

(1976) 07 MP CK 0014

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 597 of 1973

Mukutdhari Sharma

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 21-07-1976

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1981) ILR (MP) 665 : (1978) MPLJ 59

Hon'ble Judges : S.M.N. Raina, J;G.P. Singh, J

Bench : Division Bench

Advocate : Gulab Gupta, for the Appellant; M.V. Tamaskar, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Singh, J.

Two principal questions arise for decision in this petition under Article 226 of the Constitution: (1) Whether the President of a Municipal Council constituted under the Madhya Pradesh Municipalities Act, 1961, continues in office after the Council stands dissolved by efflux of time; and (2) whether the Government is bound to hold elections within a reasonable time from the date of dissolution of a Council.

The facts giving rise to this petition are that elections to the Municipal Council, Umaria, were held in May 1969. The Petitioner, Mukutdhari Sharma, was elected as President to the Council on 22nd May 1969. The term of the President expired after two years on 21st May 1971; but as no election to fill up the vacancy was held, the Petitioner continued as President. Four years, which is the normal term of a Council, expired on 21st May 1973. By a notification published in the Gazette dated 19th September 1973, the term of the Council was extended from 21st May 1973 to 22nd September 1973. The Council stood dissolved on 23rd September 1973. By another notification dated 22nd September 1973, the State Government passed an order u/s 328(6) of the Act appointing the Tahsildar as

Administrator to exercise all powers and duties of the Council under the Act until the reconstitution of the Council. Even after the dissolution of the Council and appointment of the Tahsildar as Administrator of the Council, the Petitioner claimed that he did not vacate his office as President. The Petitioner filed the present petition praying for a declaration that he continues to be President and that he will continue to hold the office until a new President is elected to take charge of the office in accordance with the provisions of the Act. The Petitioner also prays for issuance of a writ in the nature of mandamus directing the State Government to hold elections for reconstitution of the Council.

To appreciate the questions raised in this petition, it is necessary first to refer to certain provisions of the Act. Section 3(18) of the Act defines "Municipality" to mean "the local area declared to be a Municipality u/s 5 and any other area which the State Government may, by notification, include in such area." "Council" is defined by Section 3(8) to mean a "Municipal Council constituted by or under the Act." A Municipality is created by a notification issued u/s 5. A notification under this section only declares the area to be a Municipality or the area to be included in or excluded from a Municipality. Section 18 provides that there shall be constituted for each Municipality a Council having authority over the Municipality. Every Council so constituted is a body corporate having perpetual succession and a common seal. The constitution of the Council is provided in Section 19. The Council consists of elected and selected Councillors. Section 36, which relates to the term of Council and Councillors, reads as follows before its amendment by Act 39 of 1973:

36. Term of Council and office of Councillors-(1) Every Council shall continue for four years from the date appointed under Sub-section (2) of Section 55 for its meeting.

Provided that the State Government may, by a notification, for reasons to be stated therein extend the term of the Council, from time to time, for a total period not exceeding one year in the aggregate.

(2) Notwithstanding the expiry of the term of the Council under Sub-section (1) every Council shall continue to function till the date appointed under Sub-section (2) of Section 55 for the first meeting of the Council newly constituted in its place or till the expiry of six months from the date of expiration of its term under Sub-section (1), whichever is earlier.

(3) If within the period mentioned in Sub-section (2) the Council is not newly constituted, the Council shall on the expiry of such period be deemed to have been dissolved and the provisions of Section 328 shall apply in respect thereof.

(4) The term of office of every Councillor shall be co-terminus with the term of the Council of which he is a Councillor."

By Act 39 of 1973, which came into force from 21st September 1973, Sub-section (2) was omitted and for Sub-section (3) the following sub-section was

substituted:

(3) If within the period of four years mentioned in Sub-section (1) or if the said period is extended under the proviso thereto, within the period extended, the Council is not newly constituted, the Council shall, on the expiry of the said period of four years or the extended period, as the case may be, deemed to have been dissolved and the provisions of Section 328 shall apply in respect thereof.

Section 42 provides that a person who ceases to be a Councillor shall automatically vacate all the offices which he holds by virtue of being a Councillor. Section 43, which relates to President and Vice-President, reads as follows:

43. Election and term of office of President and Vice-President.-(1) A Council shall elect:

(a) a President from its members or from other persons residing in the Municipality possessing the qualifications of a candidate for election u/s 34 and not disqualified u/s 35 or any other provision of this Act;

(b) Two Vice-Presidents to be designated as Senior Vice-President and Junior Vice-President from amongst its members.

Provided that no person shall be eligible for being elected as a President or Vice-President of a Council if he holds such similar office in any other local authority.

(2) (a) After every general election the Council shall elect the President and the Vice-Presidents at its first meeting held under Sub-section (2) of Section 55 and the President and the Vice-Presidents so elected shall hold office for a period of two years from the date on which they enter upon the offices.

(b) On the expiry of the term of the office of the President and the Vice-President elected under Clause (a), the Council shall, at a meeting convened for the purpose within one month thereof, elect new President and Vice-President who shall hold office for the unexpired term of the Council.

(c).....

Provided that the President and the Vice-President shall continue in office until their successors enter upon their respective offices in accordance with the provisions of this Act.

(3).....

(4).....

(5) The President who is not a Councillor shall unless otherwise expressly provided, be deemed to be a Councillor for all purposes of this Act."

Section 50 provides that subject to the provisions of this Act and the rules and bye laws made thereunder, the Municipal Government of a Municipality shall vest in the Council. Sub-section (1) of Section 328 confers power on the State

Government to dissolve or supersede a Council. Sub-section (6) provides for the consequences of dissolution and supersession. Sub-sections (1) and (6) of Section 328 read as follows:

328 (1) If at any time upon representation made or otherwise it appears to the State Government that-

(a) the Council is not competent to perform, or persistently makes default in the performance of the duties imposed on it by or under this Act or any other law for the time being in force, or exceeds or abuses its powers or fails to carry out any order passed by the State Government under this Act;

(b) the President of the Council or any of its committees is not competent to perform, or persistently makes default in the performance of the duties imposed on him or it by or under this Act or any other law for the time being in force, or exceeds or abuses his or its powers or fails to carry out any order passed by the State Government under this Act and the Council has failed or neglected to take action against the President or the committee;

the State Government may, by an order stating the reason therefor published in the Gazette, dissolve such Council and may order a fresh election to take place.

.....

(6) If the Council is dissolved or superseded as provided in the preceding Sub-sections, the following consequences shall ensue:

(a) all the Councillors of the Council shall, as from the date of the order, vacate their offices as Councillors;

(b) all powers and duties of the Council under this Act may, until the Council is reconstituted, be exercised and performed by such person or a Committee of persons as the State Government may appoint in that behalf;

(c) all properties vested in the Council shall, until the Council is reconstituted, vest in the State Government;

(b) when more than one person are appointed under Clause (b) any one of them, duly authorised in this behalf by a resolution passed by them, may sue or institute or defend any action at-law by or against the Council.

The first contention raised by the learned Counsel for the Petitioner is that although u/s 328(6) all councillors of the Council vacate their office as councillors on dissolution of a Council and all powers and duties of Council thereafter are exercised by the person appointed by the Government for that purpose, the President continues in office because the section does not provide that the President shall vacate his office. In this connection it is pointed out that u/s 43 President may be a person who is not a member of the Council and, therefore, it cannot be said that a person who is elected as President holds his office by virtue of being a councillor within the meaning of Section 42. It is further pointed out

with reference to the same section that the President after expiry of his term continues in office until his successor enters upon the office in accordance with the provisions of the Act. It is argued that the Petitioner continues to hold the office of President and that he will so continue in his office until a new President is appointed after the Council is reconstituted and a new President is elected.

A perusal of the relevant provisions referred to above goes to show that a Municipality is only a local area declared to be a Municipality u/s 5. The corporate body in which is vested the Municipal Government of a Municipality is the Municipal Council. The term of a Municipal Council is fixed by Section 36. The normal period of a Council is four years which can be extended by the State Government upto one year. Before Act 39 of 1973, a Council could function even after expiry of its term till the first meeting of the new Council or till the expiry of six months from the date of expiration of its term whichever was earlier. After the amendment, this statutory extension of the life of the Council for a period of six months from the date of expiry of the term is not available. If elections do not take place within four years or within the extended term, the Council automatically stands dissolved and the provisions of Section 328 become applicable as provided in Section 36(4). The dissolution of a Council means that the Council which is a corporate entity comes to an end: *Radeshym Khare and Another Vs. The State of Madhya Pradesh and Others*, .

A Council consists of elected and selected councillors. The elected and selected councillors at their first meeting elect a President and Vice-President u/s 43. The President may not be a councillor. The Vice-President has to be a councillor. If a person who is not a councillor is elected as President, he is deemed to be a councillor. The term of the offices of President and Vice-President is two years. After expiry of this term, the Council has to elect a new President and Vice-President who hold office for the unexpired period of the term of the Council. As the term of the offices of President and Vice-President is two years, normally there is always a possibility of another election for the offices of President and Vice-President during the currency of the term of the Council. Even on expiry of their term, the President and the Vice-President continue in their offices until their successors enter upon their respective offices. This is the effect of the proviso contained in Sub-section (2) of Section 43. It is this proviso on which great reliance has been placed by the learned Counsel for the Petitioner. It is submitted that although the Petitioner's term may have expired he will continue in office until the Council is reconstituted and a new President is elected. In our opinion, however, the proviso applies only in those cases where the Council continues to exist. The proviso will have no application when there is no Council in existence which can elect a President or Vice-President. Although Sub-section (6) of Section 328 does not in terms provide that the President and Vice-President shall vacate their offices, it is implicit under the scheme of the Act that the President and Vice-President cannot exist when a Council is dissolved. The offices of President and Vice-President of a Council can only exist when the Council is in existence. When a Council stands dissolved, the President and Vice-

President must vacate their offices.

Sub-section (1) of Section 328 contains the grounds on which a Council may be dissolved or superseded by the State Government, although its term has not expired. One of the grounds on which such an action may be taken is when it appears to the State Government that the President of the Council is not competent to perform or persistently makes default in the performance of the duties imposed on him or exceeds or abuses his powers or fails to carry out any order passed by the State Government and the Council has failed or neglected to take action against him. Now when an action is taken for dissolution or supersession of a Council under Sub-section (1) of Section 328 on the ground of incompetence of or abuse of powers by the President, it would be incongruous to hold that although the Council stands dissolved or superseded, the President continues in his full glory. The very object of dissolution or supersession in such a case is to remove the President who is incompetent or who is abusing his power. The dissolution or supersession of a Council, therefore, must necessarily lead to the vacation of the office by the President, otherwise the result would be that the dissolution or supersession would not meet the object for which it is provided for in Section 328. All powers and duties of a Council referred to in Clause (b) of Sub-section (6) of Section 328 must be construed in general terms to include every power and duty of any functionary acting for and on behalf of the Council. When the Council stands dissolved, all these powers which may have been previously exercised by the Council itself or by the President or by any committee or other authorities can only be performed by the person or committee appointed by the State Government in that behalf under Clause (b). In our opinion, dissolution of a Council must result in vacation of the office of President, even though this result is not specifically provided for in Sub-section (6).

It is not correct to say that even when a Council is dissolved the Municipality continues as a corporate body. We have already pointed out that a Municipality only means a local area notified u/s 5 for which a Council can be constituted. The corporate body is the Council and not the Municipality. When the Council is dissolved, the corporate body comes to an end and so there cannot be any President of such a non-existing body. Learned Counsel for the Petitioner has drawn our attention to Section 15 of the Act which provides for the effect of withdrawing the whole area comprised in any Municipality from the operation of the Act. One of the consequences provided in this section is that the President, Vice-President and Councillors of the Council shall vacate their offices. It is argued that where the intention of the Legislature was to provide that the President and the Vice-President shall vacate their offices, express provision was made to that effect and, as there is no such express provision in Section 328(6), it cannot be held that the President vacates his office on dissolution of a Council. It is true that Section 15 expressly provides for vacation of office by President and Vice-President whereas there is no such express provision made in Section 328(6), but this difference is not material, for the dissolution of a Council under Sections 36 and 328, as earlier seen, inevitably leads to the vacation of office by

President, Vice-President and Councillors. Section 15, it may be noticed, does not expressly provide for dissolution of the Council, although that must follow from the withdrawal of the whole area of a Municipality from the operation of the Act. Sections 36 and 328, on the other hand, expressly provide for dissolution. All consequences inevitably flowing from dissolution including the vacation of office by President and Vice-President must follow, more so when the continuance of President and Vice-President may defeat the very object of dissolution u/s 328(1) (b). Omission to provide expressly for vacation of office by President and Vice-President in Section 328(6) only shows careless drafting and is not of any consequence.

The conclusion reached by us that on a dissolution of a Council the President vacates his office is in line with the view taken by another Division Bench in *Niranjanprasad Kesharwani v. The State of M.P. and Ors.* 1974 MPLJ 624 (Misc. Petition No. 888 of 1973, decided on 30th April 1974.

The Petitioner, as earlier stated, was elected as President on 22nd May 1969. His term of two years expired on 21st May 1971. The Petitioner could, however, continue as President under the proviso to Sub-section (2) of Section 43 till the election of a new President. But this could be possible only upto the continuance of the Council. When the Council stood dissolved on 23rd September 1973, the Petitioner could not continue as President. The dissolution of the Council inevitably resulted in depriving the Petitioner of his office. When the Council ceased to exist, the office of the President which was inextricably connected with the Council also came to an end. The Petitioner, therefore, vacated his office.

The next contention of the learned Counsel for the Petitioner is that it is the duty of the State Government to hold elections after dissolution of a Council as soon as possible. In our opinion, this contention is well founded. Until the whole of the local area comprised in a Municipality is not withdrawn u/s 15 from the operation of the Act, the administration of that local area under the scheme of the Act is to vest in a Council. Section 18 very clearly says that there shall be constituted for each Municipality a Council having authority over the Municipality. As provided in Section 50, the Municipal Government of a Municipality vests in the Council. When a Council stands dissolved by expiry of its term u/s 36, the provisions of Section 328 begin to apply. Sub-section (1) of Section 328, which empowers the State Government to dissolve a Council, provides that "the State Government may, by an order stating reasons therefor published in the Gazette, dissolve such Council and may order a fresh election to take place." Now in case of a dissolution by efflux of time it is certainly not necessary for the State Government to make an order dissolving the Council, but the second part of Sub-section (1), that the State Government may order a fresh election to take place, has its application. The vesting of the powers of the Council in a person or committee appointed under Clause (b) of Sub-section (6) is only an interim measure to continue till the reconstitution of the Council. The idea behind Section 328 is that after the Council is dissolved, steps should be taken for holding fresh

elections within a reasonable time. This inference is further supported by Sub-sections (2) and (5) of Section 328 which deal with supersession. If after fresh elections the new Council continues to be incompetent, the Government can supersede the Council. But the supersession cannot be for a period of more than two years or the unexpired term of the Council whichever is less. Now when the maximum period of supersession is provided in Sub-section (5), it is clear that there is an obligation cast on the Government to hold fresh elections and to reconstitute the Council soon after that period. Indeed, when a Municipal Committee was not constituted after the expiry of the maximum period of supersession under corresponding provisions of the Central Provinces and Berar Municipalities Act, a writ of mandamus was issued for holding elections: [see *Gopal Jairam v. State of Madhya Pradesh* 1950 NLJ 509 : AIR 1951 Nag. 181]. The words "may order a fresh election to take place" in Sub-section (1) of Section 328, in our opinion, mean that the State Government shall order fresh election to take place within a reasonable time. Till the local area notified u/s 5 continues to be a Municipality and is not withdrawn from the operation of the Act u/s 15, it is clear that when an elected Council stands dissolved by efflux of time it is the duty of the State Government to take steps for reconstitution of the Council by holding elections within a reasonable time.

The next question is: Has the State Government failed in the discharge of its duty in failing to hold elections? In the instant case the term of the Council expired on 23rd September 1973. It is now nearly three years from the date of dissolution of the Council that elections for reconstitution of the Council have not been held. Normally, the expiry of a period of nearly three years after the dissolution of a Council would be held to be more than a reasonable time for holding elections and the Government's failure to hold elections for such a long period would make out a case for issuing a writ of mandamus. When a statute provides no date for holding an election, it can be inferred that elections must be held within a reasonable time; and when the authority entrusted with the duty to hold elections abuses its discretion by not holding elections for inordinately long period, the Court can control its action by directing it to hold elections and by fixing a date for the same: [Ferris, *Extraordinary Legal Remedies* p.386]. The difficulty in the way of the Petitioner is, however, created by the special circumstances of this case and the declaration of Emergency. The State Government in its return has stated that in April 1972 some new area was included within the Municipality by a notification under Sections 5. By inclusion of new area it became necessary to redistribute the wards and to include the extended area in the adjoining wards. Steps were being taken in that behalf. The learned Government Advocate has further stated in his arguments that he had instructions to state that the Government being busy during Emergency in the implementation of Socioeconomic programmes, it has no time to make arrangement for holding elections to reconstitute dissolved Councils, till the Emergency continues. The Government Advocate also said that there are 56 Councils in the State which have to be reconstituted as a result of dissolution.

The Court has no jurisdiction to go behind the order of the President declaring Emergency. We have also no ground to doubt the statement made by the Government Advocate that the State's hands are full in the implementation of the Socio-economic programmes to tide over the Emergency. The question as to what is reasonable time within which the Government must hold elections for a Municipality is a question depending upon the circumstances of each case. We cannot compel the Government to leave the implementation of the programmes undertaken during the Emergency and to hold elections. A writ of mandamus directing the holding of elections can be issued only in a very clear case when the breach of duty to hold election is clearly made out: [See Ferris, p.384], As we have to accept the statement made by the Government Advocate that the Government being busy in other important programmes has no time for holding elections, we cannot hold that in the special circumstances, the case of breach of duty is made out. No writ of mandamus can, therefore, be issued to compel the Government to hold elections. We may, however, point out that the Prime Minister in a recent Press Interview, in the context of general elections, said that the elections are not directly connected with the Emergency and that the country had had the Emergency from 1971 and in spite of that there were elections in 1972: [see The Indian Express of July 7, 1976]. We hope that the Government will keep in mind that there is a statutory duty to reconstitute dissolved Municipal Councils and the municipal elections will be held as soon as possible.

The petition fails and is dismissed. There shall be no order as to costs. The security amount shall be refunded to the Petitioner.