

(1997) 12 GUJ CK 0048
In the Gujarat High Court

Idar Municipal Borough

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 19-12-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1998) 1 GLR 722

Hon'ble Judges : S.D. Pandit, J;C.K.Thakker, J

Bench : Division Bench

Judgement

C.K. Thakker, J.—Admitted With the consent of all the parties the matter was taken up for final hearing.

2. We have heard at considerable length Mr. K.G. Vakharia, Senior Advocate instructed by Mr. Tushar Mehta for the Appellants, Mr. M.R. Raval Asstt. Government Pleader for respondent Nos. 1, 4 and 13, Mrs. K.A. Mehta for respondent Nos. 5 to 12 and Mr. A.H. Mehta for Respondent No. 3. Mr. R.A. Mishra for respondent No. 2 was absent.

3. This appeal is filed against judgment and order passed by the learned single Judge in Special Civil Application No. 6078 of 1993, on February 21, 1997. By the impugned judgment, the learned single Judge dismissed the petition filed by Idar Municipal Borough; formerly Idar Nagar Panchayat [Appellant herein].

4. Few relevant facts to appreciate the controversy raised in this appeal may now be stated:

The Development Commissioner, State of Gujarat issued a notification in exercise of powers under Sub-section (2) of Section 9 of the Gujarat Panchayats Act, 1961 (hereinafter referred to as "the Act") by which a part of local area of Juvanpura Group Gram Panchayat was excluded from that Panchayat and was included within the local limits of Idar Nagar Panchayat. At the end, the notification stated:

This notification will come into effect from the date its publication in Government Gazette.

It is not in dispute that because of various proceedings pending in different Courts, the notification could not be published in Official Gazette. Only on December 5, 1992, a notification was issued in the Government Gazette (Extraordinary), and published in Gazette Part 1-A on March 9, 1993. It was mentioned that though the notification was issued under Sub-section (2) of Section 9 of the Act on January 16, 1971 and local area which was within Juvanpura Group Gram Panchayat was excluded from the said area and included in Idar Nagar Panchayat, before the notification could be published in Official Gazette, Juvanpura Group Gram Panchayat filed Special Civil Application No. 164 of 1971, which was ultimately dismissed. Against the judgment of the single Judge, a Letters Patent Appeal No. 122 of 1971 was preferred. Some proceedings were also initiated in Civil Court and interim relief was obtained, which continued for a quite long time. In these circumstances, publication of the notification was delayed. After completion of proceedings, a notification was to be published in accordance with law. It was, therefore, stated that such a notification should be issued showing Survey Nos. 41 and 42 as part of Idar Nagar Panchayat. It was also stated that a notification should be given effect from January 16, 1971 retrospectively for exclusion and inclusion, viz., exclusion of Survey Nos. 41 and 42 from Juvanpura Group Gram Panchayat and inclusion of the said area in Idar Nagar Panchayat. It appears that Juvanpura Group Gram Panchayat was aggrieved by the said action and it approached this Court by filing Special Civil Application No. 5879 of 1993. When that petition came up for hearing, the learned single Judge dismissed the petition "in peculiar facts and circumstances of the case". Considerable arguments were advanced by Mr. Vakharia on the effect of the judgment and we shall consider the same at appropriate stage.

5. The Development Commissioner passed an order (Annexure "A") in exercise of powers under Clause (iv) of Sub-section (1) of Section 298 of the Act on May 10, 1993, by which a direction was issued to the Appellant to absorb nine employees mentioned therein. They were working in Juvanpura Group Gram Panchayat and by the order of the Development Commissioner, Idar Nagar Panchayat was asked to absorb them. It was that order which is challenged in the present proceedings.

6. The learned single Judge after considering the contentions raised on behalf of the contesting parties, held that the action taken by the Development Commissioner could not be said to be unlawful or contrary to law. He, therefore, did not think it proper to exercise extraordinary powers under Article 226 of the Constitution of India, and dismissed the petition. This appeal is directed against the order passed by the learned single Judge.

7. Mr. K.G. Vakharia learned Senior Advocate for the appellant raised various contentions. He submitted that (i) there is an error apparent on the face of record committed by the learned single Judge in not quashing and setting aside the impugned order, Annexure "A" passed by the Development Commissioner;

(ii) the Development Commissioner had no power, authority or jurisdiction to pass an order under Clause (iv) of Sub-section (1) of Section 298 of the Act; (iii) when the notification was to be given retrospective effect from January 16, 1971 and this Court held the same to be legal and valid, at the most, only those employees could be ordered to be allocated who were in service at the relevant time, i.e., as on January 16, 1971. All employees appointed thereafter, i.e., after January 16, 1971 could not have been ordered to be allocated; (iv) the employees were not legally and regularly appointed by Juvanpura Panchayat but they were appointed illegally and without following proper procedure. No direction could be issued for those employees; (v) the impugned action taken by the Development Commissioner affected the appellant-Panchayat and civil consequences ensued. Such action, therefore, could not have been taken without following the principles of natural justice. As no notice was issued, no explanation was sought and no reasonable opportunity of hearing was afforded to the appellant, the order is null and void and (vi) Clause (iv) of Section 298(1) enjoined a duty on the Development Commissioner to consider the circumstances in which such an order could be passed after application of mind. It must be a speaking order recording reasons. In other words, on the basis of objective facts, a finding could be recorded by the authority as to why an order was necessary in the facts and circumstances of the case.

8. Mr. Rawal, learned A.G.P., Mr. A.H. Mehta, learned Counsel for respondent No. 3 and Mrs. K.A. Mehta for employees ordered to be allocated to Idar Nagar Panchayat have supported the order passed by the Development Commissioner and confirmed by the learned single Judge.

9. Mr. Rawal submitted that a notification under Sub-Section (2) of Section 9 of the Act was issued in accordance with law by the competent authority. The consequential action could have been taken by the Development Commissioner. On issuance of notification certain consequences ensue. The Legislature has contemplated such a situation and Section 298 empowers the Development Commissioner to take appropriate action by passing appropriate orders. In view of statutory powers, the action taken by the Development Commissioner cannot be said to be unlawful or illegal. He submitted that issuance of notification is a quasi-legislative act. In exercise of legislative or quasi-legislative powers, principles of natural justice have no application. No notice is required to be issued, no explanation to be called for; and no opportunity of hearing need be given in such cases. Regarding effect of notification, our attention was invited to a decision of the Hon'ble Supreme Court in *Khambalia Municipality and Another Vs. State of Gujarat*, . Regarding employees, Mr. Rawal submitted that it is true that except one, all other employees were appointed after January 16, 1971 but they were appointed for collection of Octroi for the area of Survey Nos. 41 and 42 and as they were to be excluded from the local area of Juvanpura Group Gram Panchayat and to be included in Idar Nagar Panchayat, the employees had become surplus and were ordered to be allocated to Idar Nagar Panchayat. The Development Commissioner after application of mind, passed the impugned

order which cannot be said to be illegal. In affidavit-in-reply filed by Mr. K.P. Gurjar, Assistant Development Commissioner, it was stated that since Survey Nos. 41 and 42 were excluded from Juvanpura Group Gram Panchayat and included in Idar Nagar Panchayat, the employees engaged by Juvanpura Group Gram Panchayat were ordered to be allocated to appellant-Panchayat under Clause (iv) of Sub-section (1) of Section 298 of the Act. It was, therefore, submitted that the action was legal and valid.

10. Mrs. Mehta appearing for employees submitted that in the affidavit filed by Juvanpura Panchayat also, it was stated that the employees were appointed to collect octroi from Survey Nos. 41 and 42 and since they were included in Idar Nagar Panchayat, the action taken by the Development Commissioner was in consonance with law and no objection could be raised against such an order. Mrs. Mehta further submitted that the order passed by the Development Commissioner is legal and valid and also equitable and just inasmuch as all the employees were working since long. They were appointed by Juvanpura Group Gram Panchayat to collect octroi in Survey Nos. 41 and 42 and considering all relevant facts, the Development Commissioner passed an order allocating them to appellant-Panchayat. The appellant-Panchayat, therefore, cannot refuse to obey the said order. Regarding order passed by the learned single Judge in Special Civil Application No. 5879 of 1993, she submitted that it would not affect the employees who were not parties to the petition. Finally, she submitted that the appellant-Panchayat has approached this Court by invoking Article 226 of the Constitution. The employees are working since many years. They were regularly appointed (though this fact was seriously disputed by the learned Counsel for the appellant). When extraordinary powers have not been exercised by the learned single Judge, it cannot be said that error of law has been committed by the learned single Judge, which requires interference in appeal.

11. Now, before dealing with respective contentions of the parties, it may be necessary to state the Scheme of Section 9. It enables the State Government to exclude or include certain areas from one local area to another local area. It enacts that before such an action is taken by the State Government, it must consult Taluka Panchayat, District Panchayat and Gram or Nagar Panchayat as the case may be. As soon as the action is taken and notification is issued and published, exclusion or inclusion becomes effective. The case of the appellant-Panchayat was that the notification was issued on January 16, 1971 (Page No. 43 of the petition) and was to come into force from the date of its publication in the Government Gazette. The notification, however, could not be published in the Gazette because of pendency of Civil suit, as well as Special Civil Application No. 3544 of 1992. It was published in the Government Gazette on December 5, 1992. It was stated in the Gazette that though notification was ready as early as on January 16, 1971, it could not be published in view of pending proceedings. In these circumstances, notification was given retrospective effect from January 16, 1971. Accordingly, the Development Commissioner issued notification by giving retrospective effect, viz., from January 16, 1971. A copy of the said

notification dated December 5, 1992 published in the Gujarat Government Gazette (Extraordinary) dated March 9, 1993 is also placed on record.

12. As stated above, validity and legality of the said notification was challenged by Juvanpura Group Gram Panchayat, respondent No. 3 herein, by filing Special Civil Application No. 5879 of 1993. In that petition, it was contended by Juvanpura Group Gram Panchayat that as per settled law and a decision of a Division Bench of this Court, in Special Civil Application No. 1583 of 1969 (Page 215), decided on March 12, 1970 (Page 215), no retrospective effect could be given to a notification published in the Government Gazette. Hence, the notification dated December 5, 1992 could not have been given retrospective effect from January 16, 1971 and the notification was ultra vires and unlawful.

13. The learned single Judge considered the decision of the Division Bench as also legal position and in para 4 observed:

4. It cannot be gainsaid that, sitting as the single, I am bound by the aforesaid Division Bench ruling of this Court. Even otherwise, I am in respectful agreement therewith. It cannot also be gainsaid that the notification at Annexure-C to this petitioner gives retrospective effect to the Notification at Annexure-A to this petition. That is contrary to the aforesaid binding Division Bench ruling of this Court. It has been urged that, in order to give effect to the notification at Annexure-A to this petition, the same is required to be published in the Government Gazette and it cannot be brought into effect by any other notification even though the subsequent notification is published in the Government Gazette.

The learned single Judge, however, in the light of the facts and circumstances in para 5 stated:

5. Ordinarily, I would have upheld the challenge to the notification at Annexure-C to this petition on the aforesaid ground. However, on the peculiar facts and circumstances of the case, the relief claimed by the petitioner in this petition need not be granted in exercise of the discretionary power vested in this Court under Article 226 of the Constitution of India. The reason therefore is quite simple. As transpiring from the preamble to the notification at Annexure-C to this petition, the notification at Annexure-A to this petition could not be published in view of the challenge to its validity by means of certain litigations and grant of interim orders by Court therein. In the meantime, as aforesaid, by the order at Annexure-B to this petition, this Court permitted the authorities to hold elections to the Nagar Panchayat of Idar by including within its limits Survey Nos. 41 and 42 of Village Juvanpura. The effect of the order of this Court at Annexure-B to this petition would be to give effect to the notification at Annexure-A to this petition. It appears that, pursuant to the order of this Court at Annexure-B to this petition, the notification at Annexure-C to this petition has been issued. It thus becomes clear that not only the validity of the notification at Annexure-A to this petition has been upheld by this Court, but this Court has also given effect to

it by its order at Annexure-B to this petition. It is not in dispute that, pursuant thereto elections to the Nagar Panchayat of Idar were held including within its limits the area comprising of Survey Nos. 41 and 42 of village Juvanpura. That means the effect to the notification at Annexure-A to this petition was fully given without its publication in the Official Gazette. In that view of the matter, issuance of the notification at Annexure-C to this petition was a mere formality. It is these peculiar facts and circumstances of this case which have prompted me to uphold the validity of the notification at Annexure-C to this petition bringing into effect prospectively the notification at Annexure-A to this petition from its date without publication of the latter in the Official Gazette.

(Emphasis supplied)

Strong reliance was placed on the above observations of the learned single Judge by Mr. Vakharia. It is not necessary to express any opinion on that point in the present proceedings. Suffice it to say, however, that (i) the learned single Judge dismissed the petition filed by Juvanpura Group Gram Panchayat; and (ii) the employees who are sought to be allocated by the impugned order passed by the Development Commissioner in the appellant-Idar Nagar Panchayat were not parties.

14. It is not in dispute that Survey Nos. 41 and 42 which were in Juvanpura Gram Panchayat were excluded from Juvanpura Group Panchayat and included in Idar Nagar Panchayat. There was, however, some dispute as to whether before issuing notification under Sub-section (2) of Section 9 of the Act Idar Nagar Panchayat was or was not consulted. The said question, however, is not material in the present Letters Patent Appeal. In the present proceedings, we are concerned with legality of an order passed by the Development Commissioner of allocation of nine employees, passed under Clause (iv) of Sub-section (1) of Section 298. Section 298 is material and hence, it requires to be quoted in extenso:

298.(1) When by a notification under Sub-section (2) of Section 9 of the limits of any gram or nagar are altered so as to-

(a)include any area therein, or

(b)exclude any area therefrom,

the State Government may, notwithstanding anything contained in this Act or any other law for the time-being in force, by order published in the Official Gazette, provide for all or any of the following matters, namely:

(i) in a case falling under Clause (a), the interim increase in the number of the members of the Gram Panchayat or, as the case may be, Nagar Panchayat by appointment of additional members by the State Government;

(ii) in a case falling under Clause (b), the removal of the members of the Gram Panchayat or, as the case may be, Nagar Panchayat, who in the opinion of the

State Government represent the area excluded from the gram or, as the case may be nagar;

Provided that where the area so excluded has been included in any other gram or nagar, the members so removed shall be appointed as additional members of the Panchayat of such gram or nagar:

(iii) the term for which additional members so appointed shall hold office and the manner of filling casual vacancies;

(iv) allocation of any officer or servant of the Panchayats affected by the alteration of the limits.

(2). The Panchayat, if any, constituted for the gram or nagar and functioning immediately before the alteration of the limits shall, subject to the addition or exclusion of members under Sub-section (1) continue to function until the expiry of its term under this Act and on such expiry it shall be reconstituted in the manner provided in this Act.

(3)The Nyaya Panchayat constituted for the respective gram or nagar shall, notwithstanding the alteration of the limits of the gram or nagar, continue to function in the gram or nagar as constituted with the altered limits, until the expiry of its term under this Act.

(4) If in altering the limits of any gram or nagar, the area excluded therefrom is included in any other gram or nagar, then-

(a) such portion of the gram or nagar fund, debts, obligations and other property of the gram or nagar from which the area is so excluded shall be transferred and shall vest in the Panchayat of the gram or nagar in which such area is included, as the State Government may, by order in writing direct;

(b) the rights and liabilities of the Panchayat in respect of any contracts, agreements and other matters and things, arising in or relating to the area so excluded shall vest in the Panchayat of the gram or nagar in which the area is so included;

(c) any notice, tax, fee, cess, order, licence, permission, rule or bye-law issued, imposed, granted or made in respect of the area so excluded shall be deemed to have been issued, imposed, granted or made in respect of the Panchayats in which the area is so included and shall continue in force until it is superseded under the provisions of the law applicable thereto;

(d) all proceedings relating to the area excluded from the gram or nagar and pending before the Panchayat or the Nyaya Panchayat on the date of such exclusion shall be transferred to and disposed of by the Panchayat, or, as the case may be, the Nyaya Panchayat of the gram or nagar in which the area is included.

Bare reading of the section makes it clear that when a notification is issued

under Sub-section (2) of Section 9 of the Act and limits of any Gram or Nagar Panchayat is altered either by exclusion or by inclusion, it enjoins upon the State Government to provide for all or any of the matters enumerated in Clauses (i), (ii), (iii) and (iv). In other words, it is a consequential action to be taken by the State Government in the light of alterations in limits of Gram or Nagar Panchayat.

15. It was contended by Mr. Vakharia that before taking an action under Clauses (i), (ii), (iii) or (iv); as the case may be, (a) there must be application of mind on the part of the State Government or officer authorised by the State Government for the said purpose, and (b) there must be observance of principles of natural justice and fair-play. In the instant case, according to Mr. Vakharia, there is total non-application of mind by the Development Commissioner in not considering relevant facts and coming to the conclusion as to whether allocation of any officer or servant of the Panchayat affected by such alternation of limits was necessary. The order is, therefore, illegal and contrary to law. He further submitted that by such an order the appellant-Idar Nagar Panchayat was undoubtedly to be affected, and hence, even after application of mind and satisfying about allocation of employees, the appellant-Panchayat ought to have been afforded opportunity of hearing. As that is not done, the order is void being violative of the principles of natural justice.

16. The question which arises for our consideration is whether the order could have been passed under Clause (iv) of Sub-section (1) of Section 298 of the Act by the Development Commissioner and whether before issuing such order and giving direction to the appellant-Panchayat to absorb employees of Juvanpura Gram Panchayat in Idar Nagar Panchayat, opportunity of hearing should have been afforded. This contention was advanced before the learned single Judge also. According to the learned single Judge, Section 298 speaks of "consequences" of alteration of limits of gram or nagar. Once the alteration of the limits of gram or nagar is effected consequences therefrom must ensue as a matter of course. Such consequences flow by operation of law and the principles of natural justice have no application. By not extending opportunity of hearing and observing principles of natural justice, the Development Commissioner has not committed illegality and the order cannot be said to be unlawful on that count.

17. We are of the view that the learned single Judge has not committed any illegality in dismissing the petition and in rejecting the contentions of the appellate-Panchayat. We are also unable to accept the argument of the learned Counsel for the appellant. It is true that a petition filed by Juvanpura Gram Panchayat against giving retrospective effect to the notification issued by the Development Commissioner u/s 9 of the Act was dismissed. It is also true that no appeal was filed or other proceeding was taken and that order has become final. But considering the legal position as well as established fact, the learned single Judge in the present proceeding has held that the notification must take effect from the date of publication of notification and when the notification was

published in 1992, the effect must be given from that date. Such legal position, in our view, is well settled and no grievance can be made. If it is true, the learned single Judge was right in observing that the Development Commissioner could have passed an order u/s 298 of the Act as one of the consequences of the alteration of the limits of Juvanpura Gram Panchayat was the effect on service of employees of the area which was in Juvanpura Gram Panchayat. An order of allocation of those employees was, therefore, within the competence of the Development Commissioner, It is true that the employees sought to be allocated to appellant-Panchayat by an order of the Development Commissioner were not appointed by the appellant-Panchayat but since it was a consequential action resulting from alteration of limits of Juvanpura Gram Panchayat, it could be taken by the Development Commissioner and even though the appellant-Panchayat is affected thereby, it is consequential to alternation and hence could not be objected to.

18. It is, no doubt, the case of the appellant-Panchayat that some employees of Juvanpura Gram Panchayat were not appointed in accordance with law after following proper procedure. In the present case, however, we are not concerned directly with that question and we may clarify that we are not expressing any opinion regarding status of those employees. The limited question with which we are concerned in the present appeal is as to whether an order of allocation could have been made by the Development Commissioner. Since in our view such an order could have been passed by the Development Commissioner, to that extent and to that extent only, we hold the action to be legal and valid and the appellant-Panchayat cannot object to the exercise of such power by the Development Commissioner.

19. In our opinion, submission of Mrs. Mehta for the employees is also not ill-founded that even if in earlier petition, some order was passed by the learned single Judge against Juvanpura Gram Panchayat, the said order cannot change legal position nor can adversely affect the employees of Juvanpura Gram Panchayat in whose favour the order was passed by the Development Commissioner in the present proceedings. She submitted that a limited inquiry before this Court in present proceeding is whether an order could have been passed by the Development Commissioner under Clause (iv) of Sub-Section (1) of Section 298 of the Act. If it is held that such a power could be exercised by the Development Commissioner, the matter must end there. In our view, the order could have been passed by the Development Commissioner u/s 298(1)(iv) which is one of the consequences of exclusion and inclusion of areas and principles of natural justice cannot be invoked. The action taken by the Development Commissioner was, therefore, according to law.

20. For the foregoing reasons, we do not see any ground to interfere with the order passed by the learned single Judge. The appeal deserves to be dismissed, and is accordingly, dismissed. In the facts and circumstances of the case, there shall be no order as to costs. Ad-interim relief granted earlier is hereby vacated.

21. Mr. Vakharia, learned Counsel for the appellant has requested that the appellant intends to approach the Apex Court. He, therefore, prays that the order passed by us may be kept in abeyance for some time. We have heard learned Counsel for the respondent also. In the facts and circumstances of the case, the ad-interim relief granted earlier and operative till today will continue to operate till 2nd February, 1998.