
(1998) 05 OHC CK 0028

In the Orissa High Court

Case No : Original Jurisdiction Case No. 2293 of 1997

Satyabrata Dash

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 15-05-1998

Acts Referred:

Constitution of India, 1950 — Article 243T(6)
Orissa Municipal (Delimitation of Wards, Reservation of Seats and Conduct of Elections) Rules, 1994 — Rule 67
Orissa Municipal Act, 1950 — Section 11(1), 11(3), 47

Citation : (1998) 2 OLR 14

Hon'ble Judges : S.N. Phukan, C.J.; A. Pasayat, J

Bench : Division Bench

Advocate : S.K. Sangneria, P.C. Pattanaik and T.K. Mohanta, for the Appellant; A.S. Naidu and C.R. Dash (O.P. No. 3) and Additional Government Advocate (for Opp. Parties 1 and 2), for the Respondent

Final Decision : Dismissed

Judgement

S.N. Phukan, C.J.—The writ petitioner has assailed the notification issued by the Housing and Urban Development Department, Government of Orissa on 8.1.1997 under Sub-rule (6) of Rule 67 of the Orissa Municipal (Delimitation of Wards, Reservation of Seats and Conduct of Elections) Rules, 1994. The notification is at Annexure-4. By the said notification office of the Chairpersons of some Municipalities has been reserved under Sub-section (4) of Section 47 of the Orissa Municipal Act, 1950 (for short "the Act"). Under the impugned notification the office of the Chairperson of Dhenkanal Municipality was reserved for backward class citizens.

2. According to the writ petitioner, the said notification was issued without taking into consideration the population factor of backward classes of the area, which is the requirement under the constitutional amendment. It has also been stated that from its inception the office was meant for general citizens, but not reserved either for S.C./S.T. or any other category and even after constitutional

amendment this office was kept for unreserved category. The petitioner has stated that under the constitutional provision, for reservation of the office of Chairperson of any municipality or N.A.C. population factor is to be taken into consideration. The petitioner has referred to the first notification dated 25.5.1996 (Annexure-1) under which office of Chairperson of Dhenkanal Municipality was notified as general seat. Objection was called for and finally by notification dated 7.8.1996 (Annexure-2) the seat was kept unreserved under Sub-rule (6) of Rule 67 of the Orissa Municipal (Delimitation of Wards, Reservation of Seats and Conduct of Elections) Rules, 1994. However, according to the writ petitioner, without considering the population factor, a notification was issued on 16.11.1996 rescinding the earlier notification vide Annexure-2.

3. Another notification was issued by the Government on 18.11.1996 vide Annexure-3 inviting objections and suggestions in respect of the offices of Chairperson of different municipalities and under the said notification the Chairperson of the Dhenkanal Municipality was shown as reserved for backward classes. It has been alleged that the petitioner and a number of persons filed objections stating that there is no categorisation regarding backward classes as per 1991 census, and, therefore, the number of voters of backward class had not been determined. So, the office of chairperson of Dhenkanal Municipality cannot be reserved in the category of backward class. The opposite parties however, without giving due consideration to the objection filed, notified by notification dated 8.1.1997 (Annexure-4) reserving the office of Chairperson of Dhenkanal Municipality for backward class citizens. It has been pleaded that under Articles 243T of the Constitution while reserving a seat, total population of the area is to be taken into consideration and such seat may be allotted by rotation to different constituencies in a Municipality. The said principle also applies for reservation of the office of the Chairperson of different Municipalities and N.A.Cs. It has been alleged that there was no determination of the percentage of backward class citizens in Dhenkanal Municipality area as per the last census of 1991 and therefore, reservation is arbitrary.

4. Additional affidavit has been filed by the petitioner wherein it has been stated that the office of chairperson of Dhenkanal Municipality has been reserved without taking into consideration the population factor or any statutory provision. It was a pick and choose method inasmuch as in Bargarh and some other named municipalities, the office was unreserved.

5. In the counter filed, it has been stated that Annexure-1 to the writ petition was issued considering the Governor's order dated 14.10.1995 directing exclusion of Urban Local Bodies coming within the schedule area while making reservation. The order of the Governor is annexed in Annexure A/1 to the counter. It has been further stated that notification under Annexure-1 to the writ petition was confirmed without considering the above order of the Governor. According to opposite parties Section 47(a) of the Orissa Municipality Act had earlier provided for reservation by taking the percentage in relation to the total

population of the State. But this was amended and according to amended provision, population of the concerned Urban Local Body was to be taken into consideration. The said notification is at Annexure B/I. Considering the changed circumstances, a draft notification was published on 18.11.1996 for re-arrangement according to the constitutional and statutory provisions, and therefore, the Chairperson was re-assigned taking into consideration the constitutional amendment under the orders of the Governor. The draft notification was confirmed as per Annexure-4 to the writ petition.

6. Regarding population criteria, reference has been made to Article 243T of the Constitution and it has been urged that this provision clearly makes a constitutional mandate that reservation has to be made for backward classes of citizens and accordingly, as per Section 47(d) of the Municipal Act, 27% of the total number of Offices of the Chairpersons has to be reserved for backward classes. 26 Urban Local Bodies came under the schedule area of Schedule-V of the Constitution and were duly excluded. Out of the remaining 76 officers, 27% works out of 21 offices, and accordingly action was taken.

7. According to the opposite parties, in 1991 Census, there was no classification of backward classes and it is in the process of being identified. But this cannot override the constitutional provision and also the requirement u/s 47(d) of the Orissa Municipal Act and, therefore, 27% of the offices have been reserved for backward classes which has been done weeding out the offices meant for S.C. and S.T. and their women. It has been stated that for this purpose, the Local Bodies were arranged population-wise and every third office in the list as far as practicable was assigned to the category of backward class. This has been done to implement the constitutional mandate.

8. Before we proceed to consider the various contentions raised at the Bar, let us quote the relevant provisions of law.

I. Constitution of India. Article 243T(6)

"Nothing in this Part shall prevent the "Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens".

II. Orissa Municipal Act. 1950 (Sections 11 (1) and (3) and 47)

"11.(1). There shall be reserved by the District Magistrate, seats in every Municipality for the Scheduled Castes and Scheduled Tribes and the number of seats so reserved shall 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 of the Scheduled Tribes in that area bears to the total population of that area and such seats shall be allotted by rotation to different wards in a Municipal area;

(3) As nearly as may be, but not less than twenty-seven percentum of the total number of seats to be filled up by direct election in every Municipality shall also

be reserved in favour of backward class of citizens as referred to in Clause (6) of Article 243T of the Constitution."

47. Election of Chairperson and Vice-Chairperson -

(1) Every Municipality shall have a Chairperson and a Vice-Chairperson.

(2) The Councillors of the Municipality, specified in Clause (a) of Section 8 shall -

(a) at the first meeting of the Municipality, which shall be convened soon after the publication of their names under Sub-section (2) of Section 10, select in the prescribed manner a Chairperson from among them;

(b) at a subsequent meeting, which shall be convened for the purpose at the instance of the Chairperson so elected as soon as may be, but not later than thirty days, after the date of election of the Chairperson elect a Vice-Chairperson of the Municipality from among them :

Provided that where the office of the Chairperson of a Municipality is not reserved under Sub-section (3) for women or where the Chairperson elected under this Act is not a woman, the office of the Vice-Chairperson of the Municipality shall be reserved for women.

(3) Notwithstanding anything to the contrary in Sub-section (1)-

(a) Office of the Chairperson in the Municipalities shall be reserved for the Scheduled Castes and Scheduled Tribes and the number of offices so reserved for the Scheduled Castes and the Scheduled Tribes shall bear, as nearly as may be, the same proportion to the total number of such offices as the population of the Scheduled Castes and the Scheduled Tribes respectively in the State bears to the total population of the State;

(b) as nearly as may be one-third of the total number of seats reserved under Clause (a) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes; and

(c) as nearly as may be, one-third including the number of offices reserved for women belonging to the Scheduled Castes, the Scheduled Tribes and the backward class of citizens of the total number of offices of Chairperson in the Municipalities shall be reserved for women; and

(d) as nearly as may be, but not less than twenty-seven percentum of the offices of Chairpersons of Municipalities shall also be reserved in favour of backward class of citizens as referred to in Clause (6) of Article 243T of the Constitution; and

(e) as nearly as may be, one-third of the total number of seats reserved under Clause (d) shall be reserved for women belonging to the backward class of citizens.

(4) Reservation of offices of Chairpersons under Subsection (3) shall be made by

the State Government by rotation among different Municipalities in the prescribed manner and shall be published in the Gazette:

Provided that the procedure provided in Sub-section (3-A) of Section 12 relating to reservation of seats in the Municipalities for the Scheduled Castes, Scheduled Tribes, backward class of citizens and women shall, as far as may be, be applicable for the purpose of reservation of offices of Chairpersons to be made by the State Government under this sub-section; and

(6) The reservation of offices of Chairperson (other than reservation for women and backward class of citizens) u/s (3) shall cease to have effect on the expiration of the period specified in Article 334 of the Constitution.

(6) If at an election under Sub-section (2) -

(a) no Chairperson is elected, a fresh election should be held within thirty days from the date of the first election; or

(b) no Vice-Chairperson is elected, a fresh election shall be held within thirty days from the date of the first election.

(7) If at the subsequent election held under Sub-section (6) no Chairperson or, as the case may be, Vice-Chairperson is elected, the State Government may fill up the office of the Chairperson or the Vice-Chairperson, as the case may be, by nomination of suitable person until such time as a Chairperson or Vice-Chairperson, as the case may be, is elected by the elected Councillors from among them."

III. Orissa Municipal (Delimitation of Wards. Reservation of Seats and Conduct of Elections) Rules. 1994.

(Rule 67)

"67. Reservation of offices of the Chairperson of the Municipality by rotation -

(1) For the purpose of election to the Municipalities for the first time after the Orissa Municipal (Amendment) Act, 1994 ((Orissa Act 11 of 1994) comes into force, the number of offices of Chairpersons of the Municipalities in the State to be reserved for the Scheduled Castes, Scheduled Tribes, Backward Class of citizens and women shall be determined in accordance with Sub-section (3) of Section 47 of the Act. After determining the total number for reservation of offices of the Chairpersons of the Municipalities in the State for Scheduled Castes, Scheduled Tribes, Backward Class of citizens and women the reservation of offices of the Chairpersons for the Scheduled Castes, Scheduled Tribes and for their women shall be assigned to different Municipalities in descending order of the percentage of the respective population to the total population in each Municipality. If a Municipality qualified at a particular general election for reservation for both Scheduled Castes and Scheduled Tribes for the office of the Chairperson on the basis of the said principle, the office of the Chairperson shall be reserved for Scheduled Castes or Scheduled Tribes, as the case may be,

whose population in terms of percentage of population is higher.

(1-A) Subject to the directions, if any, issued by the Governor under sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India, out of the Municipalities left after reservation of offices of the Chairpersons for the Scheduled Castes, Scheduled Tribes and their women, the reservation of required number of offices of the Chairpersons for the members of the Backward Class of citizens including their women in the Municipalities shall be made until the required quota is completed. The reservation of offices of Chairpersons for women belonging to Backward Class of citizens shall be made from out of the Municipalities reserved for such class of citizens keeping in view the percentage of women population to the total population of the Municipality.

(2) The reservation and assignment of Municipalities for Scheduled Castes, Scheduled Tribes, Backward Class of citizens and women in subsequent election shall be made by rotation.

(3) Reservation of offices of the Chairperson of the Municipalities for the Scheduled Castes, Scheduled Tribes, Backward Class of citizens and women shall be made and assigned to the category to which the particular Municipality would have been entitled by taking all Municipalities into consideration in accordance with Sub-rule (1) of this rule, notwithstanding the functioning of the nominated councils immediately before commencement of these rules.

(4) The required number of offices of Chairpersons in the Municipalities in the State shall be reserved for women in the following manner, namely :

(a) in computing total number of offices of Chairpersons for reservation for women as required under Sub-section (3) of Section 47 of the Act, the offices of Chairpersons reserved for women belonging to Scheduled Castes, Scheduled Tribes and Backward Class of citizens shall be taken into account;

(b) reservation of offices of Chairpersons for women belonging to Scheduled Castes shall be made at the first instance, then for the Scheduled Tribes and then for the Backward Class of citizens; and

(c) out of the Municipalities left after reservation for the offices of the Chairpersons for the Scheduled Castes, Scheduled Tribes and Backward Class of citizens including their women, the offices of Chairpersons in the Municipalities shall be reserved for women in descending order of the percentage of the women population to the total population in each Municipality.

(5) For reservation of the offices of Chairpersons under Sub-section (3) of Section 47, the State Government shall cause to be published a notification in the official gazette showing reservation of the offices of the Chairpersons of the Municipalities for Scheduled Castes, Scheduled Tribes, Backward Class of citizens and women after inviting objections and suggestions from all persons interested to be filed before the State Government within a period of fifteen days from the date of such notification. Copy of such notification inviting objections and

suggestions shall be sent to the District Magistrate for wide circulation by publishing it in the Notice Board (s) of his office and office of the Municipality.

(6) The State Government, after considering the objections and suggestions received within the specified period in respect of the notification issued under Sub-rule (5), shall publish the reservation of offices of Chairpersons under Sub-section (4) of Section 47.

(7) The reservation of the offices of the Chairpersons of the Municipalities shall be communicated to the Election Commission."

9. Thus, the constitutional mandate in Clause (6) of Article 243T of the Constitution is that the Legislature of a State has power for making provision for reservation of seats in any Municipality or of offices of Chairpersons of the Municipalities in favour of backward class citizens. Accordingly, the State Legislature of Orissa while enacting the Act, in Section 11 provided for reservation of seats for backward class citizens. By Orissa Municipal (Second Amendment) Act, 1996, Clause (a) of Subsection (3) of Section 47 was amended, and, for the words "in the State bears to the total population of the State", the words "in the Municipal areas of the State bears to the total population of such Municipal areas" were substituted. According to Clause (d) of the said sub-section, as nearly as may be, but not less than 27% of the offices of Chairpersons of Municipalities shall be reserved in favour of backward class of citizens, as provided in Clause (6) of Article 143T of the Constitution. Thus, it appears that 27% of offices of Chairpersons of the Municipalities shall be reserved in favour of backward class of citizens. But, this reservation is by rotation. In other words, in the next election, the seat to be reserved may be changed.

10. The main grievance of the petitioner is that the percentage of backward class of citizens residing in Dhenkanal district does not justify such reservation. In the counter, it has been stated that in view of the above legal provision, 27% seats have to be reserved. 26 Urban Local bodies coming under the scheduled area were excluded by the Government. 27 % of the remaining 76 offices works out at 21. Accordingly, reservation was done. Though reservation has to be based on population structure, but in the 1991 census, there was no classification of backward class citizens as these persons were not identified. Since in view of the above constitutional mandate and the provisions in the Act, reservation has to be made, the State Government, after weeding out the offices meant for Scheduled Castes and Scheduled Tribes and their women, took into consideration the rest seats, out of which 27% was kept reserved for backward classes. In doing so, the population of backward class, as far as practicable, was taken into account.

11. A similar petition came up before the Andhra Pradesh High Court in *S. Fakruddin and Others Vs. The Govt. of A. P. and Others*, . A Full Bench of that Court took note of the fact that it was not possible for the State Government to know exactly the village level population of backward classes. The Full Bench

accepted the contention of the learned Advocate General that there was no infirmity in the reservation of seats for the backward classes though the Election Commission was handicapped in closing the territorial constituency for allotment of reserved category of backward classes. We are in respectful agreement of the above ratio.

12. We may state here that in the case in hand the petitioner has not placed anything on record to show the population structure of Dhenkanal Municipality. Therefore, no relief can be given in the absence of any material on record and as the State Government, in view of the Constitutional and legislative mandate, has to reserve seats for backward classes.

13. In *Ratanlal Nath, etc. Vs. State of Tripura and others*, , the question regarding delimitation of constituencies for the purpose of reservation of seats for Scheduled Castes and Scheduled Tribes in Tripura came up before the apex Court. In paragraph 10 of the judgment, it has been observed that all that the first and second provisos to Sub-rule (3) of Rule 3 of the Delimitation Rules provide is that where census figures are available, that shall be the primary basis- indeed it shall be the only basis-for determining the total population of a Panchayat, or for that matter, the population of the Scheduled Tribes and Scheduled Castes, as the case may be, but where the census figures are not available, the population figures shall be ascertained from the other relevant authenticated record. Thus, in the case in hand, the State Government has given some justification for reserving seats for backward classes and we are not inclined to interfere with the same.

14. In *Boddula Krishnaiah and another Vs. State Election Commissioner, A.P. and others*, , in paragraph - 10 of the judgment, the apex Court quoted its earlier decision in *P. Ram Reddy and Others Vs. Land Acquisition Officer, Hyderabad Urban Development Authority, Hyderabad and Others*, at page 331. We extract below the relevant portion.

"What is more objectionable in the approach of the High Court is that although Clause (a) of Article 243O of the Constitution enacts a bar on the interference by the Courts in electoral matters including the questioning of the validity of any law relating to the delimitation of the constituencies made or purported to be made under Article 243K and the election to any Panchayat, the High Court has gone into the question of the validity of the delimitation of the constituencies and also the allotment of seats to them. We may, in this connection, refer to a decision of this Court in *Meghraj Kothari Vs. Delimitation Commission and Others*, . In that case, a notification of the Delimitation Commission whereby a city which had been a general constituency was notified as reserved for the Scheduled Castes. This Court held that the impugned notification was a law relating to, the delimitation of the constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution, and that an examination of Sections 8 and 9 of the Delimitation Commission Act showed that the matters therein dealt with were not subject to the scrutiny of any Court of law. There was a very

good reason for such a provision because if the orders made under Sections 8 and 9 were not to be treated as final, the results would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from Court to Court. Although an order u/s 8 or 9 of the Delimitation Commission Act and published u/s 10(4) of that Act puts such an order in the same position as a law made by Parliament itself which could be made by it under Article 327. If we read Articles 243C, 243K and 243O in place of Article 327 and Sections 2(kk), 11-F and 12-BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, it will be obvious that neither the delimitation of the Panchayat area nor of the constituencies in the said areas and the allotments of seats to the constituencies could have been challenged nor the Court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification for holding the elections was issued. The High Court not only entertained the challenge but has also gone into the merits of the alleged grievance although the challenge was made after the notification for the election was issued on 31.8.1994".

15. From the above, we hold that reservation of the office of the Chairperson of Dhenkanal Municipality was legally and validly done. As there is no stay order, elections have already taken place.

16. In the result, the writ petition is dismissed.

A. Pasayat, J.

17. I agree.