

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 18th November, 2021

**DIVISION BENCH : THE HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE
THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**

WP(PIL) No.08 of 2021

Petitioner : Shakuntala Gurung

versus

Respondents : State of Sikkim and Others

Petition under Article 226 of the Constitution of India

Appearance

Mr. Yam Kumar Subba, Advocate for the petitioner.

Mr. Sudesh Joshi, Additional Advocate General with Mr. Sujan Sunwar, Assistant Government Advocate for the State-respondents No.1 to 5 and 7.

Mr. Jorgay Namka, Advocate for the respondent No.6.

J U D G M E N T

Meenakshi Madan Rai, J.

1. What would be the consequence of a failure to place an Ordinance before the Legislative Assembly in terms of Article 213(2)(a) of the Constitution of India (*for short, the "Constitution"*), once the Legislative Assembly reassembles is the short question that falls for determination herein.

2. The petitioner said to be a public spirited citizen and a Voter of 10/Arithang-II Municipal Ward and Acting Vice President of the Sikkim Democratic Front (*Cheli Morcha*) has filed the instant writ petition alleging that the State-respondent No.1 has acted contrary to the provisions of Article 213 of the Constitution while amending the Sikkim Municipalities Act, 2007 by way of the Sikkim Municipalities (Amendment) Act, 2021 (*for short the "Amendment*

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Act of 2021”). Consequently the By-Election to the 10/Arithang-II Municipal Ward cannot be held under the provisions of the said Amendment Act of 2021. It was further urged that Elections to the 19 (nineteen) Wards of the Gangtok Municipal Corporation (*for short, the "GMC"*) held in March, 2021, is illegal and unconstitutional in view of the Amendment Act of 2021 not adhering to the provisions of Article 213 of the Constitution.

3. The crux of the case as can be culled out from the averments of the petitioner is that on 30.11.2020, the Governor of Sikkim promulgated the Sikkim Municipalities (Amendment) Ordinance, 2020 (Ordinance No.04 of 2020) (*for short, the "Ordinance"*), vide notification No.04/LD/20 issued by the State-respondent No.5 (*Law and Parliamentary Affairs Department*) of the same date, duly published in the Sikkim Government Gazette, wherein amendments to sections 8 and 13 of the Sikkim Municipalities Act, 2007 (*for short, the "Act of 2007"*) were inserted. By the said amendments, under clause (a) of section 8 of the Act of 2007, the word "nineteen" was substituted for the word "seventeen," while in section 13 of the Act, in the existing Table, against Municipal Corporation, under the column "Maximum Number" for the figure "17," the figure "19" was substituted. That, pursuant thereto, the Public Notice No.352/UDD/2020, dated 30.11.2020, was issued by the State-respondent No.3 (*Urban Development Department*), informing that the State Government intended to insert the said amendments. That, the Fourth Session of the Tenth Assembly of the Sikkim Legislative Assembly was held on 11.01.2021 but the Ordinance dated 30.11.2020 allegedly was not laid before the Sikkim Legislative Assembly despite being

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bound by constitutional provisions and thereby ceased to operate from 22.02.2021 on or before which date it ought to have been placed before the Sikkim Legislative Assembly in view of clause (2)(a) of Article 213 of the Constitution. Despite this circumstance the State-respondent No.2 (*State Election Commission*) prepared Electoral Rolls for 19 (nineteen) Wards of the GMC wherein election were called vide notification No.19/Home/2021 dated 25.02.2021, elections held on 31.03.2021 as per notification No.7/SEC/2021 dated 01.03.2021 and results declared on 03.04.2021. That, reservation of seats were notified on 25.02.2021 in the various local governing bodies. In the Fourth Session (Part II) of the Tenth Assembly of the Sikkim Legislative Assembly, held on 26.03.2021, the Sikkim Municipalities (Amendment) Bill 2021 (Bill No.07 of 2021) was introduced and duly considered and passed. The assent of the Governor was obtained on 30.03.2021 and the Bill converted to the Sikkim Municipalities (Amendment) Act, 2021 providing for a "repeal and saving" clause thereby illegally clothing the Legislative Assembly with powers to override Clause (2)(a) of Article 213 of the Constitution. That, the said amendments are thus null and void.

4. Learned counsel for the petitioner advancing his arguments urged that despite the lapse of the Ordinance, the Election to the 19 (nineteen) Wards of the GMC was held and the Election Results declared in April, 2021. That, the repeal and saving clause is in violation to the mandatory constitutional provisions. That, an Ordinance is necessarily to be laid before the Legislative Assembly before expiration of six weeks from the reassembling of the Legislative Assembly. The subsequent election

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of Mayor and Deputy Mayor followed by Oath Taking Ceremony on 04.05.2021 is *non est* in the eyes of law. That, the By-Election to 10/Arithang-II Municipal Wards also could not have been held on 22-09-2021 as per the Schedule prepared by the State-respondent No.2 in view of the aforestated reasons. To buttress his submissions, learned counsel garnered strength from the ratio in ***Krishna Kumar Singh and Another vs. State of Bihar and Others***¹ wherein it was observed by the Hon'ble Supreme Court that the laying of the Ordinance before Parliament or the State Legislature is a mandatory constitutional obligation cast upon the Government and failure to comply with such requirement, is a serious infraction and abuse of the constitutional process. Hence, the prayers in the writ petition.

5. Learned Additional Advocate General for the State-respondents No.1 to 5 and 7, denying and disputing the allegations put forth by counsel for the petitioner, contended that nothing illegal or unconstitutional has emanated on the part of the State-respondents besides which elections to the GMC have already been held including the By-Election to 10/Arithang-II Municipal Wards. That, vide notification No.07/L&PAD/2021, dated 30.03.2021, the Amendment Act of 2021 received assent of the Governor. Clause "4.(2)," the "repeal and saving" clause in the said Act clearly lays down that the Ordinance shall be deemed to have been done or taken in exercise of the power conferred by or under this Act as if this Act was in force on the day on which such thing was done or such action was taken.

¹ (2017) 3 SCC 1

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6. Learned counsel for the respondent No.6 relied on the submissions advanced by the learned Additional Advocate General and had no further arguments to place.

7. We have given due consideration to the submissions of learned counsel for the parties and perused the averments in the petition.

8.(i) A prolix discussion need not ensue in the instant matter, neither is there a necessity for reiteration of facts as placed before us, besides noting relevantly that admittedly elections to 19 Wards of the GMC were held on 31.03.2021 and By-Election to 10/Arithang-II Municipal Wards was held on 22.09.2021 during the pendency of the instant matter and results declared.

(ii) Suffice it to note that on 30.11.2020, the Governor promulgated the Sikkim Municipalities (Amendment) Ordinance, 2020 (Ordinance No.04 of 2020) vide notification No.04/LD/20 of the same date, with the amendments as detailed hereinabove. The Governor of the State draws Ordinance making powers under Article 213 of the Constitution which empowers him to promulgate Ordinance on urgent matters during recess of the Legislature. The maximum validity of an Ordinance is six months and six weeks. An Ordinance will expire after six weeks once the Legislative Assembly is in session. However, Article 213 of the Constitution also provides that the every Ordinance promulgated must be laid before the State Legislature when it reassembles and would cease to operate at the end of six weeks from the reassembly of the Legislature which is required to uphold it, on failure of which, the Ordinance would be rendered invalid. Since the power vested on the Governor to issue Ordinances is an emergent power to be

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exercised when the Legislature is not in session in order, to deal with situations that require immediate action, it must necessarily have a limited life. The Ordinance was issued on 30.11.2020, the Fourth Session of the Tenth Assembly of the Sikkim Legislative Assembly was held on 11.01.2021 and thus the Ordinance ceased to exist on 22.02.2021, in view of the lapse of six weeks from the reassembly of the Legislature. However, it is apposite to point out here that regardless of this circumstance, notification No.07/L&PAD/2021, dated 30.03.2021, was published vide Sikkim Government Gazette bearing No.81 of the same date, which at "4(2)" bore a "Repeal and saving" clause which specifically lays down as follows;

"Repeal and saving 4. (1)
(2) Notwithstanding such repeal, anything done or any action taken in exercise of the powers conferred by or under that Ordinance shall be deemed to have been done or taken in exercise of the power conferred by or under this Act as if this Act was in force on the day on which such thing was done or such action was taken."

(iii) Black's Law Dictionary, Tenth Edition, defines "saving clause" as one generally used in a repealing act to preserve rights and claims that would otherwise be lost. In **Bennion on Statutory Interpretation, Indian reprint, Sixth Edition, at page 676,** "The saving" provides as follows;

"A saving is a provision the intention of which is to narrow the effect of the enactment to which it refers so as to preserve some existing legal rule or right from its operation.

.....

..... A saving resembles a proviso, except that it has no particular form. Furthermore it relates to an existing legal rule or right, whereas the proviso is usually concerned with limiting the new provision made by the section to which it is attached. A saving often begins with the words 'Nothing in this [Act] shall

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. . .' A saving may be qualified or conditional. Very often a saving is unnecessary, but is put in *ex abundans cautela*.

.....

However, a saving may preclude an interpretation of other provisions of the enactment that would interfere with the subject matter of the saving. In other words, if competing constructions of the other provisions are open, the Court should adopt the construction that give effect to, rather than detracts from, the saving.

A saving is taken not to be intended to confer any right which did not exist already.

....."

(iv) In *State of Punjab vs. Mohar Singh, Son of Pratap Singh*²

the Supreme Court observed as follows;

"(6) Under the law of England, as it stood prior to the Interpretation Act of 1889, the effect of repealing a statute was said to be to obliterate it as completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law : Vide Craies on Statute Law, 5th edn, page 323. A repeal therefore without any saving clause would destroy any proceeding whether not yet begun or whether pending at the time of the enactment of the Repealing Act and not already prosecuted to a final judgment so as to create a vested right : Vide Crawford on Statutory Construction, pp. 599-600. To obviate such results a practice came into existence in England to insert a saving clause in the repealing statute with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment.

Later on, to dispense with the necessity of having to insert a saving clause on each occasion, section 38(2) was inserted in the Interpretation Act of 1889 which provides that a repeal, unless the contrary intention appears, does not affect the previous operation of the repealed enactment or anything duly done or suffered under it and any investigation, legal proceeding or remedy may be instituted, continued or enforced in respect of any right, liability and penalty under the repealed Act as if the Repealing Act had not been passed. Section 6 of the General Clauses Act, as is well known, is on the same lines as section 38(2) of the Interpretation Act of England."

(v) Thus, from all of the above, it clearly emerges that the object of a saving clause is to save the effect of what has been

² AIR 1955 SC 84

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previously done under the statute repealed. The result of such a saving clause is that the pre-existing law continues to govern the act done before a particular date from which the repeal of the pre-existing law takes effect. Nothing unconstitutional emanates from such an act of the Legislature.

(vi) Indeed, this Court is conscious and aware that the Ordinance which has not been placed before the Legislature cannot have the same force and effect as a law enacted by the Legislature and thereby would be inconsequential. However, in view of the “repeal and saving” clause in the Amendment Act of 2021, as discussed *supra*, all other acts purported to have been done under the Ordinance, thereby gain legal sanctity. In our considered opinion, nothing further remains for adjudication in this matter.

9. Writ Petition, therefore, stands dismissed and pending applications, if any, also stand disposed of accordingly.

(Meenakshi Madan Rai)
Judge
18-11-2021

(Biswanath Somadder)
Chief Justice
18-11-2021

Approved for reporting : **Yes**