

(2021) 12 OHC CK 0148

In the Orissa High Court

Case No : Writ Petition (C) Nos. 34206, 35365, 35442, 36479, 36695, 37376 Of 2021

Prasanna Kumar Behera And Another

APPELLANT

Vs

State Of Odisha And Others

RESPONDENT

Date of Decision : 22-12-2021

Acts Referred:

Constitution of India, 1950 — Article 243D, 243D(4), 243D(6) Orissa Gram Panchayat Act, 1964 — Section 10(5), 10(5)(c), 10(6), 10(6)(a), 10(6)(b)

Citation : (2021) 12 OHC CK 0148

Hon'ble Judges : Dr. S. Muralidhar, CJ; A. K. Mohapatra, J

Bench : Division Bench

Advocate : Gautam Mishra, Ashok Parija, Debakanta Mohanty, Budhadev Routray

Final Decision : Disposed Of

Judgement

1. These writ petitions question the manner in which the Government of Odisha has applied the provisions in Article 243-D of the Constitution of India read with Sections 10 (5) and 10(6) of the Orissa Gram Panchayat Act, 1964 ('the OGP Act') for determining the percentage in the post of Sarpanches of reservation for Scheduled Castes (SC), Scheduled Tribes (ST) and Backward Classes of Citizens (BCC) in the Panchayat elections to be held for the Panchayats, Panchayat Samitis and Zilla Parishads in 2022.

2. The State Election Commission ('SEC') and the Panchayati Raj Department of the Government of Odisha are Opposite Parties in all the petitions. These petitions were filed at a stage when the Notification announcing the schedule for the elections was yet to be published.

3. The petitions were taken up for hearing yesterday 21st December, 2021, upon urgent mentioning, when the Court was informed that the SEC had written to the Government of Odisha proposing that the Notification for holding the aforementioned elections should be published positively by 23rd December, 2021 keeping in view that the election process had to be completed on or before 8th

March, 2022. This was because the five-year term of the previously elected bodies would come to an end on that date.

4. Certain developments that have taken place in the month of December, 2021 were brought to the notice of the Court in the course of the hearing of the petitions yesterday. As far as reservation for BCCs in the posts of Sarpanches is concerned, the attention of the Court was drawn to two orders of the Supreme Court of India. The first is an order dated 6th December, 2021 in SLP (C) No.19756 of 2021 (Rahul Ramesh Wagh v. State of Maharashtra). The second is an order dated 17th December, 2021 of the Supreme Court of India in Miscellaneous Application Diary No. 31495 of 2021 (Manmohan Nagar v. State of Madhya Pradesh).

5. In *Rahul Ramesh Wagh v. State of Maharashtra* (supra), the Supreme Court of India, after taking note of the mandatory directions contained in the judgments of the Supreme Court in *Dr. K. Krishnamurthy v. Union of India* (2010) 7 SCC 202 and *Vikas Kishanrao Gawali v. State of Maharashtra* (2021) 6 SCC 73, held that the election programme in the State of Maharashtra for election to the local bodies would have to abide by the directions issued in the aforementioned decisions which make it mandatory for a 'triple test' to be fulfilled prior to making reservations for Other Backward Classes (OBC). In terms of such triple test, it was mandatory first to set up a dedicated Commission to conduct 'contemporaneous rigorous empirical inquiry into the nature and implications of backwardness qua local bodies within the State'. The second requirement was "to specify the proportion of reservation required to be provisioned local body-wise in light of the recommendations of the Commission, so as not to fall foul of overbreadth". The third requirement was that such reservation in any event should not exceed the aggregate of 50% of the total seats reserved in favour of SC, ST and OBC taken together. It was noted by the Supreme Court that in the State of Maharashtra even "the first step of collating empirical data has not been completed so far." Therefore, it was ordered that the SEC of Maharashtra "shall desist from proceeding with the election programme already notified in respect of reserved seats for OBC category only". This was despite the election program already having been announced by way of publication of a notification to that effect.

6. In the second mentioned order, *Manmohan Nagar v. State of Madhya Pradesh* (supra), which was in the context of local body elections in the State of Madhya Pradesh, despite the elections being underway, the Supreme Court in its order dated 17th December, 2021 again stayed the election process in respect of OBC seats in all the local bodies and further mandated that such seats would be re-notified for the 'general category'.

7. The position in Odisha, as informed by Mr. Ashok Parija, learned Advocate General (AG) , in respect of reservation for the BCC in posts of Sarpanches under Article 243-D (6) of the Constitution read with Section 10 (5) (c) and Section 10 (6) of the OGP Act as amended on 23rd September 2021, would be no different.

Here although there is a Commission set up by the Government of Odisha in fulfillment of the first of the 'triple' tests, the second test of the Commission making recommendations specifying the percentage of reservations to be made, after collecting data, is not fulfilled as on date. Consequently, in light of the aforementioned two decisions of the Supreme Court, there can be no reservation yet provided for BCCs in the posts of Sarpanches in Odisha in the elections to be held. It is inevitable, therefore, for the Government of Odisha to re-work the draft notification for holding of elections to the Panchayats, Panchayat Samitis and Zilla Parishads in 2022.

8. Another development that has taken place, as informed by Mr. Parija, is that in view of the deliberations in the Court during the hearing of these petitions, and in a departure from what was the previous practice followed from 1997 onwards, the Government of Odisha has decided to rework the reservation in the posts of Sarpanches for SCs and STs by adopting a procedure whereby it will first complete the exercise in terms of Section 10 (5) (a) of the OGP Act [which incidentally is identically worded as the first proviso to Article 243-D (4) of the Constitution of India] before undertaking the exercise under Section 10 (6) (a) and (b) of the OGP Act.

9. In view of the above developments, Mr. Parija, learned AG makes a statement that the Government of Odisha will now come out with a fresh draft notification announcing the elections to the aforementioned three Panchayat Raj institutions, which will be published on 27th December, 2021. The Collectors will invite objections thereto, which objections would be submitted by 3rd January, 2022. This is after accounting for the seven-day period which has to be provided for such exercise under Rule 3 (4) of the OGP Election Rules, 1965. He states that such claims/objections would be disposed of by the Collectors by 5th January, 2022 and the final list will be communicated to the SEC on 7th January, 2022. The date of issuance of the notification under Section 12 of the OGP Act read with Rule 13 of the OGP Election Rules will be 8th January, 2022.

10. The Court clarifies that it is not expressing any view on the correctness or otherwise of the above stand of the State Government. In view of the fact that a fresh exercise is to be undertaken before the final publication of the notification in the manner indicated hereinabove, learned counsel for the Petitioners do not press for any of the reliefs prayed for at this stage and reserve their rights to file fresh petitions at a subsequent point in time.

11. Mr. Buddhadev Routray, learned Senior counsel for the SEC, states that the SEC will correspondingly communicate to the State Government a fresh date for publication of the election notification.

12. The writ petitions and all pending applications are disposed of.

13. An urgent certified copy of this order be issued as per Rules.

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