Belait Sheikh and ors. Vs. State of West Bengal and anr.

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Court : Kolkata

Decided On : May-09-1952

Reported in : AIR1952Cal753

Judge : Das Gupta and ; Lahiri, JJ.

Acts : Constitution of India - Article 226; ; Limitation Act, 1908 - Section 5 - Schedule - Article 151; ; Calcutta (Appellate Side) Rules - Rules 2 and 8; ; Bengal Municipal Act, 1932 - Section 6, 8 and 16; ;Constitution of India - Article 226; ;Evidence Act, 1872 - Sections 45(1), 101 and 103

Appeal No. : A.F.O.O. No. 87 of 1952

Appellant : Belait Sheikh and ors.

Respondent : State of West Bengal and anr.

Advocate for Def. : Hemendra Kumar Das and ; Hari Prasanna Mukherjee, Advs.

Advocate for Pet/Ap. : Nirmal Chandra Sen, Adv.

Disposition : Appeal dismissed

Judgement :

Das Gupta, J.

1. The appellants are residents of the village of Brahmanigram within the jurisdiction of Police Station Bampurhat in the district of Birbhum. The entire village was formerly included in the Bampurhat Union under the Village Self Government Act. A portion of the Brahmanigram has however been included in the Municipality of Bampurhat that has been constituted by the Government of West Bengal in 1950.

2. Aggrieved by this, the appellants have, for the purpose of removing their grievance, applied to this Court for exercise of powers under Article 226 of the Constitution. They have for this purpose challenged the very constitution of Bampurhat Municipality as a mala fide act of the West Bengal Government, carried out in contravention of the Statute, and have also challenged as invalid the appointment of persons, as the first body of Commissioners of Municipality as not made in accordance with law. They have asked (1) for a writ in the nature of certiorari for the quashing of the notifications by the Government - the notification No. M. 1M-16/50 (I) of 2nd May 1950, published on 11th May 1950, by which the Municipality was constituted (referred to hereinafter as Notification A), the notification No. M. 1M-16/50 (II) of 2nd May 1950, also published on llth May 1950,

by which Commissioners were appointed for the Municipality (hereinafter referred to as Notification b) and the Notification M. 1M-16/50 of 9th February 1951, (hereinafter referred to as-Notification c) by which the earlier notification appointing commissioners was amended; (2) for a, writ in the nature of mandamus for the exclusion of Brahmanigram from the Municipality, and (3) for a writ in the nature of prohibition to prevent the Commissioners of the Municipality from assessing holdings in the Brahmanigram Mauza. and from levying and realising rates from ratepayers of that Mauza. This appeal has been preferred against the judgment of Bose J. by which he passed an order rejecting the application.

3. It is necessary to consider first the preliminary point that has been raised that the appeal is barred by limitation. The learned Advocate for the respondents contends that Article 151, Limitation Act applies to this appeal, and so the period within which the appeal has to be filed to save limitation was twenty days from the date of the order. Article 151 prescribes the period of limitation for an appeal from a decree or 'order of this High Court and some other High Courts, in the exercise of its original jurisdiction, as twenty days from the date of the decree or order.

4. The real question for decision before us-therefore is : Was the order that was made by Bose J. an order made in the exercise of original jurisdiction. Article 226(1) of the Constitution, under which the High Court was asked to exercise its power, which it refused to exercise, is in these words:

'Notwithstanding anything in Article 32, every High, Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.'

In exercising this power, is the Court exercising original jurisdiction It is quite clear that in exercising the power under Article 226, the High Court is not exercising the ordinary original civil jurisdiction, that is vested in the Court under Clause 11 of the Letters Patent, or the Extraordinary Original Civil Jurisdiction, as is vested in the Court under Clause 13; nor is it exercising the Ordinary Original Criminal Jurisdiction vested by Clause 22, or the Extra-ordinary Original Criminal Jurisdiction vested by Clause 24. It is equally clear that it is not exercising, in exercising power under Article 226 of the Constitution, the appellate jurisdietion vested in the Court under Clause 16 or Clause 27 of the Letters Patent.

5. In deciding whether in using the power under Article 226 of the Constitution, the Court does so, as a Court of Original Jurisdiction, or as a Court of Appellate Jurisdiction, it is therefore necessary to look at the nature of the proceedings which are instituted in asking for the use of the power. In my judgment, the application by which a Court is asked, to exercise powers under Article 226 is essentially of the nature of original action. As between the parties to the application, there has not been decision by any tribunal of the dispute. One of the respondents in such an application is invariably the inferior tribunal, or the public official, against whose order relief is sought. The applicant asks in effect for a decision of a dispute between him and the inferior tribunal or the public official, for the first time. In deciding the dispute, the Court cannot therefore be held to exercise appellate jurisdiction, but must be held to exercise original jurisdiction.

6. It is helpful to remember that applications for writs of certiorari, or prohibition, or mandamus were always dealt with in England by the King's Bench, (or Queen's Bench) in the exercise of its original jurisdiction, and that as a result of the assignment by Section 34, Supreme Court of Judicature Act, to the Queen's Bench Division of the High Court of

'all causes and matters civil and criminal which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction,'

if the Act had not been passed, these matters were dealt with after that Act, by the Queen's Bench Division of the High Court, in its original jurisdiction. Since the Act of 1938, orders of certiorari, or prohibition, or mandamus instead of writs of certiorari, or prohibition, or mandamus were issued; but the matters were dealt by the King's Bench in its original jurisdiction.

7. That the issue of a writ of mandamus was in the exercise of original jurisdiction was held by the Madras High Court in Chief Commr. of Income-tax v. North Anantpur Gold Mines, Ltd., 44 Mad. 718 The question whether the exercise of the power to issue a writ of certiorari was exercise of original jurisdiction or not was considered by the Madras High Court in Venkataratnam v. Secy, of State, 53 Mad. 979; the decision of the Court was that it was exercise of original jurisdiction.

8. My conclusion is that in exercising powers under Article 226 of the Constitution, the High Court exercises original jurisdiction. Article 151, Limitation Act, therefore, applies to an appeal made from an order in an application under Article 226.

9. It appears that in making rules for the exercise of powers, of the High Court under Article 226, this Court framed R. 8 (Ch. II, p. 12 of the A. S. Rules) in these words :

'.....Applications for the issue of orders or writs in the nature of mandamus prohibition, quo-warranto and certiorari or any of them referred to in Article 226(1) of the Constitution of India outside the original jurisdiction of the Court, shall subject to any direction of the Chief Justice be made before the Judge on the original aide taking interlocutory applications or such other Judge as the Chief Justice may appoint and heard and disposed of by him as a Judge sitting on the appellate side and as matters appertaining to that side. The effect of this rule, read with R. 2 of Chap. VIII of the Appellate Side Rules is that in its rule making power, the Court has prescribed the period of limitation for appeals from orders on application under Article' 226 as sixty days. In law, however', the Court has no power to over ride a statute, by the exercise of its rule making power. In so far as the Court has prescribed sixty days as the period of limitation for an appeal from an order passed on an application under Article 226 of the Constitution its act is ultra vires, and invalid and ineffective in law.'

10. It must be held that the period of limitation for such appeals, as prescribed under Article 151 of the Constitution, must prevail.

11. The present appeal was admittedly filed beyond the period prescribed by the Limitation Act. I have no hesitation in holding however that the rules framed by the Court misled the appellant in ascertaining the prescribed period of limitation, and that the appellant had sufficient cause for not preferring the appeal within the period prescribed by the Limitation Act. Under Section 5, Limitation Act, therefore, the appeal must be held to be within time.

12. Coming now to the merits of the appeal, we find that the case that the very constitution of Rampurhat Municipality has been against the provisions of law is based on a three-fold argument. The first branch of the argument is that Rampurhat is not a town, and so could not be constituted a municipality, with or without other areas. Under Section 6, Municipal Act, the State Government has the power to declare by notification its intention to constitute into a municipality, a town, with or without a local area or a village, subject to the proviso that no such declaration shall be made unless the State Government is satisfied that three-fourths of the adult male population of the town are chiefly employed in non-agricultural pursuits, that the town has at least 3000 inhabitants, with an average of at least 1000 per square mile. Section 7 provides that inhabitants may submit objection within three-months and that the State Government shall take them into consideration.

13. Section 8 provides for the Government's power to constitute the municipality, by notification. It is clear, therefore, that the first requisite is that there must be a town, to be constituted into a municipality. The Act does not however define the word ' town. ' The word has however, a fairly definite connotation to the ordinary man -the main attributes of a town being the existence of house in clear proximity, concentration of a large number of people in a comparatively small area, engagement of the bulk of the population in non-agricultural pursuits. We are bound to hold, in the absence of any statutory definition of the word, that the legislature used it in the sense in which ordinary people understand it. It was for the appellants to show that Rampurhat was not a town in this sense. No serious attempt has been made to establish this. On the contrary, it appears that the census authorities considered Rampurhat to be a town in 1941. In any case, as the appellants have not established that Rampurhat is not a town, the first part of the argument fails.

14. It is next argued that the mere statement in the notification that ' the Provincial Government is satisfied that three-fourths of the adult male population of the area of the town Rampurhat are chiefly employed in pursuits other than agriculture, and the area contains not less than three thousand inhabitants and an average number of not less than one thousand inhabitants to the square mile ' is not sufficient compliance with the requirements of the proviso mentioned above. It is contended that as the questions whether or not three-fourth of the adult male population of an area are chiefly employed in agriculture and the question whether it contains not less than three thousand inhabitants, with an average number of not less than one thousand inhabitants to the square mile, are capable of exact determination, the legislature must have intended that the Government must be satisfied on grounds, which appear reasonable not only to them, but to the Court. In my opinion this contention should not prevail. If the legislature had intended that the satisfaction must be 'objective ', that is, based on grounds which in the opinion of others also would justify the satisfaction, the legislature would have used the words ' satisfied on reasonable grounds ' or words to that effect. The legislature's intention must be gathered from the words used, and not on any guesswork as to what the legislature should have intended, or ' must have' intended. Looking at the words I am of opinion that the legislature required only the subjective satisfaction of the Government. The statement in the notification that the Government is satisfied must be taken to prove that it was satisfied, unless facts are established which are inconsistent with such satisfaction. Such facts have not been established. The second part of the argument also, therefore, fails.

15. The third part of the argument is that the law requires a single notification saying

that a Municipality is constituted, and appointing a body of persons as Commissioners of the Municipality, and as in the present case, there is one notification constituting the Municipality, and another appointing a body of Commissioners, there is neither a lawful constitution of the Municipality, nor a lawful appointment of Commissioners. Mr. Sen has argued that the Municipality is a body corporate, and so, it cannot come into existence, before individuals who form the body are also ascertained. The scheme of the law as enacted in the Bengal Municipal Act, however draws a distinction between the formation of an area into a Municipality, and the establishment of a body of persons to administer the affairs of that Municipality. Just as the Village Self-Government Act provides for the formation of a number of villages into a Union, to be followed by the Constitution of a Union Board, the Municipal Act provides for a notification in Section 8 to constitute an area as a Municipality, and provides in other sections, for the establishment of a body of commissioners. The statute nowhere says that one single notification should deal with these two matters. I see no reason why this should be done. Section 15 provides that the number of the Commissioners should be specified in the notification under Section 8; and this has been done.

16. The appellants have therefore wholly failed to make out a case that in constituting the Municipality, the Government did not act in accordance with the law.

17. There is not also the slightest evidence to show that the Government acted mala fide in constituting the Municipality.

18. There remains for consideration the contention that there has been no valid appointment of Commissioners. It will be helpful to set out first the second proviso of Section 16. It is in these words :

'The State Government may appoint all the Commissioners of a Municipality newly created, and constituted under this Act for a period not exceeding two years from the date of the notification under which such Municipality is created and constituted.'

It was in exercise of this power, that the Government made the appointment by notification 'B'. The material portion of this notification for our present purpose runs thus :

'In exercise of the power conferred by Clause (2) of proviso to 8. 16, Bengal Municipal Act, 1932 (Bengal Act XV [15] of 1932), the Governor is pleased to appoint the following persona to be the Commissioners of the Municipality of Rampurhat in the district of Birhhum for a period of two years with effect from the date of election of Chairman under Section 45 (1) of the said Act.....'

19. It is contended by Mr. Sen that as the election of Chairman could only take place after Commissioners had been appointed, the appointment of Commissioners from the date of election of Chairman was inherently impossible. It must be admitted that the phraseology in which the appointment is worded is unsatisfactory, and shows a regrettable confusion of mind. I have come to the conclusion however that it is reasonable to read the words 'with effect from the date of election of Chairman under Section 45 (l)' to mean 'with effect from the date on which the appointed persons enter upon their function of electing a chairman.' It is an involved and unsatisfactory way of indicating the date; but the defect is in form only and I hold that the appointment took effect from 29th May 1950, on which the Commissioners elected

the Chairman.

20. Clearly, however, the statute gave the Government no power to appoint Commissioners for any point of time, beyond the period mentioned in the proviso. In giving Government the special power to appoint Commissioner, the statute has limited the period for which it can be exercised to the two years from the date of notification under Section 8 to the expiry of two years from the date. This period expired in the present case on 10th May 1952. The period of appointment was according to the notification B from 29th May 1950 to 28th May 1952. It must therefore be held that in making an appointment for the period 11th May 1952 to 28th May 1952 the Government acted without any legal authority. The appointment for the period from llth May 1952 to 28th May 1952 is therefore invalid and ineffective in law.

21. This brings us to Notification C, by which the Government amended the Notification B, by substituting for the words, 'with effect from the date of election of chairman . . . . ' the words 'the date of notification under Section 8'. In my judgment, the Government had power in law under Section 21, General Clauses Act to make the amendment; but the amendment could have no retrospective effect in law. At the date of the amendment, the position was that there had been no valid appointment of Commissioners for the period llth May to 28th May 1950; and the amendment could by no means produce the effect that such an appointment was made. The very nature of 'appointment' is that it is made for a future period for the purpose of doing acts after the appointment is made. It is absurd to think that when the Government discovered that it had not made any appointment of Commissioners from the llth May 1950 to 28th May 1950, it could long after that, make such an appointment by the subterfuge of an amendment of the original order of appointment. I hold that in so far as Notification C purported to make an appointment of Commissioners, for the period from llth May 1950 to 28th May 1950, it was invalid in law; and in so far as it purported to make the appointment that had been made by the Notification B effective for the period 29th May 1950 to 10th May 1952, it was superfluous.

22. The fact that the Notifications B and C are in part invalid, does not however entitle the applicant to any of the reliefs asked for.

23. In making the appointment, the Government does not perform a judicial act; there is therefore no scope for a writ in the nature of certiorari as against the issue of the Notifications B and C.

24. There is also no scope, on the pleadings in this case, for a writ in the nature of prohibition against the levying and realising of rates, because of the fact that there was no valid appointment of Commissioners for the period 10th May 1950 to 28th May 1950.

25. The writ of mandamus was prayed for the exclusion of Brahmanigram from the Municipality of Rampurhat. As it has not been shown that the constitution of the Municipality under Notification A was not in accordance with law, no such writ can issue.

26. The appeal is therefore dismissed with costs. Hearing fee 2 Gold Mohurs.

Lahiri, J.

27. I agree.