ORISSA HIGH COURT

Bhupendra Kumar Bose

Vs

State of Orissa

Original Jurisdiction Case No. 12 of 1959

(R.L. Narasimham C.J. and G.C. Das J.)

20.03.1959

JUDGMENT

R.L. Narasimham, C.J.

1. This is a petition under Article 226 of the Constitution for a declaration that the Orissa Municipal Elections Validation Ordinance 1959 (Orissa Ordinance No 1 of 1959) (hereinafter referred to as the Ordinance) is void and inoperative in its application to Cuttack Municipality and for a permanent injunction restraining the State of Orissa (opposite party No. 1) from enforcing the Ordinance and restraining opposite parties Nos. 2 to 28 from exercising their functions as Councillors, Chairman and Vice-Chairman as the case may be, of Cuttack Municipality.

2. The elections to Cuttack Municipality took place during the period from December, 1957 to March, 1958 and opposite parties 2 to 28 were duly declared elected as Municipal Councillors. Opposite party No. 3 Sri Manmohan Misra was elected Chairman and opposite party No. 15, Sri Mahendra Kumar Sahu was elected Vice Chairman of the said Municipality. The petitioner Sri Bhupendra Kumar Bose who was one of the defeated candidates, challenged the validity of the elections before this Court in O. J. C. No. 72 of 1958. A Division Bench of this Court by its judgment dated 11-12-1958 declared the elections to be invalid and issued a direction to the State of Orissa and to the District Magistrate of Cuttack to hold fresh elections to the Municipality according to law. A further direction was issued to the elected Municipal Councilors restraining them from functioning as Councilors on the basis of the said elections. Neither the State of Orissa nor the other members of the opposite party challenged the judgment by way of an appeal to the Supreme Court. Consequently, the judgment became conclusive and was given effect to in due course; and the District Magistrate of Cuttack took over the administration of the Municipality as an interim arrangement.

3. It will be useful at this stage to briefly summaries the reasons for which the Division Bench held the elections to be invalid, in O. J. C. No. 72 of 1958. They are as follows :

(i) The qualifying date for determining the age qualification of voters under Section 13 of

the Orissa Municipal Act was published by the State Government only on 10-1-1958 whereas the preliminary electoral rolls had already been published on 23-12-1957 and claims and objections had been invited for a period of twenty one days from that date, i.e. from 23-12-1957 to 12-1-1958. In consequence of the belated notification of the qualifying date the citizens of Cuttack, in effect, were given only two days time to file their claims and objections though under the Orissa Municipal Election Rules they were entitled to twenty-one clays. On the affidavits of the parties the Court further held that such a drastic abridgement of the period for filing claims and objections materially affected the results of the elections, by depriving several persons of their right to be enrolled as voters.

(ii) A candidate was entitled to fifteen clear days for the purpose of canvassing but the notification issued under the Orissa Municipal Election Rules curtailed this period to fourteen days. The onus was, therefore, upon the opposite party to show that the results of the elections were not, and could not be, affected by the contravention of the rules and that party did not discharge this onus.

4. On 15-1-1959 the Governor of Orissa promulgated the Ordinance validating the elections to Cuttack Municipality notwithstanding the decision of this Court in O. J. C. No. 72 of 1958. The provisions of the Ordinance are as follows :

Orissa Ordinance No. 1 of 1959.
The Orissa Municipal Elections Validation
Ordinance, 1959.
AN
ORDINANCE

To provide for the validation of electoral rolls and elections to Municipalities and certain other matters. Whereas in certain judicial proceedings it has been held that the elections to the Cuttack Municipality are invalid due to some defect and irregularity in the preparation of the electoral roll and fixation of the date of polling; And whereas doubts regarding the validity of elections to certain other Municipalities have arisen; And whereas the preparation of fresh electoral rolls and the holding of fresh elections will entail huge expenditure and also give rise to problems regarding the administration of such Municipalities during the intervening period; And whereas it is necessary to take immediate steps to provide for the validation of the electoral rolls and the elections and also for other matters as hereinafter appearing; And whereas the Legislature of the State of Orissa is not in session and the Governor is satisfied that circumstances exist which render it necessary to take immediate action for the purposes aforesaid; Now, therefore, in exercise of the powers conferred by clause (f) of Article 213 of the Constitution, the Governor of Orissa is pleased to make and promulgate the following Ordinance in the Ninth Year of the Republic of India : Short title and extent.

1. (1) This Ordinance may be called the Orissa Municipal Election Validation Ordinance 1959.

(2) It extends to the whole of the State of Orissa. Definition.

2. In this Ordinance, unless there is anything repugnant in the subject or context –

(a) "the Act" means the Orissa Municipal Act, 1950;
(b) "election" means the election of a Councilor of a Municipality held during the year, 1958;
(c) "electoral roll" means the electoral rolls on the basis of which the elections of the councilors of a Municipality were held during the year 1958;
(d) "order" includes a writ, direction, determination or decision.

Validation of electoral rolls.

3. (1) Notwithstanding the Order of any Court to the contrary or any provision in the Act or the rules thereunder –

(a) the electoral rolls of the Cuttack Municipality shall be, and shall always be deemed to have been, validly prepared and published; and
(b) the said electoral rolls shall be deemed to have come in force on the date of publication and shall continue to be in force until they are revised in accordance with the rules made in this behalf under the Act.

2. The validity of the electoral rolls shall not be called in question in any Court on the ground that the date on which a person has to be not less than 21 years of age was fixed under Section 13 of the Act after the publication of the preliminary electoral rolls. Validation of elections.

4. Any Order of a Court declaring the election to the Cuttack Municipality invalid on account of the fact that the electoral rolls were invalid on the ground specified in sub-section (2) of Section 3 or on the ground that the date of polling of the election was not fixed in accordance with the Act or the rules made thereunder, shall be deemed to be and always to have been of no legal effect whatsoever, and the elections to the said Municipality are hereby validated.
Savings.

5. (1) All actions taken, and powers exercised by the Councilors, Chairman or Vice-Chairman of the Cuttack Municipality prior to the coming into force of this Ordinance shall be deemed to have been validly taken, and exercised.

(2) All actions taken and powers exercised by the District Magistrate of Cuttack in respect of the Cuttack Municipality in pursuance of the Order of the Government of Orissa in the Health (L. S. G.) Department No. 8263 - L. S. G. dated 13-12-1958, shall be deemed to have been taken, and exercised by the Council of the said Municipality or its Chairman or Vice-Chairman, as the case may be.

Y.N. SUKTHANKAR. Governor of Orissa The 13th January 1959
5. Though the Ordinance does not expressly refer to the judgment of the Division Bench of this

Court in O. J. C. No. 72 of 1958, there can be no doubt, from the context, that it was that judgment that the Governor had in view when he referred to "certain judicial proceedings" in which it was "held that the elections to the Cuttack Municipality are invalid." It is not denied that that is the only judgment dealing with the invalidity of Cuttack municipal elections. It is true that the petitioner had stated in paragraph 4 of his petition that about six election petitions challenging the election of some of the opposite parties to Cuttack Municipality were filed but his further statement that some of them are pending has not been challenged.

6. The preamble to the Ordinance gives the special reasons which induced the Governor to promulgate the Ordinance. Though the decision of this Court in O.J.C. No. 72 of 1958 related only to the elections to Cuttack Municipality yet the reasons given for that decision have created doubts regarding the validity of elections to certain other Municipalities in Orissa. The Governor was further satisfied that the "preparation of fresh electoral rolls and the holding of fresh elections will entail huge expenditure and also give rise to problems regarding the administration of such municipalities during the intervening period". For these reasons he was satisfied that an emergency had arisen and that as the Legislative Assembly was not in session it was necessary to take immediate action to promulgate the Ordinance. Section 2 : Clause (d) of Section 2 of the Ordinance defines an 'order' as including a 'writ, direction, determination or decision.' In the context, this expression means the decision of this Court in O.J.C., No.72 of 1958 and nothing else. Section 3 : Sub-section (1) of Section 3 of the Ordinance validates the electoral rolls prepared for Cuttack Municipality during the year 1958 notwithstanding the decision of this Court. Retrospective effect is given to this validating provision by the use of the deeming clause "shall always be deemed to have been validly prepared". Sub-section (2) further says that the validity of the electoral rolls shall not be called in question in a court on the ground that the qualifying date was fixed under Section 13 of the Orissa Municipal Act after the publication of the preliminary electoral roll. S. 3 in its entirety, therefore nullifies the effect of the judgment in O.J.C. No.72 of 1958, so far as the invalidity in the preparation of the electoral rolls is concerned, either on account of non-compliance with the provisions of the Orissa Municipal Election Rules or on account of the belated publication of the qualifying date under Section 13 of the Orissa Municipal Act, after the publication of the preliminary electoral roll. Sub-section (1) of Section 3 deals only with the electoral rolls of Cuttack Municipality, whereas sub-section (2) deals with the electoral rolls of all Municipalities on the basis of which the elections were held in 1958. Some election cases against some members of the opposite party are said to be pending and in those cases, apart from other issues, one of the main issues that may arise for decision would be whether the electoral rolls of Cuttack Municipality were validly prepared. The Court trying these election disputes (District Judge, Cuttack) would feel himself bound by the findings of this Court in O. J. C. No. 72 of 1958 and would hold, without further argument, that the electoral rolls prepared in 1958 were invalid. But by virtue of sub-section (1) of Section 3 the effect of the judgment in that O. J. C. is taken away to that extent and that Court is compelled to hold that the electoral rolls were validly prepared and published on the due date. Again, if new cases are instituted in appropriate courts where the validity of the electoral rolls prepared for other Municipalities in Orissa is under challenge, on similar grounds, sub-section (2) of Section 3 would take away the precedent effect of our judgment in so far as matters referred to in that sub-section are concerned. Section 4: This section expressly renders ineffective the judgment of this Court in O. J. C. No. 72 of 1958 but that ineffectiveness is to a limited extent only. It says that the invalidity of the elections to Cuttack Municipality arising on account of (i) fixation of the qualifying date after the date of publication of the preliminary electoral roll and (ii) fixation of

the dates of polling in contravention of the provisions of the Orissa Municipal Act or the rules made thereunder, shall be inoperative. Section 5 : Sub-section (1) of Section 5 validates "all actions taken and powers exercised" by the Vice-Chairman, Chairman and Councillors of Cuttack Municipality prior to the coming into force of the Ordinance. There are no qualifying words to show that classes of "actions taken and powers exercised", were validated.

7. Mr. Srinivas Misra on behalf of the petitioner raised the following contentions :

(i) The provisions of the Ordinance are a mere colourable device to set aside the judgment of this Court in O.J C. No.72 of 1958. Hence, it is not exercise of legislative power by the Governor but assumption of judicial power which is not warranted by the Constitution.

(ii) Section 4 of the Ordinance offends the equality clause guaranteed in Article 14 of the Constitution inasmuch as, of all the successful litigants of Orissa the petitioner alone has been singled out for the purpose of being deprived of the fruits of his success in O.J.C. No. 72 of 1958. There is no reasonable basis for thus classifying him nor is there a reasonable nexus between the basis of such classification on the one hand and the object sought to be achieved by the Ordinance on the other.

(iii) Even if Section 4 of the Ordinance be held to be not violative of Article 14 of the Constitution, yet it does not cure the invalidity of the elections to Cuttack Municipality arising out of the fact that material prejudice had been caused to the citizens by the abridgement of the period for filing claims and objections and of the period tor canvassing.

(iv) Sub-section (1) of Section 5 is unconstitutional firstly because it offends many of the provisions of the existing penal laws and civil laws of India with respect to matters in the Concurrent List and the Instructions of the President had not been obtained prior to the passing of the Ordinance so as to cure the invalidity arising out of Article 254(1) of the Constitution; and secondly, it arbitrarily discriminates between the Chairman, the Vice-Chairman and the Councillors of Cuttack Municipality on the one hand and the staff of the Municipality on the other as regards their liability for actions done under the Orissa Municipal Act. (See Section 375 of the Act.)

(v) On the 23rd February, 1959 a Bill entitled "Orissa Municipal Election Validating Bill 1959" whose terms are practically identical with those of the Ordinance was sought to be introduced in the Orissa Legislative Assembly, but was defeated by a majority of votes. According to Mr. Misra the refusal of the Orissa Legislative Assembly to grant leave for the introduction of that Bill is tantamount to its expression of disapproval of the Ordinance and that by virtue of sub-clause (a) of clause (2) of Article 213 of the Constitution the Ordinance has ceased to be operative from that date.

8. The first and last points may be dealt with first. In my opinion, they are not tenable. Complete separation of powers between the Judiciary, the Executive and the Legislature, which is an essential feature of the American Constitution has not been provided for in our Constitution and consequently, a piece of legislation, unless it is shown to have offended any of the provisions of the Constitution such as those dealing with Fundamental Rights or distribution of legislative

powers, cannot be struck down on the ground that it involves encroachment on judicial functions. Mr. Misra relied on some American decisions such as, City of *Janesville v. Edwin F. Carpenter*[1], and *State of Indiana, ex rel. John Worrell v. Bruce Carr, State Auditor 13 LR (Annotated) 177* where the assumption of purely judicial functions by the Legislature was held to be unconstitutional. In my opinion these decisions are not applicable here. The constitutionality or otherwise of the provisions of an Ordinance must be judged solely on a consideration as to whether any of its provisions contravened the provisions of the Constitution and not on the general ground of usurpation of judicial power by the Legislature or by the Governor in exercise of his legislative functions.

9. It was not denied that the Orissa Municipal Elections Validation Bill, 1959 (whose provisions are identically the same as those of the Ordinance) was sought to be introduced in the Orissa Legislative Assembly on the 23rd February, but the Assembly refused to grant leave for its introduction by a majority of votes. Under Rule 96(i) of the Rules of Procedure and Conduct of Business in the Orissa Legislative Assembly the consequence of the refusal of leave for the introduction of a Bill would only be that such a Bill shall be removed from the list of Bills for one Sessions of the Assembly. Mr. Misra's argument that such refusal is tantamount to passing a resolution disapproving the Ordinance seems to be somewhat farfetched.
The said Rules make a sharp distinction between "Bills" on the one hand and "Resolutions" on the other, (see Chapters X and XI). Such a distinction is also found in sub-clause (a) of clause (1) of Article 213 and in sub-clause (a) of clause (2) of that Article. The expressions 'Bill' and 'Resolution' have thus been given different meanings both in the Legislative Assembly Rules and in the Constitution. The procedure for the introduction of a Bill is different from that required for moving a Resolution and it will not be proper for this Court to hold that by refusing leave to introduce a Bill, the Assembly has, in substance, passed a resolution disapproving of the Ordinance and that consequently the Ordinance ceased to be operative from 23-2-1959.

10. I now take up the most important argument based on Article 14 of the Constitution. In a recent decision of the Supreme Court, *Basheswar Nath v. I. T. Commissioner, Delhi*[2], has been placed on a very high pedestal, even amongst fundamental rights, and it has been declared that that night cannot be waived by a party as it is in the nature of "an admonition addressed to the State". The scope of this Article has been fully explained by their Lordships of the Supreme Court in several judgments, the latest being that reported in *RamkrishnaDalmia v. Justice Tendolkar*[3], There, after a review of all the previous decisions, their Lordships formulated the principles as follows (at page 547):

> "(i) A law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not to others, the single individual may be treated as a class by himself.
> (ii) There is always a presumption in favour of the constitutionality of an enactment, and the burden is upon him, who attacks it, to show that there has been clear transgression of the constitutional principles.
> (iii) It must be presumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based on adequate grounds.

(iv) The Legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.
(v) In order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of things which can be conceived as existing at the time of legislation; and
(vi) While good faith and knowledge of the existing conditions on the part of the Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation".

After formulating the above principles their Lordships further pointed out that statutes whose validity may come under challenge under Article 14 may consist of five classes of which the following two are relevant for our purposes :

"(i) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances, known to or brought to the notice of, the Court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the Statute are intended to apply only to a particular person or thing or only to a certain class of persons or things, where the Court finds that the classification satisfies the tests the Court will uphold the validity of the law as it did in *Charanjit Lal v. Union of India*[4], *State of Bombay v. F. N. Balsara*[5], *Kedarnath Barjoria v. State of West Bengal*[6], *V. M. Syed Mohammed and Co. v. State of Andhra*[7], and *Budhan Chowdhury v. State of Bihar*[8]
(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or deducible from the surrounding circumstances, or matters of common knowledge. In such a case, the Court will strike down the law as an instance of naked discrimination, as it did in *Ameerunnisa Begum v. Mahboob Begum*[9], and *Ramprasad Narain Sahi v. State of Bihar*[10],

11. On the question as to what should be the basis for reasonable classification clear indications are found in *State of West Bengal v. Anwar Ali*[11] Mahajan, J. at page 313 (of SCR) : (at pp. 85-86 of AIR) observed :

"Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily". Mukherjea, J at page 320 (of SCR) also expressed the same idea in the following terms :

"It (referring to Article 14) only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if, as regards the subject matter of the legislation, their position is substantially the same".

Das, J. (as he then was) also conveyed the same idea as follows at page 334 (of SCR) :

"It is now well established that while Article 14 is designed to prevent a person or class of persons from being singled out from others similarly situated, for the purpose of being specially subjected to discriminatory and hostile legislation, it does not insist on an "abstract symmetry" in the sense that every piece of legislation must have universal application.

.....The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which will be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the objects of the legislation".

Thus, the first requisite for reasonable classification is that the persons grouped together must be similarly circumstanced, and their position must be substantially the same as regards the subject matter of the legislation. Otherwise, the classification will have no rational basis and will become arbitrary.

12. Though in those observations their Lordships were dealing with a statute, as a

whole, it is obvious that these principles would also apply while examining the constitutional validity of a particular provision of a statute such as a section or sub-section or even a clause. Most of the provisions of a statute may be constitutionally valid but a particular clause thereof may become invalid on account of its contravention of Article 14. Thus, in the well known *Surajmall Mohta and Co. v. A. V. Visvanatha Sastri*[12], their Lordships of the Supreme Court, in the first instance, pronounced sub-section (4) of Section 5 of the Taxation on Income (Investigation Commission) Act, 1947 to be violative of Article 14 and as such void, but left open the question as to whether sub-section (1) of that section or sub-section (5) of section 6 of that Act offended the constitutional provisions. It is true that in a later decision in *Shree Meenakshee Mills Ltd. Madurai v. A. V. Visvanatha Sastri*[13], sub-section (1) of Section 5 was also declared to be void, but these two decisions support the view that the test of reasonableness of classification and the existence of a nexus between the basis of that classification on the one hand and the object of the impugned Act on the other, would apply not only while examining the provisions of an Act if impugned as a whole, but also in examining one of its provisions if that

provision alone is impugned. Doubtless, if all the provisions of a statute are closely inter-linked and a reasonable basis for classification can be found applicable to all of them, the separate examination of the constitutional validity of a particular provision may not arise. But if a provision is severable from the remaining provisions and it appears that the Legislature had in mind a separate basis for classification in respect of that particular provision, its constitutional validity will have to be examined independently.

13. A judgment of a superior court of record like a High Court has effect on two classes of persons. Firstly, as between the parties to the judgment and their privies it is binding and conclusive unless reversed by a superior court of appeal or amended by the court itself, according to law. Moreover, the original cause of action on the basis of which the action commenced, is merged in the judgment and its place is taken by the rights created between the parties by virtue of the judgment. (See Halsbury, Third Edition, Vol. 22 pages 780 and 781). But as regards persons who are not parties to the judgment, it becomes a valuable precedent on any disputed point of law, not merely as a guide but as an authority to be followed by all courts of co-ordinate or inferior jurisdiction administering the same system until it is overruled by a court of superior jurisdiction or by a validly enacted statute. As pointed out in Halsbury, Third Edition, Volume 22 at p. 796,

> "the enunciation of the reason or principle on which the question before a Court has been decided, is alone binding as a precedent. This underlying principle is often termed the 'ratio decidendi', that is to say, the general reasons given for the decision or the general grounds on which it is based, detached or abstracted from the specific peculiarities of a particular case which gives rise to the decision. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision which alone has the force of law".

Thus, this Court's judgment in *Bhupendra Kumar Bose v. The State*[14], (Orissa) is binding as between the parties, namely the petitioner Sri Bhupendrakumar Bose on the one hand and the State of Orissa and the elected Councillors of Cuttack Municipality on the other and new rights as between them were created by the judgment itself. This is irrespective of the ratio decidendi of the judgment. But the judgment is also an authority to be followed by all courts in Orissa on the disputed points of law decided therein if and when they arise in any pending or future litigation.

14. A half-hearted attempt was made to show that the aforesaid observations in Halsbury apply to 'judgments' where the rights to property are involved and not to judgments of this Court under Article 226 of the Constitution. In fact, the learned Advocate-General went to the extent of saying that the petitioner obtained no rights whatsoever by virtue of the decision in O.J.C. No. 72 of 1958 (Orissa). But at page 740 of Halsbury (cited above) it was pointed out that the term 'judgment' or 'order' in its widest sense may be said to include any decision given by a court on a question or questions at issue between the parties in a proceeding properly before it, and at page 741 it was further pointed out that judgments and orders considered in that title were those of the Queen's Bench and Chancery Divisions of the High Court and orders of the Court of Appeal. The writ jurisdiction in England is exercised by the High Court and consequently decisions in

exercise of such writ jurisdiction would also be included in the expression 'judgment' which has been dealt with in Halsbury. In fact in paragraph 1680 at page 795 (ibid) judgments in mandamus proceedings are expressly referred to. It seems fantastic to say that the petitioner has obtained no rights by virtue of the judgment in O.J.C. No. 72 of 1958 (Orissa): He is a citizen of Cuttack and was one of the defeated candidates in the last elections to the Cuttack Municipality. He was clearly entitled to challenge the validity of the election of his rival candidate even under the Orissa Municipal Act (sec. 18) and the judgment of this Court in O.J.C. No. 72 of 1958 upheld that challenge, restrained the municipal councillors from functioning as councillors on the basis of the elections held in March, 1958 and directed the State Government to hold fresh elections according to law. The petitioner has thus obtained a very valuable right of preventing the existing councillors from functioning as such and of having fresh elections conducted according to law in which he will have the right to stand as a candidate once again. The rights to be enforced in an application under Article 226 of the Constitution need not be confined to rights to property only or to fundamental rights. They may include all other classes of incorporeal rights recognised in jurisprudence. It is now settled that the Legislature has power, in appropriate cases to pass validating Acts, but as pointed out by the Federal Court in *Piare Dusadh v. Emperor*[15], that power is ancillary to the main power derived from the Legislative Lists. Hence, when after the pronouncement of the judgment of a competent court, the Legislature feels the necessity for passing a validating Act it must first make up its mind as to whether (i) the binding nature of the judgment inter partes should be annulled or (ii) the effect of the judgment as a precedent should be rendered inoperative or whether both these effects should be produced. The principle of classification for these two purposes will not necessarily be the same and the provisions in the validating Act will also necessarily differ

accordingly, but it is elementary that none of the validating provisions should offend Article 14 of the Constitution.

15. This is what the Governor has attempted to do in Sections 3 and 4 of the Ordinance. Sub-section (1) of Section 3 merely declares that notwithstanding the order of any court the electoral rolls of Cuttack Municipality for the year 1958 shall be deemed to have been validly prepared and published and to have come into force on the date of publication. This declaration should be taken to be the law of the land to be followed by all courts where this issue is raised, either in a pending proceeding or in a future litigation. Sub-section (2) of Section 3 is not, however, limited to Cuttack alone and applies to all Municipalities within the State of Orissa. It merely prohibits a court from entertaining any objection to the validity of the electoral rolls of such Municipalities on the ground that the qualifying date under Section 13 of the Orissa Municipal Act was fixed after the publication of the preliminary electoral rolls. Hence, if in any pending application or a future application under Article 226 in respect of other Municipalities the validity of the electoral rolls is challenged on grounds similar to those which were upheld in O.J.C. No. 72 of 1958 (Orissa) the effect of that judgment as precedent is taken away by this sub-section.

16. The learned Advocate-General and Mr. M. Mohanty, however, strenuously contended that Section 3 of the Ordinance would render ineffective the judgment in O.J.C. No. 72 of 1958 (Orissa) even between the parties thereto, by taking away the foundation on which that judgment was based. I am unable to accept this argument. The judgment is binding as between the parties not because of the strength of the reasons on which it is based, but because it is a judgment of a competent court and new rights are created by it. The reasoning’s, especially on questions of law,

may disappear by a validly enacted retrospective law (in this case the Ordinance). But the judgment cannot be annulled unless the Legislature makes express provisions to that effect in the statute. Section 4 of the Ordinance contains such a provision. It expressly says that the decision in O.J.C. No. 72 of 1956 (Orissa) shall be deemed to have no legal effect. It is true that in Section 4 there is a reference to sub-section (2) of Section 3 and to that extent the two Sections are linked. But Section 3 is wholly independent of Section 4 and the principle of classification for the purpose of Section 3 is not the same as the principle for the purpose of Section 4. In the present application we are concerned with the limited question as to whether the petitioner, who was the successful suitor in O.J.C. No. 72 of 1958 (Orissa), should be granted any relief, and not with the other collateral question as to whether the Suitors, in other litigations that may be pending in other courts, or that may be instituted in future, either in respect of Cuttack Municipality or other Municipalities in Orissa, should be granted any relief. Hence, for the purpose of this petition it is unnecessary to examine the constitutional validity of Section 3 of the Ordinance. I pronounce no opinion on that question and would leave it open.

17. Coming to Section 4, a striking feature that is noticeable is that notwithstanding the general words used, it means in effect that the petitioner should be deprived of the fruits of his success in O.J.C. No. 72 of 1958 (Orissa). This section is thus a piece of legislation against one person only and it must satisfy the rigorous tests laid down by their Lordships of the Supreme Court in the cases cited above, that is to say, it must be shown that there were special circumstances or reasons applicable to him only and not to others so as to make him a class by himself. It must be further shown that his treatment as a class can be reasonably regarded as based on some differentia which distinguishes him from other persons, and that the differentia has reasonable relation to the object sought to be achieved by the Ordinance. The reasonable basis for such classification must appear on the face of the statute itself or must be deducible from the surrounding circumstances or matters of common knowledge. The reasons for singling out Sri Bhupendra Kumar Bose for such a hostile legislation appear to be (1) that he had the misfortune to implead the Municipal Councillors of Cuttack as his rivals in O.J.C. No. 72 of 1958 (Orissa) and (ii) that by enforcing the judgment of this court in O.J.C. No. 72 of 1958 (Orissa) the Governor apprehends that huge financial expenditure may be involved and difficult administrative problems may arise. The learned Advocate-General could not give any other reason. In my opinion, these reasons are unsubstantial and would not suffice to deny Sri Bose the fruits of his success. The existing Councillors of Cuttack Municipality cannot claim a special privileged position of not being liable to be impleaded as opposite parties in an application under Article 226. It cannot also be reasonably contended that the expenditure that will have to be incurred in holding fresh elections to Cuttack Municipality would be so great as to strain the financial resources of even a poor State like Orissa, Moreover, no difficult administrative problems will arise in managing the affairs of that Municipality until the elections are held afresh. I have already shown that for a period of nearly a month from the date of the Judgment in O.J.C. No. 72 of 1958 (Orissa) i.e. 11-12-1958 till the date of promulgation of the Ordinance, i.e. 15-1-1959 the District Magistrate of Cuttack administered the Municipality. He has also been administering the Municipality from 24-1-1959, the date on which an interim order of injunction was passed in this application till now. Though the Court is bound to treat with great respect the opinion of the Legislature (in this case the Governor) about the needs of the times, yet, as the final authority to examine the reasonableness of a statutory provision, in so tar as it contravenes Article 14, this Court cannot abdicate its functions and lake the Governor's opinion as final and conclusive. The presumption of constitutionality attaching to an enactment cannot be carried so

far. This case is hardly distinguishable from another case in which a litigant obtains a decree for a large sum of money, say, of one lakh of rupees against the Cuttack Municipality. Will it be reasonable to say that the payment of that sum of money to the successful decree-holder would be such a strain on the financial resources of the State Government or of the Municipality, or else that it would cause such serious administrative problems that the Legislature can step in and annul the decree and thus deprive the decree-holder of the fruits of his success? The petitioner Sri Bhupendra Kumar Bose may legitimately ask why, when hundreds of successful suitors who have sought the help of this Court for relief under Article 226 were allowed to enjoy the fruits of their success, he alone should have been discriminated against by hostile legislation. Considerations like heavy expenditure or administrative difficulties cannot be a reasonable basis for such legislation. This case is similar to Ameerunnisa Begum's case reported in AIR 1953 S.C. 91 and to Ram Prasad Narain's case reported in AIR 1953 S.C. 215 where it was held by their Lordships of the Supreme Court that a piece of Legislation against a single person with a view to prevent him from approaching law courts for the purpose of enforcing his claim violates Article 14. In the latter case, their Lordships expressed themselves in the following strong language :

> "What the Legislature has done is to single out these two individuals and deny them the right, which every Indian citizen possesses, to have his right adjudicated upon by a judicial tribunal in accordance with the law which applies to his case. The meanest of citizens has a right of access to a court of law for the redress of his just grievances and it is from this right that the appellants have been deprived by this Act. It is impossible to conceive of any worse form of discrimination than the one which differentiates a particular individual from all his fellow subjects and visits him with a disability which is not imposed on anybody else and against which even the right of complaint is taken away."

The present case is even stronger than the Bihar case. There the right to bring a suit was taken away under the impugned Act, but here under Article 226 of the Constitution a right had already been conferred on the aggrieved party by the judgment of this Court in O.J.C. No. 72 of 1958. His right to enforce that judgment has been taken away by Section 4 of the Ordinance for no valid reason except that heavy financial expenditure will be involved and administrative problems will be created, if that judgment was allowed to be enforced. As pointed out by the Supreme Court in AIR 1959 S.C 1.49 Article 14 is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State such as India is, by her Constitution, expected to do. A legislative body (in this case the Governor) cannot be permitted to weaken the effect of this guarantee in Article 14 by arbitrarily creating a class and then ask the Court to accept such classification as a proper one. In that case, two of the learned Judges (Bhagwati and Subba Rao JJ.), have attributed almost divine status to fundamental rights and pointed out that it would be a "sacrilege" to whittle down those rights.

18. I am fully aware that circumstances may arise where persons who have obtained judgments or decrees in their favor may have to be classed into a group for the purpose of being deprived of the fruits of their success, if the object of the Legislation is to promote a public purpose or secure some advantage, to a class of persons. Thus, the provisions in the Money Lenders Act which

requires the scaling down of decrees obtained by creditors against debtors, or the provisions of the tenancy laws which protect, from eviction tenants against whom decrees for eviction have been obtained by the landlords, or which provide for reduction of the rent, or the provisions of House Rent Control Act which protect tenants against landlords, may come under this class. In these cases the Legislature is entitled to say that the debtors or tenants as the case may be, may require special protection and that, for that purpose, even decrees obtained by creditors and landlords in law courts should not be enforced except to such limited extent as may be authorized by the statute. In those cases, there is a reasonable basis for the classification of "decree-holder-Landlords" or "decree-holder-money lenders" in one group and there is also a reasonable nexus between the basis of that classification on the one hand and the object sought to be achieved by the beneficent legislation on the other. But no such public purpose or welfare of the community as a whole is discernible in depriving Sri Bhupendra Kumar Bose of the fruits of his success in O.J.C. No. 72 of 1958. The only persons who will be benefited will be the elected councillors including the Chairman and the Vice-Chairman, but they were all parties to that judgment and could have gone up in appeal to the Supreme Court, if they were aggrieved by it. There is no satisfactory reason why the Governor should exercise in their favor his power of making Ordinance. In my opinion, therefore, Section 4 of the impugned Ordinance is violative of Article 14 and is consequently invalid.

19. The Advocate General thereupon contended that Sections 3 and 4 of the Ordinance should be read together and that all persons affected by our judgment in O.J.C. No. 72 of 1958 whether they were parties to that judgment or whether they may be future litigants who may spring up as a result of the pronouncement of that judgment, may well form one class. According to him the heavy financial expenditure or the administrative problems created by the judgment should be viewed as a whole and that it will not be proper to divide the litigants into two classes, namely (i) those who obtained judgments in their favour on the one hand and (ii) those who may initiate fresh litigation later on. In my opinion this contention is unsustainable. The observations of their Lordships of the Supreme Court Mahajan, Mukherjea and Das JJ. in Anwar Ali Sarkar's case, AIR 1952 SC 75 which I have quoted above, are emphatic on one point namely that "persons grouped together for the purpose of legislation must have common characteristics and must be similarly circumstanced. Their position must be substantially the same as regards the subject-matter of the legislation". I cannot conceive how a person who has obtained a judgment in his favour can be said to be similarly circumstanced with another person who might possibly initiate litigation in the future. The rights or the former have already been declared whereas the rights of the latter have not yet come into existence and it is hypothetical if any right will be declared in their favor by the law courts. To link up these two classes together and to say that there is a reasonable classification is, I think, arbitrary and irrational. Thus Sri Bose stands on a fundamentally different footing from any other person who may challenge the validity of the municipal elections either in respect of Cuttack Municipality or of any other Municipality in the State. I may, in this connection, refer to a Patna decision in *Briji Bhukan v. S.D.O., Siwan*[16], There some persons who by virtue of the law of limitation acquired rights in public lauds were grouped together with other persons who had not acquired any such right and Section 2(ii)(d) of the Bihar Land Encroachments Act (1950) was made applicable to both of them. It was held by Narayan J. and Das J. (as he then was) that such a classification was arbitrary and offended Article 14. It is true that they also held that the said provision offended Article 31(2) of the Constitution, but the reasons for which that clause was held to have offended Article 14 would apply in the present case also. Apart from these considerations, it should be remembered that the

Governor himself realized that the petitioner formed a class different from other litigants and consequently while enacting section 3 for the latter class of persons, he expressly enacted Section 4 so as to adversely affect the petitioner alone. It is therefore not open to the Advocate General to contend that the petitioner can be included in the class of 'future litigants' who may possibly bring cases against Councillors of other Municipalities, on grounds similar to those which were upheld in
O.J.C. No. 72 of 1958 (Orissa). In this connection the following observations of Mahajan C.J. in Meenakshi Mills' case, AIR 1955 S.C. 13 are relevant :

> "This Article not only guarantees equal protection as regards substantive laws but procedural laws also come within its ambit. The implication of the Article is that all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defense, with like protection and without discrimination".

Once a litigant secures a judgment in his favor the enforcement of that judgment is a matter of procedure. Section 4 of the Ordinance deprives that person of this procedural right. Section 3, however, deprives litigants whose cases may be pending and future litigants of their substantive right of challenging the validity of the elections on certain specified grounds. A litigant whose procedural right is affected is not similarly situated, with a litigant whose substantive right is affected and remains to be yet determined. To group the two classes of litigants together would be unnatural and also irrational.

20. The learned Advocate General cited the following instances in which the decisions either of the Supreme Court or other High Courts were rendered ineffective by validating Ordinances or Acts passed by the appropriate legislative authority.
Thus, in *Bengal Immunity Co. Ltd. v. State of Bihar*[17] their Lordships of the Supreme Court directed, by a majority, that

> "until Parliament by law provides otherwise the State of Bihar do forbear and abstain from imposing sales tax on out-of-State dealers in respect of sales or purchases that have taken place in the course of inter-State trade or commerce, even though the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar." Soon after the judgment of the Supreme Court was delivered, the President promulgated the Sales Tax Laws Validation Ordinance 1956 (Ordinance No. III of 1956) which was subsequently replaced by the Sales Tax Validation Act 1956 (Act No. 7 of 1956). By that Act the judgment of the Supreme Court was not rendered ineffective so far as the Bengal Immunity Co., Ltd. was concerned but sales tax levied or collected prior to the pronouncement of that judgment which were held illegal by that judgment were validated. In other words, this validating Act did not in any way affect the right conferred on the Bengal Immunity Co. by the judgment.

That right was affected by an amendment made to Article 286 of the Constitution by the Constitution (Sixth Amendment) Act 1956. A constitutional amendment stands on a different footing and is not controlled by Article 14. Again in AIR 1959 SC 149 the Supreme Court

passed the following order in favor of Basheshwar Nath :

> "The order of the Income Tax Commissioner, Delhi dated 29-1-1958 is set aside and all proceedings now pending for implementation of the order of the Union Government dated 5-7-54 are quashed".

Soon after the delivery of this judgment, the President promulgated the Indian Income Tax (Amendment) Ordinance 1959 (Ordinance No. 1 of 1959) but that Ordinance did not deprive Basheshwar Nath of the right which he obtained by the judgment of the Supreme Court but only made the precedent-value of that judgment ineffective in respect of other cases, and provided for interim arrangements until these cases were re-opened under the ordinary law. This Ordinance also does not show that the President deprived the successful suitor of the right which he obtained by the judgment of the Supreme Court.

21. The Advocate-General relied very much on the Himachal Pradesh Legislative Assembly (Constitution and Proceedings) Validation Ordinance 1958 (Ordinance No. VII of 1958) which was promulgated by the President in consequence of the decision of their Lordships of the Supreme Court in *Vinode Kumar v. State of Himachal Pradesh*[18], In that case their Lordships issued mandamus directing the State of Himachal Pradesh to forbear from giving effect to or acting in any manner on the basis of Himachal Pradesh Act No. XV of 1954, on the ground that the Himachal Pradesh Legislature was not properly constituted. By Ordinance No. VII of 1958 (which was replaced by Act 56 of 1958) it was directed that notwithstanding the judgment of the Supreme Court, it shall be deemed that the Himachal Pradesh Legislative Assembly was validly constituted and the Bills passed by the Himachal Pradesh Assembly shall be deemed to have been validly enacted. The Act is a very recent one which came into force on 30-12-1958 and it is not known whether its validity has subsequently been challenged before the Supreme Court. But even in this Act though the precedent effect of the Supreme Court judgment might have been removed there is no express provision to the effect that the order passed in favour of Vinode Kumar in AIR 1959 SC 223 was annulled. There is no provision corresponding to Section 4 of the Ordinance before us.

22. The validating Acts of the other Slate Legislative Assemblies (except in the Nagpur cases referred to later) have not gone so far as to deprive the successful suitor of the fruits of his success. Thus in *Durgeswar v. Secretary, Bar Council*[19], an Advocate named Durgeswar Dayal succeeded in an application under Article 226 of the Constitution and the Secretary of the Uttar Pradesh Bar Council was directed by the Allahabad High Court to include his name in the roll of Advocates without his having to pay any sum of money. The reason for this order was that the amendment to the Indian Bar Councils Act made by the Uttar Pradesh Amendment Act of 1950 was held to be ultra vires the Uttar Pradesh Legislature. Soon afterwards the Parliament passed the Bar Councils (Validation of Sate Laws) Act 1956 (Act 4 of 1956) validating the Indian Bar Councils (U. P. Amendment) Act 1950, but Parliament did not go further and say that the decision of the Allahabad High Court in AIR 1954 Allahabad 728 shall be deemed to be ineffective thereby compelling the successful suitor Durgeswar Dayal to pay the required sum of money before getting himself enrolled as an Advocate. This is also an instance where, though the precedent effect of the judgment of the Allahabad High Court was rendered nugatory, Parliament wisely refrained from striking down the judgment so far as its binding effect inter partes is concerned. Similarly, in *Mangtulal v. Radhashyam*[20], the landlord's (Mangtulal's) prayer for

eviction of his tenant from his house was dismissed on the ground that the Bihar Buildings (Lease, Rent and Eviction) Control Amendment Act 1951 was invalid. The Governor of Bihar thereupon promulgated the Bihar Buildings (Lease, Rent and Eviction) Control (Continuance) Ordinance 1952 (Bihar Ordinance No. V of 1952) nullifying the effect of the judgment of the Patna High Court so far as the validity of that amendment was concerned, but he did not proceed further and enact that the judgment in AIR 1953 Patna 14, shall be deemed to be ineffective as between the parties, thereby permitting eviction of the tenant by the landlord Mangtulal. The validity of that Ordinance was upheld by the Patna High Court in *Kedarnath v. Nagindra Narayan Sinha*[21],. That Court again held on 17th October 1955 in another case *Tata Iron and Steel Co. v. Bihar State*[22], that the amount of sales tax collected by a registered dealer from customers and paid over to Government cannot be treated as a part of the purchase-price so as to be included in the taxable turnover of the registered dealer. The Legislature thereupon passed the Bihar Sales Tax (Definition of Turnover and Validation of Assessments) Act, 1958 (Bihar Act 13 of 1958) by which they validated assessments made up to the 31st March 1956, on the basis of the inclusion of such amounts under the taxable turnover of the registered dealer. But as regards assessments made after that date they strictly followed the aforesaid Patna decision. Here also the Legislature did not completely render the Patna decision nugatory so far as the parties were concerned.

23. The aforesaid instances cited by the learned Advocate General himself are sufficient to show that the practice generally followed by legislative bodies in passing validating Acts in consequence of decisions of either the Supreme Court or the High Court is only to render ineffective the precedent effect of the judgment and not to annul the binding effect of that judgment inter partes. Doubtless, the Legislature's competence to annul judgments in appropriate cases has already been noticed and the only limitation is that while so annulling, it should not offend the fundamental rights especially those guaranteed in Article 14. The above mentioned instances are helpful, for enabling this Court to decide whether in the absence of a reasonable classification, it will be proper for a legislative authority to step in and deprive the successful litigant either in the High Court or in the Supreme Court, of the fruits of his success.

24. Section 5(1). This sub-section validates "all actions taken and powers exercised by the Councillors, Chairman and Vice Chairman of Cuttack Municipality prior to 15-1-1959". Such wide language is seldom used in validating past actions of public officials which have become invalid due to the judgment of a Court. If the sub-section had contained limiting words such as "all actions taken and powers exercised under the Municipal Act" or else if it had merely stated that "all actions taken and powers exercised which would have been otherwise valid but for the judgment of the High Court in O. J. C. No. 72 of 1958 (Orissa)" such a provision may not be open to any objection. In fact, after the pronouncement of the decision in O. J. C. No. 72 of 1958 (Orissa), on 11-12-58, such a provision became absolutely necessary because all actions taken and powers exercised under the Municipal Act from March 1958 till 11-12-1958 by the Chairman, Vice-Chairman and Councillors became invalid and unless validated, great injustice would be caused to innocent third parties. But unfortunately,
due presumably to bad drafting, the sub-section has been put in the widest possible
terms. Moreover, the wide language used in that sub-section would make it inconsistent with a several "existing laws" dealing with matters in concurrent list. For instance, suppose the Chairman had falsified accounts while purporting to act as Chairman of the Municipality and as such made himself liable for criminal prosecution under Section 477-A of the Indian Penal Code. But by virtue of sub-section (1) of Section 5 he may claim immunity from prosecution. There is a

clear inconsistency between section 5(1) of the Ordinance and Section 477-A, Indian Penal Code, i.e. an existing law which is a matter in the Concurrent List, (item No. 1). Similarly, suppose the Chairman has committed breach of contract while functioning as Chairman of the Municipality, he will be liable under the provisions of the Contract Act, which is a law dealing with a matter in the Concurrent List (item 3), but sub-section (1) of Section 5 gives him complete immunity from any action. Instances of this type can be multiplied. It is to avoid such inconsistencies that clause (2) of Article 254 requires that such laws of the Legislature of a State should be reserved for the consideration of the President and assented to by him. In the case of an Ordinance, the Instructions issued by the President under the proviso to clause (1) of Article 213 would cure such an invalidity, but it is admitted that no such previous Instructions were received from the President prior to the promulgation of the Ordinance in question. Sub-section (1) of Section 5 should therefore be held to be void to the extent of its repugnancy to the "existing laws" dealing with matters in the Concurrent List.

25. Mr. M. Mohanty thereupon contended that though there may be some omissions in that sub-section, we should, as a matter of construction supply the words "under the provisions of the Orissa Municipal Act" and construe the sub-section accordingly. He urged that the words "powers exercised" would necessarily imply that the Governor was thinking of the powers exercised under the Municipal Act only, inasmuch as the Chairman, the Vice-Chairman and the Councillors did not exercise powers under any other Act. There might be some basis for this argument if the words "actions taken" are not found in that sub-section. Those words, without any qualification, may mean immunity to the Chairman and Vice-Chairman in a manner not contemplated by the Governor. The petitioner filed an affidavit before us to the effect that prior to the promulgation of the Ordinance another application under Article 226 (O. J. C. No. 165 of 1958) had been filed by one Govind Das challenging the validity of the action of the Chairman in delegating his functions to the Vice-Chairman and that application is still pending. Sub-section (1) of Section 5 if construed ordinarily would validate that order of delegation made by the Chairman also. It is difficult to believe that the Governor contemplated that cases pending in respect of some other acts of the Chairman also should be validated by this sub-section. The Court cannot by adding some words remove the difficulty arising out of the natural construction of the sub-section.

26. This provision is also void for another reason. Section 375 of the Orissa Municipal Act makes the Chairman, the Vice-Chairman, Councillor, Officer, or servant, of the Municipal Council liable for the loss caused or mis-application of money or other property of the Municipal Council on account of his illegal act, omission, neglect or misconduct. By virtue of sub-section (1) of Section 5 however, the Chairman, Vice-Chairman and Councillors will escape such liability whereas the officers and servants of the Municipal Council will continue to be liable under that section. There seems to be no reasonable basis for thus conferring immunity on the Chairman, Vice-Chairman and Councilors of the Municipality and treat them differently from the officers and servants of the Municipality. This classification is arbitrary and would offend Article 14 of the Constitution. I must therefore pronounce sub-section (1) of Section 5 also to be invalid.

27. Mr. Misra next contended that even if it be held that section 4 of the Ordinance is not violative of Article 14 yet it will not suffice to annul the judgment in O. J. C. No. 72 of 1958 (Orissa). Section 4 consists of two parts. The first part says that any order of the Court declaring the election to Cuttack Municipality invalid on account of (i) the invalidity of the electoral rolls

arising out of the fixation of the qualifying date after the publication of the preliminary electoral rolls and (ii) the fixation of the date of polling in contravention of any of the provisions of the Municipal Act or of the rules framed thereunder shall have no legal effect whatsoever. Though the section has been expressly inserted to annul the judgment of this Court in O. J. C. No. 72 of 1958, the framers appear to have overlooked the main ground on which the elections were held to be invalid in that judgment. As already pointed out in the beginning, the invalidity of the elections arose not merely because the qualifying date was fixed after the publication of the preliminary electoral rolls and the statutory period for canvassing was abridged from 15 to 14 days, but also because the results of the elections were materially affected thereby. Doubtless, if such a result is a necessary consequence, it may be argued with some justification that express mention of the same is unnecessary in the validating provision. But it cannot be held that a mere contravention of the provisions of the Orissa Municipal Act or of the Municipal Election Rules dealing with the holding of elections, must necessarily result in prejudice. Thus the fixation of a qualifying date even after the publication of the preliminary electoral rolls may not cause prejudice if after such fixation, adequate interval is given to the parties concerned to file claims and objections. In fact, affidavits were filed by the opposite party in O. J. C. No. 72 of 1958 (Orissa), to show that no prejudice was caused by abridging the period for filing claims and objections to two days, but after a careful scrutiny of the affidavits and a consideration of the surrounding circumstances this Court held that the results of the elections were materially affected. Hence when the validating provision merely cures the invalidity arising out of the fixation of the qualifying date after the publication of the preliminary electoral roils and is completely silent about the results of the elections being materially affected thereby, it cannot be said to have annulled the judgment of this court in O. J. C. No. 72 of 1958. The same reasoning would also apply to the abridgment of the period of canvassing from 15 days to 14 days which also materially affected the results of the elections. This Court held, as a principle of law, that where a contravention of the Election Rules took place, the burden will be on the party maintaining the validity of the elections, to show affirmatively that the elections were not materially affected by such contravention. If the Governor wanted to annul the effect of the Court's decision in O. J. C. No. 72 of 1958, based on this principle of law, he should have made express provision to that effect in Section 4.

28. The learned Advocate General raised an ingenious argument based on the last portion of Section 4 which says "and the elections to the said Municipality are hereby validated". According to him these words are wider than the preceding words and would support the view that whatever may be the grounds on which the elections were held to be invalid by this Court in O. J. C. No. 72 of 1958 the elections should be deemed to have been lawfully validated. I am unable to accept this argument. If these words have such a wide connotation there was no point in referring, in the earlier portion of Section 4, to the invalidity arising out of the two specific grounds, mentioned above. Moreover, this argument overlooks the significance of the word "hereby" which in the context would refer to the preceding words of that Section. A reasonable construction would be that any defects arising out of those two grounds alone were sought to be cured by Section 4. I must therefore accept the contention of Mr. Misra that Section 4 has been so badly drafted as not to annul the judgment of this Court in O. J. C. No. 72 of 1958.

29. *Gulabrao Keshavrao Dhole v. Pandurang Bhanji*[23], may now be discussed as the learned Advocate General very much relied on it. The facts of that case were very similar to the facts here. A full Bench of the Nagpur High Court held in *Kanglu v. Chief Executive Officer*[24]. that the

electoral rolls of Godhu Constituency of Durg Janapada were not properly prepared and set aside the election of the successful candidate and directed the holding of fresh elections after due preparation and publication of the electoral rolls. The Legislature, however, stepped in, first with an Ordinance which was later followed by Madhya Pradesh Act No. I of 1955, the language of which is very similar to the language of the Ordinance here. Sub-section (2) of Section 4 of that Act reads as follows :-

> "Any order of a Court declaring any election invalid merely on the ground that the electoral rolls were invalid or on any of the grounds specified in sub-section (2) of section 3, shall be deemed to be and always to have been of no legal effect whatsoever."

The Full Bench of the Bombay High Court held in the aforesaid Bombay case that such an Act which had the effect of nullifying the judgment of the High Court was a valid enactment and that it would not amount to an encroachment by the Legislature on judicial functions. Their Lordships of the Bombay High Court, however, did not further examine the question whether that provision of the validating Act would be violative of Article 14 of the Constitution. Article 14 was discussed in some other connection and the question whether that Article had a bearing on the reasonableness or otherwise of the classification of the successful litigant in AIR 1955 Nagpur 49 (FB), for the purpose of being deprived of the fruits of his success, was not considered. Hence the aforesaid Bombay decision will not be of much help to the Advocate General.

30. It will be interesting to note that the savings provision in the Madhya Pradesh Act (Act 1 of 1955) has been drafted more carefully and is more restrictive than sub-section (1) of Section 5 of the Ordinance. That section reads as follows :

> "(5). Validation of acts done :- No act done by the Sabha or a Janapada or by
>
> any standing committee or by the outgoing councillors shall be called in question in any court whatsoever merely on the ground that the term of the Sabha or any standing committee or the councillors had expired on the 31st day of March, 1954 or that the outgoing councillors had continued to hold office until the election of all councillors from the rural and urban circles had been notified under the Act."

This provision does not validate all actions taken and powers exercised but only those actions taken and powers exercised which, but for the judgment of the Nagpur High Court AIR 1955 Nagpur 49 (FB), would have been valid. If the draftsman who drafted the Ordinance was anxious to follow the Nagpur model, I do not know why he overlooked the language of this section.

31. For the aforesaid reasons, I would hold that Section 4 and sub-section (1) of Section 5 of the Ordinance are invalid. I would further hold that Section 4 is not sufficient to annul the binding effect of the judgment of this Court, in O. J. C. No. 72 of 1958 on the parties to that judgment. The petition is, therefore, allowed and opposite parties 2 to 28 are permanently restrained by Mandamus from functioning as Councillors of Cuttack Municipality, or as the Chairman or Vice-Chairman of the said Municipality, as the case may be, on the strength of the Ordinance. Opposite Party No. 1 is also permanently restrained by Mandamus from enforcing the aforesaid

two provisions of the Ordinance. The petitioner will be entitled to the costs of this application. Hearing fee is assessed at Rs. 200/- (Rupees two hundred) to be apportioned equally between the State of Orissa on the one hand and the contesting Municipal Councillors on the other.

32. Before concluding this judgment I wish to mention that though under the Orissa High Court Rules a Division Bench has jurisdiction to hear this case, a Special Bench consisting of the Chief Justice Hon. Rao, J. and Hon. Das, J. heard the case in the earlier stages, but for the reasons mentioned in our order dated the 16th March, 1959, the hearing of the petition was continued by a Division Bench and judgment is being pronounced by the same Bench.

Das, J.

33. I agree.

Order accordingly.

Cases Referred.

[1]8 LR (Annotated) 808
[2] AIR 1959 SC 149 Article 14
[3] AIR 1958 SC 538
[4]1950 SCR 869
[5]1951 SCR 682
[6]1954 SCR 80
[7]1954 SCR 1117
[8]1955-1 SCR 1045
[9] AIR 1953 S.C. 91
[10] AIR 1953 S.C. 215
[11]1952 SCR 284
[12] AIR 1954 SC 545
[13] AIR 1955 SC 13
[14] O.J.C. No. 72 of 1958
[15] AIR 1944 FC 1
[16] AIR 1955 Pat 1
[17] AIR 1955 SC 661
[18] AIR 1959 SC 223
[19] AIR 1954 All 728
[20] AIR1953 Pat 14
[21] AIR 1954 Pat 97
[22] AIR 1956 Pat 92
[23]AIR 1957 Bom 266 (FB)
[24] AIR 1955 Nag 49