

(1968) 01 PAT CK 0010

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 790 of 1967

Siya Sharan Sinha and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 29-01-1968

Acts Referred:

Bihar and Orissa Municipal Act, 1922 — Section 390A, 4, 4(1), 4(2), 5

Citation : AIR 1969 Patna 88 : (1969) 17 BLJR 17 : (1968) 1 PLJR 258

Hon'ble Judges : N.L. Untwalia, J;B.P. Sinha, J

Bench : Division Bench

Advocate : Basanta Chandra Ghose, Raghunath Jha, Sanat Kumar Chattopadhyaya and Brahamanand Prasad Sinha, for the Appellant; K.P. Verma, Standing Counsel, Karuna Nidhan Keshava and Brajeshwar Malick, for the Respondent

Final Decision : Allowed

Judgement

Untwalia, J.—This is an application under Article 226 of the Constitution of India to quash the Notification No. 10021/LSG, issued by the Government of Bihar on the 8th December, 1967, a copy of which is Annexure "A" to the writ application, and to restrain the State of Bihar (Respondent No. 1) to forbear from enforcing Annexure "A" and the other respondents from acting thereunder. Cause has been shown by the learned standing counsel on behalf of Respondents Nos. 1, 19 (the Sub-divisional Officer, Madhepura) and respondent No. 20, the Doctor Incharge of the Madhe-pura Dispensary and Mr. Brajeshwar Mallick on behalf of respondents Nos. 2 to 18, who are nominated as office-bearers and members of the Ad Hoc Committee appointed by the State Government of the Madhepura Municipality constituted under the impugned notification.

2. The locality known as the Town of Madhepura was formed a notified area and a Notified Area Committee was constituted by the State Government by Notification No. 3830/LSG dated the 21st March, 1960, u/s 388 of the Bihar and Orissa Municipal Act, 1922 (B. & O. Act VII of 1922). hereinafter called the Act. Ac-cording to the case of the petitioners,, out of whom petitioners 1 and 2 were

the Members of the Notified Area Committee and petitioner No. 3 was a mere taxpayer, towards the end of September, 1967, a notice issued by the Local Self-Government Department of the Government of Bihar was received by the Notified Area Committee intimating the declaration of the intention of the State Government to convert the Notified Area Committee into a Municipality. The Committee objected in writing, inter alia, on the ground that the conditions imposed by Sec. 4 of the Act were not fulfilled and hence the Notified Area could not be converted into a Municipality. The petitioners' grievance is that without giving any opportunity to the members of the committee to have their say in the matter and without replying to their objections, the State Government in the Local Self-Government Department, purporting to act u/s 390A of the Act, by the impugned notification has declared that the Madhepura Notified Area Committee shall be converted into a Municipality with effect from the 15th December, 1967. By the same notification it has also been declared that for the period of transition, a committee of nineteen members, consisting of Respondents 2 to 20, shall exercise and perform all the powers and duties of the Commissioners of the Municipality. The petitioners have quoted various figures from the latest census report of the Government to show that the conditions imposed by Section 4 of the Act are not fulfilled, and that the impugned notification is wholly illegal and without jurisdiction, being in contravention of Section 4 of the Act. They further alleged that the State Government had no power to appoint an Ad Hoc Committee to be the office-bearers and the Commissioners of the Municipality constituted by the impugned notification and that the Minister Incharge of the Local Self-Government Department had constituted the Committee mala fide to give a majority to the people belonging to his political party,

3. The writ application was filed on the 13th December, 1967, and a supplementary affidavit was filed on the 14th December, 1967, the day when the application came up before a Bench of this court for admission. By the supplementary affidavit, certain clarifications were introduced in regard to the total male population of Madhepura as it appears from the census report. The application was admitted on the 14th December, 1967 and the operation of the impugned notification was stayed. On the 15th January, 1968, a counter-affidavit was filed on behalf of the Sub-Divisional Officer of Madhepura, who is Respondent No. 19, and on the same date another counter-affidavit was filed on behalf of the State of Bihar, Respondent No. 1, and the Civil Assistant Surgeon, Madhepura, Respondent No. 20, as also one was filed by Shree Kapildeo Mandal, Respondent No. 3. The stand taken on behalf of the respondents is that prior to the conversion of the Notified Area into a Municipality, a preliminary notice was issued inviting objections and suggestions and the objections which were received were examined and taken into account while finally publishing the notification dated the 8th December, 1967. All the pre-conditions imposed by Section 4 of the Act have been fulfilled. The State Government had power to appoint a Board for the transitory period until elections were held under the Act and that the appointment of the Ad Hoc Committee was not mala fide.

4. At the hearing of the application. Mr. B. G. Ghose, learned Advocate for the petitioners, pressed the following four points :--

(i) That the mandatory procedure prescribed by Sub-section (2) of Section 4 of the Act was not followed in this case and, therefore, the notification dated the 8th December, 1967. is null and void;

(ii) That the condition of three-fourth of the adult male population of any town being engaged on pursuits other than agricultural, as required by Clause (a) of Sub-section (1) of Section 4 was not fulfilled and hence the State Government had no power to constitute the town of Madhepura into a Municipality;

(iii) That the State Government had no authority u/s 390A of the Act to constitute an Ad Hoc Body of the office-bearers and the Commissioners of the Municipality; and

(iv) That, in any event, the constitution of the Body in question was mala fide.

5. We called upon the learned Stand-Ing Counsel and the learned Advocate for Respondents 2 to 18 to reply to the first two points raised on behalf of the petitioners and since we are satisfied that the impugned notification has to be held void on both these points, we did not proceed to examine, nor do we propose to express any opinion of ours, on the third and the fourth points urged on behalf of the petitioners.

6. Section 390A(1) of the Act reads as follows :--

"Conversion of a Notified Area into a Municipality :--

(1) Notwithstanding anything contained in Sections 388, 389 and 390 and subject to the provisions of Section 4, the State Government may, by notification, declare that with effect from the date to be specified in the notification and subject to such provisions as the State Government may make for the period of transition, a notified area constituted u/s 388 shall be converted into a Municipality, and with effect from that date all the provisions of this Act shall apply to such Municipality unless the State Government in the notification, or by a fresh notification, specifically bar the application of any provision in that area."

Clauses (b) to (d) of Sub-section (1) of Section 4 of the Act are not necessary to be read for the purpose of the present case. It is, however, necessary to quote Clause (a) of Sub-section (1) and Sub-section (2) of Section 4, which run as follows :--

"(1)(a) When the State Government is satisfied that three-fourths of the adult male population of any town are engaged on pursuits other than agricultural and that such town contains not less than five thousand inhabitants, and an average number of not less than one thousand inhabitants to the square mile of the area of such town, the State Government may declare its intention to constitute such town, together with or exclusive of any railway station, village, land or building in

the vicinity of such town, municipality, and to extend to it all or any of the provisions of this Act

(2) Every declaration under this section shall be published in the Official Gazette and in such other manner as the State Government may direct."

It is manifest, therefore, that the conversion of a Notified area into a Municipality u/s 390A has been subjected to the provisions of Section 4 of the Act. In other words, the State Government must be satisfied that all the three conditions, which are conditions precedent to constitute a town a Municipality in accordance with Clause (a) of Sub-section (1) of Section 4 of the Act, have been fulfilled and that the declaration of its intention to constitute the town a municipality must be published in the official gazette and in such other manner as the State Government may direct as required by Sub-section (2).

7. The wordings of Sub-section (2), extracted above, clearly indicate that the publication of the declaration of the intention to constitute a town a Municipality is mandatory both in regard to its publication in the official gazette as also in such other manner as the State Government may direct. The publication of the declaration of the intention in the official gazette only is not sufficient nor is it sufficient to give a notice of the said declaration to the Notified Area Committee, because the publication of the declaration of the intention must be in such other manner as the State Government may determine. Giving of notice to the Notified Area Committee is not the publication of the declaration within the meaning of Sub-section (2) of Section 4 of the Act.

8. Section 5 of the Act provides:--"The State Government shall take into consideration any objection submitted through the District Magistrate within six weeks from the date of the publication of a declaration u/s 4, by any inhabitants of the town or area, or any rate-payer of the municipality concerned, and in the case of a declaration under Clause (a) of Sub-section (1) of the said section, by the district board of the district in which the town is situated."

9. In view of the provisions aforesaid, it is clear that the intention of the Legislature was that the declaration of the intention of the State Government must be published in the locality in some other manner, apart from the publication in the official gazette, as the State Government may think fit and proper to direct, so that any inhabitant of the town or the area or any rate-payer of the Municipality concerned, if it was a case covered by the other Clauses of Sub-section (1) of Section 4, may get an opportunity to submit his objection through the District Magistrate, within six weeks from the date of the publication of the declaration u/s 4 of the Act. Such a provision, made for safeguarding the rights of the inhabitants of the locality, could not but be mandatory, as it had a very good purpose behind it. It is a matter of common experience that the official gazette is not subscribed or read by the general inhabitants of any town or area. If, therefore, the publication of the declaration of the intention of the State Government is made only in the official gazette and in no other manner,

the inhabitants of the locality are deprived of their valuable right to file their objections for the consideration of the State Government u/s 5 of the Act.I

10. In the case of Mahesh Prasad Sinha Vs. Manjay Lal and Others, a Bench of this court, to which I was a party, quoted the well-known principles from various authoritative text books to enable the court to determine as to whether a particular provision of law is mandatory or mere directory. Out of those quotations, I think, it is expedient to quote a few passages here also. In Maxwell's Interpretation of Statutes, Eleventh Edition, at page 364 occurs a passage, which reads thus :--

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not (to) be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

At page 362, the learned author has said -

"When a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, the question often arises: What intention is to be attributed by inference to the legislature? Where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention".

Lord Campbell's observations while affirming the decision in the case of Liverpool Borough Bank v. Turner (1860) 29 LJ Ch 827 made in (1861) 30 LJ Ch 379 to the effect:

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed,"

were quoted with approval in Howard v. Bodington, (1877) 2 PD 203. Before quoting the said passage, Lord Penzance has said at page 210 -

"In the case of statutes that are said to be imperative, the courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the courts hold a provision to be mandatory "or directory" they say that, although such provision may not have been complied with, the subsequent proceedings do not fail"

It has been pointed out in note (b) at page 434 of Volume 36 of Halsbury's Laws of England, Third Edition, that Lord Penzance has used the term "mandatory" as synonymous with "directory" in contradiction of the term "imperative". A passage in paragraph 5813 in Third Volume of Sutherland's Statutory Construction, Third Edition, reads as follows :--

"With respect to the question of mandatory and directory operation, as with any question of statutory construction, the primary consideration is that of determining the intent of the legislature. Each case stands pretty much on its own facts, to be determined on an interpretation of the particular language used. Various methods of attacking the problem are employed. One oft-repeated formula is that statutory requirements that are of the essence of the thing required by statute are mandatory, while those things which are not of the essence are directory. And it is said that the ordinary meaning of language should always be favoured."

11. In the light of the above principles for determining the character of the command of the legislature as to whether it is mandatory or mere directory, it has to be noticed that Sub-section (2) of Section 4 requires that every declaration under this section shall be published in the official gazette and shall be published in other manner also. Of course, the State Government has been given the discretion to determine that other manner, but that does not mean that the State Government would say that publication of the declaration is not necessary in any other manner. In some other manner the declaration of the intention must be published and the word "publication" necessarily connotes the publication of the declaration of the intention in the locality in a manner which may communicate the declaration to the residents of the locality. As I have said above, mere giving of the notice of the declaration to the Notified Area Committee was not such a publication, as was done in this case. On the affidavits filed by the parties, as also from the gazette notification, it is clear that the declaration of the intention was published only in the gazette and a notice was given to the Notified Area Committee. In no other manner it was published in the locality. The declaration of the intention was published in the Bihar Gazette (Extraordinary) dated the 25th September, 1967. The English version of the notification published in the gazette is as follows :--

"The 21st September, 1967. No. 8026-LSG --whereas the Governor of Bihar is satisfied that three-fourths of the adult male population of Madhepura Notified Area in the district of Saharsa declared as such in notification No. 3830-LSG dated the 21st March, 1960, are engaged in pursuits other than agricultural and that the town comprised in the aforesaid notified area contains not less than five

thousand inhabitants, and average number of not less than one thousand inhabitants to the square mile of the area of the town.

Now, therefore, in exercise of the powers conferred by Section 390A of the Bihar and Orissa Municipal Act, 1922 (B. and O. Act VII of 1922), the Governor of Bihar, is pleased to declare his intention to convert the said notified area into a Municipality.

Any objection or suggestion in this regard which may be received through the District Magistrate, Saharsa, and the Commissioner of the Bhagalpur Division, within four weeks from the date of the publication of this notification in the Bihar Gazette, will be considered.

By order of the Governor of Bihar, S. H. Karim Deputy T. Secretary to Government."

A few months later followed the impugned notification converting the Notified Area into the Municipality. On the facts placed before us, it is undisputed that the declaration of the intention as published in the Bihar Gazette (Extraordinary) dated the 25th September, 1967, was not published in any other manner. That being so, there was clear infraction of the mandatory requirement of Sub-section (2) of Section 4 of the Act.

12. In support of the view I have expressed above, a reference may be made to the decision of the Supreme Court in the case of Raja Bahadur Giriwar Prasad Narain Singh Vs. Dukhu Lal Das and Others, . The relevant provision of Sub-section (2) of Section 3 of the Bihar Land Reforms Act, which was being considered by the Supreme Court, required that the "notification referred to in Sub-section (1) shall be published in official gazette and at least in two issues of two newspapers having circulation in the State of Bihar." It was held by the Supreme Court that the direction was mandatory and the publication in the official gazette, in absence of any publication in two newspapers having circulation in the State of Bihar, was not sufficient. In support of this view, Bhargava J., delivering the judgment of the Court, laid stress on the adjectival clause "at least" used in subsection (2) of Section 3 of that Act, but, in my opinion, even in the context of the provision made in Sub-section (2) of Section 4 of the Act it has got to be held that the requirement of publication of the declaration in such other manner as the State Government may direct is also mandatory.

13. Although Section 390A in terms does not make the exercise of the power by the State Government subject to the provisions of Section 5 of the Act, when it makes it subject to the provisions of Section 4, as a rule of construction and by necessary implication it has got to be held that it is subject to Section 5 also, otherwise there would be no purpose and meaning in making it subject to Section 4 only. In that view of the matter, I may point that the period for filing objection through the District Magistrate is six weeks from the date of the publication of the declaration u/s 4 and the State Government seems to have

arbitrarily reduced that period to four weeks by the declaration published in the Bihar Gazette (Extraordinary) dated the 25th September, 1967.

14. Coming to the second point urged on behalf of the petitioners, it is to be noted first that there are three requirements in respect of which the State Government is to be satisfied before declaring its intention to constitute a town or an area a Municipality and they are the following:--

(i) That three-fourth of the adult male population of the town or the area are engaged in pursuits other than agricultural;

(ii) That such town or area contains not less than five thousand inhabitants; and

(iii) That the density of the population of an average number of not less than one thousand inhabitants to the square mile of the area of the town is there,

15. It is no doubt true that the State Government, namely, the Governor, has to be satisfied as to the existence of the three conditions aforesaid before a declaration of intention is made u/s 4 of the Act. The satisfaction is of the Governor and not of the Court. But when undisputed materials have been placed before the court, as have been done in this case, which necessarily lead to the conclusion that any or more of the conditions has or have not been satisfied, then the court has got to hold that the satisfaction of the State Government or the Governor was based on no material. In that view of the matter also, the notification has got to be declared invalid.

16. In the case of *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, Hidayatullah J. whose view is one of the majority view of the Court, said in relation to a provision of a similar nature :--

"No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out."

His Lordship quoted with approval a passage from the judgment of Shelat J. in the same case, which said -

"It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on circumstances which it thinks exist."

17. I would first like to observe that the three conditions which are to be fulfilled under Clause (a) of Sub-section (1) of Section 4 of the Act must be referable to the facts as they exist at the time of declaration of the intention of the State Government to constitute a town or an area a Municipality. The facts as they appear from the census report of 1961 made several years ago before the declaration of the intention of the State Government cannot be safe criteria for the satisfaction of the State Government that the conditions have been fulfilled.

In the instant case, there is nothing to indicate the facts as they existed in 1967 were taken into consideration before the issuance of the declaration of the intention of the State Government. This is clear from a copy of the letter dated the 30th November, 1967, written by the District Magistrate of Saharsa to the Commissioner of the Bhagalpur Division, which is Annexure "I" to the counter-affidavit filed on behalf of Respondents 1 and 19. That letter shows that the objection of the Notified Area Committee was examined in the light of the census figures of 1961 and on no other basis. Even on that basis on the face of the materials placed before this Court, it is manifest that the first condition was not fulfilled, although un-disputedly the other two were fulfilled,

18. The figures given in the petition as well as in the counter-affidavit with reference to the Census Report of 1961 are not at a variance. According to these figures, the total male population of the area of Madhepura was 6,763. This included both adult and minor male population. Out of this total, the number of male workers was 3,380. 489 of whom were cultivators and 226 were agricultural labourers, that is to say out of 3,380, 715 workers were engaged in agricultural pursuits and 2,665 workers were engaged in pursuits other than agricultural. The number 2,665 was not the three-fourth of the total adult male population of Madhepura. It appears from the supplementary affidavit, which has not been controverted, that the adult male population out of the total male population was about 60 per cent, i. e., it was in the neighbourhood of 4,000 and the figure 2,665, falls short of the three-fourth of the adult male population which can be said to be engaged in pursuits other than agricultural. An obvious mistake seems to have been committed by the authorities in this regard as it appears from the copy of the letter written by the District Magistrate to the Commissioner of the Bhagalpur Division on the basis of which in the counter-affidavit filed on behalf of the respondents 1 and 19 it has been stated that "out of the total male population of 6,763, only 489 are cultivators and 226 are agricultural labourers. The rest are engaged in pursuits other than agricultural who are much more than three-fourth of the total male population." In the writ application itself, a fact has been mentioned that the population of the male non-workers in the Madhepura town, according to the 1961 census, was 3,383, which would include, "students or children doing no other work, or other persons engaged in household duties only, infants or disabled persons incapable of doing any work, retired persons (not re-employed), rentiers, beggars, vagrants, convicts in jails, inmates of penal, mental or charitable institutions, and unemployed persons." (Vide page xxxii of the Census of India, 1961, Bihar District Census Handbook of Saharsa). The authorities, as the counter-affidavit clearly indicates, proceeded on the assumption that the total male population of 6,763 was the total adult male population. This is one obvious error and secondly, whoever was not engaged in agricultural pursuit was taken to be engaged in pursuits other than agricultural. That is the second obvious error. In view of the glaring facts disclosed in the counter-affidavit, it has got to be held that the satisfaction of the State Government as to the fulfilment of the first

requirement of Clause (a) of Sub-section (1) of Section 4 of the Act was based upon obvious errors and erroneous views.

19. I, therefore, hold that the declaration of the intention as published in the Bihar Gazette (Extraordinary) dated the 25th September, 1967, leading to the conversion of the Madhepura Notified Area into a Municipality by the impugned notification dated the 8th December, 1967, was null and void because all the three pre-conditions, which were sine qua non of the formation of the intention and its declaration, were not fulfilled, as also because the declaration was not in compliance with the mandatory requirement of Sec. 4(2) of the Act.

20. In the result, the application is allowed and the notification No. 1002/LSG dated the 8th December, 1967, a copy of which Is Annexure "A" to the writ application, is held to be null and void and of no effect- A writ of mandamus will Issue directing respondent No. 1 not to give effect to it. There will be no order as to costs.

B.P. Sinha, J.

21. I agree.