
(2001) 09 UK CK 0021

In the Uttarakhand High Court

Case No : Writ Petition No. 247 (M/B) of 2000

Nagar Palika Parishad, Roorkee and Others

APPELLANT

Vs

State of Uttaranchal and Others

RESPONDENT

Date of Decision : 28-09-2001

Acts Referred:

Constitution of India, 1950 — Article 243

Uttar Pradesh Municipalities Act, 1916 — Section 10AA

Citation : (2003) 2 UC 947 : (2003) 1 UD 333

Hon'ble Judges : Ashok A. Desai, C.J;M.C. Jain, J

Bench : Division Bench

Judgement

Ashok A. Desai, C.J.—The petitioners have questioned the legislative competence of the State in enacting as well the constitutional validity of reviving original Section 10AA and further provision of proviso with it in U. P. Municipalities Act, 1916 by Uttaranchal Act No. 1 of 2001. The impugned provision reads as thus :

"10AA. Temporary provisions regarding administration of a Board until a new Board is constituted.

(1) Where in circumstances other than those mentioned in Section 11, the term or the extended term of the Board has expired and a new Board has not been constituted, then until the due constitution of the new Board :

(a) All powers, functions and duties of the Board, its President and Committees shall be vested in and be exercised, performed and discharged by Administrator appointed in that behalf by the State Government (hereinafter referred to as the Administrator] and the Administrator shall be deemed in law to be the Board, the President or the Committee, as the occasion may require (Original).

Provided further that the Administrator appointed under this section shall have a term not exceeding six months, or after the new Board is constituted, whichever is earlier (Added).

2. The prologue to challenge is the original Section 10AA as it then stood, conferred unbridled power on the Government in the matter of appointment of the Administrator in absence of prescription of any time limit. The Division Bench of Allahabad High Court by judgment dated 20-9-1992 in Anurag Narayan Singh (1992)1 UPL 170 struck down original Section 10-AA of the U. P. Municipalities Act, 1916 (U. P. Act No. 11 of 1916] holding the same as ultra vires and repugnant to the spirit of Local Self Government. The U. P. Legislation by Act No. 12 of 1994 deleted the said Section 10AA from the Statute Book.

3. The Uttaranchal has been carved out from the erstwhile State of Uttar Pradesh. On November 9, 2000, it has attained the Statehood. The State of Uttaranchal Initially by Ordinance No. 2 of 2000 on 11.12.2000 revived Section 10AA incorporating the proviso therewith. Proviso stipulated that the term of the Administrator appointed u/s 10-AA in any case shall not exceed more than six months. Subsequently, the Ordinance was converted into Act No. 1 of 2001.

4. Elections of Municipal Board of Hardwar and Roorkee were held on 29. 12.1995 and 30. 12. 1995 respectively. The normal period of five years expired in first week of January. 2001. For constitution of new Board, the election became due before expiry of the said period. Since new Municipal Board could not be constituted. Administrator was appointed by order dated 11.12.2000 from 1.1.2001 in exercise of the power under the impugned proviso.

5. According to petitioners, the revival of Section 10AA amounts to a legislative overruling of a judicial verdict in Anurag Narayan Singh's case which is beyond legislative competence, abuse of legislative exercise and offending the constitutional scheme. The same is, therefore liable to be struck down.

6. Precisely, it is urged that Part IXA incorporated by 73rd Constitution Amendment of 1992, the Constitution of India made the Municipal Board, a constitutional (sic). The Constitution by this Part (IXA) regulated the composition, continuation and duration of the Municipal Board. Article 243V, according to them, envisages the continuity of the period of the Board. The impugned provisions regarding temporary appointment of Administrator of Board result in discontinuity. And thereby, it deprives the elected representatives of the public to manage or regulate the affairs of the Municipal Government. Impugned provision was, therefore, beyond legislative competence and also affect the basic fibre of the Municipal Government as ordained by the Constitution.

7. The learned Advocate General precisely urged that the impugned amendment doesn't suffer from similar vices which resulted in quashing original Section 10AA of the Act of 1916. The impugned amendment cured of invalidity by providing specific term for the Administrator. Moreover, the Members of the outgoing Board cannot continue in the office beyond five years which has expired. We on 9.5.2001 closed hearing of judgment.

8. Even as per impugned proviso, the term of Administrator was upto 30.6.2001. The State, however, in the meanwhile on 8.5.2001 by Amending Act "U. P.

Municipalities (Second Uttaranchal Amending Act of 2001)" replaced the proviso by substituting "the term of Administrator shall continue upto 31.3.2002." The term was, thus, extended by nine months.

9. The petitioners, therefore, amended the petition and directed their challenge to the said Amendment. The precise submission is that the proviso further extending the term of Administrator has squarely fallen in vices deprecated by the judgment in Anurag Narayan Singh, and therefore, liable to be struck down,

10. The learned Advocate General urged that in view of Article 243U of the Constitution, period of Municipality shall continue only for five years from the date of its first meeting and no further. As such, the period of the elected Board expired at the end of 2000, and in view of the constitutional injunction, the outgoing Members of the Board cannot continue beyond the period stipulated. It is then urged that the Court is not competent to extend the period of the elected members of the Board and allow them to continue in the office.

11. The submission is besides the point. We are not examining any claim to continue the elected representatives of the public in the outgoing Board. The question before us is of holding of election for constitution of new Municipality in terms of Article 243U of the Constitution before the expiry of the period of the outgoing Municipality. Article 243U of the Constitution provides for the duration of Municipalities, etc. Clause (1) reads as under.

"Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer".

Clause (3) of Article 243U reads as under:

"An election to constitute a Municipality shall be completed :

(b) before the expiry of its duration specified in Clause (1)."

12. The learned Advocate General made a submission that the provisions are not mandatory, though the framers of the Constitution deployed the word "shall". It does not unequivocally bring that mandatory character. Reference was made to The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, . The Advocate General formulated the criteria thus :

(i) The nature and design of the statute.

(ii) The consequences, which would follow from construing it one way or other.

(iii) The impact of the provision whereby the necessity of complying with the provisions in question is avoided.

(iv) The circumstances namely that the statute provides for a contingency of the non-compliance with the provisions.

(v) The fact that the non-compliance with the provisions Is or not visited by

some penalty.

(vi) Seriousness/ triviality consequences that flow therefrom.

(vii) Object of the legislation will be defeated or furthered.

The learned Advocate General has formulated the above dicta but he has not persuaded us at all as to how the same apply to the present situation.

13. We have examined the constitutional scheme of the Municipalities under Part IXA of the Constitution. This part, took the Municipality from the statutory pedestal to the constitutional one. Under Clause (e) of Article 243P. Municipality is defined as institution of Self-Government constituted under Article 243Q which includes the constitution of Nagar Panchayat, Municipal Council or Municipal Corporation. The scheme under this part is couched with a mandate, which is imperative in character.

14. Article 243U. to which the reference is already made, mandates that every Municipality shall continue for a period of five years. In the submission of learned Advocate General, this provision is mandatory and, therefore, outgoing Municipality cannot continue for a period beyond as stipulated. The submission does not need any scrutiny since it runs in tune with the constitutional objective of the scheme under this part.

15. The learned Advocate General, however, then chose to argue that Clause (3) of Article 243U is not mandatory and is directory. It is extremely difficult to accept this submission. The same is self-destructive. The provision to hold election before expiry of duration of five years as prescribed under Clause U) is equally mandatory. We are of this view not simply because the word deployed is "shall", but for the consequences. If It ts held to be directory and elections are not held before the completion of duration of five years, as a consequence it will completely impair the basic Institution of Self-Government. This consequence will lead to frustrate the objective of the Constitution. It is, therefore, not permissible to accept the submission of the learned Advocate General.

16. Learned Advocate General then relying on decision in R. C. Podiyal v. Union of India 1994 SCC (Supp) 324 canvassed a proposition that a provisional/interim Government need not adhere to the law to be followed in other States. We are unable to persuade ourselves to accept the relevance of this submission. Firstly, it is not explained how the Government of Uttaranchal, no doubt, it is newly formed, could either be Interim or Provisional Government. Moreover, it is nobody"s case that State Government of Uttaranchal has not to adhere with the law, which is to be followed in other States.

17. The question is the constitutional validity of the Second Amendment which has done away the First Amendment. And that First Amendment is not a piece of legislation for any other State. But It was the first legislative venture of the State of Uttaranchal.

18. Learned Advocate General invited our attention to Section 88 of U. P. Reorganisation Act, 2000, which reads thus :

"88. Power to construe law. --Notwithstanding that no provision or insufficient provision has been made u/s 87 for the adaptation of a "law made before the appointed day, any Court, tribunal or authority, required or empowered to enforce such law may, for the purpose of facilitating its application in relation to the State of Uttar Pradesh or Uttaranchal, construe the law in such manner, without affecting the substance, as may be necessary or proper in regard to the matter before the Court, tribunal or authority,"

Submission of the Advocate General is that the Second Amendment needs to be construed to facilitate the Government Business. This submission to us, is also not having bearing on the question. The section refers to the law made prior to the appointed day. In relation to that law, this provision mandates a course to construe in such manner without affecting the substance as may be necessary, or proper in regard to the matter before the Court. We are not engaged in any manner in interpretation or construction of any such law or statute. The question before us Is constitutional validity and legislative competence of the impugned Second Amendment to the U. P. Act No. 1 of 2001. The same is enacted after appointed day, by State of Uttaranchal. Section 88 also, therefore, has no application.

19. The learned Advocate General submitted that It was not feasible to hold election of Municipal Board of Hardwar and Roorkee because of practical difficulties. And that has necessitated to extend the term of Administrator by Second impugned Amendment. He attempted to substantiate the ground by inviting our attention to Article 243T, which provides reservation of seats of Scheduled Caste and Scheduled Tribe in every Municipality. It is pointed out that State of U. P. by Amending Act No. 12 of 1994 and by Amending Act No. 26 of 1995 prescribed the reservation respectively for Scheduled Caste and Scheduled Tribe and for Backward Class in compliance of the Amended Article 243T.

20. Pursuant, thereto, on 5.9.2000, the reservation of seats in different Municipalities of different districts has been earmarked by the Government of U. P. After formation of State of Uttaranchal, the new State has to review the reservation as earmarked for the thirteen districts allocated to the State of Uttaranchal. He further submitted that while in State of U. P., elections of the Municipalities in twelve districts other than Hardwar took place in 1996 and those elections are due at the beginning of 2002. To earmark reservation and to bring uniformity in the Municipal elections throughout the State, it was not possible to hold election during Initial period of six months of the Administrator. The period of Administrator was, therefore, extended by the Second impugned provision.

The learned Advocate General, relying on the Black's Law Dictionary Volume VII (Addition page 760), canvassed , the Doctrine of Impossibility. That stipulates thus ;

"The principle that a party may be released from a contract on the ground of uncontrollable circumstances have rendered performance impossible."

Then he invited our attention to Raj Kumar Dey and Others Vs. Tarapada Dey and Others, , which refers to legal maxim "The law does not compel a man which he cannot possibly perform". He then submitted that as a principle of Administrative Law. the State cannot be compelled to hold election before the expiry of normal period of five years or within the period of six months prescribed by earlier proviso.

21. We do not see the proposition as canvassed is of any avail to the State. The obligation in the instant case is not contractual. The holding of election to constitute Municipal Board within stipulated period is a constitutional mandate. The doctrine of impossibility to perform the contract has, therefore, no bearing. On the contrary, such dictum which governs the private rights, if extended, would frustrate the constitutional obligation which is impermissible.

22. Even otherwise, we factually don't see any substance in the submission. The reservation of seats was already earmarked for the thirteen districts of Uttaranchal by the erstwhile State of Uttar Pradesh.

Being conscious of the election due of Municipal Boards, the State by Ordinance on 11.12.2000 incorporated the impugned First Amendment and gained six months beyond due date. Any revision of reservation of seats as earmarked was feasible even within the reasonable period.

23. In notes of arguments dated 3.9.2001 the learned Advocate General suggested that to earmark reservation of seats, several exercises are involved, Even now it is not reported that the Government has undertaken any process of revision of earmarking of reserve seats immediately after 1.1.2001. It is also not reported for holding elections for Hardwar with other twelve districts where term of Municipalities expires at the beginning of 2002, whether, the Government has initiated the process as mandated by Article 243ZA. We, therefore, feel that the ground as canvassed for extending the period of Administrator by the Second Amendment is just a pretext. Exercise of legislative power is for collateral purpose. And the same is, therefore, colourable. Impugned Amendment, thus, cannot be sustained on this ground.

24. Still more serious objection to the impugned Second Amendment is that it has peculiarly extended term of Administrator not by specified period, but by fixed date. i.e.. upto 31st March, 2002. Consequently, the life of the impugned amended proviso is only upto that date. As such, it shall become lifeless thereafter. The learned Advocate General faintly urged that the situation in the instant case is not analogous to the facts in Anurag Narayan Singh where the term of Administrator was extended for several years. We don't agree. Once this period has expired after April. 2002, the substantive provision u/s 10AA shall enable the Administrator to continue with perpetuity. It is, therefore, prone to gross abuse as held in the Judgment of Anurag Narayan Singh (supra).

25. However, in the instant case, as discussed, by First Amendment by incorporating proviso confining the period of Administrator for a period of six months, the Legislature of State of Uttaranchal removed the invalidity in the original provision which supplied the unbridled power to the executive to continue appointment of Administrator for an uncertain period. However, by Second Amendment, the Legislature has done away the validating provision which claimed to have cured invalidity and further extended the period.

26. in Anurag Narayan Singh, the High Court held :

"33. The existence of local Government has been part of the skeleton on which democracy is to be based, under the Constitution The Constitution goes, further by explaining that local Government would in fact be Local Self-Government. The phrase in Entry 5 reads : "For the purposes of local self-Government or the village administration."

"34. This entry is self explanatory The interpretation of this entry is that there shall be a local Government, but it will be constituted as local self-Government. This simply descends to mean that there will be Government of the people, by the people and for the people, but not a corporate entity run by those who are not the people. The entry in the Constitution of India has been extracted out of the Government of India Act. 1935. The constitution of local Government as local self-Government is, thus, explained in continuity for the last half century to permit local Government to exist as local with the Constitution."

"38. Now comes the question of the credibility of the laws which arrange a state of affairs by which civil elections to the local bodies remain suspended year by year so that the Parliamentary democracy under the Constitution of India must operate in a vacuum without its grass roots in local self-Government. The power to negate local self-Government is not available to any State Legislature or even to the federal Parliament."

"60. These principles will apply squarely in the context of present set of cases. The legislation which played the mischief to virtually put a lid on local self Government was for a temporary purpose, but used and abused too long."

"63. These two enactments in question blended along with additional powers provided to the State Government as excuse to administrator local bodies without elected representative. This void had a disastrous effect in preventing the maturing of local self-Government, in the State of Uttar Pradesh. It is not for the Court to spell out the formula if healthy conventions were not permitted to bloom local self-Government into a workable, sophisticated perfection. The Constitution of India does not encourage an anti-thesis to local self-Government and the legislative list lends itself to an interpretation that local self-Government should move forward in becoming articulate with functional utility and continue to move forward by experience to function in decentralisation".

27. We are of the view that this legislative exercise of introducing Second

Amendment has Incurred the constitutional invalidity in view of Anurag Narain Singh's (1992) 1 UPL 170 case. It completely offends the constitutional objective and mandate contained in Part 1XA, Moreover, granting such an extension to the Administrator by the statutory provision is also beyond legislative competence. According to us, the constitutional validity, therefore, cannot be sustained and the impugned Amendment Is liable to be struck down.

28. We, therefore, strike down the second amendment introduced by Second Amendment Act of 2001 replacing the proviso introduced by First Uttarancnal Amendment Act of 2001 and substituting "the term of Administrator shall continue upto 31.3.2002" and direct the State Government to immediately initiate the process to complete the election as mandated by Part 1XA of the Constitution of India. The writ petition is ruled accordingly.