
(1969) 04 OHC CK 0027
In the Orissa High Court
Case No : O.J.C. No. 105 of 1969

Tarini Charan Patnaik

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 10-04-1969

Acts Referred:

Constitution of India, 1950 — Article 170(1), 226, 330, 81, 81(2)
Delimitation Commission Act, 1952 — Section 8
Orissa Municipal Act, 1950 — Section 12(2)

Citation : (1969) 35 CLT 539

Hon'ble Judges : Barman, C.J.; Patra, J

Bench : Division Bench

Advocate : R. Mohanty, R.K. Kar, S.N. Kar and N. Patra, for the Appellant; A.G. in O.P. Nos. 1 to 3, C.V. Murty, D. Sahu, Y.S.N. Murty and L. Rath for Interveners, for the Respondent

Final Decision : Dismissed

Judgement

Barman, C.J.—In this petition, the Petitioner challenges as worthless the electoral roll of the Berhampur Municipality, prepared for the purpose of polling on January 31, 1969, on the ground that Rules 3 and 5 of the Orissa Municipal (Councillors) Election Rules, 1950 (hereinafter referred to as the Election Rules) were not complied with in that inter alia there is difference between the Telugu and Oriya voters list published and that some of the names of the streets found in certain wards of the Municipality had been omitted from the list—all as stated in the petition. The Petitioner also challenges the manner in which the Municipality had been divided into wards in that in disregard of the mandatory provisions of Section 12(2) of the Orissa Municipal Act, 1950 (Orissa Act No. 23 of 1950) (hereinafter referred to as the Act) the opposite parties without consulting the Councillors purported to divide the wards without taking into consideration equitable distribution of population and compactness of the area as required by the section.

2. After the writ petition was filed, some persons, including eight candidates who were elected uncontested from some of the wards, filed applications to be joined as parties to oppose the writ petition. The said petitions by the interveners were allowed by our order dated January 30, 1969.

3. At Berhampur, the Municipal electoral roll was finally published on December 6, 1968, nominations were filed on January 11, 1969 and scrutiny of the nominations was done on January 14, 1969. A list of the contesting candidates was finally published on January 15, 1969 and polling was fixed to be held on January 3], 1969. On January 24, 1969 this petition was filed for issue of an appropriate writ, directing the Election Officer to forbear from holding the elections in accordance with the voters' list as published and in accordance with the purported division of wards on the grounds as fully stated in the petition. On January 30, 1969 this Court admitted the writ petition and made an order allowing the election to proceed but all procedures as laid down in Rules 53 to 59 of the Election Rules were stayed. On the said date the interveners' petitions were allowed as aforesaid.

4. The main point urged on behalf of the Petitioner was that the electoral roll was so worthless that it could not be the basis on which the election could be held. As regards the wards, the Petitioner's point is that they were made in disregard of the principles of equitable distribution of population and compactness of areas as required by the Act.

5. Rules 3 and 5 of the Election Rules are these:

3. Preliminary Electoral Roll for the Municipal Ward-For each ward, the Election Officer shall prepare in Form I an electoral roll comprising of the names of voters included in the electoral roll of the Assembly Constituency relatable to the area of that ward. The roll shall be divided into parts for each polling area. Polling areas shall be distinguished by capital letters and the name of the polling centers shall be entered against each polling area.

5. Language of the electoral roll-The electoral roll shall be kept in Oriya provided that the Election Officer may direct that the electoral roll or any portion of it shall also be kept in any other language or languages spoken in a particular Municipality.

6. It was argued on behalf of the Petitioner that the voters list is the bed-rock of election. Indeed the settled position in law is that it is of the essence of elections that proper electoral rolls should be maintained and in order that proper electoral rolls should be maintained it is necessary that after the preparation of the electoral roll opportunity should be given to the parties concerned to scrutinize whether the persons enrolled as electors possessed the requisite qualifications; opportunity should also be given for the revision of the electoral roll and for the adjudication of claims to be enrolled therein and entertaining objection to such enrolment. Unless this is done, the entire obligation cast upon the authorities holding elections is not discharged and the elections held on such imperfect

electoral rolls would acquire no validity and would be liable to be challenged at the instance of the parties concerned. It was on these considerations that the Supreme Court expressed the opinion that it was necessary for the concerned authority to frame rules in this behalf and so far as the rules which were thus framed omitted these provisions, they were defective Chief Commissioner, Ajmer Vs. Radhey Shyam Dani, .

7. In the present case, Rule 3 to 21 of the Election Rules are those purporting to ensure accuracy in the preparation of electoral rolls. Rules 3 and 5 as quoted above provide for preliminary electoral rolls for the municipal wards and the language of such electoral rolls. Rule 7 provides for claims and objections and Rule 8 relates to enquiries and correction before bearing under Rule 10. Rule 14 provides that the final electoral roll shall be published for not less than 7 days by pasting in the office of the Election Officer, in the office of the Municipality and at a conspicuous place in the ward. Rule (sic) dealing with amendment of electoral rolls provides that any person may apply for the amendment of any electoral roll for the time being in force by presenting an application in that behalf to the Election Officer. Rule 21 is for publication of lists of amendments. It is thus amply clear from the scheme of the Rules that all precautions are taken for ensuring publicity and accuracy of the electoral rolls before polling.

8. The main grounds on which the Petitioner challenges the correctness of the electoral roll for alleged non-compliance with the rules as stated in the petition are these: Non-mention, in breach of Rule 3, of the particulars of the polling centre, polling area and booth number is fatal and is not only in derogation of the mandatory provisions of the statute but is bound to create confusion in the minds of the voters in the absence of any indication in the voters list of the polling centre polling area, and booth number as a consequence of which the electors will be prevented from exercising their franchise. It was further submitted that in the absence of specific mention of the polling centre and booth number, it is impossible for the electors to vote in the election. In breach of Rule 6, the electoral rolls published in Oriya and Telugu did not tally in that in some cases the Oriya electoral roll shows more number of voters than the Telugu electoral roll and vice versa. It is said that in ward No. 14 the total number of voters in Oriya electoral roll is 3068 whereas in the electoral roll published in Telugu for the said ward the total number of electors is 3009; similarly for Ward No. 24 the Oriya voters list shows 1557 voters whereas the Telugu list shows 1639 voters.

9. In the counter affidavit filed by the Election Officer it was explained that the requirements of Rule 3 were met by attaching a slip of paper containing the particulars of the heading in form No. 1 i.e. the names of numbers of the district, sub-division, municipality, electoral ward registration unit, polling area and polling centre. The final electoral roll was prepared and published from December 6 to December 14. As regards Rule 5, it was submitted that the electoral roll which had been published in Oriya and Telugu for each ward, substantially tallied

except for a few omissions, repetitions or skipping of serial numbers during the preparation of the list, or mistakes of spelling of names as indicated in the statement filed with the counter-affidavit. The position with regard to ward Nos. 14 and 24 has also been explained in the said statement. It is said that there are a few cases where names have been omitted from the Oriya list, but in any event they find place in the Telugu list, and vice versa. It was submitted that these omissions have not materially affected the election proceedings inasmuch as the electors whose names appear either in the Oriya list or in the Telugu list have been allowed to vote.

10. On the question whether Rules 3 to 5 are mandatory or merely directory, decisions were cited by both sides in support of their rival contentions. On the prima facie view of the rules themselves which we take as directory, it is unnecessary for us to refer to the said decisions for the purpose of this case. There is no doubt that the Rules enjoin and require an Election Officer to ensure the correctness of the electoral rolls; in other words, it is a performance of public duty which is required by the Election Officer in the matter of preparation of an electoral roll. It is the settled position in law that where the prescriptions of the statute relate to the performance of a public duty, and where the invalidation of the acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, yet not promote the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed ; or, in other words, as directory only; the neglect of these duties does not affect the validity of the act done in disregard of them. Thus, when an act or rule ordered a thing to be done by a public body or a public officer and appointed a specific time when it was to be done or the manner or form in which it is to be done, the rule is directory only (See Maxwell on Interpretation of Statutes, Eleventh Edition p. 369).

11. In our opinion, Rules 3 and 5 purporting to require from the Election Officer the performance of a public duty in the matter of preparation of the electoral roll in the manner or form indicated therein, are directory, and substantial compliance thereof is sufficient. The question then arises whether the electoral roll with the irregularities as pointed out by the Petitioner, is so defective as to vitiate the election held on the basis of such electoral roll. There is no doubt that each case is to be decided on merits on its own facts and circumstances. In a similar case the Rajasthan High Court in a recent Full Bench decision while purporting to lay down the test, made some observations as indicative of the perspective from which the accuracy of an electoral roll has to be considered. They are quoted below:

... ..

A question may arise in a writ petition that the electoral roll prepared in contravention of the law was so defective as to be treated an entirely worthless document for holding an election. If such a case comes up, the High Court may,

acting under Article 226 of the Constitution, examine the circumstances of the case and grant relief, in its discretion, even by setting aside an election. But such a case will be an exceptional one.

It is not possible for us to lay down any hard and fast rule as to how this Court should exercise its discretion beyond saying that this Court shall exercise its extraordinary jurisdiction under Article 226 of the Constitution with due regard to all the circumstances including the nature of the breach of the provision of law relating to the preparation of electoral roll, its effect on the final electoral roll, and even the circumstance bow far it has affected the election" Atma Singh and Others Vs. State of Rajasthan and Others, .

12. Thus viewed from this perspective we cannot, on the basis of the explanation of the Election Officer in his counter affidavit, hold that in the present case the impugned electoral roll is an entirely worthless document for holding the election; nor is there any circumstance to show that the electoral roll has affected the election.

13. That apart, the rules provide that the electoral roll is conclusive in that Rule 16 lays down as follows:

16. Conclusiveness of the electoral roll-No failure to observe the dates prescribed by these rules or to observe other directions regarding the preparation or publication of any electoral roll shall entitle anyone to question the validity and conclusiveness of the roll in election proceedings.

Although this rule is meant to be applicable to election proceedings it is certainly indicative of the obvious intention of the Legislature in this respect.

14. Now we come to the next point urged on behalf of the Petitioner that in the division of the Municipality into wards the State Government did not consult the Councillors, nor in dividing the Municipality into wards, equitable distribution of population and compactness of area were taken into consideration all as required by Section 12(2)(read along with the proviso) of the Act. Section 12(2) of the Act so far as material, along with the proviso, is as follows:

"12(2). For the purpose of election of councilors to a municipality, the State Government may, in the case of a new municipality, of their own motion and shall, in the case of municipalities already in existence at the time the notification is made after consulting the municipal council, by notification

(a) divide the municipality into wards;

... ..

Provided that in dividing a municipality into wards equitable distribution of population among the various wards and the compactness of the area forming each ward shall be taken into consideration.

15. On this point, the argument on behalf of the Petitioner was in substance

this : The provisions of Section 12(2) (including the proviso) quoted above are mandatory. In disregard of the said mandatory provisions the Election Officer without consulting the councillors of the municipality purported to divide the municipality into wards. It was submitted that such non-consultation with the councillors is a fatal omission. The Petitioner's further contention is that the proviso to Section 12(2) makes it mandatory that while dividing the municipality into wards, equitable distribution of population and compactness of a shall be taken into consideration; in support of this contention it was argued that in some of the single member wards the total number of voters is more than 3000 whereas in other single member wards it is about 1500 voters only-as stated in the petition.

16. The point about alleged non-consultation with the Municipal Councillors has been explained by the Election Officer in his counter-affidavit stating that after the Ordinance, the Municipal Council is to be consulted; that the proposal for formation of wards and reservation of seats for scheduled caste members as approved by the Municipal council in their Resolution No. 1 dated 16-10-1968, after taking into account the suggestions received from some persons of the Berhampur Municipality, was submitted to Government by the Berhampur Municipality in their letter No. 5790 dated 16-10-1968. That being the position, the assumption that there was no consultation with the Councillors as required by law is not correct.

17. As regards the complaint about non-observance of the principle of equitable distribution of population and compactness of the area in dividing the municipality into wards as required by Section 12(2)(Proviso), the Election Officer's explanation is - as stated in his counter affidavit - that the Municipality had in fact been divided into wards keeping in view the above requirements of the Act. He stated that the wards are compact geographically and there has been an equitable distribution of population among the wards in that in the three double-member wards the voters' strength is about 3000 in each ward and in all other wards which are single-member wards, the number of voters varied between 1350 to 2100; thus both the requirements laid down in Section 12(2) of the Act were kept in view.

18. The division of the Municipality into wards is to be done on the basis of the total population and not on the basis of the number of voters. It is significant that the proviso to Section 12(2) refers to equitable distribution of population and does not confine that expression to voters only. The Petitioner, however, in his statement showing the percentage of polling for contested seats in the Municipality gives the figures for each contested ward, the total number of voters, the number of electors voting and the percentage of polling. It is on the basis of these figures that it was commented that the minimum number of voters in a single-member ward is 1351 whereas for another single member ward it is 2101, the difference being 57%, which according to the Petitioner shows that there was no equitable distribution of population as contemplated u/s 12(2)

(Proviso). This argument, however overlooks the patent position that what the section requires is equitable distribution of the total population and not equitable distribution of the voters only.

19. As to what the word "population" in the proviso to Section 12(2) of the Act means, we may, as a basis, take it as that ascertained at the Census of which figures are available at the relevant time. The proportion of population in each ward having regard to the compactness of the area, cannot, for obvious reasons, be exact arithmetically. The word "equitable" gives scope for discretion in the matter of division of the Municipality into wards. What is expected is that such distribution must be equitable; and so far as practicable, the population is also kept in view in the matter of composition of the House of the People and the State Legislative Assemblies as laid down in Article 81(2) and Article 170(1) of the Constitution. For composition of the House of People, Article 81(2) provides that:

there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the State.

In regard to composition of the State Legislative Assemblies, Article 170(1) says that for purposes of such composition:

each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State.

The phrase so far as practicable occurring in both the Articles is significant. The Explanation to Article 170(1) provides that the expression "population" means population as ascertained at the last preceding census of which the relevant figures have been published.

20. The italic scheme of Section 12(2) (read with the proviso) is based on certain wholesome principles as adopted in similar other statutes. The Delimitation (Commission) Act of 1952 (Act No. 81 of 1952), as its preamble shows, provides that object of the statute is readjustment of the representation of territorial constituencies in the House of the People and in the State Legislative Assemblies and the delimitation of those constituencies and for matters connected therewith. Section 8 of the Delimitation (Commission) Act while providing for the manner of making readjustment and delimitation lays down that the Commission shall, in the manner provided in the said section, first determine on the basis of the latest census figures the number of seats and in so doing shall have regard to the provisions of Article 81 and Article 330. The whole scheme of the Delimitation Act is readjustment and such readjustment is to be made primarily on the basis of the population as far as practicable. These principles would apply in the present

case for division of the Municipality into wards and some discretion must necessarily be left with the authorities concerned in the matter of such division into wards as far as practicable according to population and such discretion being a matter involving subjective satisfaction, is not justiceable.

21. One of the points urged on behalf of the interveners was that the election of the eight candidates who had already been declared duly elected as Councillors of the Municipality from certain wards without contest cannot in any case be challenged. A similar contention was advanced before the Patna High Court in Awadhesh Prasad Vs. Tarkeshwar Singh and Others, . But the Patna High Court does not appear to have expressed any final opinion on this question. In the present case also, we would like to leave this question open as in view of our findings on merits it is unnecessary to express any opinion.

22. The locus standi of the Petitioner to file this writ petition was also challenged on behalf of the opposite parties, submitting that the right to stand for election and the right to move for setting aside an election are not common law rights; they must be conferred by statute and can be enforced only in accordance with the conditions laid down therein. The right of a person to file an application for setting aside an election must be determined by the statute which gives it and that statute, in the present case, is the Orissa Municipal Act. The Petitioner must directly bring himself within the four corners of the Act and has no rights apart from it. Here again in view of our findings against the Petitioner on merits, on the alleged irregularities in the electoral rolls and the division of the Municipality into wards on the facts and circumstances of the case-all as discussed above-we do not think it necessary to express any opinion on this question.

23. In the result therefore the writ petition is dismissed, but there will be no order as to costs.

Patra, J.

24. I agree.