
(1977) 04 GUJ CK 0007
In the Gujarat High Court

Mehmoodmiya Kadri and Others

APPELLANT

Vs

Sirishkumar Modi and Another

RESPONDENT

Date of Decision : 13-04-1977

Acts Referred:

Gujarat Municipalities Act, 1963 — Section 53, 55, 55, 55(2)

Citation : (1978) 19 GLR 97

Hon'ble Judges : D.A. Desai, J

Bench : Single Bench

Judgement

D.A. Desai, J.—Petitioners question the validity and legality of a resolution adopted by the second respondent Palanpur Municipality (Municipality for short) of 20th March 1977 by which the Municipality at its requisitioned meeting held on that day formed as many as 12 new Committees including the Executive Committee.

2. Few facts leading to the present petition, are quite interesting and revealing and may be noticed. Municipality is deemed to have been constituted under the Gujarat Municipalities Act, 1963 (1963 Act for Short). As required by Section 55 of the 1963 Act, it had appointed various committees. Term of all these committees expired on 11 th November 1976. The President of the Municipality—first respondent convened a meeting of the General Board of the Municipality by a notice dated 23rd October, 1976 Annexure "A" on 11-11-1976 at 8-30 P.M. Item No. 2 on the agenda was "Appointing new Committees as the term of the existing committees were to expire on 11-11-1976." The meeting was convened and as many as 12 committees were set up including the executive committee which transpires from the Circular Annexure B dated 12-11-1976 issued by the Chief Officer of the Municipality. These committees started functioning from the date of their appointment. A requisition dated 5th March, 1977 signed by 7 councillors appears to have been received by the first respondent President, and pursuant to this requisition, the President directed a notice to be issued and such notice dated 14/15th March 1977 was issued convening & meeting of the General

Board of the Municipality on 20th March 1977 at 10-30 A.M. Item No. 2 on the agenda was that the requisition was received from seven councillors and requisitionists desired a resolution to be moved to set up all the committees afresh, as the existing committees had failed to discharge their duties or were not satisfactorily discharging their duties. One development that took place before the meeting was convened may be now noted. Petitioners four in number who are Chairmen of four different committees filed a petition on 18th March 1977 questioning decision of convening the meeting. An interim relief was prayed for, restraining the Municipality from examining item No. 2 on the agenda. A notice was ordered to be issued. Interim stay was refused under certain circumstances which need not be stated here. However, the meeting was convened and a resolution appointing all the 12 committees afresh was adopted. On 21st March 1977 petitioners herein moved the Court for interim stay of the operation of the resolution adopted on 20th March 1977 which was granted. The petition was thereafter amended with a view to joining all those persons who are appointed on different committees and who may be affected by the decision in this petition. Another amendment was sought questioning the validity of the resolution itself. These amendments were granted. The petition was set down for hearing preemptorily thereafter.

3. Mr. S.K. Zaveri, learned Advocate who appeared for respondents Nos. 1 and 2 namely the President and the Municipality raised a preliminary contention to the maintainability of this petition. Mr. Zaveri formulated the preliminary objection thus: Under Article 226(1)(b) and (c) of the Constitution amended by the Constitution (Forty-second) Amendment Act, 1976, it would not be open to this Court to entertain this petition purporting to be under Article 226 in view of the provision contained in Sub-Article (3) which forbids the Court from entertaining a petition seeking redress under Clauses (b) and (c) of Article 226(1), if any other remedy for such redress is provided for by or under any other law for the time being in force. Urged Mr. Zaveri that Section 258 of the 1963 Act provides a remedy under the Act in respect of the wrong complained of, full redress can be had from the authority set up under the Act and, therefore, the Court should not entertain this petition. Section 258 confers power on the Collector to suspend execution or prohibit the doing of anything which is about to be done by the municipality, if it is causing or likely to cause injury or annoyance to the public or to lead to a breach of the peace or is unlawful. It was said that the resolution of the municipality, validity of which is questioned, if it is alleged to be unlawful by the petitioners, they could move the Collector and obtain effective relief u/s 258. This was countered by Mr. A.S. Qureshi, learned Advocate for the petitioners by saying that the remedy provided by Section 258 is not effective remedy. If one were to accept the contention of Mr. Qureshi it may unnecessarily in a given situation cut down the power of the Collector where possibly someone can avail of cheaper remedy being had, compared to High Court. Therefore, I do not propose to reject the preliminary contention raised by Mr. Zaveri on the ground that Section 258 would not provide a full remedy under the Act to the petitioner.

who are seeking relief under the very Act. I would however overrule the preliminary objection on a wider ground.

4. Petitioners contend that in view of the statutory provision contained in Sub-section (2) of Section 55 of the 1963 Act whenever a committee is set up u/s 55 by the Municipality governed by the 1963 Act, members of the committee shall hold office for a period of one year. There is some controversy about the construction of expression shall hold office for a period of one year". For the purpose of the preliminary objection, I would proceed on the assumption that the members of the committee are entitled to hold office as member of the committee for a period of one year. In other words, unless they are disqualified, the Municipality at any rate cannot dissolve the committee and set up a new committee before the expiry of their term. The question, therefore, would be whether the Municipality has power by some action of its own to cut down the term of the office of an elected member of a committee. If there is no power, the action is ab initio void. It would be an action without the sanction of law. If there is an action which impinges upon right of elected member without the authority of law, the action would be ab initio void. It would therefore be a purported exercise of power by the Municipality. If there is no power to dissolve the committee which has been validly set up before the expiry of period of one year, then the action by whatever method adopted dissolving the committee, thereby cutting down the term of the office of the member to a period less than one year, would be an action ab initio void. If there is no power, and yet power is exercised one can at best say that it is a purported exercise of power. The decision or order being without jurisdiction would be ab initio void. It would, therefore, be a nullity. It has been held by a Constitution Bench of this High Court in Special Civil Application No. 1721 of 1976 and other cognate petitions decided today (13th April 1977) (Ahmedabad Cotton Mfg. Co. Ltd. v. Union of India 18 G.L.R. 714 that where power is sought to be exercised without the authority of law, not backed by law or without sanction of law or the order is a purported order, fetter of Sub-Article (3) of Article 226 would not come in the way of the High Court entertaining a petition, I would presently point out that the resolution of the Municipality cutting down the term of office of the elected members of the committees set up 12th November 1976 was without the authority of law, nor had the Municipality any power to do so or it lacked power, its decision has no sanction of law and therefore, it is a nullity. Nullity can be questioned even without preferring an appeal. It is on this larger ground that I would overrule the preliminary objection. Of course this decision to overrule the preliminary objection is intricately connected with the decision on merits and therefore, the preliminary objection as such would cease to be preliminary objection. However, as it was put up in that fashion. I have disposed it of earlier, otherwise it would look a little out of turn.

5. Mr. Qureshi, learned Advocate for the petitioners urged that the Municipality has no power to reduce or terminate the tenure of the committee duly elected for the term as prescribed by law. It was next contended that assuming the

Municipality has power to terminate or reduce the term or to remove the committee and set up a new committee before expiry of the term, exercise of power was not justified as if was not necessary to exercise power or there was no basis for exercise of power, or there was no reason or sufficient cause for doing the same. It was further urged that removal of the former committees, in any view of the matter was mala fide.

6. Part (2) of Chapter IV of the 1963 Act deals with the committees Section 53 provides for setting up of an executive committee and it is obligatory on a municipality to form executive committee. The members so elected to the executive committee shall hold office for a period of one year. Section 54 refers to the setting up of Pilgrim Committee, with which, we are not concerned, save and except taking note of the fact that members of the Pilgrim Committee shall hold office for the duration of the municipality and thereafter upto the date on which the new Pilgrim Committee is constituted in accordance with the provisions of the Act. Section 55 confers powers upon the Municipality to appoint other committees consisting of such number of councillors as municipality may decide to exercise the powers and perform duties of the municipality in respect of any purpose excluding the one which is reserved for the Pilgrim Committee." It further provides that where such committee is set up the executive committee shall not exercise any power or perform any duty which such committee has been appointed to exercise or perform. Sub-section (2) is material and may be set out in extenso:

55.(2) The members of such committee shall be elected by the municipality in accordance with the rules framed under Clause (a) of Section 271-and such members shall hold office for a period of one year.

Section 56 provides for setting up of consultative committees. Section 57 authorises the municipality under certain circumstances to elect as member of any committee appointed as consultative committee any one who is not a councillor of the municipality but who holds certain qualification. Section 58 provides for a contingency in respect of casual vacancy in the executive committee or any other committee appointed u/s 55. Second part of the provision of Section 55 which requires attention is that where vacancy is filled up by election, a member so elected shall hold office so long only as the person in whose place he is elected would have held it if the vacancy had not occurred. Section 271 confers power on the Municipality and the State Government to make rules. Clause (a) of Section 271 confers power to make rules for regulating the conduct of its business and the delegation of any of its powers or duties to any committee or to the chief officer or subject to the provisions of Section 54 the powers or duties of any committee to any other committee or to the chief officer and the appointment and constitution of committees u/s 55. Section 279(1) provides-that the Bombay District Municipal Act, 1901 (1901 Act for short) and that Act as adapted and applied to the Saurashtra area of the Gujarat State, an the Bombay Municipal Boroughs Act, 1925, and that Act as adapted

and applied to the Saurashtra area of the Gujarat State and that Act as extended to the Kutch area of the Gujarat State are repealed. Consequence of repeal is provided in Sub-section (2), Clause (vi) providing for continuance of various things done under the repealed statute. It reads as under:

(2) Notwithstanding the repeal of the said Acts:

(vi) any appointment, notification, notice, tax, fee, order, scheme, licence, permission, rule, by-law, or form made, issued, imposed, or granted in respect of the said boroughs or districts and in force immediately before the date of the commencement of this Act shall in so far as they are not inconsistent with the provisions of this Act be deemed to have been made, issued, imposed or granted under this Act in respect of the borough and shall continue in force until it is suspended or modified by any appointment, notification, notice, tax, fee, order, scheme, licence, permission, rule, by-law or form made, issued, imposed or granted under this Act.

It maybe mentioned that the rules made under the 1901 Act would continue to be in force so far as they are not inconsistent with the provisions of the Act.

7. The Municipality prior to the introduction of the 1963 Act was governed by the 1901 Act. Part II of Chapter III of the 1901 Act provided for Committees. Section 29 conferred power on the Municipality to appoint various committees for a period not exceeding one year. Section 29 reads as under:

29. Subject to the limitations prescribed by the rules aforesaid, the Municipality may appoint, for a period not exceeding one year any such committee or such or so many committees consisting of such councillors as they think fit for any purpose or respectively for any of the purposes, other than, those specified in Section 28, for which a managing committee may, u/s 27, exercise the powers of a Municipality, and may invest each committee so appointed with such of the said powers as may be necessary or expedient for the fulfilment of the purpose for which it is appointed not being, where a Pilgrim Committee is appointed, powers or duties referred to in Section 27-A.

Section 46(i) conferred power on the Municipality governed by 1901 Act to make rules and specific attention was drawn to Section 46A which reads as under:

46. Every Municipality shall, as soon as conveniently may be the constitution thereof, and subject to the provisions of Chapter XII-A, make and may from time to time alter or rescind rules, but not so as to render them inconsistent with this Act.

(a) regulating the conduct of their business and the delegation of any of their powers or duties and, subject to the provisions of Sections 27 and 27A, the appointment and constitution of committees.

Armed with the powers under repealed Act, second respondent Municipality has framed rules and they are deemed to be continued under the Act of 1964 in view

of the provisions contained in Section 279(2) (vi). Rule 2 refers to the Act to mean Bombay District Municipal Act, III of 1901. Expression "delegate" is defined to mean any committee or individual to whom tiny of the powers, duties or executive functions of the Municipality have been delegated by or under any of the Act or the Rules. Chapter II enacts rules in exercise of the powers conferred by Section 46(a). Rule 42 provides for delegation of the Municipality's executive functions, power or duties and every such delegation is deemed to be made subject to the general control of the Municipality and in particular to the provisions of Rules 43 to 45. Rule 43 provides that delegation shall not be valid, unless it is made at a general meeting, and in the case of delegation to an individual the resolution by which the delegation is made is supported by at least half the total number of councillors. Rule 44 provides for conditions of delegation when it is made to more than one person. Rule 48 provides for reservation of powers and duties which are not delegated. Rule 49 was specifically referred to point out that it is the duty of the President to watch over delegates (whether committees or individuals) and to bring to their notice and, if necessary, to the notice of the Municipality, any instances in which they seem to have erred in the exercise of their functions as delegates or negligent or dilatory about exercising the same. Rules 50 and 51 were relied upon to show that the President is competent to suspend, operation of any order passed in virtue of delegation which appears to the President to be open to objection in law or in policy and if such power of suspension is exercised duty was cast on the President to call a special general meeting of the Municipality to consider the matter within five days. Rule 51(a) provides for procedure when a requisition for calling a meeting is received. Then comes Rule 53 which was specifically relied upon by the respondents to justify their action. It reads as under:

53. Should the President report any committee or individual to the Municipality as negligent or dilatory about exercising functions as delegates of the Municipality, the Municipality shall be competent either:

(i) to withdraw any particular matter from the delegates and dispose of it themselves or through some individual delegate u/s 37, or

(ii) to terminate the delegation altogether, and, if they think fit, appoint a few (sic) delegate in place of one complained of.

8. Rule 53, assuming it is relevant and the impugned action can be justified under it, would come into play, when those against whom it is sought to be used, are exercising functions as delegates of the Municipality. It proceeds on the assumption that every committee set up under the statute is a delegate of the Municipality. Committees are set up under the statute. Their functions are prescribed by the statute. If the committee is not set up, the executive committee will discharge those functions, except in the case of Pilgrim Committee. Section 29 of the 1901 Act makes it discretionary for the Municipality to appoint committees. The executive Committee has got to be set up u/s 27 of the 1901 Act and it is obligatory for the municipality to appoint a managing

committee. Section 29 which enable the municipality to appoint other committees provides that such committees may be set up for the purposes other than those specified in Section 28, for which a managing committee may, u/s 27, exercise the powers of a Municipality, and may invest such committee so appointed with such of the said powers as may be necessary or expedient for the fulfilment of the purpose for which it is appointed. Sub-section (2) of Section 28 clearly provides that when every committee with its own powers are appointed, such power shall not be exercised by the executive committee. So when Section 27 is read with Section 29, scheme clearly emerges that the managing committee has got to be appointed. Suppose no other committee is appointed, except of course, the Pilgrim Committee, the Managing Committee shall exercise powers and functions which can otherwise be conferred by other committee, but once such other committee is appointed, the managing committee is precluded from exercising those powers and functions, and the managing committee can exercise all powers of the municipality. Therefore, there is carving out of the powers. Once a committee is set up, it becomes a statutory committee. To say that it is delegate for the purpose of Rule 53, is to deny the status which it enjoys as a statutory committee. Therefore, even if Rule 53 were to mean what Mr. Zaveri says that Committee was delegate as envisaged in Rule 53 and therefore, delegation was terminated by the impugned resolution, it would completely destroy statutory character of the committee itself. But Mr. Zaveri contended that the very rules were framed under the Act and more so for regulating business and business would include such business as to what power a particular committee should enjoy and that power can be taken away. I am afraid, if Rule 53 were to mean that statutory provisions enabling the municipality to set up committee and confer power and which can be exercised for the period not exceeding one year, would be such a delegate as to be amenable to the provisions of Rule 53, the rule would run counter to the statutory provision and would be invalid.

9. Assuming, I am not correct in my interpretation of Rule 53, and assuming that every committee is such delegate which could be amenable to Rule 53, it must be borne in mind that Section 29 provides for a committee to be appointed for a period not exceeding one year. Expression "not exceeding one year" on grammatical construction would only mean any period, not beyond one year, not exceeding 365 days. Now if this committee is set up initially its term must be prescribed and if not prescribed it shall come to an end at the end of one year. It would be open to the Municipality to appoint a committee for shorter period. That is the maximum one can say about the expression "not exceeding one year. The Municipality while appointing the committee can prescribe its terms for a period upto one year. If the term is prescribed, the Committee would cease to exist at the end of a term. If it is not prescribed the period would be one year because of statute and again it cannot be cut down by resort to Rule 53.

10. Now, Section 55 of the 1964 Act is in pari materia with Section 29 of the 1901 Act with this specific difference which is noticeable. Section 29 provides

that committee shall be appointed for a period "not exceeding one year". Sub-section (2) of Section 55 of 1964 Act provides that members of committee set up u/s 55 shall hold office for a period of one year. When expression used is that committee may be appointed for a period not exceeding one year, it would mean that the appointing authority has power to appoint a committee and can appoint committee for a period of one year or for a period shorter than one year. But it is provided that if a committee is set up and members of the committee shall hold office for a period of one year, unless a specific power of reducing the term is to be pointed out, which would control the right conferred by Sub-section (2) on the members of the committee, the term of office of members of such committee shall be one year and, therefore, cannot be less than one year. Grammatically expression "not exceeding one year" and "shall hold office for a period of one year" is so clear or unambiguous and propulsive that no other meaning can be assigned to it. But Mr. Zaveri contended that the departure made by the legislature by using the expression shall hold office for a period of one year instead of "not exceeding one year would not make any difference in the connotation of the section because it only means that these committees must come back to the parent body once every year, I am afraid it is not possible to so easily overlook the departure made by the Legislature. It strikes at the root of the power of the Municipality to prescribe the term of a committee. Earlier Municipality could prescribe term for any period upto one year but now that power is taken away and the term of a committee is statutorily fixed. Viewed from another angle it was said that it restricts power of the Municipality not to prescribe a term for a period exceeding one year. No exception can be taken to this submission. To say that the expression shall hold office for one year" would have the same meaning as period not exceeding one year, is to overlook the legislative intendment. Mr. Zaveri then said that framers of the legislation had only one end in view and that was this that the committees should come back to the parent body, and that was the purpose behind using the expression shall not exceed one year" and no other purpose is discernible and therefore, the Court should read the provision same way even if the language is changed the same result can be achieved by reading "shall" as "may". With respect, it is not possible to accept that position. In fact, the legislature had clearly before it the Act which it was repealing. In that Act, it had provided that the term of the committee shall not exceed one year. They deliberately changed the expression which means entirely a different thing. In one case, the Municipality enjoyed the discretion of setting up committees for a period shorter than one year as it deemed proper. Legislature did not want to confer that power and wanted the committee at least to continue for one year. If this legislative intendment is manifested by the change in the language used, it would be impermissible to so construe it as to defeat the intention. Once one reads "shall" as "may" the situation as it has developed here, will come back with vengeance. Bombay District Municipal Act, was of 1901 and Gujarat Municipalities Act is of 1964. There is 62 years mature experience of the working of the Act and the framers of the Act were translating their experience in modelling the new Act. Pulling of the

legs in local bodies with fluctuating loyalties at short intervals-a phenomenon of recent origin was present to the mind of the legislature. They wanted a committee to continue for a period of one year before loyalty is changed. No one would be able to work if members changed their loyalty like chameleon changing its colour at short intervals. That was to be prevented or arrested and if the Legislature has made a clear exposition of its intention which it did for the goods of the local self-administration, the Court by construction should not defeat it. It is therefore, not possible to read "shall" as "may".

11. Now, if the legislature wants that a committee as set up shall fraction for a period of one year, it would at least curb the mischief of irresponsibility of changing sides for paltry gain. Committee is statutorily assured of a life of one year. It can proceed to discharge its duties with confidence that at least it would not have its untimely death before 365 days expire. Therefore, change in the expression clearly indicates that the term of the Committee once set up u/s 55 cannot be for a period less than one year.

11.1 It was then urged that at any rate. Rule 53 continues to be in force because no new rules are enacted u/s 271(a). That is correct. But rules continue to apply unless there is any repugnancy in the subject or context. If there is inconsistency between the rules and the provisions of 1963 Act, to that extent, rules must give way to the statutory provisions. Even otherwise where the rule is inconsistent with the provisions of the statute under which it is enacted or deemed to be enacted, statute prevails over subordinate legislation namely the rules. This position is too well entrenched in our jurisprudence to require authority in support of it. Now, assuming that Rule 53 were to mean what Mr. Zaveri contends for, the rule has become obsolete. It was said that if the Municipality can set up a committee for a shorter period than one year, then even if the committee is already appointed for a period of one year, the Municipality can shorten its life from the period of one year to any period shorter if it so desired in exercise of the power conferred by Rule 53 which continues to be in force. The Rule has become obsolete because the statutory provision has undergone a basic change. Provision now is that the term of the members of the committee now set up u/s 55 of the 1963 Act shall be for a period of one year. Therefore, the rule which permitted the Municipality to cut down life of committee has become obsolete. If any authority were needed for this proposition one can profitably look to Earl of Antrim (1967) A.C. 691, which clearly provides that while the provision was enacted to meet certain situation, if the situation does not exist, the provision becomes obsolete. There is no present situation that there can be a term of a committee set up under 1963 Act which can be for a period shorter than one year then any provision in the rules so providing would become obsolete. So viewed from either angle, period of the validly set up committees u/s 55 of 1963 Act would be for a period of one year and there is no power in the Municipality, because no power outside Rule 53 was claimed, to shorten it.

12. Reverting to the facts of this case, the Committees were set up on

12-11-1976. That is an admitted position. No one says that there was any invalidity or illegality in setting up these committees. Once these committees were validly set up each committee will have a life of one year. The term would expire on 11-11-1977. By the impugned resolution the term is sought to be reduced to 20th March 1977. That is the power sought to be claimed by the municipality. Municipality has no power to do it. Therefore, resolution is without authority or jurisdiction or sanction of law and it has become void and must be quashed.

13. This conclusion would also answer the preliminary objection. In view of the fact that the petition can be disposed of on this ground, it is not necessary to examine other two grounds.

14. Accordingly, this petition is allowed by issuing a writ of mandamus quashing and setting aside the impugned resolution dated 20th March, 1977 by which the term of the committees formed on 11-11-1976 was reduced and new committees were set up and it is declared that the old committees continue to function. They have continued to function under interim relief of the Court and they continue to function hereafter. In the circumstances of the case, there would be no order as to costs.