

THE HIGH COURT OF ORISSA : CUTTACK.
W.P.(C) No. 7646 of 2003

In the matter of:

An application under Articles 226 and 227 of the
 Constitution of India, 1950.

A N D

In the matter of:

Rashid Aslam ...

Petitioner

- Versus -

1. State of Orissa, represented by the Secretary, Department of Housing and Urban Development Department.
2. State Election Commission represented by its Secretary.
3. District Magistrate, Sundargarh.
4. Executive Officer, Rourkela Municipality

Opposite Parties

For petitioner

M/s. I. Mohanty,

B.K. Sharma, A.K. Mohanty, G.K. Dash,
 B. Mohanty, K.K. Nayak & K.A.Guru.

For Opp. Parties

Mr. P.K. Mohanty,

Addl. Government Advocate

(for Opp. Party nos. 1 and 3)

M/s Pitambar Acharya, S.R. Pad,

P.K. Ray and M.R. Mohanty

(for opp. Party No.2)

M/s D.M. Mishra & Binayak Mishra

(for opposite party no.4)

PRESENT: -

THE HONOURABLE THE CHIEF JUSTICE MR SUJIT BARMAN ROY

AND

THE HONORABLE JUSTICE LAXMIKANTA MOHAPATRA

Date of Order : 14.08.2003

SUJIT BARMAN ROY, C.J. We have heard the learned counsel for respective parties as regards the prayer for interim order. But, in course of hearing of the matter and in view of the stand taken by the respective parties, it seems that if we decide all those questions agitated before us, it will amount to final disposal of the writ petition. Accordingly, we have obtained consent from the learned counsel for respective parties for final disposal of the writ petition.

2. Orissa State Legislature has amended the Orissa Municipal Act, 1950 in conformity with the provisions of Part IX-A of the Constitution of India as inserted by constitution (74th Amendment) Act, 1992. This case relates to election to Rourkela Municipality. Said Municipality is admittedly situated within the scheduled areas under the provision of Fifth Schedule to the Constitution of India. Learned counsel for the petitioner while referring to article 243ZC which occurs in part IX-A of the Constitution of India contended that in view of this provision, the provisions of the Orissa Municipal Act as amended in conformity with the provisions of Part IX-A of the Constitution cannot apply in respect of election of municipalities situated within the scheduled areas established under the provisions of Fifth Schedule of the constitution. It is therefore contended by the learned counsel for the petitioner that a declaratory relief be granted to this effect and the Opp. Parties be restrained from holding any election of the said Rourkela Municipality under the provisions of the Orissa Municipal Act. On the other hand, learned counsel for the State Election Commission as well as Mr.P.K. Mohanty, learned Additional government Advocate drew our specific attention to Para 5 of Fifth Schedule of the Constitution of India Sub-Para (i) of Para 5 of the said Schedule provides :

"(1) **Notwithstanding** anything in this Constitution, the Governor may by public notification direct that any particular act of Parliament or of the Legislature of the State shall not apply to a Schedule Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given as to have retrospective effect."

Therefore, the contention of the learned counsel for opposite parties is that despite what is provided by or under Article 243ZC, the Governor has power under paragraph 5 of Fifth Schedule to the Constitution to decide whether or not the provisions of the Orissa Municipal Act as recently amended in conformity with the constitutional mandate contained in Part IX-A thereof should apply to municipalities situated within such scheduled areas.

3. If we accept the contention of the learned counsel for the petitioner that in view of the mandate contained in Article 243ZC, the provisions of paragraph 5 of Fifth Schedule to the Constitution of India would be

inapplicable to municipalities situated in scheduled area then the Governor cannot exercise his discretion vested in him under this said paragraph. Therefore, the sum and substance of the contention of the learned counsel for the petitioner is that the provisions of Article 243ZC being repugnant or inconsistent with the provisions of paragraph 5 of Fifth Schedule, it will be Article 243ZC which should prevail over **paragraph 5**. It is well settled rule of interpretation of statute that every effort must be made so as to harmonise apparently conflicting provisions of the same statute. All efforts must be made, if possible, to adopt an interpretation so that one part or the other do not become devoid of any application or meaning. It is the settled principle of interpretation of statute that a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between different parts or sections of the same statute. It is the duty of the Courts to avoid "a head on clash" between different sections or the provisions of the same Act, and, "whenever it is possible to do so, to construe provisions which appear to conflict so that any harmonise". It should not be lightly assumed that "Parliament had given with one hand what it took away with other". It has further been held in catena of decisions of the Apex Court that the provisions of one section of the statute cannot be used to defeat those of another "unless it is impossible to effect reconciliation between them".

5. Parts IX and IX-A were inserted in the Constitution by the Constitution (74th Amendment) Act, 1992. It is true that Article 243 ZC provides as follows :

"243ZC (1) Nothing in this Part shall apply to the Scheduled Areas referred to in clause(1), and the tribal areas referred to in clause (2), of Article 244.

(2) Nothing in this part shall construed to affect the functions and powers of the Darjeeling Gorkha Hill Council constituted under any law for the time being in force for the hill areas of the district of Darjeeling in the State of West Bengal.

(3) Notwithstanding anything in this Constitution, Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the tribal areas referred to in clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of Article 368."

6. Therefore, Article 243ZC declares that nothing contained in Part IX-A of the Constitution shall apply to scheduled areas referred to in

clause (1) and tribal areas referred to in clause (2) of Article 244. The law making power on the subject has been conferred exclusively on the State Legislature by Entry 5 of List II -State List. None of the provisions of the Constitution including Part IX-A thereof has taken away such law making power of the State Legislature conferred upon it by or under Entry 5 of List II - State List. It is true that Article 245 of the Constitution provides that subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State. Therefore, the law making power under Entry 5 of List II- State List which has been conferred exclusively on the State Legislature is subject to provisions of the Constitution. That power has not been diluted or taken away by inserting Part IX-A in the Constitution. But in view of the provisions of Part IX-A, the State Legislature and the State Government are under obligation to either make new law or amend the existing law on the subject in conformity with the broad outlines given in Part IX-A of the Constitution. However, State is under obligation to apply such laws to Municipalities situated outside scheduled areas or tribal areas. This is evident from Article 243ZC. Therefore, State Legislature is not under any obligation to apply Part IX-A of the Constitution or the laws made in conformity therewith to Municipalities situated within scheduled areas or tribal areas. Had there been no such Part IX-A inserted by the Constitution (74th Amendment) Act, 1992, the State Legislature would not have been deprived of its law make power under Entry 5 of State List in respect of scheduled areas constituted under the provisions of Fifth Schedule to the Constitution. Surely, that power cannot be taken away. Therefore, the effect of Article 243ZC is that while making laws in conformity with the provisions of Part IX-A of the Constitution, the State is not under compulsion or obligation to extend similar laws to areas governed by or under the provisions of Fifth Schedule to the Constitution. The State legislature has power to make such laws independent of Part IX-A of the Constitution. Such laws as may be made by the State Legislature which is relatable to Entry 5 of List II- State List of the Constitution can be applied not only to municipalities in areas outside the scheduled areas and tribal areas but also to the municipalities within scheduled areas as well as tribal areas even if no such amendment was introduced in the Constitution by inserting Part IX-A. In that view of the matter, it appears to us that under Part IX-A though the State Legislature and the State Government are under obligation to make law in respect of the areas situated outside the scheduled areas in conformity with Part IX-A, it is under no such obligation or compulsion to make such laws in respect of the scheduled areas or tribal areas. The effect of Article 243ZC is simply this. But, it does not mean that the State Legislature is deprived of such power to make laws in respect of municipalities situated within the scheduled areas or tribal areas. It may be obligatory to make laws in conformity with Part IX-A in respect of areas situated outside the scheduled areas or tribal areas. But the State is not under any obligation or compulsion to make any law in

conformity with Part IX-A of the Constitution so far as their applicability to scheduled areas and tribal areas is concerned. But at the same time the State Legislature has indeed all the powers independent of Part IX-A to make similar law in respect of municipalities situated within the scheduled areas or tribal areas, as the case may be. In that view of the matter, we are of the view that if the Governor does not think it proper in exercise of his discretion conferred upon him by or under paragraph 5 of Fifth Schedule to the Constitution to Withhold the applicability of Orissa Municipal Act as amended in conformity with Part IX-A of the Constitution to the scheduled areas or the tribal areas, as the case may be, this Court cannot compel the Governor, that is, the State Government to withhold the application of Orissa Municipal Act to those areas.

7. In the circumstances, we do not find any ground to interfere with the proposed election in Rourkela Municipality in accordance with the provisions of the Orissa Municipal Act as amended in recent time in conformity with Part IX-A of the Constitution. However, it is open to the Governor to withhold the application thereof to the scheduled areas and it is not for the court to usurp this power conferred upon the Governor by Paragraph 5 of Fifth Schedule to the Constitution.

8. If we adopt the aforesaid interpretation, we feel that the apparent repugnancy or conflict or inconsistency between the provisions of Article 244(1) read with paragraph 5 of Fifth Schedule to the Constitution and Article 243ZC thereof can be avoided and both these provisions will not be rendered devoid of any meaning or application. Only such an interpretation can bring about reconciliation between the aforesaid provisions of the Constitution.

9. In the result, we do not find any merit in this petition and accordingly, the writ petition is dismissed. The interim order passed earlier stands vacated. No order as to cost.

Sd/- S. B. Roy, Chief Justice

Sd/- L. Mohapatra, Justice.