

# **Kishansing Tomar vs Municipal Corporation Of The City Of ... on 19 October, 2006**

**Author: K.G. Balakrishnan**

**Bench: Chief Justice, K.G. Balakrishnan**

CASE NO.:

Appeal (civil) 5756 of 2005

PETITIONER:

Kishansing Tomar

RESPONDENT:

Municipal Corporation of the City of Amedabad & Ors

DATE OF JUDGMENT: 19/10/2006

BENCH:

CJI, K.G. Balakrishnan & S.H. Kapadia C.K. Thakkar P.K. Balasubramanyan

JUDGMENT:

**J U D G M E N T K.G. BALAKRISHNAN, J.**

This appeal is directed against the judgment of the Division Bench of the High Court of Gujarat. The appellant filed a Special Civil Application No. 9847 of 2005 praying for a writ of mandamus or any other appropriate writ or direction to the respondents in the writ petition, namely, the Municipal Corporation of the City of Ahmedabad, the State of Gujarat and the Gujarat State Election Commission, to take all steps necessary for the purpose of holding elections for constituting the Municipal Corporation of the city of Ahmedabad before the expiry of the duration of the Municipal Corporation constituted pursuant to the elections held in October, 2000. The appellant, who was the writ petitioner before the High Court, was the Chairman of the Standing Committee of the Ahmedabad Municipal Corporation (hereinafter referred to as "AMC"). The elected body of the AMC was constituted for the relevant period pursuant to an election held in October, 2000 and its term was due to expire on October 15, 2005. The appellant apprehended that the authorities may delay the process of election to constitute the new Municipal body and therefore filed the aforesaid writ petition on 23rd August, 2005. The AMC filed an affidavit before the High Court stating that it was the responsibility of the third respondent, namely, the State Election Commission, to conduct the elections in time. The State Election Commission, in a separate affidavit in reply, submitted that under the provisions of the Bombay Provincial Municipal Corporations Act, 1949, the State Govt. had issued a Notification on 8th June, 2005 determining the wards for the city of Ahmedabad by which the total number of wards had been increased from 43 to 45 and in view of the increase in the number of wards, the Commission was required to proceed with the exercise of delimitation of the wards of the city of Ahmedabad in accordance with the provisions of the Bombay Provincial

Municipal Corporation (Delimitation of Wards in the City & Allocation of Reserved Seats) Rules, 1994 and that the Commission had issued a circular requiring the Collectors and the Designated Officers to furnish the details and to make proposals for delimitation of the wards. The Commission contended that it would take two months' time to complete the process of delimitation as the preparation of voters' list in each ward had to be revised in accordance with the Bombay Provincial Municipal Corporation (Registration of Voters) Rules, 1994. It was alleged by the Commission that it was required to consult the political parties to carry out the delimitation of the wards and that it would take at least six months' time for completing the process of election and the Commission could act only after the State Govt. issued the notification. The State Govt. produced a chart showing the detailed steps taken by the State Govt. at various stages culminating in the issue of Notification dated 8th June, 2005.

The appellant contended before the Single Judge that in view of Article 243-U of the Constitution, the authorities were bound to complete the process at the earliest and the elections should have been held before the expiry of the term of the existing Municipal Corporation. The learned Single Judge accepted the timeframe suggested by the State Election Commission and directed that it should be strictly followed and the process of elections must be completed by 31st December, 2005, and that no further extension for holding the elections would be permissible.

Aggrieved by the decision of the Single Judge, the appellant filed a Letters Patent Appeal before the High Court and the Division Bench of the High Court by the impugned judgment held that the timeframe given by the State Election Commission was perfectly justified and the Election Commission was directed to begin and complete process as per the dates given in its affidavit and the L.P.A. was dismissed. Aggrieved thereby, the present appeal is preferred before us by the appellant.

We heard appellant's counsel as also the counsel for the respondents. The main thrust of the arguments of the appellant's counsel was that in view of the various provisions contained in Part IX of the Constitution of India, it was incumbent on the part of the authorities to complete the process of election before the expiry of the period of five years from the date appointed for first meeting of the Municipality. The counsel for the respondents, especially the counsel for the State Election Commission contended that every effort was made by the Election Commission to conduct the elections before the stipulated time, but due to unavoidable reasons, the elections could not be held and the preparation of the electoral rolls and the increase in the number of wards had caused delay in the process of election and under such circumstances the delay was justified in conducting the elections.

The question that arises for consideration is whether Article 243-U of the Constitution, by which the duration of the Municipality is fixed is mandatory in nature and any violation could be justified in the circumstances stated by the respondents. Article 243-U of the Constitution reads as follows :

"243-U. Duration of Municipalities, etc. (1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer:

Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed,---

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of dissolution:

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under clause (1) had it not been so dissolved."

Article 243-ZA provides that the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in a State Election Commission referred to in Article 243-K. Article 243-S states that there shall be constituted Wards' Committees consisting of one or more wards, within the territorial area of a Municipality having a population of three lakhs or more and that the State Legislature may by law make provision with respect to (a) the composition and the territorial area of a Wards Committee; and (b) the manner in which the seats in a Wards Committee shall be filled.

Under Article 243-T, it is provided that the seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality. Further clause (2) of Article 243-T says that not less than one third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes. Clause (3) of this Article further provides that not less than one third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality. Clause (6) empowers the State Legislature to make any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens.

The provisions contained in the Bombay Provincial Municipal Corporations Act, 1949 also are relevant to be noted here. Section 6 of this Act deals with the duration of a corporation. It reads as under :

"6. Duration of Corporation :

(1) Every Corporation unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer.

(2) A Corporation constituted upon the dissolution before the expiration of its duration shall continue only for the remainder of the period for which it would have continued under Sub-Section (1) had it not been so dissolved."

Section 6A reads as under :

"6A. Terms office of Councillors :

The term of the office of the Councillors shall be co- extensive with the duration of the corporation."

Section 6B is to the following effect :

"Election to Constitute the Corporation :

An election to constitute a corporation shall be completed

(a) before the expiration of its duration specified in sub-section (1) of the section 6.

(b) before the expiration of six months from the date of its dissolution :

Provided that where the remainder of the period for which the dissolved Corporation would have continued is less than six months, it shall not be necessary to hold any election under this section for constituting the Corporation for such period."

It may be noted that Part IX-A was inserted in the Constitution by virtue of the Seventy Fourth Amendment Act, 1992. The object of introducing these provisions was that in many States the local bodies were not working properly and the timely elections were not being held and the nominated bodies were continuing for long periods. Elections had been irregular and many times unnecessarily delayed or postponed and the elected bodies had been superseded or suspended without adequate justification at the whims and fancies of the State authorities. These views were expressed by the then Minister of State for Urban Development while introducing the Constitution Amendment Bill before the Parliament and thus the new provisions were added in the Constitution with a view to restore the rightful place in

political governance for local bodies. It was considered necessary to provide a Constitutional status to such bodies and to ensure regular and fair conduct of elections. In the statement of objects and reasons in the Constitution Amendment Bill relating to urban local bodies, it was stated :

"In many States, local bodies have become weak and ineffective on account of variety of reasons, including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions. As a result, urban local bodies are not able to perform effectively as vibrant democratic units of self-Government.

Having regard to these inadequacies, it is considered necessary that provisions relating to urban local bodies are incorporated in the Constitution, particularly for

(i) putting on a firmer footing the relationship between the State Government and the Urban Local Bodies with respect to :

(a) the functions and taxation powers, and

(b) arrangements for revenue sharing.

(ii) ensuring regular conduct of elections.

(iii) ensuring timely elections in the case of supersession; and

(iv) providing adequate representation for the weaker sections like Scheduled Castes, Scheduled Tribes and women.

Accordingly, it has been proposed to add a new Part relating to the Urban Local Bodies in the Constitution to provide for ---

(f) fixed tenure of 5 years for the Municipality and re- election within a period of six months of its dissolution."

The effect of Article 243-U of the Constitution is to be appreciated in the above background. Under this Article, the duration of the Municipality is fixed for a term of five years and it is stated that every Municipality shall continue for five years from the date appointed for its first meeting and no longer. Clause (3) of Article 243-U states that election to constitute a Municipality shall be completed -

(a) before the expiry of its duration specified in clause (1), or

(b) before the expiration of a period of six months from the date of its dissolution. Therefore, the constitutional mandate is that election to a Municipality shall be completed before the expiry of the

five years' period stipulated in Clause (1) of Article 243-U and in case of dissolution, the new body shall be constituted before the expiration of a period of six months and elections have to be conducted in such a manner. A Proviso is added to Sub-clause (3) Article 243-U that in case of dissolution, the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period. It is also specified in Clause (4) of Article 243-U that a Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under Clause (1) had it not been so dissolved.

So, in any case, the duration of the Municipality is fixed as five years from the date of its first meeting and no longer. It is incumbent upon the Election Commission and other authorities to carry out the mandate of the Constitution and to see that a new Municipality is constituted in time and elections to the Municipality are conducted before the expiry of its duration of five years as specified in Clause (1) of Article 243-U. The counsel for the respondents contended that due to multifarious reasons, the State Election Commission may not be in a position to conduct the elections in time and under such circumstances the provisions of Article 243-U could not be complied with *stricto sensu*.

A similar question came up before the Constitution Bench of this Court in Special Reference No. 1 of 2002 with reference to the Gujarat Assembly Elections matter. The Legislative Assembly of the State of Gujarat was dissolved before the expiration of its normal duration. Article 174(1) of the Constitution provides that six months shall not intervene between the last sitting of the Legislative Assembly in one session and the date appointed for its first sitting in the next session and the Election Commission had also noted that the mandate of Article 174 would require that the Assembly should meet every six months even after dissolution of the House and that the Election Commission had all along been consistent that normally a Legislative Assembly should meet at least every six months as contemplated by Article 174 even where it has been dissolved. As the last sitting of the Legislative Assembly of the State of Gujarat was held on 3.4.2002, the Election Commission, by its order dated 16.8.2002, had not recommended any date for holding general election for constituting a new Legislative Assembly for the State of Gujarat and observed that the Commission will consider framing a suitable schedule for the general election to the State Assembly in November-December, 2002 and therefore the mandate of Article 174(1) of the Constitution of India to constitute a new Legislative Assembly cannot be carried out. The Reference, thus, came up before this Court.

Speaking for the Bench, Justice Khare, as he then was, in paragraph 79 of the Answer to the Reference, held :

"However, we are of the view that the employment of the words "on an expiration" occurring in Sections 14 and 15 of the Representation of the People Act, 1951 respectively show that the Election Commission is required to take steps for holding election immediately on expiration of the term of the Assembly or its dissolution, although no period has been provided for. Yet, there is another indication in Sections 14 and 15 of the Representation of People Act that the election process can be set in

motion by issuing of notification prior to expiry of six months of the normal term of the House of the People or Legislative Assembly. Clause (1) of Article 172 provides that while promulgation of emergency is in operation, Parliament by law can extend the duration of the Legislative Assembly not exceeding one year at a time and this period shall not, in any case, extend beyond a period of six months after promulgation has ceased to operate.

The aforesaid provisions do indicate that on the premature dissolution of the Legislative Assembly, the Election Commission is required to initiate immediate steps for holding election for constituting Legislative Assembly on the first occasion and in any case within six months from the date of premature dissolution of the Legislative Assembly."

Concurring with the foregoing opinion, Pasayat, J. in paragraph 151, stated as follows :

"The impossibility of holding the election is not a factor against the Election Commission. The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that *impotentia* excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims, 10th Ed., at pp 1962-63 and Craies on Statute Law, 6th Edn., p.

268.) These aspects were highlighted by this Court in Special Reference No. 1 of 1974. Situations may be created by interested persons to see that elections do not take place and the caretaker Government continues in office. This certainly would be against the scheme of the Constitution and the basic structure to that extent shall be corroded."

From the opinion thus expressed by this Court, it is clear that the State Election Commission shall not put forward any excuse based on unreasonable grounds that the election could not be completed in time. The Election Commission shall try to complete the election before the expiration of the duration of five years' period as stipulated in Clause (5). Any revision of electoral rolls shall be carried out in time and if it cannot be carried out within a reasonable time, the election has to be conducted on the basis of the then existing electoral rolls. In other words, the Election Commission shall complete the election before the expiration of the duration of five years' period as stipulated in Clause (5) and not yield to situations that may be created by vested interests to postpone elections from being held within the stipulated time.

The majority opinion in Lakshmi Charan Sen & Ors. Vs. A.K.M. Hassan Uzzaman & Ors. (1985) 4 SCC 689 held that the fact that certain claims and objections are not finally disposed of while preparing the electoral rolls or even assuming that they are not filed in accordance with law cannot arrest the process of election to the Legislature. The election has to be held on the basis of the electoral rolls which are in force on the last date for making nomination. It is true that Election Commission shall take steps to prepare the electoral rolls by following due process of law, but that too, should be done timely and in no circumstances, it shall be delayed so as to cause gross violation of the mandatory provisions contained in Article 243-U of the Constitution.

It is true that there may be certain man-made calamities, such as rioting or breakdown of law and order, or natural calamities which could distract the authorities from holding elections to the Municipality, but they are exceptional circumstances and under no circumstance the Election Commission would be justified in delaying the process of election after consulting the State Govt. and other authorities. But that should be an exceptional circumstance and shall not be a regular feature to extend the duration of the Municipality. Going by the provisions contained in Article 243-U, it is clear that the period of five years fixed thereunder to constitute the Municipality is mandatory in nature and has to be followed in all respects. It is only when the Municipality is dissolved for any other reason and the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any elections for constituting the Municipality for such period.

In our opinion, the entire provision in the Constitution was inserted to see that there should not be any delay in the constitution of the new Municipality every five years and in order to avoid the mischief of delaying the process of election and allowing the nominated bodies to continue, the provisions have been suitably added to the Constitution. In this direction, it is necessary for all the State governments to recognize the significance of the State Election Commission, which is a constitutional body and it shall abide by the directions of the Commission in the same manner in which it follows the directions of the Election Commission of India during the elections for the Parliament and State Legislatures. In fact, in the domain of elections to the Panchayats and the Municipal bodies under the Part IX and Part IX A for the conduct of the elections to these bodies they enjoy the same status as the Election Commission of India.

In terms of Article 243 K and Article 243 ZA (1) the same powers are vested in the State Election Commission as the Election Commission of India under Article 324. The words in the former provisions are in pari materia with the latter provision.

The words, 'superintendence, direction and control' as well as 'conduct of elections' have been held in the "broadest of terms" by this Court in several decisions including in Re :

Special Reference No. 1 of 2002 (2002) 8 SCC 237 and Mohinder Singh Gill's case (1978) 1 SCC 405 and the question is whether this is equally relevant in respect of the powers of the State Election Commission as well.



From the reading of the said provisions it is clear that the powers of the State Election Commission in respect of conduct of elections is no less than that of the Election Commission of India in their respective domains. These powers are, of course, subject to the law made by Parliament or by State Legislatures provided the same do not encroach upon the plenary powers of the said Election Commissions.

The State Election Commissions are to function independent of the concerned State Governments in the matter of their powers of superintendence, direction and control of all elections and preparation of electoral rolls for, and the conduct of, all elections to the Panchayats and Municipalities.

Article 243 K (3) also recognizes the independent status of the State Election Commission. It states that upon a request made in that behalf the Governor shall make available to the State Election Commission "such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1). It is accordingly to be noted that in the matter of the conduct of elections, the concerned government shall have to render full assistance and co-operation to the State Election Commission and respect the latter's assessment of the needs in order to ensure that free and fair elections are conducted.

Also, for the independent and effective functioning of the State Election Commission, where it feels that it is not receiving the cooperation of the concerned State Government in discharging its constitutional obligation of holding the elections to the Panchayats or Municipalities within the time mandated in the Constitution, it will be open to the State Election Commission to approach the High Courts, in the first instance, and thereafter the Supreme Court for a writ of mandamus or such other appropriate writ directing the concerned State Government to provide all necessary cooperation and assistance to the State Election Commission to enable the latter to fulfill the constitutional mandate.

Taking into account these factors and applying the principles of golden rule of interpretation, the object and purpose of Article 243-U is to be carried out.

As the elections to the Ahmedabad Municipal Corporation have already been held and the new Municipal body constituted, no further direction is required in the matter. With these observations, we dispose of the appeal with no order as to costs.