

(2008) 06 OHC CK 0004

In the Orissa High Court

Case No : Writ Petition (C) No. 2539 of 2008

Krushna Nanda Mohanty and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 17-06-2008

Acts Referred:

Constitution of India, 1950 — Article 243R, 243T
Orissa Municipal (Delimitation of Wards, Reservation of Seats and Conduct of Elections) Rules, 1994 — Rule 3
Orissa Municipal Act, 1950 — Section 11, 12, 12(3)

Citation : (2008) 06 OHC CK 0004

Hon'ble Judges : R.N. Biswal, J;B.P. Das, J

Bench : Division Bench

Advocate : Devananda Mishra, Sunil Ku. Swain and Daya Sagar Mishra, for the Appellant; Additional Government Advocate, Niranjana Panda-1, Saroj Ku. Acharya, Manoj Ku. Panda for O.P. No. 4 and Susanta Das, R.C. Ray and A. Mishra, for the Respondent

Final Decision : Allowed

Judgement

R.N. Biswal, J.—The Petitioners challenge the legality, propriety and correctness of the notification No. 647 dated 15.2.2008 (Annexure-1) issued under Sub-section (3) of Section 12 of the Orissa Municipal Act, 1950 (in short "the Act") by Collector, Mayurbhanj, (opp. party No. 3) and the order dated 8.1.2008 of the Minister, Housing and Urban Development Department (appellate authority) passed in appeals preferred by the Petitioners on the grounds that both the impugned orders suffer from gross infirmity and inherent defect and are violative of the statutory provisions contained under Sections 11 and 12 of the Act as well as Rule 3 of Orissa Municipal (Delimitation of Wards, Reservation of Seats and Conduct of Election) Rules, 1994 (hereinafter referred to as "1994 Rules") and the mandates of Articles 243-R and 243-T of the Constitution.

2. As per the writ petition, the notification dated 15.2.2008 of the Collector (Annexure-1) and the order dated 8.1.2008, passed by the appellate authority

(Annexure-2) show that both the authorities committed grave illegalities while making delimitation of wards and reservation of seats. While dividing the wards the numerical strength of the population had not been taken into consideration. Similarly while making reservation of seats the principle of rotation had not been followed. There was no equitable distribution of population amongst the wards inasmuch as while in one ward there are 2000 and some odd voters in another ward there are more than 5000 voters. The present Council of Baripada Municipality had not been consulted while making delimitation of wards and reservation of seats. The suggestions and recommendations of the Council were not taken into account and with extraneous consideration opp. party No. 3 carved out the wards and reserved the seats in a slipshod manner.

3. It is the further case of the Petitioners that they themselves and many others filed appeals against the final notification dated 4.12.2007, before the appellate authority on 28.12.2007. The Under Secretary to the Govt, in Housing and Urban Development Department issued notice to the Petitioners and other Appellants for personal hearing, without naming the authority by whom the hearing would be taken up. The Hon'ble Minister Housing and Urban Development (appellate authority) took up hearing of the appeals and passed the impugned order (Annexure-2) on the date fixed, in absence of the Appellants. Appellate authority candidly admitted in its order passed under Annexure-2 that while reserving the seats provisions of Section 11 of the Act read with Rule 3 of Rules 1994 had not been followed properly, but still then since Municipality was going to face the election for the 3rd term confirmed the delimitation made in the notification dated 4.12.2007, while only modifying the assignment of reserved seats in respect of some wards. Accordingly the Petitioners prayed to quash Annexures-1 and 2.

4. Opp. parties 1 and 2 in their joint counter affidavit stated that as per the provision laid down u/s 12 of the Act, for the purpose of election of the councillors of a Municipality, the District Magistrate, in the case of a new Municipality, of his own motion and in the case of a Municipality already in existence, after consulting the concerned Municipality has to divide the Municipal area into wards keeping in mind equitable distribution of population among the wards and the compactness of the area of each ward. Accordingly, the District Magistrate, Mayurbhanj divided the area of Baripada Municipality into 28 wards in consultation with Municipality. The final notification dated 4.12.2007 was issued after considering the objections received against the draft notification. With regard to appellate order, these opposite parties stated that notices were issued to the Appellants to appear before the appellate authority on 8.1.2008 at 11 A.M. in the Conference Hall of Bhubaneswar Development Authority, Bhubaneswar. After taking into consideration the contention raised by the Appellants present, the appellate authority held that while making reservation of seats by the District Magistrates, provisions as laid down u/s 11 of the Act read with Rule 3 of Rules 1994 had not been followed properly and accordingly disposed of the appeals on 8.1.2008 modifying the reservation of seats made by

the District Magistrate, in accordance with the provision of law. As regards the delimitation of wards, the appellate authority did not differ from the view taken by the District Magistrate, since the same was done taking into account equitable distribution of population and compactness of the area. As per the statement under Annexure-A, out of 28 wards in Baripada Municipality, 3 wards were to be reserved for Scheduled Castes including one ward for their women. Considering the percentage of population of the S.C., to the total population of the Municipality and following the principle of rotation, ward Nos. 4 and 21 were reserved for S.C. and ward No. 9 for S.C. (women). Adopting the same principle ward Nos. 17, 18 and 19 were reserved for Scheduled Tribes and ward No. 2 for their women and ward Nos. 4, 5, 6, 10, 16, 22 and 27 for women (general). Since Baripada Municipality comes under the Scheduled area, no reservation was made for Backward Class of Citizens. Accordingly, opp. parties 1 and 2 prayed to dismiss the writ petition.

5. Opp. party No. 3 while supporting the stand taken by opp. parties 1 and 2 in his counter affidavit, stated that after receiving the proposal from Municipal Council, he issued draft notification on 15.11.2007 inviting objections/suggestions on the proposed delimitation, to be submitted within 26.11.2007; in response to which 23 objections were filed by different persons, all of whom were noticed for personal hearing. After hearing them, the Collector constituted a committee in which the Sub-Collector, Baripada, Executive Officer, Baripada Municipality and the District Emergency Officer, Collectorate, Baripada were the members. The committee was asked to visit the spot in order to verify the genuineness of the objections and submit its report by 2.12.2007. Accordingly, the committee visited the spot, met the local public and finally submitted its report on 2.12.2007 stating that if all the 25 wards were bifurcated to create 3 more wards, then it would affect mass dislocation of postal address, Govt. institution would not be available for establishment of booths and public distribution service, sanitary arrangement etc. would also be affected. Furthermore, it would create problem for demarcation of boundaries of the delimited areas. According to the suggestion of the committee, 5 numbers of wards having the maximum population should be bifurcated into 8 wards. So that 3 more wards could be created and there would not be huge difference of population in the wards. The committee further observed that the population in ward No. 7 being more, some area there from could be allotted to adjoining ward Nos. 6 and 9. The suggestion given by the-Committee being accepted, the Collector, Mayurbhanj took a decision to divide wards Nos. 23 to 25 to six wards.

6. Opp. party No. 4 in a separate counter affidavit stated that on receipt of the letter dated 31.10.2007 from District Magistrate instructing to take necessary action on delimitation of wards and reservation of seats, the Municipality vide resolution dated 8.12.2007 resolved that the number of wards of the said Municipality should be increased from 25 to 28 by creating 3 more wards and accordingly keeping in view the equitable distribution of population in each ward the proposed wards were carved out, and as per the requirement of law

reservation of seats was made, and the proposal was communicated to the District Magistrate (O.P. No. 3). In turn opposite party No. 3 directed the Municipality to publish the draft notification regarding division of wards and reservation of seats as proposed by it. The proposed division of wards under Annexure-4 was prepared in consultation with Baripada Municipality, but after inviting objections/suggestions opposite party No. 3 notified Annexure-5 in which delimitation of wards Nos. 1 to 21 remained same as in 2003 Municipal election and ward Nos. 22 to 25 were divided into 7 wards creating 3 new wards viz 26, 27 and 28 without consultation. The final notification under Annexure-5 was challenged before the Government wherein the impugned order under Annexure-2 was passed. Distribution of population of each ward under Annexure-4 was made equitably.

7. Learned Counsel the Petitioners submitted that as required under Sub-section 3 of Section 12 of the Act, the District Magistrate, after consultation with the concerned Municipality should divide the Municipal area into wards and determine the wards in which the seats reserved u/s 11 of the Act to be set assigned. In the present case, opp. party No. 3 without consulting Baripada Municipality issued the final notification No. 4539 dated 4.12.2007 and without properly considering the same the appellate authority confirmed it only modifying reservation of seats in respect of ward Nos. 2, 6, 19, 26, 27 and 28. According to the learned Counsel for the Petitioners since the statutory requirements had not been complied with by opp. party No. 3 both Annexures-1 and 2 deserved to be quashed.

8. There is no dispute with regard to the proposition of law. As it appears from Annexure A/4, the Executive Officer of Baripada Municipality was communicated vide letter No. 4086 dated 31.10.2007 to take necessary action on delimitation of wards and reservation of seats with necessary resolution of the Council within 8.11.2007. Accordingly, Baripada Municipality vide resolution dated 18.11.2007 (Annexure-B/4) resolved that the number of wards of the Municipality would be increased from 25 to 28 and accordingly keeping in view the equitable distribution of population in each ward the Municipal area was carved out and as per the requirement of law reservation of wards was made under Annexure C/4. Both the resolutions were sent to the District Magistrate and after examining the same he prepared the draft notification under Annexure-4 as suggested by the Municipal Council and published it inviting objections/suggestions from all interested persons, to be submitted within 10 days. So, learned Addl. Govt. Advocate submitted that when the suggestion of the Municipal Council was accepted by opp. party No. 3 in toto, it cannot be said that the Municipality was not consulted, before preparation of the final notification under Annexure-5.

9. In response to invitation of objections/suggestions to the draft notification 23 numbers of objections were filed and the objectors were heard personally. On hearing the objectors, opp. party No. 3 constituted a committee consisting of the Sub-Collector, Baripada, Executive Officer, Baripada Municipality and the District Emergency Officer, Collectorate, Baripada to visit the spot to enquire into the

genuineness of the objections and submit its report. On receipt of the report of the Committee, opp. party No. 3 published the final notification on 4.12.2007 showing division of wards and reservation of seats of the Municipality. Before publication of notification under Annexure-5, no further consultation was made with the Municipality. Now, the question is whether publication of the final notification under Annexure-5 can be faulted on that ground. It would be profitable to quote Section 12(3) of the Orissa Municipal Act which reads as follows :

For the purpose of election of councillors to a Municipality, the District Magistrate shall, in the case of a new Municipality, of his own motion and, in the case of a Municipality already in existence at the time the notification is made, after consulting the concerned Municipality, by notification:

- (a) divide the Municipality area into Wards;
- (b) determine, subject to other provisions of this Act, the Wards in which the seats reserved u/s 11 shall be set assigned;

Provided that-

- (i) in dividing a (Municipal area) into Wards, equitable distribution of population among the various Wards and the compactness of area forming each Wards shall be taken into consideration; and
- (ii) the number of Wards in any Municipal area shall not be less than eleven and more than forty.

Provided further that notwithstanding anything contained in this section, if any person is aggrieved by the decision as to the division of the Municipal area into Wards or the assignment of Wards, as referred in Clauses (a) and (b), he may prefer an appeal to the State Government within fifteen days from the date of publication of the notification which shall be disposed of by the appellate authority within thirty days from the date of its filing, after giving the person concerned opportunity of being heard, and the decision of the appellate authority shall be final.

As stipulated u/s 12(3) of the Act for the purpose of election of councillors of a Municipality the District Magistrate after consulting the concerned Municipality, by notification divide the Municipality area into wards and determine the wards in which the seats reserved u/s 11 should be set assigned. So, consultation has to be made with the Municipality before publication of the final notification u/s 12(3) of the Act.

10. In the case of Supreme Court Advocates-on-Record Association and another Vs. Union of India, , the apex Court referred to Stroud's Law Lexicon, wherein definition of "consultation" has been given as follows:

Consultation: (New Towns Act, 196 (9 and 1) Geo. 6, c. 68), Section 1(1), "consultation with any local authorities". "Consultation means that, on the one

side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and on the other hand, a sufficient opportunity must be given to the local authority to tender advice" per Blucknil L.J. in *Rollo v. Minister of Town and Country Planning* (1948) 1 All ER 13 (CA); see also *Fletcher v. Minister of Town and Country Planning* (1947) 2 All. ER 496)

Then in paragraph 131, the apex Court referred to the Word and Phrases-Permanent Edition, wherein the meaning of "consult" has been given thus:

Consult means to seek opinion or advice of another, to take counsel to deliberate together; to confer; to deliberate on; to discuss, to take counsel to bring about; devise; contrive; to ask advice of; to seek the information of; to apply to for information or instruction; to refer to. *Teplisky v. City of New York* 133 NTS 2nd 260, 261.

In paragraph 136 of the aforesaid Judgment, the apex Court referred to the decision in *Fletcher v. Minister of Town Planning* (1947) 2 All ER 496, wherein the word "consult" was subject of judicial scrutiny and it was observed thus:

The word "consultation" is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which the consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the Court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultations may often be a some what continuous process and the happenings at one meeting may form the background of a later one.

The apex Court in the aforesaid Judgment referred to the case of *R. Pushpam v. State of Madras* AIR 1953 Mad 392, wherein a Bench of the Madras High Court interpreting the word "consult" in terms of the Madras District Municipalities Act, 1920, Section 3 of which read that "for the purpose of election of councillors to a Municipal Council, the Local Government "after consulting the Municipal Council" may by notification divide the Municipality into wards...." observed thus:

The word "consult" implied conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important....The consultation must enable the consultor to consider the pros and cons of the question before coming to a decision. A person consults another to be elucidated on the subject matter of the consultation...Many instances may be found in the statute when an authority is entrusted with another authority which is qualified to give advice in respect of that duty. It is true that the final order is made and the ultimate responsibility rests with the former authority. But it will not, and cannot be, a performance of duty if no consultation is made, and even if made, is only in formal compliance with the

provisions. In either case the order is not made in compliance with the provisions of the Act.

11. In the present case as noted earlier before publishing the draft notification opp. party No. 3 asked Baripada Municipality to take necessary action in delimitation of wards and reservation of seats with necessary Council resolution. Accordingly, Baripada Municipality in resolution dated 8.11.2007 proposed to increase the number of wards from 25 to 28, carved out the Municipality area to 28 wards, and set assigned the reserved seats and communicated the same in black and white to opposite party No. 3. The suggestion was accepted in its entirety and draft notification was published. After considering the objections raised to the draft notification and the report of the committee, as stated earlier the opposite party No. 3 published the final notification under Annexure-5. Opp. party No. 3 was not expected to consult the Municipality at each stage. He is also not bound to accept the suggestion of the Municipality. The ultimate responsibility rests with him. So, it cannot be said that opposite party No. 3 did not consult the Municipality before publication of the final notification under Annexure-5.

12. Learned Counsel for the Petitioners again submitted that as required u/s 12 of the Act appellate authority is required to give opportunity of being heard to the Appellants. But in the case at hand no such opportunity was given to the Appellants-Petitioners. According to the submission of learned Counsel for the Petitioners, the Under Secretary to the Government in their Housing and Urban Development Department vide letter Nos. 29761 and 29759 dated 28.12.2007 issued notices to the Petitioners for personal hearing on 8.1.2008. There was no mention by whom the hearing was to be conducted and the appellate authority (Hon"ble Minister) took up the hearing on that date and passed the impugned order under Annexure-2 in absence of the Appellants-Petitioners. So, he persuaded us to quash Annexure-2 on that ground alone. But on perusal on Annexure-2 it is found that Petitioner No. 2 was present when the appeal was heard. In the notice Annexure-7/B it has been specifically mentioned that the hearing of the appeal would be taken up in the Conference Hall of Bhubaneswar Development Authority on 8.1.2008 at 11 A.M. Even if the notice did not contain the name of authority by whom the appeal would be heard, still then there was no impediment for Petitioner No. 1 to remain present in the Conference Hall of the Bhubaneswar Development Authority on the stipulated date and time particularly when Petitioner No. 2 appeared there in time. So, it cannot be said that no opportunity was afforded to the Petitioners in the hearing of the appeals.

13. Again learned Counsel for the Petitioners submitted that as required u/s 12(3) (b)(i) of the Act while dividing the Municipality area into wards equitable distribution of population among the various wards and the compactness of area forming each ward should be taken into consideration. But in the present case as found from Annexure-B while the population in ward No. 21 is 5257 in ward No. 6 it is 2351. Further, it is found from the said Annexure that the population in

ward Nos. 22, 25 and 27 are less than 2500 and population in ward No. 15 and 12 are within the range of 4500 to 5000. It clearly shows that there was no equitable distribution of population among the various wards. Perused Annexure-B and found the submission of learned Counsel for the Petitioners with regard to wide gap in population strength of different wards is correct. Since the mandatory provision contained u/s 12(3)(b)(i) has not been complied with, Annexure-1 and 2 are to be quashed.

14. Learned Counsel for the Petitioners further submitted that as required u/s 11 of the Act, seats in every Municipality should be reserved for the Scheduled Castes and Scheduled Tribes and the number of seats so reserved should bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the concerned Municipal area or the Scheduled Tribes in that areas bears to the total population of that area and seats should be allotted by rotation to different wards in a Municipal area. There are also provisions for reservation of 27% seats for Backward Class of Citizens and one third of seats for women in the minimum. Rule 3 of 1994 Rules stipulates that reservation of seats for Scheduled Castes and Scheduled Tribes should be made in descending order of numerical strength of their respective population by rotation. But without following those provisions opp. party No. 3 published Annexure-1, which was erroneously confirmed by the appellate authority, except making some changes with regard to assignment of reserved seats. Some wards which ought not to have been reserved have been kept reserved and vice versa.-So, the learned Counsel for the Petitioners urged to quash both Annexure-1 and 2. On perusal of Annexure-2, it is found that the appellate authority in very explicit terms observed therein that while reserving seats provision of Section 11 of the Act read with Rule 3 of 1994 Rules had not been followed properly. However, since the Municipality was going to face the election for the 3rd term, he did not interfere with it, except making some alteration with regard to assignment of reserved seats in some wards. When the appellate authority was of the view that the mandatory provision contained u/s 11 of the Act was not complied with by opposite party No. 3, he ought to have set aside Annexure-5. In such view of the facts Annexure-1 which was prepared mainly on the basis of Annexure-5 and Annexure-2 deserve to be quashed also.

In the result, the writ petition is allowed and Annexure-1 and 2 are hereby quashed. No cost.

B.P. Das, J.

15. I agree.