. We should take an interpretation which sustains the constitutional validity of Section 54 (1) of the U. P. Municipalities Act in preference to an interpretation which invalidates the statutory provision. Hence, in our opinion nominated members can also vote in the election for Vice President.

42. For the reasons given above there is no merit in this petition. It is dismissed.