

MY NO - 682/SEC

11/2/2016

No. U239 (4)

W.P.(C) NO. 682 OF 2016

FROM:

**SUPERINTENDENT OF THE HIGH COURT OF ORISSA**

To

1. The State Election Commissioner, Odisha, Toshali Plaza, Block – B – 2, 1<sup>st</sup> Floor, Satyanagar, Bhubaneswar – 751007.
2. The Secretary, Orissa State Election Commission, Odisha, Toshali Plaza, Block – B – 2, 1<sup>st</sup> Floor, Satyanagar, Bhubaneswr – 751007.
3. The Director, Municipal Administration, Housing & Urban Development Department, Orissa Secretariat, Bhubaneswar, District – Khurda.
4. The Commissioner, Cuttack Municipal Corporation, Cuttack, At- Choudhury Bazar, P.O. - Telenga Bazar, Town & District- Cuttack- 753009

Dated, Cuttack the..... 01.02.2016

WD  
11/2/16 Sir,

I am directed to forward herewith a copy of Court's Order No. 4 dated 21.1.2016 passed in W.P.(C) No. 682/2016 (Kanak Lata Nayak Vrs. Election Commissioner & Others) for your information and necessary action.

Yours faithfully,

*sh*  
27.1.16

**SUPERINTENDENT**

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Sl. No. of Order	Date of Order	ORDER WITH SIGNATURE	Office note as to action (if any), taken on Order
4.	21.01.2016	<p>Heard Mr. Rajat Kumar Rath, learned Senior Counsel for the petitioner, Mr. Pitambar Acharya, learned Senior Counsel for opposite party nos.1 and 2, learned Additional Government for opposite party no.3 and Mr. M.R. Mohanty, learned counsel for intervenor.</p> <p>2. The petitioner, who claims to be a scheduled caste woman and a resident of Ward No.21 of Cuttack Municipal Corporation, has filed this writ petition challenging the legality and propriety of notification dated 08.01.2016 (Annexure-4) issued by the State Election Commissioner, Orissa-opposite party no.1 for the bye-election for the post of Mayor of Cuttack Municipal Corporation (hereinafter referred to as 'the Corporation') to be held on 22.01.2016, with a further prayer to direct the opposite parties to hold bye election to the post of Corporator of Ward No.21 of the Corporation and thereafter to hold the bye-election to the post of Mayor of the Corporation.</p> <p>3. The undisputed facts are that the Corporation comprises of 59 wards, out of which 32 wards fall within the Barabati-Cuttack Assembly Constituency; 21 wards come within the Choudwar-Cuttack Assembly Constituency; and 6 wards pertain to Cuttack Sadar Assembly Constituency. Ward No.21 of the Corporation comes within Barabati-Cuttack Assembly Constituency. Notification no.31141 dated 24.10.2013 (Annexure-2) issued under sub-sections (3) and (4) of Section 14 of the Orissa Municipal Act 2003 (in short 'the Act') read with sub-rule(8) of Rule-80 of the Orissa Municipal Corporation (Division of City into Wards, Reservation of Seats, and Conduct</p>	

Sl. No. of Order	Date of Order	2 ORDER WITH SIGNATURE	Office note as to action (if any), taken on Order
		<p>of Election) Rules, 2003 (in short 'the Rules') was published by the State Government reserving the office of the Mayor of the Corporation for scheduled caste woman for the current term 2013-2018 on rotation basis. Accordingly in general municipal election of the corporation held in 2013 one Smt. Anita Behera, a scheduled caste woman was elected as Corporator of Ward no.21 and she was also elected as the Mayor of the Corporation. In view of some allegations made against her, the said Anita Behera resigned from the post of Mayor as well as post of Corporator of Ward No.21 of the Corporation. Her resignation having been accepted as per law, the post of corporator of Ward no.21 and the post of Mayor of the Corporation have fallen vacant with effect from 04.01.2016. The vacancies so caused was intimated by the Commissioner of the Corporation to the Secretary, State Election Commission (opposite party no.2) and also to the Government as per Annexure-3 in terms of Rule-90 of the Rules.</p> <p>The State Election Commissioner (opposite party no.1) has thereafter issued notification dated 08.01.2016 (Annexure-4) for bye-election to the post of Mayor of the Corporation and no notification has yet been issued for bye-election to the post of Corporator of Ward No.21 of the Corporation.</p> <p>4. In challenging the validity of the notification under Annexure-4, the learned Senior Counsel for the petitioner raise the following contentions:</p> <p>(a) As per the notification of reservation of seats, on ward (ward no.21) pertaining to Barabati-Cuttac</p>	

[O. H. C.-98]

SI. No. of Order	Date of Order	3 ORDER WITH SIGNATURE	Office note as to action (if any), taken on Order
		<p>Constituency, two wards (ward nos. 39 and 45) falling under Choudwar-Cuttack Constituency and one ward (ward no.51) pertaining to Sadar-Cuttack Constituency of the Corporation have been reserved for scheduled caste women, and that the largest number of wards of the Corporation come under Barabati-Cuttack Assembly Constituency and the only ward reserved for scheduled caste women within this area having remained vacant after resignation of Smt. Anita Behera from the post of Corporator of the said ward, in the election to be held for the post of Mayor as per notification under Annexure-4 the wards of the Corporation coming within Barabati-Cuttack Assembly Constituency shall go unrepresented and, therefore, the notification under Annexure-4 is bad and unsustainable.</p> <p>(b) The Commissioner of the Corporation having intimated opposite party nos.1 and 2 about the occurrence of vacancy to the post of Corporator of ward no.21, opposite party no.1 should have immediately conducted bye-election for the said vacancy in terms of Rule-90 of the Rules before proceeding to issue notification under Annexure-4 for holding election to the post of Mayor. It is stated that keeping the post of Corporator of one ward vacant, while proceeding to conduct of election for the post of Mayor of the Corporation, is bad in law as it strikes at the root of the reservation policy.</p> <p>5. In response, as stated in the counter affidavit of opposite party nos.1 and 2, the Senior Counsel representing</p>	

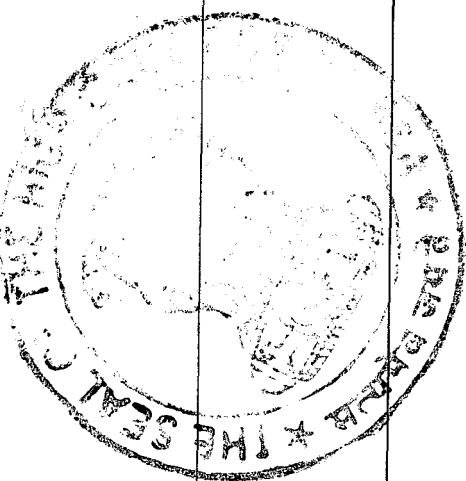
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		<p>them submits that in view of the bar contained in Article 243-ZG of the Constitution, the present writ petition challenging the election notification is not maintainable. It is also submitted that the petitioner has no locus standi to challenge the notification inasmuch as she is merely an aspiring candidate, who intends to contest for the post of corporator of Ward No.21 and Mayor of the Corporation, which is in the realm of speculation. She may get elected or may not get elected for the post of Corporator and as long as she has not been elected as a Corporator, she has no right to contest for Mayor and as such she is a stranger to the case and, therefore, has no right to challenge the notification under Annexure-4. It is further submitted that reservation of wards of the Corporation are not Assembly Constituency wise and, therefore, there is no question of non-representation of the Wards of the Corporation coming within Barabati-Cuttack Constituency. It is stated that there are three existing scheduled caste women corporators in the Corporation, who are eligible to contest for the post of Mayor, which is reserved for scheduled caste woman. It is further submitted that in case of vacancy occurring in the office of the Mayor of a Corporation on account of resignation of the Mayor, the same shall be filled up by election as soon as possible after it fell vacant, in terms of Section 14(9) of the Act read with Rule 81(3) of the Rules, whereas there is no such mandate for filling up the casual vacancy occurring in the post of a Corporator due to resignation or death etc. as soon as possible. On the contrary, as per Section 59 of the Act a bye-election to fill up any casual vacancy in the Corporation (post of a Corporator) shall be held within a period of six months from the date of occurrence of</p>	

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		<p>such vacancy.</p> <p>6. The learned counsel for other opposite parties and intervenor support the contention raised on behalf of opposite party nos. 1 and 2.</p> <p>7. The main legal question that falls for consideration is whether bye-election to the office of the Mayor of the Corporation in which a causal vacancy has occurred cannot be held until all vacant posts of Corporator are filled up by election. It is therefore, necessary to see some relevant provisions of the Act and the Rules.</p> <p>8. Section 6 of the Act speaks of composition of Corporation. As per clause (a) thereof, there shall be elected Corporators, the number of which shall depend on the population of the Corporation, as per the table appended to clause (a). Under clause (b) the Government shall nominate not more than five persons from amongst the residents of the city having special knowledge or experience in municipal administration. Under clause (c) every member of the House of People and the member of the State Legislative Assembly representing constituencies which comprise wholly or partly the area of the city and who are registered as electors shall also become members of the Corporation.</p> <p>Section-7 of the Act provides for reservation of Scheduled castes, Scheduled Tribes, Other Backward Classes and women for the wards and of the Corporation on rotation basis.</p> <p>9. Provision for election of Mayor has been made in Section 14 of the Act. The relevant provisions of Section 14 are quoted</p>	

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		<p>hereunder :</p> <p>“14. (1) Every Corporation shall have a Mayor and a Deputy Mayor.</p> <p>(2) The Corporators of the Corporation, specified in clause (a) of Section 6 shall.</p> <p>(a) at the first meeting of the Corporation elect a Mayor from among themselves;</p> <p>(b) at a subsequent meeting, specially convened for the purpose at the instance of the Mayor as soon as may be, but not later than thirty days after the date of election of the Mayor, elect a Deputy Mayor of the Corporation from among themselves:</p> <p>Provided that where the office of the Mayor of a Corporation is not reserved under sub-section (3) for women or where the Mayor elected under this Act is not a woman, the office of the Deputy Mayor of Corporation shall be reserved for women.</p> <p>(3) Notwithstanding anything to the contrary in sub-section (1)-</p> <p>(a)offices of Mayor in the Corporations shall be reserved for the Scheduled Castes and the Scheduled Tribes and the number of offices so reserved for the Scheduled Castes and the Scheduled Tribes shall bear, as nearly as may be, the same proportion to the total numbers of such offices as the population of the Scheduled Castes</p>	

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		<p>and the Scheduled Tribes, respectively in the Corporation areas of the State bears to the population of such Corporation areas;</p> <p>(b) as nearly as may be one-third of the total number of seats reserved under clause (a) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes;</p> <p>(c) as nearly as may be one-third (including the number of offices reserved for women belonging to the Scheduled Castes, the Scheduled Tribes and the backward class of citizens) of the total number of offices of the Mayor in the Corporations shall be reserved for women; and</p> <p>(d) as nearly as may be, but not less than twenty-seven percentum of the offices of Mayor of Corporations shall also be reserved in favour of backward class of citizens as referred to in clause (6) of article 243T of the Constitution; and</p> <p>(e) as nearly as may be, one third of the total number of seats reserved under clause (d) shall be reserved for women belonging to the backward class of citizens.</p> <p>(4). Reservation of offices of Mayor under sub-section (3) shall be made by the Government by rotation among different corporations in the prescribed manner and shall be published in the</p>	

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Gazette :			
<p>Provided that the procedure provided in sub-section (6) of Section 7 relating to reservation of seats in the Corporations for the Scheduled Castes, Scheduled Tribes, Backward class of citizens and Women shall, as far as may be, be applicable for the purpose of reservation of offices of Mayors to be made by the Government under this sub-section.</p> <p>(5).....</p> <p>(6).....</p> <p>(7)....</p> <p>(8) The first meeting of the Corporation after the general election shall be held on a date, not later than thirty days after the publication of the results of such election and shall be convened by the Director, Municipal Administration.</p> <p>(9) If any casual vacancy occurs in the office of the Mayor or Deputy Mayor, the Corporators of the Corporation shall, as soon as conveniently may be after the occurrence of the vacancy at a meeting to be convened by the Director, Municipal Administration, elect one from amongst themselves to fill up the vacancy and every Mayor or Deputy Mayor so elected shall hold office so long as the person in whose place he is elected would have been entitled to hold it, if the vacancy had not occurred."</p> <p>(10) ... ...</p>			



[O. H. C.-98]

Sl. No. of Order	Date of Order	9 ORDER WITH SIGNATURE	Office note as to action (if any). taken on Order
		<p>11 ... ...."</p> <p>10. Sub-section (2) of Section 55 of the Act speaks of filling up a casual vacancy occurring in the post of a Corporator by reason of death, resignation, removal etc. by bye-election which shall be held within a period of six months from the date of occurrence of such vacancy, in the prescribed manner as contemplated Section 59 of the Act.</p> <p>11. Rule-81 of the Rules makes provision for election of Mayor which runs as under :</p> <p><b>"81. Election of Mayor-</b> (1) The election of the Mayor of Municipal Corporation shall be held in the office of the Municipal Corporation or at any other place as may be decided by the Election Commission by the [Corporators] specified in clause (a) of Section 6 of the Ordinance from among themselves at a meeting specially convened for the purpose.</p> <p>(2) Such meeting shall be convened at the instance of the Election Commission soon after the publication of the names of elected (Corporators) in the Orissa Gazette.</p> <p>(3) In the case of vacancy in the office of the Mayor of a Municipal Corporation due to any cause other than the expiry of the term of office of the Chairperson, such meeting shall be convened at the instance of the Election Commission as soon as possible.</p> <p>(4) The meeting to elect the Mayor shall be</p>	

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		presided over by an officer authorised by the Election Commission."	
		Rule-90 of the Rules speaks about the duty of the Commissioner of the Corporation to intimate about the vacancy occurring in the office of the Corporator or a Deputy Mayor of the Corporation which is quoted hereunder :	
		<p><b>"90. Vacancy to be intimated to the Election Commission -</b> (1) Where a vacancy occurs in the office of (Corporator), or Deputy Mayor of a Municipal Corporation by reason of death, resignation, removal or otherwise, the same shall be reported by the Commissioner concerned Municipal Corporation to the Election Commission forthwith under intimation to the District Magistrate concerned and to Government.</p>	
		<p>(2) The Election Commission shall take steps to hold bye-elections to fill up such vacancy"</p>	
		<p>12. There is no specific provision in the Act and in the Rules as to how bye-election is to be held in case of casual vacancy occurring in the office of the Mayor. Therefore, the provisions of Section 14 of the Act read with Rule 81 of the Rules shall apply to such a bye-election. Under Section 14 (2) of the Act it is only the elected Corporators as specified in clause (a) of Section (6) of the Act who shall elect a Mayor from amongst themselves in the first meeting of the Corporation after the general election of the Corporation. Such first meeting shall be held not later than thirty days after the publication of the results of the general election as per sub-section (8) of Section</p>	

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		<p>14. Sub-section (9) of Section 14 speaks of filling up of casual vacancy occurring in the office of the Mayor, which shall be held as soon as conveniently after the occurrence of the vacancy.</p> <p>Now the question is if the initial election to the office of the Mayor in the first meeting after the general election to the Municipal Corporation can be held with one or more vacancies in the post of elected Corporators, then there would be no hindrance for holding bye-election for filling up casual vacancy in the office of the Mayor with the existing elected Corporators even though some posts of elected Corporators remained vacant for death, resignation or otherwise. Section 14 does not mandate that before proceeding to elect the Mayor of the Corporation it must be ensured that the post of all the elected Corporators are filled up and all such Corporators take part in the election of the Mayor. Since the law mandates that the first meeting of the Corporation after the general election is to be held within 30 days after the publication of the results of the general election to the Corporation where the Mayor is to be elected, it may so happen that on the date fixed for election of Mayor some posts of Corporators may fall vacant either due to death or resignation. There is no mandate of law that such casual vacancies in the post of Corporators should be filled-up before the Mayor is elected. In spite of existence of some casual vacancies in the post of Corporators the first election of Mayor can be held after the general election. Therefore, there is no reason as to why bye-election to the office of Mayor which has fallen vacant either due to death or resignation cannot be held while causal vacancy in the post of some Corporators still continue to exist.</p>	

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		<p>Therefore, merely because the post of Corporator of Ward No.21 of the Corporation has not been filled up, it cannot be said that the State Election Commissioner is not competent to hold election to the office of the Mayor to fill up the causal vacancy.</p>	
		<p>13. It is not a case where no Scheduled Caste woman candidate at all is available for being elected to the office of the Mayor. Reservation of seats of Corporators and the Office of the Mayor are done in accordance with the provisions of the Act on rotation, and not on the basis of number of wards falling under the various Assembly Constituencies within the Corporation area. There is no substance in the contention raised on behalf of the petitioner that the reservation policy is going to be frustrated or that the Barabati-Cuttack Assembly Constituency is going to be un-represented in the Mayor election.</p>	
		<p>14. True, the Commissioner of the Corporation sent intimation to the State Election Commissioner under Rule 90 of the Rules about occurrence of the causal vacancy in the office of the Corporation in Ward No.21 with a request to take steps to hold bye-election to fill up such vacancy. There is no mandate of law that such bye-election to fill up the casual vacancy in the office of the Corporator must be filled up before election to the office of the Mayor is held.</p>	
		<p>15. In the light of the discussions made above and the conclusion reached, this Court finds no infraction of law in the matter of issuance of notification under Annexure-4 by the State Election Commission for holding election to the office of the Mayor of the Corporation.</p>	

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		<p>In view of the conclusion reached, the question with regard to maintainability of this writ petition and the locus standi of the petitioner are not necessary to be answered.</p> <p>16. In the result, the writ petition fails and is dismissed.</p> <p>A free copy of this order be supplied to the learned State Counsel.</p> <p>Issue urgent certified copy of this order on proper application in course of the day</p>	<p>Sd/- B. K. Nayak J</p> <p>True Copy Dr 27/1/16 Sonpati</p>