

SUPREME COURT OF INDIA

Sundargarh Zilla Adivasi Advocates Association

Vs.

State Government of Odisha

(R.M.Lodha, J. Chelameswar and Madan B.Lokur JJ.)

07.05.2013

JUDGMENT

MADAN B. LOKUR, J.

1. The primary question for consideration in this writ petition under Article 32 of the Constitution is whether the provisions of the Orissa Municipal Act, 1950 are applicable to Sundargarh district in Odisha.

2. It is not in dispute that Sundargarh district is a declared ‘Scheduled Area’ in terms of Clause 6(1) of the Fifth Schedule to the Constitution. This Clause reads as follows:

“6. Scheduled Areas.—(1) In this Constitution, the expression “Scheduled Areas” means such areas as the President may by order declare to be Scheduled Areas.”

3. The administration and control of a Scheduled Area is provided for in Article 244 of the Constitution which reads as under:-

“244. Administration of Scheduled Areas and Tribal Areas:

(1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam Meghalaya, Tripura and Mizoram.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam, Meghalaya, Tripura and Mizoram.”

4. What follows from this is that an area may be declared by the President as a Scheduled Area (as has happened in the case of Sundargarh) and the administration and control of that area is then governed by the Fifth Schedule to the Constitution.

5. Scheduled Areas are also referred to in Part IX-A of the Constitution. This Part came into effect from 1st June 1993 through the Constitution (Seventy-fourth Amendment) Act, 1992. This Part concerns itself with the establishment, constitution, powers and functions of municipalities as institutions of self government. For the present purposes, we are concerned with Article 243-ZC and Article 243-ZF in Part IX-A. These provisions read as follows:

“243ZC. Part not to apply to certain areas.—(1) Nothing in this Part shall apply to the Scheduled Areas referred to in clause (1), and the tribal areas referred to in clause (2), of article 244.

(2) Nothing in this Part shall be construed to affect the functions and powers of the Darjeeling Gorkha Hill Council constituted under any law for the time being in force for the hill areas of the district of Darjeeling in the State of West Bengal.

(3) Notwithstanding anything in this Constitution, Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the tribal areas referred to in clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of article 368.”

“243ZF. Continuance of existing laws and Municipalities.— Notwithstanding anything in this Part, any provision of any law relating to Municipalities in force in a State immediately before the commencement of the Constitution (Seventy-fourth Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier:

Provided that all the Municipalities existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative

Assembly of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State.”

6. A BREAK-DOWN OF THE PROVISIONS OF ARTICLE 243-ZC OF THE CONSTITUTION MAKES IT CLEAR THAT: (A) PART IX-A DOES NOT IPSO FACTO APPLY TO SCHEDULED AREAS [ARTICLE 243-ZC(1)]; (B) PARLIAMENT MAY, BY LAW, EXTEND THE PROVISIONS OF PART IX-A TO A SCHEDULED AREA SUBJECT TO EXCEPTIONS AND MODIFICATIONS [ARTICLE 243-ZC(3)]. FACTUALLY, PART IX-A HAS NOT BEEN EXTENDED TO THE SCHEDULED AREA OF SUNDARGARH. IN OTHER WORDS, PART IX-A OF THE CONSTITUTION (WITH OR WITHOUT EXCEPTIONS AND MODIFICATIONS) DOES NOT APPLY TO THE SCHEDULED AREA OF SUNDARGARH.

7. Similarly, a break-down of the provisions of Article 243-ZF of the Constitution makes it clear that: (a) The existing law relating to municipalities will remain in force even if it is inconsistent with the provisions of Part IX-A of the Constitution [first part of Article 243- ZF]; (b) However, the inconsistent provisions of the existing law will remain in force only for a period of one year, unless amended or repealed earlier [second part of Article 243-ZF]. Clearly, the purpose of continuing an existing law (even though it may be inconsistent with Part IX-A) was to enable necessary amendments to be made to the existing law to make it in consonance with Part IX-A.

8. At this distant point of time, we are not concerned with the proviso to Article 243-ZF of the Constitution.

9. If Part IX-A of the Constitution does not apply to a Scheduled Area, how is the Scheduled Area of Sundargarh to be administered? For this, one has to fall back on the Fifth Schedule to the Constitution which specifically relates to the administration and control of Scheduled Areas. Clause 5(1) thereof is of relevance so far as the present case is concerned. This reads as follows:-

“5. Law applicable to Scheduled Areas.—(1) Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction

given under this sub-paragraph may be given so as to have retrospective effect.

(2) xxx xxx xxx [dealing with regulations].”

10. Clause 5 empowers the Governor of the State, inter alia, to issue a public notification to the effect that: (a) Any particular statute (enacted either by Parliament or by the State Legislature) shall not apply to a Scheduled Area; (b) Any particular statute (enacted either by Parliament or by the State Legislature) shall apply to a Scheduled Area, subject to specific exceptions and modifications.

11. In so far as the State of Odisha is concerned, an amendment was carried out in the Orissa Municipal Act by inserting sub-section (6) in Section 1 thereof to the following effect:

“(6) Nothing in this Act shall apply to the scheduled areas referred to in Clause (1) of Article 244 of the Constitution.”

The aforesaid amendment was carried out through Orissa Act No.11 of 1994 with effect from 31st May 1994.

12. The effect of the above amendment was that the Orissa Municipal Act was no longer applicable to Sundargarh, a Scheduled Area, with effect from 31st May 1994. In a sense, therefore, there was a vacuum in the administration and control of the Scheduled Area of Sundargarh from 1st June 1994 since neither Part IX-A of the Constitution nor the Orissa Municipal Act were applicable to the Scheduled Areas in Odisha.

13. Realizing the existence of a vacuum, the Governor of Odisha issued Notification No. SRO No.743/95 dated 14th August 1995 with effect from 31st May 1994. This was in exercise of powers conferred on him by Clause 5(1) of the Fifth Schedule to the Constitution. By virtue of this Notification, sub-section (6) in Section 1 of the Orissa Municipal Act was repealed and the said Act was extended to the Scheduled Areas of the State.

14. Unfortunately, this Notification has not been placed on record by either of the parties, though a reference to this is made by the Union of India in its counter affidavit. Therefore, it is appropriate to reproduce the Notification. It reads as follows:

“Housing & Urban Development Department Notification

The 14th August 1995 S.R.O. No. 743/95- Whereas the Orissa Municipal Act, 1950 has been amended by Orissa Municipal (Amendment) Act, 1994 for strengthening the Municipalities and for giving effective and adequate representation to the Scheduled Castes, Scheduled Tribes, Backward Class of citizens and Women;

And, whereas, the constitution of the Municipalities prior to the commencement of the Orissa Municipal (Amendment) Act, 1994 has not been made in accordance with the amended provisions with regard to the composition, reservation of seats and reservation of offices of the Chairpersons and Vice-Chairpersons of Municipalities for the Scheduled Castes, Scheduled Tribes, Backward Class of citizens and Women;

And, whereas, for the purpose of strengthening the Municipalities and giving effective and adequate representation to the Scheduled Castes, Scheduled Tribes, Backward class of citizens and Women in the Scheduled Areas of the State, it is considered expedient to apply the provisions of the Orissa Municipal Act, 1950 as amended by the Orissa Municipal (Amendment) Act, 1994 to the Scheduled Areas of the State of Orissa;

Now, therefore, in exercise of the powers conferred by sub- paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India and in supersession of the notification of the Governor bearing No. 16222—Legis-H.U.D., dated the 28th May 1994 issued under the Housing & Urban Development Department of the Government of Orissa and published as S.R.O. No. 521/94, the Governor of Orissa hereby directs that the provisions of the Orissa Municipal Act, 1950 (Orissa Act 23 of 1950) shall be deemed to have been applied to the Scheduled Areas of the State with effect from the 31st day of May 1994 subject to the following exception and modification, namely :-

- 1) Sub-section (6) of Section 1 of the Orissa Municipal Act, 1950 shall be omitted; and
- 2) Notwithstanding anything to the contrary in the Orissa Municipal Act, 1950, the term of office of every Councilor, Vice- Chairperson and

Chairperson of the Municipal Councils and Notified Area Councils existing in the Scheduled Areas of the State immediately before the commencement of the Constitution (Seventy-fourth Amendment) Act, 1992 shall be deemed to have come to an end with effect from the 2nd day of August 1995, and –

a) during the period beginning with the 2nd day of August 1995 till the reconstitution of said Councils, the powers and duties of every such Council and Chairperson and Vice- Chairperson thereof shall be exercised and performed by such authority and in such manner as the State Government may, by notification, direct; and

b) any action taken or thing done by the State Government under the Orissa Municipal Act, 1950, so applied to the Scheduled Areas of the State, shall be deemed to have been validly taken or done.

[No. 27397—Elec.-37/95-H.U.D.]

G. RAMANUJAM

Governor of Orissa”

15. In this constitutional and statutory background, the contention urged by learned counsel for the petitioners is that on the coming into force of Part IX-A of the Constitution, the existing municipalities in Sundargarh district, that is, Sundargarh, Rourkela, Rajgangpur and Birmitrapur could not continue beyond a period of one year as provided in Article 243-ZF of the Constitution and therefore, their existence beyond 1st June 1994 was unconstitutional. The basic postulate of this contention is that the provisions of the Orissa Municipal Act are inconsistent with Part IX-A of the Constitution.

16. The further submission is that Parliament has not extended the provisions of Part IX-A of the Constitution to the Scheduled Area of Sundargarh nor has the Governor extended the provisions of the Orissa Municipal Act to Sundargarh district in exercise of power conferred by Clause 5 of the Fifth Schedule to the Constitution. Therefore the provisions of the said Act are not applicable to Sundargarh district with the result that the continuance of the municipalities beyond 1st June 1994 is illegal.

17. We are unable to accept both contentions urged by the petitioners since they proceed on a misunderstanding of facts and the relevant provisions of the Constitution. We may also note that Notification No. SRO No. 743/95 dated 14th August, 1995 is not under challenge.

18. Clause 1 of Article 243-ZC provides that the provisions of Part IX-A of the Constitution do not apply to Scheduled Areas such as Sundargarh. Clause 3 of Article 243-ZC provides that Parliament may, by law, extend the provisions of Part IX-A of the Constitution to Scheduled Areas such as Sundargarh subject to exceptions and modifications. It is nobody's case that such a law has been enacted by Parliament. The only consequence of this is that Part IX-A of the Constitution which deals with the municipalities as institutions of self government does not apply to Sundargarh.

19. This may be contrasted with the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 which specifically extends Part IX of the Constitution relating to panchayats introduced by the Constitution (Seventy-third Amendment) Act, 1992 to Scheduled Areas. There is no corresponding statute relating to the extension of Part IX-A of the Constitution relating to municipalities to Scheduled Areas.

20. Therefore, in the absence of the application of Part IX-A of the Constitution to the Scheduled Area of Sundargarh, what does apply is the Orissa Municipal Act, 1950. This Act has been made applicable with effect from 31st May 1994 by the issuance of a public notification being SRO No.743/1995 dated 14th August 1995. The petitioners seem to be oblivious of this fact which has been stated by the Union of India in its counter affidavit filed to the writ petition. It has further been stated by the Union of India in its affidavit that the provisions of Section 12 of the Orissa Municipal Act (relating to the general election of councillors and formation of wards) have also been extended to the Scheduled Areas by a Notification being SRO No.1264/1995 dated 16th November 1995 with effect from 14th November 1995. These facts relating to the issuance of the two notifications have not been denied by the petitioners by filing any rejoinder affidavit. Therefore, the entire basis on which the petitioners have built up their case is factually lacking.

21. Apart from the above, learned counsel for the petitioners has not shown us any provision of the Orissa Municipal Act which is inconsistent with the provisions of Part IX-A of the Constitution. Article 243-ZF provides that any law relating to municipalities shall continue to apply even to a Scheduled Area for one year,

except to the extent of inconsistency with the provisions of Part IX-A of the Constitution. Even beyond a period of one year a law relating to municipalities may be applicable to a Scheduled Area, if the law is so extended, provided it is not inconsistent with the provisions of Part IX-A. It is in this context that learned counsel for the petitioners could not point out any provision in the Orissa Municipal Act which is inconsistent with Part IX-A. The contentions of learned counsel for the petitioners are presently without any foundational basis, but we leave open this question and express no opinion in this regard since Part IX-A has not been made applicable to the Scheduled Area of Sundargarh.

22. The interpretation of Article 243-ZC and Article 243-ZF of the Constitution has come up for consideration in some High Courts from time to time but the issue raised before us, which is entirely factual in nature, has not come up for consideration earlier. It is, therefore, not necessary to advert to those decisions.

23. Reference may, however, be made to *Bondu Ramaswamy v. Bangalore Development Authority*, (2010) 7 SCC 129 which explains the purpose behind the introduction of Part IX-A in the Constitution. This is what was said:

“The Constitution (Seventy-fourth Amendment) Act, 1992 inserting Part IX-A in the Constitution, seeks to strengthen the system of municipalities in urban areas, by placing these local self-governments on sound and effective footing and provide measures for regular and fair conduct of elections. Even before the insertion of the said Part IX-A, municipalities existed all over the country but there were no uniform or strong foundations for these local self-governments to function effectively.

“Provisions relating to composition of municipalities, constitution and composition of Ward Committees, reservation of seats for weaker sections, duration of municipalities, powers, authority, responsibilities of municipalities, power to impose taxes, proper superintendence and centralised control of elections to municipalities, constitution of committees for district planning and metropolitan planning, were either not in existence or were found to be inadequate or defective in the State laws relating to municipalities.

“Part IX-A seeks to strengthen the democratic political governance at grass root level in urban areas by providing constitutional status to municipalities,

and by laying down minimum uniform norms and by ensuring regular and fair conduct of elections.”

This objective has been achieved by the Orissa Municipal Act and the amendments made thereto, as extended to the Scheduled Areas.

24. In view of the factual position before us, we see no merit in this writ petition. It is accordingly dismissed. No costs.