

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.1291 of 2021

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1. Vimlesh Kumar son of Rambali Rai resident of Village- Khaira, P.O. Nisurpur, P.S.- Tikari, District- Gaya (Bihar), PIN Code No. 824236.
 2. Surendra Prasad son of late Lala Sao resident of Village- Makhpa, P.O. Chiraili, P.S.- Tikari, District- Gaya (Bihar), PIN Code No. 824236.

... .. Petitioners

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Secretariat, Patna.
2. The Principal Secretary, Urban Development Department, Government of Bihar, Secretariat, Patna.
3. The Principal Secretary, Rural Development Department, Government of Bihar, Secretariat, Patna.
4. The Commissioner, Gaya.
5. The District Magistrate, Gaya, District- Gaya.
6. The Sub- Divisional Magistrate, Tekari, District- Gaya.
7. The Executive Officer, Nagar Panchayat at Tikari, District- Gaya.

... .. Respondents

Appearance :

For the Petitioners	:	Mr. Ajay Prasad, Advocate Mr. Ajit Kumar Sinha, Advocate Mr. Kaushal Kumar, Advocate
For the Respondent State:		Mr. Abbas Haider, S.C.-6
For the Respondent Nagar Panchayat	:	Mr. Ashok Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date : 07.09.2021

Petitioner No. 1 claims to be elected Mukhiya of Chhatauni Panchayat and petitioner No. 2, that of Aamakuan Panchayat under Tekari Prakhand of district Gaya, who were elected in 2016. They filed this writ application seeking a direction to the Divisional Commissioner, Magadh Division, Gaya, and the District Magistrate, Gaya, to dispose of their objections and



representations dated 05.01.2021 filed in response to a notice published in the newspaper daily 'Hindustan' on 27.12.2020 against proposed up-gradation of Nagar Panchayat Tekari into Nagar Parishad by including certain villages including Makhpa, Nisurpur, Chiraili and Jagdishpur of the Gram Panchayats of which the petitioners are Mukhiya. During the pendency of this writ application, Tekari Nagar Panchayat has been up-graded and final notification in this regard has been published.

2. By filing I.A. No. 1 of 2021, the petitioners have sought for addition of the State Election Commission, Bihar, through its Secretary as party-respondent as the Election Commission is the body competent to hold the election of the local bodies. Further, they have filed I.A. No. 2 of 2021 seeking quashing of the said notification dated 26.12.2020 in response to which they had earlier filed the objections as noted above. Further, by filing I.A. No. 3 of 2021, the petitioners are seeking quashing of the same gazette notification dated 26.12.2020 inviting objections, which was published in newspaper on 27.12.2020. The petitioners have filed I.A. No. 4 of 2021 as during the pendency of the writ application, final notification dated 03.03.2021 has been issued by the Urban Development and Housing Department, Government of Bihar, whereby the villages in question have been



included with the up-graded Nagar Parishad Tekari and the petitioners seek to question the legality of the said notification by way of amendment.

3. It may be noted, at this stage, that Section 3 of the Bihar Municipal Act, 2007 confers upon the State Government an authority to declare its intention to specify such area to be a larger urban area or a medium urban area or a transitional area, after making such enquiry as it may deem fit and having regard to the population of any urban area, density of population therein, the revenue generated for the local administration of such area, the percentage of employment in non-agricultural activity in such area, economic importance of such area and such other factors as may be prescribed, by notification. The first *proviso* to Section 3(1) of the Act, however, provides that no such declaration shall be made unless the population, (a) in the case of a larger urban area, is two lacs or more, (b) in the case of medium urban area, is forty thousand or more but is less than two lacs, and (c) in the case of a transitional area, that is a small town, is twelve thousand and more but not more than forty thousand. The second *proviso* to Section 3(1) prescribes that the non-agricultural population in all cases shall be seventy five per cent or more.



4. The second *proviso* has been subsequently substituted, initially with the promulgation of an Ordinance on 12.05.2020 under Article 213 (1) of the Constitution of India and subsequently by the Bihar Municipal (Amendment) Act, 2020, notified on 10.08.2020, substituting the same with the following : -

“Provided further that the total population of main cultivator workers and marginal cultivator workers shall be below fifty percent of total population of workers in such area in all cases.”

5. In paragraph 9 of the writ application, the petitioners have attempted to make out a case that the said villages cannot be merged as the criteria fixed for agricultural land is not specified inasmuch as more than 50 percent of land, nearly 75 percent to 80 percent is agricultural.

6. In nutshell, it is the petitioners' case that the up-gradation of Nagar Panchayat, Tekari into Nagar Parishad by including the four villages, namely, Makhpa, Nisurpur, Chiraili and Jagdishpur, is not in conformity with the mandatory requirement as prescribed under the second *proviso* to Section 3 of the Act. The petitioners have asserted that a number of agriculturists of the village have filed a representation before the authority concerned and even the Agriculture Department has



issued certificate which shows that 85-98 percent of land of the villages concerned is agricultural in nature. It is their case that without obtaining any objection from the villagers of the concerned villages, the notification has been issued converting them into municipal area, which is impermissible.

7. The petitioners are seeking an interim order from this Court against the impugned action on the ground that if no stay order is granted, “the petitioners will come on road and large number of people would start agitation”. In I.A. No. 4 of 2021, it has been stated that the amendment Act does not disclose that the calculation was to be made on the basis of census 2011. Further, no calculation of census has been brought on record by the respondent authorities, the petitioners assert in their I.A. No. 4 of 2021. It is the petitioners’ case that the determination for the purpose of up-gradation of Nagar Parishad has been made on the basis of 2011 old census, which is not logical.

8. Counter affidavits have been filed on behalf of the respondents, wherein it has been stated that objection filed by the petitioners were considered by a duly constituted five-men committee and the same having been found untenable were rejected on the basis of report submitted by the Committee. It has been stated that after amendment in Section 3(1) of the Act, reports



were solicited from the District Magistrates of the concerned districts regarding proposals for the constitution of new local urban bodies and re-constitution of old local urban bodies. After receipt of the proposals from the various District Magistrates, including the District Magistrate, Gaya, the Urban Development and Housing Department has come out with various notifications including the said notification dated 26.12.2020, in exercise of powers under Section 3(a)(A), 4, 5, 6 and 8 of the Act.

9. Mr. Ajay Prasad, learned counsel appearing on behalf of the petitioners has submitted that the respondents have failed to bring on record a copy of the census to justify their decision to up-grade Tekari Nagar Panchayat into a Parishad including the four villages and for the said reason the action requires interference by this Court. He has submitted that the notification dated 26.12.2020 on the basis of 2011 census is not at all tenable in view of subsequent amendment in Section 3 of the Act. According to him, the respondents have not appreciated the requirement of Section 23 of the General Clauses Act, while taking the impugned decision to merge the four villages into up-graded Tekari Nagar Parishad.

10. I have carefully examined the pleadings on record. The power to up-grade/constitution of an urban area/ constitution of a municipal area is in the State Government to be exercised in



accordance with the provisions under Sections 3, 4, 5, 6, 7 and 8. Before amendment in second *proviso* to Section 3, State Government was empowered to declare its intention to specify such area to be larger urban area or medium urban area or a transitional area subject to the two provisos mentioned thereunder.

11. The first *proviso* prohibits such categorization unless the population in case of larger urban area is two lakhs or more; in case of medium urban area, it is 40000 (forty thousand), but less than two lakhs and, in case of transitional area, i.e. a small town, 12000 (twelve thousand) or more, but not more than 40000 (forty thousand). The second *proviso*, as amended, mandates that in all such cases, the total population of main cultivator workers and marginal cultivator workers shall be below 50 percent of the total population of the workers in such area. Before amendment in the second *proviso* 'non-agricultural population' was the determining factor and required that non-agricultural population should be 75 percent or more.

12. Evidently thus, before coming into force of the Bihar Municipal (Amendment) Ordinance, 2020, which subsequently became an Act of Legislature, namely, Bihar Municipal (Amendment) Act, 2020 (Act 13 of 2020), determination, under the second *proviso* to sub-section (1) of Section 3, was non-



agricultural population and, unless non-agricultural population was more than 75 percent, a declaration under Section 3(1) constituting a municipal area could not be made.

13. As has been noticed above, after publication of declaration under Section 4 of the Act, the petitioners had filed their objections containing signatures of other villagers also. The objection has been brought on record by way of Annexure-1 to the writ application. In the objection, the petitioners have asserted that entire land other than the lands in the nature of canal, pond, paine and playing ground was agricultural of the Nisurpur, Chiraili and Jagdishpur. It was asserted that 85 percent of the lands in the said three villages being agricultural in nature, the decision to include the said village with Tekari Nagar Parishad upon its up-gradation is contrary to the provisions under the Act.

14. No objection was raised questioning the legality of the declaration with reference to the requirement under the amended second *proviso* to Section 3(1) of the Act, which changed the very basis of determination, prescribing that total population of main cultivator workers and marginal cultivator workers shall be below 50 percent of total population of workers in such area in all the cases. No plea was ever taken by the petitioners with reference



to the requirements under second *proviso* to Section 3(1) of the Act.

15. It is to be kept in mind that the provisions under the Bihar Municipal Act, 2007, in relation to constitution of municipal area and classification of municipality is in accord with Article 243-Q of the Constitution of India, which reads as under : -

"243-Q. Constitution of Municipalities.

—(1) *There shall be constituted in every State,—*

(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area;

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.



(2) In this article, “a transitional area”, “a smaller urban area” or “a larger urban area” means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part.”

16. If an urban area is specified to be an industrial area by a notification issued by the Governor having regard to size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area, a Municipality may not be constituted for such area, stipulates the *proviso* to clause (1) of Article 243-Q of the Constitution. Clause (2) of Article 243-Q of the Constitution refers to the transitional area, small urban area or larger urban area as such area as the Governor having regard to the population of the area, density of the population therein, revenue generated for local administration, the percentage of employment in non-agricultural activities, economic importance or such other factors may deem fit.

17. Under the constitutional scheme of Part-IX-A of the Constitution, it can be easily noticed that the jurisdiction of



declaring transitional area/urban area is upon the Governor of the State depending upon various factors as mentioned therein. The municipal areas have been classified in Section 7 of the Act in conformity with the requirement Article 243-Q of the Constitution. It is clear from Clause (2) of Article 243-Q of the Constitution that percentage of employment in non-agricultural activities, the economic importance or such other factors are relevant considerations for the Governor to constitute a municipal area.

18. In the counter affidavit filed on behalf of the respondents, particularly respondents No. 5 and 6, it has been stated that after receipt of communication from the Urban Development and Housing Department by the Collectorate for sending proposals for up-gradations, the District Magistrate, Gaya, had constitute a three-men committee based on 2011 census.

19. Based on 2011 census, following was found to be the break-up of total number of workers. A total population of main cultivator workers, marginal cultivator workers and the total population of workers as under : -

Name of village	Total No. of Worker	Main Worker	Marginal Worker	Percentage
Jagdishpur	129	9	1	7.75%
Nisurpur	453	71	15	18.98%
Chiraili	1191	145	18	13.68%
Makhpa	854	91	34	14.63%



20. It has been stated that for considering the objection filed by the petitioners, a five-men committee was constituted. Based on the report of five-men committee, the District Magistrate, Gaya, rejected the objection filed by the petitioners.

21. Indisputably, the villages in question are adjacent to the Nagar Panchayat Tekari, which has been up-graded to Nagar Parishad. By way of Annexure-F, the respondents have brought on record total number of workers, total number of main cultivator workers and total number of marginal cultivator workers to make out a case that total number of main cultivator workers and total number of marginal cultivator workers is much less than the total population workers in the area.

22. Mr. Ajay Prasad, learned counsel appearing on behalf of the petitioners has attempted to convince this Court that the said determination of population is based on 2011 census and, therefore, determination for the purpose of up-gradation of the Nagar Panchayat is erroneous. The said submission is not acceptable to this Court no census operation after 2011 census has been completed. In such circumstance, reliance placed by the respondent State of Bihar on 2011 census, in my opinion, cannot be faulted with.



23. The Supreme Court in case of *Champa Lal v. State of Rajasthan*, reported in (2018) 16 SCC 356, had the occasion to examine the power/discretion of constitution of Municipality or up-gradation of an area to Municipality under Articles 243-Q(2) of the Constitution. The Court conclusively held that the Governor is not free to notify the 'areas' in his absolute discretion but is required to fix parameters necessary to determine whether a particular area is a transitional area or a smaller urban area or larger urban area with due regard to the factors mentioned therein. The Supreme Court further held that such parameters must be uniform for the entire state and only after determination of the parameters, various municipal bodies contemplated under Article 243-Q(1) could be constituted.

24. Evidently, to achieve the said requirement of uniformity, provisions have been made in Section 3 of the Act laying down parameters to be followed for the entire State of Bihar. In the present case, certain issues were raised about the residents of the villages of losing their privileges, which they had as the residents of the Panchayat, with inclusion of the said villages in the up-graded Nagar Parishad. This aspect, the Supreme Court has occasion to deal with in case of *State of Maharashtra v. Jalgaon Municipal Council*, reported in (2003) 9 SCC 731,



wherein it has been held that every change in mode of governance needs some readjustments. Paragraph 35 of the said decision can be usefully quoted, which reads as under: -

“35. So far as the objections preferred by the Municipal Council collectively and the individual 239 objectors are concerned, no one has alleged that any one of the factors contemplated as relevant by Article 243-Q proviso of the Constitution was absent or non-existent. None has disputed the correctness of the population figure as totalled by the census. The contentions raised are that the development works initiated by the Municipal Council may be adversely affected or that the taxes would increase while the quantum of the State's financial aid or grant may be reduced. Though it is for the State Government to apply its mind to the relevance and weight of the objections preferred, still we may note the submissions made by the learned counsel for the appellant State Government that a mere change in the constitution of the local self-government does not necessarily entail discontinuance of development projects and there is no reason to apprehend that they would not be continued. A change in governance is involved at every election though the administration continues with the Municipal Council. At the time of an election certain development works would be pending in progress which would naturally be



taken over by the successor Municipal Council. Just as any new Municipal Council would take over the ongoing projects initiated by the predecessor Municipal Council so also a Municipal Corporation newly brought into being shall take over the continuing projects of the previous Municipal Council. Every change in mode of governance needs some readjustments. Need for switching over from a Municipal Council to a Municipal Corporation mode of administration is occasioned by growth of population and prosperity in any particular urban area. People share the prosperity and so must be prepared to pay the additional price by way of additional taxes, submitted the learned counsel for the State Government and we found substance therein”

25. In view of the above mentioned discussions, I am of the view that the objection filed by the petitioners under Section 5 of the Act did not point out any deviation from the requirement of the second *proviso* to sub-section (1) of Section 3 of the Act. The rejection of their objection, on basis of materials relied on by the respondents does not require interference by this Court exercising power of judicial review.

26. *A priori*, the subsequent notification declaring the villages in question to be part of up-graded Nagar Parishad Tekari



cannot be said to be illegal, in contravention of statutory prescriptions or otherwise unauthorized/unsustainable.

27. Situated thus, in the Court’s opinion, this application is devoid of merit and is accordingly dismissed.

28. There shall, however, be no order as to costs.

(Chakradhari Sharan Singh, J)

Pawan/-

AFR/NAFR	NAFR
CAV DATE	25.08.2021
Uploading Date	10.09.2021
Transmission Date	N/A

