

Court No. - 1

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Case :- P.I.L. CIVIL No. - 6929 of 2021

Petitioner :- Ajay Kumar

Respondent :- State Of U.P. Thru. Addl.Chief Secy. Panchayat Raj,Lko.&Ors.

Counsel for Petitioner :- Mohd.Ataf Mansoor,Nitin Kapoor,Tanay Chaudhary

Counsel for Respondent :- C.S.C.,Anurag Kumar Singh

Hon'ble Ritu Raj Awasthi,J.

Hon'ble Manish Mathur,J.

Heard Mr. Mohd. Ataf Mansoor, learned counsel for petitioner as well as learned Advocate General assisted by Mr. H.P. Srivastava, learned Additional Chief Standing Counsel on behalf of opposite parties no. 1 and 2 and Mr. Anurag Singh, learned counsel for opposite party no.3.

In this Public Interest Litigation, the petitioner has come before this Court seeking following reliefs:

"a) Issue a writ, order or direction in the nature of certiorari quashing the impugned government order dated 11.02.2021 (contained in Annexure No. 1).

b) Issue a writ, order or direction in the nature of mandamus directing the respondents to issue fresh guidelines in accordance with the procedure provided under the Uttar Pradesh Panchayat Raj (Reservation and Allotment of Seats and Offices) Rules, 1994 and the Uttar Pradesh Kshetra Panchayats and Zila Panchayats (Reservation and allotment of seats and offices) Rules, 1994.

c) Issue a writ order or direction in the nature of mandamus directing the respondents not to proceed and finalize the reservation of seats of the gram panchayats, Kshetra Panchayats or Zila Panchayat in pursuance to the impugned government order dated 11.02.2021.

d) Award costs in favour of the petitioner against the opposite parties.

e) Pass such further or other orders as may be considered

Learned counsel for petitioner submits that provisions for reservations in the aforesaid elections are to be determined as per the Uttar Pradesh Panchayat Raj (Reservation and Allotment of Seats and Offices) Rules, 1994 [hereinafter referred to as Rules of 1994] with Rule 4 providing allotment of seats for reservation on rotational basis. It has been submitted that pursuant to amendment in Article 243D of Constitution of India, the aforesaid Rules were notified and for the purposes of allotment of seats as per reservation under Rule 4 of Rules of 1994, the base year was taken as 1995. It is submitted that subsequent elections in 1995, 2000, 2005 and 2010 were held in accordance with the aforesaid Rules of 1994.

Learned counsel has thereafter drawn attention to the Government Order dated 16.09.2015 in which it has been indicated that due to substantial demographic changes in the Districts of the State in the Gram Panchayat and Khetra Panchayat territories in view of the census of 2001 and 2011, it is no longer conducive to have 1995 as the base year for purposes of applying reservation as per Rule 4 of Rules of 1994. As such, the base year in view of the changed demographic situation was required to be taken as 2015.

It is submitted that vide impugned order and ignoring the Government Order dated 16.09.2015, the opposite parties are proceeding to reserve the seats in terms of Rule 4 of Rules of 1994 by taking 1995 as the base year instead of 2015. It is further submitted that Government Order dated 16.09.2015 is still in existence and the previous elections held in the year 2015 were also in accordance with the aforesaid Government Order.

It is further submitted that even otherwise in view of the changed demographic situation as noticed by the State Government itself in the Government Order dated 16.09.2015, it does not stand to reason that the base year for purposes of reserving seats in terms of Rule 4 of Rules of 1994 should be taken as 1995.

It has also been submitted by learned counsel for petitioner that even otherwise the provisions for reservation as contemplated

by the impugned Government Order would result in more than 60 per cent seats in a district being reserved, which would be violative of various judgments of Hon'ble the Supreme Court and that it would also violate the maximum cap fixed with respect to reservation of Backward Class of 27 per cent.

With regard to aforesaid, learned counsel for petitioner has submitted that similarly worded provisions in Clause 12(2)(c) of the Maharashtra Zilla Parishads and Panchyat Samitis Act, 1961 was held to be *non est* by a recent judgment of Hon'ble the Supreme Court in the case of **Vikas Kishanrao Gawali vs. State of Maharashtra and others; 2021 SCC OnLine SC 170**. It is submitted that Hon'ble the Supreme Court while following the Constitution Bench judgment in the case of **K. Krishna Murthy (Dr.) vs. Union of India; (2010) 7 SCC 202** has held that the quantum of reservation ought to be local bodies specific and be so provisioned to ensure that it does not exceed the quantitative limit of 50 per cent (aggregate) of vertical reservation of seats for SCs/STs/OBCs taken together. The offending provision of the Act of 1961 was quashed to the extent it provided reservation of seats for OBC. Relevant paragraphs of the said judgment are as follows:

"8. On a fair reading of the exposition in the reported decision, what follows is that the reservation for OBCs is only a "statutory" dispensation to be provided by the State legislations unlike the "constitutional" reservation regarding SCs/STs which is linked to the proportion of population. As regards the State legislations providing for reservation of seats in respect of OBCs, it must ensure that in no case the aggregate vertical reservation in respect of SCs/STs/OBCs taken together should exceed 50 per cent of the seats in the concerned local bodies. In case, constitutional reservation provided for SCs and STs were to consume the entire 50 per cent of seats in the concerned local bodies and in some cases in scheduled area even beyond 50 per cent, in respect of such local bodies, the question of providing further reservation to OBCs would not arise at all. To put it differently, the quantum of reservation for OBCs ought to be local body specific and be so provisioned to ensure that it does not exceed the quantitative limitation of 50 per cent (aggregate) of vertical reservation of seats for SCs/STs/OBCs taken together.

9. Besides this inviolable quantitative limitation, the State Authorities are obliged to fulfil other pre-conditions before

reserving seats for OBCs in the local bodies. The foremost requirement is to collate adequate materials or documents that could help in identification of backward classes for the purpose of reservation by conducting a contemporaneous rigorous empirical inquiry into the nature and implications of backwardness in the concerned local bodies through an independent dedicated Commission established for that purpose. Thus, the State legislations cannot simply provide uniform and rigid quantum of reservation of seats for OBCs in the local bodies across the State that too without a proper enquiry into the nature and implications of backwardness by an independent Commission about the imperativeness of such reservation. Further, it cannot be a static arrangement. It must be reviewed from time to time so as not to violate the principle of overbreadth of such reservation (which in itself is a relative concept and is dynamic). Besides, it must be confined only to the extent it is proportionate and within the quantitative limitation as is predicated by the Constitution Bench of this Court.

12. As a matter of fact, no material is forthcoming as to on what basis the quantum of reservation for OBCs was fixed at 27 per cent, when it was inserted by way of amendment in 1994. Indeed, when the amendment was effected in 1994, there was no guideline in existence regarding the modality of fixing the limits of reserved seats for OBCs as noted in the decision of the Constitution Bench in *K. Krishna Murthy (supra)*. After that decision, however, it was imperative for the State to set up a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of backwardness and on the basis of recommendations of that Commission take follow up steps including to amend the existing statutory dispensation, such as to amend Section 12(2) (c) of the 1961 Act. There is nothing on record that such a dedicated Commission had been set up until now. On the other hand, the stand taken by the State Government on affidavit, before this Court, would reveal that requisite information for undertaking such empirical inquiry has not been made available to it by the Union of India. In light of that stand of the State Government, it is unfathomable as to how the Respondents can justify the notifications issued by the State Election Commission to reserve seats for OBCs in the concerned local bodies in respect of which elections have been held in the year December 2019/January 2020, which

~~WWW.LIVELAW.IN~~ notifications have been challenged by way of present writ petitions. This Court had allowed the elections to proceed subject to the outcome of the present writ petitions.

13. Be that as it may, it is indisputable that the triple test/conditions required to be complied by the State before reserving seats in the local bodies for OBCs has not been done so far. To wit, (1) to set up a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of the backwardness qua local bodies, within the State; (2) to specify the proportion of reservation required to be provisioned local body wise in light of recommendations of the Commission, so as not to fall foul of overbreadth; and (3) in any case such reservation shall not exceed aggregate of 50 per cent of the total seats reserved in favour of SCs/STs/OBCs taken together. In a given local body, the space for providing such reservation in favour of OBCs may be available at the time of issuing election programme (notifications). However, that could be notified only upon fulfilling the aforementioned pre-conditions. Admittedly, the first step of establishing dedicated Commission to undertake rigorous empirical inquiry itself remains a mirage. To put it differently, it will not be open to Respondents to justify the reservation for OBCs without fulfilling the triple test, referred to above.

14. As regards Section 12(2)(c) of the 1961 Act inserted in 1994, the plain language does give an impression that uniform and rigid quantum of 27 per cent of the total seats across the State need to be set apart by way of reservation in favour of OBCs. In light of the dictum of the Constitution Bench, such a rigid provision cannot be sustained much less having uniform application to all the local bodies within the State. Instead, contemporaneous empirical inquiry must be undertaken to identify the quantum qua local body or local body specific.

26. The State Election Commission had invited our attention to the fact that, provision similar to Section 12(2)(c) of the 1961 Act regarding reservation for OBCs finds place in other State enactments concerning the establishment of Village Panchayat, Municipal Council, Nagar Panchayat, Corporation, etc. Needless to observe that the view taken in this judgment would apply with full force to the interpretation and application of the provisions of the stated Act(s) and the State Authorities must immediately move into action to take corrective and follow up

measures in right earnest including to ensure that future elections to the concerned local bodies are conducted strictly in conformity with the exposition of this Court in *K. Krishna Murthy (supra)*, for providing reservation in favour of OBCs.

27. In conclusion, we hold that Section 12(2)(c) of the 1961 Act is an enabling provision and needs to be read down to mean that it may be invoked only upon complying with the triple conditions (mentioned in paragraph 12 above) as specified by the Constitution Bench of this Court, before notifying the seats as reserved for OBC category in the concerned local bodies. Further, we quash and set aside the impugned notifications to the extent they provide for reservation of seats for OBCs being void and non est in law including the follow up actions taken on that basis. In other words, election results of OBC candidates which had been made subject to the outcome of these writ petitions including so notified in the concerned election programme issued by the State Election Commission, are declared as non est in law and the vacancy of seat(s) caused on account of this declaration be forthwith filled up by the State Election Commission with general/open candidate(s) for the remainder term of the concerned local bodies, by issuing notification in that regard.

28. As a consequence of this declaration and direction, all acts done and decisions taken by the concerned local bodies due to participation of members (OBC candidates) who have vacated seats in terms of this decision, shall not be affected in any manner. For, they be deemed to have vacated their seat upon pronouncement of this judgment, prospectively. This direction is being issued in exercise of plenary power Under Article 142 of the Constitution of India to do complete justice.

29. It was urged that this Court ought not to exercise plenary power Under Article 142 and abjure from disturbing the completed elections. However, we are not impressed with this contention because participation in the elections conducted since December 2019 to the concerned local bodies across the State of Maharashtra was on clear understanding that the results of the reserved seats for OBCs would be subject to the outcome of these writ petitions. That was clearly notified by the State Election Commission in the election programme published by it at the relevant time, in consonance with the directions given by this Court vide interim orders. Therefore, the reliefs as claimed and being granted in terms of this judgment, are in consonance with liberty given by this Court.

30. Accordingly, these writ petitions must partly succeed. The challenge to the validity of Section 12(2)(c) of the 1961 Act is

negatived. Instead, that provision is being read down to mean that reservation in favour of OBCs in the concerned local bodies can be notified to the extent that it does not exceed aggregate 50 per cent of the total seats reserved in favour of SCs/STs/OBCs taken together. In other words, the expression "shall be" preceding 27 per cent occurring in Section 12(2)(c), be construed as "may be" including to mean that reservation for OBCs may be up to 27 per cent but subject to the outer limit of 50 per cent aggregate in favour of SCs/STs/OBCs taken together, as enunciated by the Constitution Bench of this Court. However, the impugned notifications/orders dated 27.7.2018 and 14.2.2020 and all other similar notifications issued by the State Election Commission during the pendency of these writ petitions mentioning that the elections to the concerned local bodies were being held subject to the outcome of these writ petitions, are quashed and set aside to the extent of providing reservation of seats in the concerned local bodies for OBCs. As a consequence, follow up steps taken on the basis of such notifications including the declaration of results of the candidates against the reserved OBC seats in the concerned local bodies, are declared non est in law; and the seats are deemed to have been vacated forthwith prospectively by the concerned candidate(s) in terms of this judgment. The State Election Commission shall take immediate steps to announce elections in respect of such vacated seats, of the concerned local bodies, not later than two weeks from today, to be filled by general/open category candidates for the remainder term of the Panchayat/Samitis. Ordered accordingly."

Upon applicability of the judgment rendered by Hon'ble the Supreme Court in the case of **Vikas Kishanrao Gawali vs. State of Maharashtra and others** (supra), it is clear that the provisions of the impugned Government Order dated 11.02.2021 would have the effect of exceeding the prescribed vertical limit of reservation of 50 per cent, which cannot be permitted.

The Court vide order dated 12.3.2021 had granted time to opposite parties to seek instructions with regard to aforesaid submissions.

Learned Advocate General appearing for the opposite parties no. 1 and 2, on the basis of written instructions, copy of which has been placed before the Court and the same is taken on record, submits that the State Government has no objection to implement the reservation and allotment of seats of constituencies in Panchayats elections taking 2015 as the base

year as first round of reservation and allotments for determining the reservations as per decision taken vide Government Order dated 16.9.2015.

We are conscious of the fact that this Court vide order dated 4.2.2021 passed in ***Writ-C No. 23377 of 2020; Vinod Upadhyay vs. State of U.P. and another*** has issued directions to the opposite parties to complete the reservation of constituencies latest by 17.3.2021 and thereupon complete the elections of all the Panchayats by 30th April, 2021 and indirect elections to be completed thereafter within fifteen days i.e., by 15th May, 2021.

It is submitted by the learned Advocate General that the entire exercise for providing reservation in the Panchayat Elections has to be done a fresh taking 2015 as the base year, as such, it would not be possible that the reservation of constituencies to be finalized by 17.3.2021. It is stated that they will complete the entire exercise in this regard by 27.3.2021 and hold the elections by 10.5.2021. Indirect election would be completed by 25.5.2021.

We have passed this order considering the changed circumstances, with the consent of parties' counsel and without calling for counter affidavit as well as taking note of the fact that ***Writ-C No. 23377 of 2020; Vinod Upadhyay vs. State of U.P. and another*** has been disposed of vide order dated 4.2.2021.

Considering the submissions of learned Advocate General, the impugned order dated 11.2.2021 is hereby quashed. The writ petition is ***allowed***.

[Manish Mathur, J.] [Ritu Raj Awasthi, J.]

Order Date :- 15.3.2021

Santosh/-