

(1974) 03 PAT CK 0007

In the Patna High Court

Case No : Civil Writ Juridn. Case No. 1469 of 1973

Rajendra Prasad Gupta and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 28-03-1974

Acts Referred:

Bihar and Orissa General Clauses Act, 1917 — Section 27, 8

Bihar and Orissa Municipal Act, 1922 — Section 13(1)

Bihar Municipality (Fourth Amendment) Ordinance, 1972 — Section 10(1)

Citation : AIR 1975 Patna 20

Hon'ble Judges : S.N.P. Singh, J;S.K. Jha, J

Bench : Division Bench

Advocate : Basudeva Prasad, G.C. Bharuka and Renuka Sharma, for the Appellant; Radha Raman, Jageshwar Prasad Sinha and Dinesh Charan, for the Respondent

Final Decision : Dismissed

Judgement

S.N.P. Singh, J.—This writ application under Articles 226 and 227 of the Constitution has been filed by the four petitioners who claim themselves to be the voters of Kishanganj Municipality.

2. Kishanganj Municipality was constituted before the Bihar and Orissa Municipal Act, 1922 (hereinafter to be called "the Act"), came into force. After the Act came into force, the Kishanganj Municipality was constituted in accordance with the provisions of the Act. By Notification No. 963/L. S.G. dated the 1st of February, 1964, the State Government, in exercise of the powers conferred by Sub-section (1) of Section 13 of the Act and in supersession of the previous notifications on the subject, fixed the total number of commissioners of the Kishanganj Municipality at 40 out of whom 32 were to be elected in the prescribed manner and 8 were to be appointed by the State Government u/s 14 (1) of the Act. A copy of the said notification has been made Annexure "1" to the writ application. The State Government in exercise of the powers conferred u/s

18 (2) of the Act divided the area comprised within the local limits of the municipality into 32 wards by a notification dated the 8th of February, 1964. Fresh election of the municipality was held on the 10th of September, 1972. On the 31st of December, 1972, the Governor of Bihar promulgated an ordinance called the Bihar Municipality (Fourth Amendment) Ordinance 1972 (Ordinance No. 175 of 1972). By that ordinance new sections were substituted in place of Sections 13, 14, 20, 29, 30, 31, 32, 33 and 35. As provided under the old Section 13 (2), the total number of Commissioners in a Municipality could not be less than 10 and more than 40. As provided in Sub-section (3) of Section 13, the number of commissioners to be elected could not be less than four-fifths of the total number of commissioners. The amended Section 13 (1) provides that the State Government shall by a notification in the Official Gazette fix the number of Municipal Commissioners to be elected in the prescribed manner which shall not be less than 10 and more than 36. Sub-section (2) of new Section 13 provides that besides the total number of Municipal Commissioners fixed under Sub-section (1), one-fifth thereof, subject to the maximum of 4, shall be co-opted by the elected members from the following categories provided that no such person has already been elected, namely (1) women, (2) scheduled castes, (3) scheduled tribes in such municipalities where, according to the last published census report, the population of such tribes exceeds five per cent. of the total population; and (4) Backward Classes. In the new Section 20, provision has been made for co-option of the Municipal Commissioners and the election of the Chairman. As provided in Sub-section (1) of that section, the District Magistrate or any other officer, not below the rank of a Deputy Magistrate, duly authorised by the District Magistrate in that behalf is required to call the first meeting of the elected Commissioners at a place and time fixed by him within 10 days from the date of the publication of the results of the election of Municipal Commissioners for the purpose of co-option of the Commissioners as provided u/s 13 (2). The old Section 14 (1) of the Act provided for appointment of Commissioners by the State Government and Section 14 (2) provided that the names of the commissioners elected and appointed shall be published in the Official Gazette. Since the new Section 13 (2) already made provision with regard to the co-option of the commissioners instead of appointment, the old Section 14 (1) was, in effect, obliterated from the statute book and the new Section 14 merely laid down that the names of the Municipal Commissioners elected or co-opted under Sub-section (1) or (2) of Section 13 shall be published in the Official Gazette. Section 10 of the Ordinance contains the saving clause. As provided u/s 10 (1), notwithstanding anything contained in the Ordinance, the election of Chairman, vice-chairman, President and Municipal Commissioners held prior to the promulgation of the Ordinance shall not be held to be illegal. Sub-section (2) of Section 10 provides that for the purpose of Section 20 of the Act, the periods prescribed for the purpose of electing the Chairman, Vice-Chairman, President and co-option of the Municipal Commissioners shall be reckoned to commence (or computed) from the date of the promulgation of the ordinance, provided that the period for the first election or co-option after the promulgation of the

ordinance may be extended by the State Government by such time as it thinks proper. It appears that, in view of the promulgation of the ordinance, the State Government issued a circular letter, dated the 23rd of January, 1973, a copy whereof has been made Annexure "2" to the writ application, to all the District Magistrates. In that circular letter, the decision of the Government that the system of co-option would be adopted in place of nomination even in such municipalities where the election of commissioners had been held prior to the promulgation of the ordinance was conveyed. The 20th of February, 1973, was fixed by the Government as the date from which the period contemplated under the new Section 20 was to be computed. On the 8th of April, 1973, the Governor of Bihar promulgated Ordinance No. 40 of 1973 incorporating almost the same provisions as those of the first ordinance with the necessary modification in the repeal and saving clause in view of the previous Ordinance No. 175 of 1972. It appears that the third Ordinance No. 99 of 1973, incorporating exactly the same provisions as in the first and second Ordinances with concomitant modifications in the saving clause was promulgated by the Governor. The District Magistrate, Purnea, purporting to exercise power under Sections 4 (1) and 4 (3) of the third ordinance regarding the holding of the meeting for the purpose of co-option delegated his power to Sri N.K. Sharma, Sub-Divisional Officer. A copy of the order of the District Magistrate Purnea, dated the 20th of October, 1973 has been made Annexure "3" to the writ application. Thereafter, the Sub-divisional Officer issued a notice to all the elected Municipal Commissioners informing them that the meeting would be held on the 13th of November, 1973, for co-opting two commissioners as provided in new Section 13 (2). A copy of that notice has been made Annexure "4" to the writ application. The petitioners in this writ application have challenged the validity of the directions, delegation and the notice as contained in Annexures "2", "3" and "4" respectively.

3. It may be stated at the outset that Mr. Basudeva Prasad, learned Counsel appearing for the petitioners, did not advance any argument with regard to the validity of any of the ordinances promulgated by the Governor, although in the writ application the validity of the ordinances has been challenged on certain grounds. The learned Counsel, however, raised two contentions. In the first place he submitted that there being no fresh notification under the new Sub-section (1) of Section 13 fixing the total number of commissioners to be elected, no steps for co-option, as provided under the new Sub-section (2) of Section 13, can be validly taken. Secondly, he urged that the constitution of Municipal Boards must be in accordance with the notification (Annexure 1) which does not provide for co-option but for the appointment of commissioners by the State Government.

4. Before dealing with the contentions, which have been raised on behalf of the petitioners, I would dispose of a preliminary objection which has been raised on behalf of the respondents. Mr. Dinesh Charan, appearing on behalf of Respondents 1, 2 and 3 and Mr. Radha Raman, appearing on behalf of the other respondents, who have been elected as Commissioners of the Municipality, urged that this writ application is not maintainable. It was submitted that the

petitioners, being only the voters, have no locus standi to question the validity of Annexures "2", "3" and "4", which relate to the co-option of commissioners. At the instance of the petitioners, whose legal right is not in any way being affected by the co-option of the Commissioners a writ of mandamus cannot be issued against Respondents 1 to 3 commanding them to appoint the commissioners in accordance with the provisions of the old Sub-section (1) of Section 14 and not to adopt the system of co-opting them as provided in the new Section 13 (2). Mr. Basudeva Prasad urged that the petitioners, being the voters of Kishanganj Municipality, having their residence within the Municipality, have locus standi to question the validity of the co-option of Commissioners under the new Section 13 (2) of the Act as the co-option of Commissioners is an integral part of the constitution of the Municipal Board. To support their respective contentions, counsel appearing for both the sides cited some decisions. In my opinion, the matter is not free from difficulty. Moreover having regard to the importance of the questions, which have been raised by the petitioners in the writ application, it will not be advisable to dispose of the writ application on the preliminary objections raised by the respondents regarding its maintainability. I will, therefore, consider the points which have been raised on behalf of the petitioners.

5. As the two questions formulated by Mr. Basudeva Prasad are interrelated, they are being considered together. The notification (Annexure "1"), which was issued under the old Sub-section (1) of Section 13 of the Act reads thus:

"Notification,

The 1st February. 1964.

No. 963-L.S.G.-- In exercise of the power conferred by Sub-section (1) of Section 13 of the Bihar and Orissa Municipal Act, 1922 (B. & O. Act VII of 1922) and in supersession of all previous Notifications on the subject the Governor of Bihar is pleased to direct that the number of Commissioners of the Kishanganj Municipality in the District of Purnea shall be fixed at Forty of whom thirtytwo shall be elected in the prescribed manner and eight shall be appointed by the State Government."

It is clear from the above notification that the Governor fixed the total number of commissioners of the Kishanganj Municipality at forty out of whom thirty-two were to be elected in the prescribed manner and eight were to be appointed by the State Government. According to Mr. Basudeva Prasad the notification has to be given effect to either as a whole or not at all. In other words, the Government cannot bifurcate the notification by implementing a part thereof and not implementing the other part. Learned Counsel appearing for the respondents, however, submitted that the notification consists of two parts, the first part providing for the election of the thirty-two commissioners in the prescribed manner and the second part providing for the appointment of eight commissioners by the State Government. As the first part of the notification is not inconsistent with the provisions of the new Section 13 (1), it will remain in

force by operation of Section 27 of the Bihar and Orissa General Clauses Act, 1917. Mr. Basudeva Prasad, in support of his contention that the constitution of the Municipal Board must be in accordance with the notification (Annexure "1"), placed reliance on clauses (b) and (c) of Section 8 of the Bihar and Orissa General Clauses Act, I will, therefore, first consider the question whether the provisions of Clauses (b) and (c) of Section 8 apply to the facts of the instant case.

6. The relevant part of Section 8 of the Bihar and Orissa General Clauses Act is extracted below:

"Where any Bihar and Orissa Act (or Bihar Act) repeals any enactment hitherto made, or hereafter to be made then, unless a different intention appears the repeal shall not,--

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed."

On a plain reading of Section 8 (b) and (c) it is clear that unless a different intention appears, the repeal shall not affect the previous operation of the law which has been repealed or anything duly done or suffered thereunder or affect any right privilege, obligation or liability acquired, accrued (or incurred ?) under the old law. In my view the provisions of Section 8 (b) have no application to the facts of the instant case. If the appointment of the Commissioners under the old law would have been made by the State Government, before the promulgation of Ordinance No. 175 of 1972, the provisions of Section 8 (b) of the Bihar and Orissa General Clauses Act would have been attracted and the appointment of the Commissioners made under the old law would not have been affected. With regard to the application of Section 8 (c) of the Bihar and Orissa General Clauses Act, Mr. Basudeva Prasad made the submission that the State Government is under an obligation which it has incurred under the notification issued under the old Section 13 (1) of the Act to complete the constitution of the Municipal Board under the old law by appointing the commissioners under the old Section 14 (1). In advancing the above contention Mr. Prasad ignores the most important words "unless a different intention appears" occurring in Section 8 of the Bihar and Orissa General Clauses Act. The consequence mentioned in Section 8 (c) will follow only if a different intention does not appear in the ordinance. It appears from Section 10 (1) of the Ordinance that the intention is to save, inter alia, the election of the Municipal Commissioners held prior to the promulgation of the Ordinance. The provision contained in Sub-section (2) of Section 10 to the effect that for the purpose of Section 20 the period fixed for the co-option of Municipal Commissioners is to be counted from the date of the promulgation of the Ordinance clearly shows that the intention is not to make the appointment of the Commissioners under the old Section 14 (1) of the Act but to co-opt the

Municipal Commissioners in accordance with the provisions of Section 13 (2) of the Act as substituted by the Ordinance. That being the position, the State Government is under no obligation to appoint the commissioners under the old Section 14 (1) of the Act and the provisions of Section 8 (c) of the Bihar and Orissa General Clauses Act are not attracted. In course of his submission. Mr. Basudeva Prasad referred to the decisions in the cases of the The Brihan Maharashtra Sugar Syndicate Ltd. Vs. Janardan Ramchandra Kulkarni and Others, , Universal Imports Agency and Another Vs. The Chief Controller of Imports and Exports and Others, and S.V. Ramakrishna Mudaliar and Another Vs. Rajabu Fathima Bukari and Another, . As those cases were decided on their own facts, which are quite distinct from those in the present case, they have no bearing on the case at hand and it is not necessary to consider those decisions. In my opinion, for the reasons which I have already stated, the provisions of Section 8 (b) and fc) of the Bihar and Orissa General Clauses Act are not attracted to the facts of the instant case.

7. Now I proceed to consider the question whether the whole of the notification (Annexure "1") or only a part thereof will remain in force after the promulgation of the Ordinance by operation of Section 27 of the Bihar and Orissa General Clauses Act, 1917. Section 27 reads as follows:

"Where any enactment is repealed and re-enacted by a Bihar and Orissa Act for Bihar Act) with or without modification, then, unless it is otherwise expressly provided any appointment, notification. order, scheme, rule, bye-law or form made or issued under the repealed enactment, shall so far as it is not inconsistent with the provisions re-enacted continue in force and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, notification order, scheme, rule, bye-law or form made or issued under the provisions so re-enacted."

As I have already stated, under the notification (Annexure 1) the Governor fixed the total number of commissioners of the Kishanganj Municipality at forty out of whom thirty-two were to be elected in the prescribed manner and eight were to be appointed by the State Government. The provision for the appointment of the eight Commissioners under the notification (Annexure 1), which was issued under the old Section 13 (1) of the Act, is inconsistent with the provisions of the Ordinance and as such that part of the Notification cannot remain in operation by virtue of Section 27 of the Bihar and Orissa General Clauses Act. 1917.

8. The question, however, which falls for consideration is whether that part of the notification in which provision for election of the thirty-two Commissioners in the prescribed manner was made will remain in force by operation of Section 27 of the Bihar and Orissa General Clauses Act, 1917. As provided under the old Section 13 (2), the total number of Commissioners in a Municipality could not be less than ten or more than forty and as provided in the old Sub-section (3) of Section 13 the number of Commissioners to be elected could not be less than four-fifths of the total number of Commissioners. Under the new Section 13 (1)

the State Government is required to fix the total number of Municipal Commissioners to be elected in the prescribed manner which shall not be less than ten and more than thirty-six. The provision for the election of thirty-two Commissioners in the prescribed manner under the Notification (Annexure 1) is, therefore, not inconsistent with the provisions of new Section 13 (1) inasmuch as even under the new Section 13 (1) the State Government is competent to fix the number of Municipal Commissioners to be elected in the prescribed manner at thirty-two. Apart from that by operation of Section 10 (1) of the Ordinance the election of the Commissioners, which had already taken place, is saved. I am, therefore, of the view that no mandamus can be issued on the State Government directing them to complete the constitution of the Municipal Board in accordance with the notification as contained in Annexure 1. I am further of the view that the election of the Commissioners of the Kishanganj Municipality, which has already been completed, is saved by Section 10 (1) of the Ordinance and co-option has to be made in accordance with the provisions contained in the ordinance to complete the constitution of the Municipal Board. The petitioners accordingly are not entitled to any relief.

9. In the result, this application fails and it is accordingly dismissed. I will, however, make no order as to costs.