

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6132 of 2015

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1. Devesh Chandra Thakur, son of Late Awadh Thakur, resident of Athri Kothi, Dumra, P.S.- Dumra, District- Sitamarhi.
 2. Baidyanath Prasad, son of Late Raj Nandan Prasad, resident of Ward No. 1, Shankar Chowk, Dumri, P.S.- Dumri, District- Sitamarhi.

.... Petitioners

Versus

1. The Union of India through the Secretary, Ministry of Law & Justice, Government of India, New Delhi.
2. The Election Commission of India through its Secretary, Nirvachan Sadan, New Delhi.
3. Chief Election Commissioner, Election Commission of India, Nirvachan Sadan, New Delhi.
4. The State of Bihar through the Chief Secretary, Bihar, Patna.
5. Principal Secretary, Parliamentary Affairs Department, Bihar, Patna.
6. Chief Electoral Officer, Bihar, Patna.
7. The Bihar Legislative Council, Patna through its Secretary.

.... Respondents

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Appearance :

For the Petitioners : Mr. Abhinav Srivastava, Adv.

For the Respondents : Mr. Lalit Kishore (P.AAG)

Mr. Bishwa Bibhuti Kumar Singh, AC to P.AAG

Mr. S.D. Sanjay, Addl.S.G. (for U.O.I.)

Mr. Ravinder Kumar Sharma, C.G.C.

Mr. Sunil Kumar Singh (for Respondent No.3)

Mr. Kaushal Kumar Jha (for Vidhan Parishad)

Mr. J.P. Karn (Sr. Adv.) (for Election Comm. of India)

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 24-06-2015

This writ petition, filed in public interest, presents important constitutional and legal issues. Added to that, it pertains to the elections to the Legislative Council. Therefore, the caution and care with which the matter is required to be undertaken is much more. Since

what is presented before us is a purely legal issue, we have decided to make an attempt to come out with a solution to the extent possible, in the given circumstances.

The Constitution of India provides for bicameral Legislatures in the States. However, it is in the discretion of the concerned States whether or not to have the Legislative Council. Chapter-3 of Part-IV of the Constitution makes this aspect clear. In the State of Bihar, there existed a Legislative Council even before the Constitution came into force.

Article-171 of the Constitution is to the effect that the total seats in the Council shall be divided into various categories, namely $1/3^{\text{rd}}$ of the members to be elected by the heads of Municipalities, District Boards or other local authorities, another $1/3^{\text{rd}}$ to be elected by the Legislative Assembly and remaining $1/3^{\text{rd}}$ to be elected by the graduates and teachers etc. In this case, we are concerned with the members to be elected by the heads of the local bodies.

The term of the members of Legislative Council is almost on par with that of Rajya Sabha, i.e. six years. An important attribute of the Legislative Councils, or, for that matter, Rajya Sabha, is the continuity of the House.



Article-172 mandates that there shall not be dissolution of the Council. In the Representation of the People Act (for short 'the Act'), the Parliament made adequate provision for this purpose. Section-156 is to the effect that the Governor shall issue orders to ensure that at the initial stage, the term of 1/3rd of members of each category is two years, next 1/3rd members of such categories is four years and that of the remaining 1/3rd, members six years. The sole objective is to ensure that 1/3rd of the members of every category retire, at the end of two years and fresh members are elected in their place.

The exercise referable to Section-156 of the Act was undertaken by the Governor of Bihar through a notification dated 17.6.1953, Annexure-1. To determine the members whose term shall be two years, four years or six years, as the case may be, lots were drawn by issuing a notification dated 20th June, 1953 (Annexure-2). After that exercise, a notification, Annexure-3, was published by the Legislative Council on July 7, 1953. In the category of local authority constituencies, the term of the following members was determined to be two years:-

1. Shri Kumar Jha
2. Shri Vishnu Shankar
3. Shri Baidyanath Mishra
4. Shri Ram Bahadur Roy
5. Shri Beer Narain Chand

6. Shri Sagar Mohan Pathak
7. Shri Kanta Kumar Lal
8. Shri Shambhunath Roy

The term of the following as four years:-

1. Shri Brij Raj Bahadur
2. Shri Mahenth Mahadevanand Giri
3. Shri Sheenath Pd.
4. Shri Mathura Pd. Singh
5. Shri Brajendra Bahadur
6. Shri Kumar Kalyan Lal
7. Shri Mayanand Thakur
8. Shri Ram Prakash Lal

and for the remaining eight candidates, the term was fixed as six years. It is important to note that the constituency, from which each candidate is elected, is chronicled from time to time.

It is axiomatic that the elections are held on completion of term of two years or the four years, as the case may be, and the same pattern continued. A sort of deadlock came into existence in the year 1976 in view of the fact that the elections to the local bodies were not conducted at all. Therefore, the biennial elections were not held to elect the members of the Council, from that category. The same hiatus continued till the year 2003, by which time, the elections to the local bodies were held.

All the 24 seats of the Council, in the category of local bodies remained vacant by that time. Contrary to the mandate under the Constitution as well as the



Representation of People Act, elections to all the 24 seats were held at a time, in the year 2003. The term of all the 24 candidates expired in the year 2009. Once again elections were held *en bloc* to all the 24 seats in that year. The term of the candidates so elected is going to expire in July, 2015.

Complaining that serious constitutional and statutory violation is taking place on account of the holding of elections to all the 24 seats in the Council at a time, C.W.J.C. No.7533 of 2009 was filed before this Court by way of Public Interest Litigation. On being convinced that the illegality and violation is taking place, this Court issued notice to the Attorney General. The latter, in turn, opined that the situation can be salvaged only by amending Section-156 of the Act. Taking note of the same, the writ petition was closed requiring the Election Commission to address a letter to the Government of India to consider the feasibility of taking steps for amending Section-156 of the Act. The matter did not move further in any manner, whatever, ever since then.

The present writ petition is filed with a prayer to direct the respondents herein to take steps, for honouring the mandate contained in Article-172(2) of the Constitution

of India and Section-156 of the Act in such a way that the elections are held in such a way that the continuity of the members of the local bodies categories is ensured and thereby the spirit of law is honoured.

The matter was listed before us on 8.5.2015. It was adjourned on three occasions. On 21.5.2015, arguments on behalf of the petitioners as well as the respondents, in particular the Election Commission, were heard at some length. After taking note of the fact that a serious violation of law has taken place and is continuing, we gave indication to the Election Commission as to how the situation can be salvaged; in the following terms:-

“.....We are of the view that it is not difficult to meet the extraordinary situation and to bring about compliance with the mandate under Article-172(2) read with Section 156 of the Representation of People Act. What one has to do is that the election, which is scheduled to take place in July for the 24 seats of local bodies, may be conducted, but in such a way that the term of 1/3rd of such members, i.e. 8, shall be for two years, another 1/3rd for four years and the remaining for the full term of six years. Once this is done, total compliance with the provisions of law would emerge. We are also of the prima facie view that this course would not be conflict with any provisions of law and, on the other hand, it would bring about constitutionality.”

The Court closed for vacation from 24.5.2015 onwards. A Press Note in relation to the election on 24 seats of Legislative Council under the local bodies



categories was issued on 4.6.2015. This was followed by a notification on 11.6.2015. It does not appear that the order passed by this Court was taken note of and no classification of terms was indicated. The petitioners filed an application to amend the prayer in the writ petition, to bring within its fold the present elections also. The petitioners plead that on account of the holding of elections for all the 24 seats for full term at a time, the mandate contained in Chapter-3 of Part-VI of the Constitution as well as Section-156 of the Act is violated and that in spite of the directions issued by this Court on earlier occasion no tangible steps were taken. We allow the I.A.

The Election Commission filed a detailed counter affidavit. It is admitted that the elections are being conducted for the full term, of 6 years for all the 24 seats of the Council under the local bodies category and for correction of the anomaly in this regard, a letter has been addressed to the Union of India, Ministry of Law and Justice, to consider the feasibility of causing amendment to Section-156 of the Act.

Shri V.K. Kanth, learned senior counsel, submits that whatever may have been the justification for not holding the election for more than a decade for the



seats in the Legislative Council earmarked for local bodies, at least when the elections were conducted, it ought to have been ensured that the continuity, contemplated under the Constitution as well as the Act is ensured. He contends that in the year 1953 itself, the members whose term shall be two years, four years and six years, as the case may be, was determined by drawing lots and thereby the corresponding constituencies were also identified and in this view of the matter, there should not have been any difficulty in replicating the same process, so that the 1/3rd of the members of that category lay off their office every two years. He contends that the very purpose of providing the mechanism of expiry of term of 1/3rd of members of the Council under each category after every two years is that the Government has the benefit of the experience and wisdom of such members and while the persons who have completed the term walk away, new blood is inducted in a phased manner.

He submits that though the Attorney General, at one point of time, opined that it needs an amendment to Section-156 of the Act to salvage the situation, on a close analysis, it would emerge that such an amendment is not warranted at all. He further submits that when the

Election Commission did not feel the necessity of there being an amendment to conduct the elections to all the 24 seats at a time, it cannot insist on there being such amendment, to comply with the provision of law.

Shri S.D. Sanjay, learned Additional Solicitor General of India, on behalf of the Union of India, submits that Article-172 of the Constitution and Section-156 of the Act are clear in their purport and the present situation has arisen not on account of any ambiguity in law, but on account of failure of the machinery to conduct the elections at the relevant point of time. He submits that when extraordinary situation has emerged on account of certain lapses or failures, the Court can certainly rectify them through the process of interpretation, instead of requiring the amendment to the provision of law.

Shri J.P. Karn, learned Standing Counsel for the Election Commission of India, submits that the Commission was handicapped from holding elections in the year 1976 and soon after the elections were held to the local bodies, the process was commenced to fill the vacancies. He submits that though what is occurring at present does not accord with the law, the remedy can be found in the form of amendment to Section-156 of the Act.

However, he summed up the arguments stating that the Commission is prepared to undertake any steps that may be indicated by this Court, since the entire effort is only to ensure compliance with the Constitution and the Act.

Shri Lalit Kishore, learned Principal Additional Advocate General appearing for the State of Bihar, advanced arguments in somewhat different direction. He contends that once a Division Bench of this Court has taken the view that it is only through amendment to the Act, that the situation can be remedied, any direction at this stage would not be in accordance with the law. He further submits that the bar contained under Article-329 of the Constitution of India comes into play. Reliance is also placed upon the judgment of Allahabad High Court in *Sudarsh Awasthi v. Election Commission of India & Ors.*¹

The legal issue, which this Court is required to deal with is somewhat complicated. We proceed to undertake discussion of the matter by adding a caveat that what we propose to do cannot be said to be the ultimate solution and the endeavour is only to ensure compliance with the provisions of the Constitution of India and the Representation of the People Act.

1. AIR 2006 ALLAHABAD 111.



It is not necessary to state in detail the composition of a bicameral House and the object, underlying it. The elections to the Legislative Assembly are conducted or held once in five years, unless the Assemblies are dissolved half way through. Whenever elections are conducted, an altogether new House comes into existence. That is why the Lok Sabha is referred with a specific number, after each election such as IX or X Lok Sabha. In contrast, the Rajya Sabha is a continuous body and it never ceases to exist or from functioning. 1/3rd of the members lay down office on expiry of every two years and 2/3rd member continue. The vacant seats are filled up. Thereby, the nation would have the benefit of the experience of the members without any interruption. Same situation obtains in respect of Legislative Councils, wherever there exist.

Article-172 of the Constitution of India reads as follows:-

“172. Duration of State Legislatures.- (1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for [five years] from the date appointed for its first meeting and no longer and the expiration of the said period of [five years] shall operate as a dissolution of the Assembly:

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased

to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.”

From a perusal of Clause-2 thereof it becomes clear that the Council shall be a continuous body and on expiry of every second year, 1/3rd of members shall be elected in accordance with the provisions made by the Parliament in that behalf. Section-156 of the Act serves this purpose. It reads:-

“156. Term of office of members of State Legislative Councils.—(1) The term of office of a member of the Legislative Council of a State, other than a member chosen to fill a casual vacancy, shall be six years, but upon the first constitution of the Council the Governor shall, after consultation with the Election Commission, make by order such provision as he thinks fit for curtailing the term of office of some of the members then chosen in order that, as nearly as may be, one-third of the members holding seats of each class shall retire in every second year thereafter.

(2) A member chosen to fill a casual vacancy shall be chosen to serve for the remainder of his predecessor’s term of office.”

A close analysis of Section-156 of the Act would give an indication that (a) the term of a member of a Legislative Council in the ordinary course shall be six years; (b) the Governor is vested with the power to fix the terms of the members in such a way that 1/3rd of them



hold the office for two years, another 1/3rd for four years and remaining 1/3rd for six years at the initial stage and (c) the objective of fixing such differential terms is to ensure that the Council functions as a continuous body with the retirement of 1/3rd of the members and induction of new member, on expiry of every two years.

Though the step that is required to be taken by the Governor under Section-156 of the Act may appear to be an initial one, it would have the cascading effect throughout the life of the Council and that constitutes the basis to ensure continuity. It is difficult to accept the contention that once the Governor exercises his power under Section-156 of the Act at the initial stage, it comes to an end and thereafter it ceases to have any relevance at all. If one needs an example to demonstrate that such an approach would defeat the very scheme contemplated under the Constitution of India, the present case provides one. On account of the break that occurred in the year 1976, all the 24 seats earmarked for local bodies category became vacant, in a phased manner.

If the situation became congenial for holding elections for local bodies in the year 2003, the Election Commission as well as the Council were required to ensure



that the same pattern in which the vacancies arose, is revived. Instead, they chose to fill all the seats for the full term of 6 years, at a time. This resulted in defeating of the scheme of Section-156 of the Act or, for that matter, Article-172(2) of the Constitution. On the one hand, the seats in respect of other categories such as those to be elected by M.L.As, teachers and graduates were being filled to the extent of 1/3rd on expiry of every two years, and on the other hand, seats that were for local bodies that they were filled *en bloc* on expiry of every six years. It is brought to our notice that even as regards the category seats by way of nomination by the Governor, the same pattern is continuing.

All the respondents are in agreement on the fact that there is a clear violation of law on account of the *en bloc* filling all the seats at a time. What, however, they plead is that an amendment to Section-156 of the Act is needed to salvage the situation. We find it difficult to accept this submission. The occasion to amend the law would arise if only the implementation thereof has led to anomalous situations. The law contained in Article 172 of Constitution and Section-156 of the Act is clear in this behalf and the entire country is abiding by it. The



extraordinary situation has emerged only on account of the lapse of the State Government to conduct elections to local bodies at the relevant point of time. That, in turn, disabled the Election Commission of India to conduct elections to the seats in the Legislative Council earmarked for local bodies once in every two years.

When the situation itself emerged on account of a human or institutional error or non-functioning, it is totally impermissible to attribute any disability to the law itself. If someone has brought into existence a situation, it is for him to take necessary steps, to accord with the law once again, instead of blaming the law itself. We have already mentioned that neither the Election Commission nor the Legislative Council looked into the law as to whether it was permissible for them to hold elections *en bloc* for all the 24 seats at a time. When they did that without amendment, they cannot take that plea to bring about orderliness and compliance.

The contention referable to Article-329 of the Constitution of India is advanced by the State Government. We are conscious of the law laid down in this behalf, and in fact, the text of the Article, itself is clear. The total prohibition ordained by that provision is that the Court

shall not a) interfere with the process of delineation of constituencies and b) once an election process commences, it shall not interdict the same, much less it can interfere with the result of the election. The only remedy provided to the affected candidates is to file an election petition.

In the instant case, there is no question of touching any delineation of constituencies. Secondly, we do not intend to interfere with the process of election even in the slightest manner. Notwithstanding the fact that the election notification was issued even while the writ petition, and almost ignoring the order dated 21.5.2015, we do not propose to meddle with the election process even remotely. The election process has to go on as per schedule in every minor aspect. The only difference would be that out of 24 seats for which elections are being held, a division into three sets has to be made and the term of 1/3rd members each must be restricted to two years, four years and six years respectively. For this purpose, neither it is necessary to issue a fresh notification nor to cancel the one which was already issued.

Another submission is that the observation is made by this Court in the earlier writ petition i.e. C.W.J.C. No.7533 of 2009 would come into way. With great respect

to the learned counsel, we find that except that this Court took into account, the opinion expressed by the Attorney General and required the organs of the State to take further steps, not a word was said about the merits of the matter.

Our hesitation in this regard is virtually wiped out with the unequivocal submission made by the learned Additional Solicitor General to the effect that it is not at all necessary to amend Section-156 of the Act to salvage the present situation. To be precise, his contention is that a purposive and pragmatic interpretation of the same would certainly ensure that the legislative intent and mandate is respected and a continuous violation of law which is going on for the past one decade, is arrested in a respectable way.

It is true that the division of the seats that will have limited terms has taken place in the year 1953 by drawing of lots, under the order of the Governor and such a step is required to be taken only at the initial stage. We would have identified those constituencies by referring to the constituencies held by the respective members who are shown in Annexure-3 of the writ petition. However, certain important changes have taken place ever since. Firstly, the



State of Jharkhand was carved out from the State of Bihar and several districts which were large in the year 1953 have since been divided and sub-divided. Therefore, we can not pick up a readily available list of constituencies, in this behalf. The Legislative Council as well as the Election Commission can certainly take up the work of identifying the constituencies which were held by the respective members mentioned in Annexure-3 to the writ petition as a result of drawing of lots in the year 1953 on the directions issued by the Governor in exercise of powers under Section-156 of the Act. If, for any reason, that exercise is not possible, they may take recourse to drawal of lots or determine the seats on the basis of authenticated record, available with the House. This would not seriously impair the rights of any candidates. The reason is that a candidate who is elected for a term of two years can contest once again from the same constituency and if he has gained the confidence of the voters, there is no reason why he cannot be re-elected for the remaining part of the term. Same is the case with the members elected four years.

In the case of Sudarsh Awasthi (supra) the Allahabad High court did not deal with any of the provisions of law and left the matter at that. We find it

difficult to treat it as a precedent on the subject.

In the entire process, our endeavour is only to ensure that the High Court does not remain oblivious to the patent illegality that is continuing for the past more than a decade and endeavour is only to ensure the compliance with the provisions of the Constitution of India and the law made by the Parliament. Even if a second view is possible on this issue, a beginning has to be made so that an authoritative pronouncement comes in one form or the other.

The timing of adjudication of matter of this nature also becomes important. The elections are scheduled to take place on 7th July, 2015. Once elections take place, the protection for the members under the first part of Section-156 of the Act comes into play and there is no way, that the term can be curtailed to less than six years. The appropriate stage is the one, obtaining as of now.

For the foregoing reasons, we dispose of the writ petition directing that the Election Commission, in consultation with the Legislative Council, Bihar shall identify 1/3rd of the 24 seats earmarked for local authorities for a term of two years, another 1/3rd seats, for

a term of four years and the remaining 1/3rd, for six years by issuing necessary notification, amendment or clarification, as the case may be, by 30th of June, 2015. The Election Programme shall remain untouched.

Learned Principal Additional Advocate General made an oral request for leave to file Appeal in the Supreme Court.

We are not inclined to grant the leave for two reasons. The first is that the State Government has hardly a role to play in this matter. The second is that except that we have directed the compliance with the provisions of law, we did not lay down any new principle of law nor did we strike down any notification, not to speak of any provision of law. Therefore, we reject the prayer for leave.

Interlocutory application, if any, stands disposed of.

There shall be no order as to costs.

(L. Narasimha Reddy,CJ)

(Sudhir Singh, J)

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