
(2008) 09 OHC CK 0051
In the Orissa High Court

State Election Commission

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 10-09-2008

Acts Referred:

Constitution of India, 1950 — Article 243K, 243U, 243ZA, 324

Citation : (2008) 106 CLT 805 : (2008) 2 OLR 1011 Supp

Hon'ble Judges : I.M. Quddusi, J;B.P. Ray, J

Bench : Division Bench

Judgement

I.M. Quddusi, J.—Since similar questions are involved in both the Writ Petitions, they were heard together and are disposed of by this common Judgment.

2. The State Election Commission, Orissa has approached this Court by filing these two Writ Petitions with the allegation that the Election commission is not receiving cooperation of the State Government as well as Municipal Corporation in discharging its constitutional obligation of holding the election to the Municipal Corporations of Bhubaneswar and Cuttack (W.P.(C) No. 12356 of 2008 for Bhubaneswar Municipal Corporation & W.P.(C) No. 12453 of 2008 for Cuttack Municipal Corporation) within the time mandated in the Constitution and, therefore, the Commission has sought the relief for issuing a writ in the nature of Mandamus directing the State Government and the Cuttack Municipal Corporation & Bhubaneswar Municipal Corporation to provide all necessary cooperation and assistance to the State Election Commission, Orissa to enable it to fulfill the constitutional mandate and also, for permitting the Election Commission to hold and complete election in respect of Cuttack Municipal Corporation & Bhubaneswar Municipal Corporation on the basis of existing delimitation of wards and reservation of seats as well as Electoral Roll.

3. The facts of the case are that under Article 243(U)(3), election to constitute Municipal Council shall be done before the expiry of its duration of five years. The duration of Cuttack Municipal Corporation is going to expire on 29th of September, 2008, the first meeting of the Municipal Corporation having been

held on 30th of September, 2008 and the duration of Bhubaneswar Municipal Corporation is going to expire on 30th of September, 2008, the first meeting of the Municipal Corporation having been held on 1st October, 2008.

4. Notwithstanding the aforesaid clear and unambiguous constitutional provisions for constituting the Municipal Corporation of Cuttack & Bhubaneswar before the expiry of the duration of five years, the State Government and the Municipal Corporations of Bhubaneswar & Cuttack are not taking any steps necessary for the purpose of holding election in utter disregard of the Constitutional provisions. The further case of the Petitioner is that by letter dated 1.10.2007 addressed to the Chief Secretary, Orissa, it desired that the State Government shall complete the delimitation and reservation process positively by 31.1.2008 so that the Commission will take steps to complete other statutory requirements like preparation of Electoral Roll etc. to complete the General Elections to Urban Local Bodies, including Cuttack and Bhubaneswar Municipal Corporations as per the Constitutional mandate. Pursuant to the said letter, the State Government wrote to the Municipal Commissioner of Cuttack & Bhubaneswar Municipal Corporation vide letter dated 27.10.2007 for publication of final notification relating to Delimitation of Wards and reservation of seats by the Government after considering all objections/suggestions before 10.1.2008. The State Government extended the period from time to time and ultimately issued the Notification on 18.2.2008 for Cuttack and on 15.2.2008 for Bhubaneswar in exercise of powers conferred by Sub-section (1) of Section 60 of the Orissa Municipal Corporation Act, 2003 read with Sub-rule (5) of Rule 3 of the Orissa Municipal Corporation (Division of City into Wards, Reservation of Seats and Conduct of Election) Rules, 2003. The aforesaid Notification was challenged by different Corporators and others before this Court in a batch of Writ Petition. One of the Writ Petitions, namely, W.P.(C) No. 4159 of 2008 filed by one Sri Dharmesh Nayak, Corporator of Ward No. 2, was disposed of by this Court on 15.5.2008. In the said order, this Court quashed the notification dated 18.2.2008 and directed to proceed in the matter afresh in accordance with the mandate of Sections 7 and 60 of the Orissa Municipal Corporation Act read with Rule 4(3) of the Orissa Municipal Corporation (Division of City into Wards, Reservation of Seats and Conduct of Election) Rules, 2003 and take a fresh decision on the objection of the Petitioner in consonance with the statutory provisions and keeping in view the principles of consultation as laid down by the Hon'ble Apex Court in *The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others*, and Supreme Court Advocates-on-Record Association and another Vs. Union of India, and other decisions relating to consultation in respect of Cuttack Municipal Corporation. But till now no step has been taken by the State Government. In respect of Bhubaneswar Municipal Corporation, the aforesaid Notification was challenged by Pramod Mohapatra, a Corporator of Bhubaneswar Municipal Corporation before this Court in W.P.(C) No. 5274 of 2008.

5. The said Writ Petition was disposed of by this Court on 15.5.2008 directing the State Government to consider the objection of the Petitioner in terms of Section

60(1) of the Act and consult the Bhubaneswar Municipal Corporation as per the principles of -consultation indicated in the case of Dharmesh Nayak v. State-of-Orissa and Ors. W.P.(C) No. 4159 of 2008 within a period of three weeks from the date of passing of the order. It is the further case of the Petitioner that the Hon"ble Apex Court in Kishansing Tomar Vs. Municipal Corporation of the City of Amedabad and Others, held that for the independent and effective functioning of the State Election Commission, where it feels that it is not receiving the co-operation of the State Government concerned in discharging its constitutional obligation of holding the elections to the panchayats or municipalities within the time mandated in the Constitution, it will be open to the State Election Commission to approach the High Courts, in the first instance, and thereafter the Supreme Court for a writ of mandamus or such other appropriate writ directing the State Government concerned to provide all necessary co-operation and assistance to the State Election Commission to enable the latter to fulfill the constitutional mandate.

6. In the counter affidavit filed by the Under Secretary to Government, H & UD Department in respect of Cuttack Municipal Corporation, it has been averred that the State Government collected the copy of the Judgment dated 15.5.2008 in Dharmesh Nayak's case through the Cuttack Municipal Corporation on 30.5.2008 and the matter was referred to Law Department on 31.5.2008 for their views. The Law Department had given its view on 6.6.2008. Thereafter, after taking Government order, Cuttack Municipal Corporation was instructed vide letter dated 18.6.2008 to furnish proposal by 1.7.2008. After receipt of the said letter, the Corporation requested the State Government to allow one month's more time to submit the proposal. The State Government extended the time to furnish proposal by 31.7.2008. This extension of time was also communicated to the State Election Commission on 16.7.2008 but Cuttack Municipal Corporation could not furnish the proposal in time and prayed for further time of twenty days but finally they have submitted their proposal on 5.9.2008. After receipt of the proposal, steps have been taken for publication of preliminary notification inviting suggestion/objections, which is expected very shortly. Here it is to be noticed that the instant Writ Petition was filed by the Election Commission on 27.8.2008 and this Court on 4.9.2008 directed the Learned Additional Government Advocate to seek instructions in the morning and the case was ordered to be taken up at 12 O'clock and it was also directed that a copy of the brief be served on the Standing Counsel for the Cuttack Municipal Corporation. But ultimately, the matter was adjourned to the next date i.e. 5.9.2008 and since no affidavit was filed on that date, the case was posted to today and it was directed to file counter by 8.9.2008.

7. Therefore, the Cuttack Municipal Corporation kept the matter pending with it till 5.9.2008 in spite of the last time granted by the State Government by 31.7.2008.

8. In the counter affidavit filed by the Under Secretary, Government of Orissa,

H&UD Department in respect of Bhubaneswar Municipal Corporation, it has been averred that after direction issued by this Court in the case of Dharmesh Nayak v. State of Orissa W.P. (C) No. 4159 of 2008 the matter was referred to Law Department and the Law Department was of the opinion that consultation shall be made with the Corporation before issue of preliminary notification and in view of that situation it was not possible to complete the process of consultation within three weeks from the date of Judgment of this Court and accordingly the State Government requested the Learned Advocate General in their letter dated 5.6.2008 to pray for extension of time to this Court but due to summer vacation no application could be made.

9. However another time petition was filed on 7.8.2008 by the State Government for extension of time up to 15.9.2008 which is pending consideration. Keeping in view the urgency, specific provision has been made in the Municipal corporation Act, 2003 i.e. u/s 49 to meet the exigencies where the Council is not there. It has been provided in Sub-section (1)(a) that in absence of any Council, the Government shall appoint an Administrator for such period not exceeding six months and the provisions of Sub-sections (6) and (7) of Section 48 shall mutatis mutandis be applicable in respect of the Administrator appointed under Sub-Section 1 of Section 48. Therefore, in view of the above provisions, it cannot be said that there will be Constitutional break down in the Municipal Corporation if the election could not be held prior to completion of the tenure of the Council. The position was also intimated to the State Election Commission, Orissa vide letter dated 5.6.2008. The Municipal Commissioner, Bhubaneswar vide letter dated 26.6.2008 requested the Government to allow one month's time to complete the exercise thoroughly to avoid any complaint or discontentment. However, the said proposal was regretted by the State Government vide letter dated 28.6.2008. Again on 5.7.2008 the Municipal Commissioner, Bhubaneswar Municipal Corporation requested the Government to allow time to complete the process by 31.7.2008.

10. However, time was allowed till 31.7.2008. Since the Bhubaneswar Municipal Corporation did not complete the process within the time granted, communication was made to the Municipal Commissioner .Bhubaneswar - Municipal Corporation to intimate the circumstances under which the direction of the Government as well as orders of the Hon''ble Court could not be carried out. On 19.8.2008, the Municipal Commissioner, Bhubaneswar Municipal Corporation furnished the proposal of the delimitation of wards and reservation of seats in respect of that Corporation and after obtaining Government order, the draft notification under Sub-section (1) of Section 60 of the Orissa Municipal Corporation Act, 2003 read with Rule-3(1) of Orissa. Municipal Corporation (Division of City Into Wards Reservation of Seats and Conduct of Election) Rules, 2003, has been issued on 30.8.2008 giving ten days time for filing objections which were over on 9.9.2008. Now the objections are to be disposed of in view of Sub-rule (4) of Rule-3 which provides that objections and suggestions received under Sub-rule (2) shall be consolidated ward-wise and after considering the

same and making such further enquiry, as may be necessary, the Government shall pass such orders as deemed appropriate. Sub-rule-5 thereof provides that the Government after considering all such objections and suggestions as required under Sub-rule (4) shall publish the final notification making alternation, if any, in form IV showing the division of the area of the Corporation into wards and reservation of seats therein as required under Sub-section (1) of Section 60 and shall forward forthwith a copy of such notification to the Election Commission, to the concerned District Magistrate and to the Corporation. Thereafter the election Officer has to prepare the electoral roll in Form-V for each ward comprising the names of voters included in electoral roll of the Assembly Constituency relatable to the area of that wards.

11. A plea has been taken on behalf of the State Government that in case the elections are not held prior to completion of the duration of the Municipal Council, there shall not be any constitutional break down as in the Orissa Municipal Corporation Act, it has been provided in Section 48 that the Government may appoint the administrator. In this regard the provisions of Article 243(U) and Section 48 of the Orissa Municipal Act are liable to be perused which are reproduced as under:

243(U). Duration of Municipalities etc:

(1) 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:

Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in Clause (1).

(3) An election to constitute a Municipality shall be completed,-

(a) before the expiry of its duration specified in Clause(1)

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder for the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under Clause (1) had it not been so dissolved.

48. Dissolution and reconstitution of the Corporation:

(1) If in the opinion of the Government the Corporation is incompetent to perform or persistently makes default in performing the duties imposed on it or undertaken by it or under this Act or any other law, or exceeds or abuses its powers or fails to carry out the directions given to it under the provisions of this Act or any other law, there may, by notification, direct that the Corporation be dissolved and reconstituted by such date not being later than six months from the date of dissolution:

Provided that a Municipal Corporation shall be given a reasonable opportunity of being heard before its dissolution:

Provided further that where the remainder of the period for which the dissolved Corporation would have continued in less than six months, it shall not be necessary to reconstitute the Corporation for such period.

(2) Before publishing a notification under Sub-section (1) the Government shall communicate to the Corporation the grounds on which they proposed to do so, fix a reasonable period for the Corporation to show cause against the proposal and consider the explanations and objections, if any, of the Corporation.

(3) On and with effect from the date of publication of such notification, all the Members including the Mayor and Deputy Mayor shall be deemed to have vacated their offices as such without prejudice to their eligibility for election under Sub-section (4).

(4) Fresh elections should be held to reconstitute the Corporation in accordance with the provisions of this Act and elected Members of the reconstituted Corporation shall hold office only for the remainder of the period for which the dissolved Corporation would have continued had it not been so dissolved.

(5) A copy of the notification issued under Sub-section (1) shall be laid as soon as may be before the Orissa Legislative Assembly.

(6) During the interval between the dissolution and the reconstitution of the Corporation all or any of the powers and duties conferred and imposed upon the Corporation, its Standing Committee, the Mayor and Deputy Mayor, by or under this Act or any other law shall be exercised and performed by an Administrator appointed by the Government in that behalf.

(7) The Government may direct that the Administrator shall be a whole time officer and when such a direction is issued, he shall be paid out of the Corporation fund such monthly salary and allowances as the Government may from time to time by order determine.

(8) In case, an Officer of the Government is appointed as Administrator, the Corporation shall make such contribution towards the leave allowance, pension and provident fund of the officer as may be required by the conditions of service under the Government to be paid by him or for him, as the case may be.

(9) In the discharge of his function, the Administrator shall be guided by such direction in matters of policy involving public interest as the Government may be order specify and if any question arises whether a direction relates to a matter of policy involving public interest the decision of the Government shall be final.

(10) All properties of the Corporation shall, until its reconstitution vest in the Government.

12. Article 243-U would show that there is a mandate in Clause-3 of that Article that an election to constitute a Municipality shall be completed before expiry of its duration meaning thereby that the duration of municipality is five years from the date appointed for its first meeting and no longer unless it is dissolved earlier. Therefore, it is mandatory to-complete the election to constitute a municipality before the expiry of five years from the date of its first meeting. However, in case of dissolution of a municipality before the expiration of duration as specified in Clause (1), the election shall be completed before the expiration of a period of six months from the date of its dissolution but where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under Clause (3) for constituting the Municipality for such period meaning thereby that in case a municipality is not dissolved and completed its duration of five years from the date appointed for its first meeting, it is mandatory to hold an election to constitute the municipality before the expiry of that duration. Section 48 of the Orissa Municipal Corporation Act also provides regarding dissolution and reconstitution of the Municipal Corporation. Clause 6 specifically provides that during the interval between the dissolution and the reconstitution of the Corporation all or any of the powers and duties conferred and imposed upon the Corporation, its Standing Committees, the Mayor and Deputy Mayor, by or under the Act or any other law shall be exercised and performed by an Administrator appointed by the Government in that behalf. Section 48 does not speak about the situation where no elections care held before the expiry of the duration of a Municipal Corporation. However, Section 49 provides regarding appointment of administrator in certain cases where the general election are not possible. Therefore, provisions of Section 49 are also reproduced as under:

49. Powers to appoint Administrator in certain cases:

(a) the general elections to be Corporation under this Act or any proceedings consequent thereon have been stayed by an order of a competent Court of authority; or

(b) the election of all the Corporators or more than two third of the Corporators has been declared by a competent Court or authority to be void; or

(c) all the Corporators or more than two-third of the Corporators have resigned;

the Government shall, by notification, appointed an Administrator for such period not exceeding six months, as may be specified in the notification.

(2) notwithstanding anything contained in this Act, on the appointment of an Administrator under Sub-section (1) and during the period of such appointment, the Corporation, the Standing Committee, the Mayor and the Deputy Mayor shall cease to exercise any powers and perform and discharge any duties or functions conferred or imposed on them by or under this Act any other law and all such powers shall be exercised and all such duties and functions shall be performed and discharged by the Administrator.

(3) The provisions of Sub-sections (6) and (7) of Section 48 shall *mutatis mutandis* be applicable in respect of the Administrator appointed under Sub-section (1).

(4) The Government may, if it thinks fit, appoint an Advisory Council to advise and assist the Administrator appointed under Sub-section (1) in the exercise of the powers and performance and discharge of the duties and functions conferred or imposed on him under this Act or any other law.

(5) The members of the Advisory Council shall hold office during the pleasure of the Government.

13. In the instant case, the Court's order was in force for a period of three weeks from the date of order i.e. 15.5.2008 and thereafter there was no order in force of the Court for deciding objections etc. as already mentioned above. Therefore, care should have been taken to fulfill the constitutional obligation by the Municipal Corporation as well as the State Government.

14. Cuttack Municipal Corporation has also filed a counter affidavit stating therein that there is sincere efforts by deploying its staff and officials to make field visit, survey for doing the exercise as per the direction of this Court and the Cuttack Municipal Corporation has unanimously accepted the matter in its meeting held on 30.8.2008 and further follow up action was taken by the Cuttack Municipal Corporation by sending proposal in letter dated 2.9.2008 to the Government which was received by the Government on 5.9.2008 since 3.9.2008 and 4.9.2008 were holidays. But nothing has been indicated for the delay in furnishing the proposal within the time fixed by the State Government after receipt of the copy of the order of this Court dated 15.5.2008 directing to take a fresh decision on the objection of the Petitioner in consonance with the statutory provisions and keeping in view the principles of consultation.

15. A Constitution Bench of the Hon'ble Apex Court in the case of *Kishansing Tomar (supra)* has held that in terms of Article 243-K and Article 243-ZA(1), the same powers are vested in the State Election Commission as the Election Commission of India under Article 324. The words in the former provisions are *in pari materia* with the latter provisions. The words, "superintendence direction and control" as well as "conduct of elections" have been held in the "broadest of terms" by the Hon'ble Supreme Court in several decisions including *Special Reference No. 1 of 2002 Ref. by President, and Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, and the question is

whether this is equally relevant in respect of the powers of the State Election Commission as well wherein it was held that from a reading of the said provision, it is clear that the powers of the State Election Commission in respect of conduct of elections is no less than that of the Election Commission of India in their respective domains. These powers are, of course, subject to the law made by Parliament or by the State legislatures, provided the same do not encroach upon the plenary powers of the said Election Commissions. Article 243-K(3) also recognizes the independent status of the State Election Commission. For independent and effective functioning of the State Election Commission, where it feels that it is not receiving the cooperation of the State Government concerned in discharging its constitutional obligation of holding the elections to the panchayats or municipalities within the time mandated in the Constitution, it will be open to the State Election Commission to approach the High Courts, in the first instance, and thereafter the Supreme Court for a writ of mandamus or such other appropriate writ directing the concerned State Government to provide all necessary cooperation and assistance to the State Election, Commission to enable the latter to fulfill the constitutional mandate. The Hon'ble Supreme Court has also held that taking into account these factors and applying the principle of golden rule of interpretation, the object and purpose of Article 243-U is to be carried out.

16. In the case of Lakshmi Charan Sen and Others Vs. A.K.M. Hassan Uzzaman and Others, , it has been held by the Constitution Bench of Apex Court that the fact that certain claims and objections are not finally disposed of, even assuming that they are filed in accordance with law cannot arrest the process of election to the Legislature. The election has to be held on the basis of the electoral roll which is in force on the last date for making nominations. It is true that the Election Commission shall take steps to prepare the electoral rolls by following due process of law, but that too should be done timely and in no circumstances shall it be delayed so as to cause gross violation of the mandatory provisions contained in Article 243-U of the Constitution.

17. Every authority under the Constitution and the laws made thereunder related to the election has an obligation to fulfill the mandate in timely conducting the elections, derelictions or deviation from the same is termed as an act against the Constitution. Therefore, it was incumbent upon the part of the Cuttack Municipal Corporation to take prompt action with an intention that the election be conducted timely i.e. before the expiry of the term of municipal council. This Court had passed an order on 15.5.2008 providing only three weeks time from the date of order for considering the objection of the Petitioner in terms of Section 60(1) of the Orissa Municipal Corporation Act.

18. It appears that the Cuttack Municipal Corporation has already sent the proposal to the State Government on 2.9.2008, which according to the Learned AGA has been received on 5.9.2008. Therefore, there is no impediment to issue draft notification under Rule-3 (1) of Chapter-III of Orissa Municipal Corporation

(Division of City into Wards Reservation of Seats and Conduct of Election) Rules, 2003 and Section 60 of the Municipal Corporation Act.

19. Thereafter, ten days time is to be granted to finalize the objection and after expiry of ten days time, the objections are to be disposed of in view of Sub-rule (4) of Rule 3 which provides that objections and suggestions received under Sub-rule (2) shall be consolidated ward wise and after considering the same and making such further enquiry, as may be necessary, the Government shall pass such orders as deemed appropriate. Sub-rule (5) thereof provides that the Government after considering all such objections and suggestions as required under Sub-rule (4) shall publish the final notification making alternation, if any, in form IV showing the division of the area of the Corporation into wards and reservation of seats therein as required under Sub-section (1) of Section 60 and shall forward forthwith a copy of such notification to the Election Commission, to the concerned District Magistrate and to the Corporation. Learned AGA on instruction assures that the draft notification will be issued by 15th of September, 2008 giving ten days time for filing objections and thereafter the objections shall be disposed of within a period of twenty-five days from the date of expiry of the period for filing the objections in respect of Cuttack Municipal Corporation. We so direct.

20. The Learned AGA submits that since draft notification has been issued in respect of Bhubaneswar Municipal Corporation on 30.8.2008 giving ten days time for filing objections and objections have already been received in the mean time, time till 5th of October, 2008 may be granted to dispose of the objections. We, therefore, direct that the objections be disposed of by 5.10.2008 and thereafter immediately the notification shall be sent to the Election Commission afresh as required under Sub-rule (5) of Rule-3. The Election Commission shall under its supervision get the electoral roll finalized as early as possible and notify the election.

21. Mr. Pitambar Acharya, Learned Counsel for the Election Commission has submitted that preparation of electoral roll in respect of Bhubaneswar Municipal Corporation has already been over. However, if any minor change is required, the same be done within a short time. That will depend upon the final notification issued under Sub-rule-(5) of Rule 3 of Sub-section (1) of Section 60 of the Municipal Corporation Act. Mr. Acharya assures that preparation of electoral roll in respect of Cuttack Municipal Corporation will be completed as expeditiously as possible.

22. We, therefore, dispose of the Writ Petitions and call upon the State Government to act in accordance with the direction given above as well as the assurance given by the Learned Additional Government Advocate on their behalf. We further direct that in case they fail to do so, it will be open for the State Election Commission to hold the election on the basis of the existing wards and the electoral roll.

Free copy of this order shall be supplied to the Learned Additional Government Advocate and learned Counsel appearing for the Election Commission.

B.P. Ray, J.

23. I agree.