

(2014) 02 BOM CK 0227

In the Bombay High Court

Case No : Writ Petition No. 3973 of 2013

Nandkishor, Prashant, Avinash and Ajay Shravanji Gondane	APPELLANT
Vs	
The State of Maharashtra and Others	RESPONDENT

Date of Decision : 24-02-2014

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 63 82 82(g) 83 84
Constitution of India, 1950 — Article 166 226

Citation : (2014) 3 ABR 572 : (2015) 1 ALLMR 711 : (2014) 4 BomCR 339 :
(2014) 4 MhLj 857

Hon'ble Judges : Z.A. Haq, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : M.G. Bhangde, Mr. V.V. Bhangde and Mr. R.M. Bhangde, for the Appellant; B.H. Dangre, Additional GP for Respondents Nos. 1 and 4, Shri C.S. Kaptan , Shri P.S. Chauhan, Advocate for Respondent No. 3, Shri A.P. Kalmegh and Shri K.S. Narwade, Advocates, for the Respondent

Judgement

B.P. Dharmadhikari, J.—By this petition filed under Article 226 of the Constitution of India, Four Corporators of Respondent No. 5-Municipal Corporation seek a direction to quash and set aside the order of Respondent No. 2-the Hon'ble the Chief Minister, State of Maharashtra and consequential orders/steps in pursuance thereto. They submit that amount of Rs. 25 crores released to Respondent No. 5-Municipal Corporation must be permitted to be used by Respondent No. 5-Municipal Corporation in its discretion as per law. Respondent No. 5 is a Body Corporate constituted under Maharashtra Municipal Corporation's Act, 1949 (hereinafter referred to as the Act). It has filed reply dated 18.12.2013 in support of the petitioners. This Court has on 24.07.2013 restrained Respondent No. 5-Municipal Corporation from parting with funds which it has received. That order continues to operate even today. In this situation, with the consent of the parties, writ petition is heard finally by issuing Rule and making it returnable forthwith. Respondent No. 1-State Government has released grants of Rs. 2,50,00,000/- as per Government Resolution dated 06.04.2013 to enable

Municipal Corporation to provide elementary facilities and developments in municipal area. This is because of abolition of octroi and introduction of Local Body Tax (LBT). The said grant casts an obligation to contribute equal amount on Respondent No. 5.

2. Respondent No. 3 is a Member of Legislative Assembly (MLA) in Maharashtra, elected from Badnera Constituency. Respondent No. 5 has got jurisdiction over two Legislative Assembly Constituencies viz., Amravati and Badnera. Respondent No. 3 on 23.05.2013 sent a communication to Respondent No. 2-Chief Minister and stated that out of grants of Rs. 25 crores, 12.5 crores needed to be spent in his constituency viz., Badnera Constituency and hence direction should be issued to Respondent No. 4-Divisional Commissioner for said purpose. He also requested that implementing Agency should be changed and work should be handed over to Public Works Department (PWD), Amravati, as works earlier done by PWD are satisfactory and Amravati Municipal Corporation did not complete its development works as expected & to match required standards. He, therefore, requested Chief Minister to direct Respondent No. 1 to issue an order to Respondent No. 4 to use Rs. 12.5 crores for development activities through PWD in Badnera constituency. He also included list of 196 works on which the funds he proposed said funds to be spent. Respondent No. 2-Chief Minister has on 03.06.2013 put a remark to include said works and to nominate PWD as agency. This has been then implemented by Respondent No. 1 by issuing a communication dated 08.07.2013 to Respondents No. 4 & 5. The said communication directs both these authorities to see that Municipal Corporation contributes its due share of 50%.

3. All these steps and communications are questioned in this petition by Four Corporators. They rely upon a resolution of Municipal Corporation dated 20.07.2013 to urge that the amount of Rs. 25 crores received by Municipal Corporation is towards reimbursement on account of deficit in LBT and the Corporation in turn has to contribute equal amount. The Corporation, therefore, resolved unanimously to undertake the development activities departmentally looking to mandate of 73rd Constitutional Amendment. The office of Corporation was directed to prepare list of works worth Rs. 12.5 crores each for both Constituencies. On 23.07.2013, Respondent No. 4 wrote to Respondent No. 5 asking it to transfer funds of Rs. 12.5 crores to Public Works Department.

4. Shri Bhangde, Senior Advocate on behalf of the petitioners states that Respondents No. 1 to 3 do not have this jurisdiction and directions issued by them are in violation of 73rd Constitutional Amendment. As the grants received constitute Municipal funds, the Municipal Corporation is competent to spend it for development activities as per its need and this discretion cannot be encroached upon by Respondent No. 3. Attention is also invited to Article 166 of the Constitution of India, to submit that the request made by Respondent No. 3 to the Hon'ble the Chief Minister and its implementation by Respondent No. 1 cannot be viewed as a direction by the State Government at all. Shri Bhangde,

learned Senior Advocate submits that this is high handed and arbitrary use of powers by Respondent No. 1. In any case, the learned Senior Advocate states that when Municipal Corporation is statutorily empowered to undertake such activities, change of implementing agency and handing over the work to State PWD is unwarranted and without jurisdiction.

5. Shri Bhangde, learned Senior Advocate has taken support from the Division Bench judgment of this Court in the case of Charan Waghmare Vs. State of Maharashtra and Others, . Another judgment delivered by the very same Bench is in the case of Sau. Banotai Vs. The Divisional Commissioner, Amravati and Others, . It is to be noted that one of us (B.P. Dharmadhikari, J.) is a party to both these judgments.

6. Mrs. Dangre, learned Additional Government Pleader has submitted that special grants have been released on 06.04.2013 to Respondent No. 5 and the only serious objection of the petitioners is to change of implementing agency. The appropriation of such special grants is regulated by Government Resolution dated 29.08.2008 and said Government Resolution authorizes State Government to direct any work to be undertaken out of special grants. It is further stated that the administrative approval is to be given by a District Level Committee which consists of Respondents No. 4, Respondent No. 5 and the Collector of the District. The said Committee is also duty bound to look into the instructions of Guardian Minister while granting approvals to said works. The purpose of this arrangement is to curtail administrative delays and to speed up development activities. The learned Additional GP relies upon unreported judgment dated 08.07.2011 in Writ Petition No. 1573 of 2011 (Surendra Hematdas Popli & Ors. vs. State of Maharashtra) to show that such change of agency has been found legal there by this Court. Again one of us (B.P. Dharmadhikari, J.), is a party to this judgment.

7. Shri Kaptan, learned Senior Advocate appearing for respondent No. 3 has stated that special grants do not vest in Municipal Corporation and its utilization is also subject to such conditions as State Government may impose. He, therefore, states that in this situation, the grievance being made is misconceived. The proceedings of District Level Committee meeting dated 13.09.2013 are relied upon by him to show how there is proper allocation to various agencies.

8. Shri Kalmegh, learned counsel for respondent No. 5-Corporation relies upon reply affidavit filed by Respondent No. 5. He points out that in District Level Committee meeting, the Municipal Commissioner pointed out the right of Municipal Corporation to use the entire amount. He also invites attention to list of various works finalized by Municipal Corporation on which the grant amount is to be spent. He contends that the direction to spend it on works as finalized in the meeting of District Level Committee on 13.09.2013 or then to hand over the development work to PWD is illegal.

9. Shri Bhangde, learned Senior Advocate, in reply argument submits that the

judgment dated 08.07.2011 in Writ Petition No. 1573 of 2011 takes into account the impossibility of execution of works by Municipal Corporation. He relies upon Section 82(g) of the Act to urge that special grants constitute part of Municipal funds and hence Municipal Corporation has got full powers and control over it. He further contends that Government Resolution dated 29.08.2008 is a general provision & no directions as envisaged therein are issued by the State Government in exercise of that power.

10. The facts noted by us above are not in dispute. The perusal of Section 82 of the Maharashtra Municipal Corporations Act reveals that it is in Chapter IX which deals with the Municipal Funds and other funds. Special funds are dealt with from Section 91 onwards. Section 82 is placed under a sub-chapter having heading "The Municipal Fund" and it is on the subject of constitution of municipal fund. This section is subject to provisions of the Act and Rules made thereunder as also subject to Section 44 of the Bombay Primary Education Act, 1947. Sub-clause (g) thereof on which Respondent No. 3 has placed reliance speaks of all moneys received by or on behalf of Corporation from the Government or public bodies, private bodies or private individuals by way of grant or gift or deposit. This receipt is subject to the conditions, if any, attached to such grant, gift or deposit. Municipal funds consist of amounts received under clauses (a) to (h) and it is held by the Corporation in Trust for the purposes of the Act, subject to provisions contained therein. Section 82A is about Annual grant by State Government from proceeds of land revenue, non-agricultural assessment and Entertainments duty. u/s 83, the Municipal Commissioner receives payments on account of Municipal fund and lodges it in a Bank. Section 84 prescribes procedure for withdrawal from said funds. Section 86 is about restrictions on expenditure from Municipal fund. No expenditure can be made unless it is covered by a current budget grant and sufficient balance is available. Section 88 stipulates the purposes to which the Municipal fund are to be applied. Section 89 states that normally the Municipal fund needs to be spent in city only.

11. Grants of Rs. 25 crores are released on 06.04.2013. Said Government Resolution at reference part Sr. No. 1 mentions Government Resolution dated 29.08.2008. A perusal of recital part of the Government Resolution dated 29.08.2008 shows that the State Government had already authorized the Collector of the District to accord administrative sanction to certain works undertaken through grants specially provided therefor. The Corporations expected to provide for basic amenities through said grant, used to forward the proposal seeking administrative sanction to State Government thereby delaying the commencement of such works. Government, therefore, thought it proper to hand over those powers to a Committee at District level. Accordingly, a Committee consisting of the Divisional Commissioner, the Collector and the Municipal Commissioner of concerned Municipal Corporations has been constituted. If any dispute arises about works to be accomplished through said grants or about 50% contribution to be made by the Municipal Corporation, said Committee has to submit a report to State Government for administrative

approval and that approval of State Government is made final. It is further mentioned that State Government shall have power to undertake execution of any work through such special grant and accordingly the Municipal Corporation shall after approval from District Level Committee, execute the work and if the Guardian Minister of concerned district issues any instructions, those instructions also need to be looked into. Thus, in exercise of this power on 06.04.2013, the special grants of Rs. 25 crores are released to Respondent No. 5. Para 2 of this Government Resolution dated 06.04.2013 stipulates that if amount released is to be spent on "new works", the implementing agency shall obtain administrative approval of the Committee constituted under the Chairmanship of the Divisional Commissioner. It is in this background that letter dated 23.05.2013 sent by Respondent No. 3-MLA to respondent No. 2-the Hon"ble the Chief Minister needs appreciation.

12. The reply affidavits have been filed on behalf of Respondent No. 3, Respondent No. 1-State and Respondent No. 5-Municipal Corporation. Respondent No. 4 has also filed a reply. But, there is no reply on behalf of Respondent No. 2, the Chief Minister.

13. As noted above, Section 82(g) of the Act speaks of moneys received from Government by way of grant subject however to conditions, if any, attached thereto. The only contention attached to grant of Rs. 25 crores on 06.04.2013 is to obtain approval of the Competent Committee, if said amount is to be spent on new works. Though a Government Resolution dated 29.08.2008 empowers Government to direct Respondent No. 5 to undertake any work through such amount or special grant, while releasing grants on 06.04.2013, State Government did not exercise that power. This power, at the most, has been exercised on 08.07.2013. The said exercise is through a letter forwarded by the Assistant Secretary of Respondent No. 1. This communication encloses letter dated 23.05.2013 with list of 196 works forwarded by Respondent No. 3 to Respondent No. 2. It is mentioned that said letter and list is forwarded for action in terms of Government Resolution dated 29.08.2008. The said request made by Respondent No. 3 to Respondent No. 2 was about works as also about nominating State PWD as implementing agency. The Government Resolution dated 29.08.2008 does not empower State Government to change the implementing agency. In present matter, our attention has not been drawn to any Government Resolution which empowers the State Government to change implementing agency and to substitute Respondent No. 5-Municipal Corporation in the matter of execution of development works through Municipal funds in Municipal area.

14. Here, it will be appropriate to refer to judgment dated 08.07.2011 in Writ Petition No. 1573 of 2011. There the implementing agency was sought to be changed and the Leader of Opposition of Respondent 5 Municipal Corporation along with four other persons had questioned that substitution. By inviting attention to the provisions of Section 63 of Bombay Provincial Municipal

Corporation Act, there, an attempt was made to contend that substitution of Municipal Corporation by State PWD as implementing agency was bad. It was argued that implementing agency was changed due to pressure of local MLA from Badnera Legislative Assembly Constituency and out of total 96 works sanctioned by District Level Committee, execution of 30 works was handed over to PWD. This challenge has been looked into in the background of the fact that at the relevant time, the contractors on panel of Municipal Corporation were on strike and hence in terms of clause (EE) of the Government Resolution dated 31.03.2010 sanctioning grants permitted said change or substitution. This Court also noted that contractors with Municipal Corporation did not respond to tender invitation twice published by Municipal Corporation and because of their boycott, State PWD was entrusted the development works. This Court also noted that change in implementing agency was not malafide. It also noted that Municipal Corporation did not file any reply and it did not oppose the proceedings of District Level Committee dated 04.03.2011. The decision to change implementing agency reached in that meeting was held in public interest. The said judgment delivered in peculiar facts, therefore has got no bearing on the present controversy.

15. Division Bench judgment in the case of Charan Waghmare vs. State of Maharashtra (supra), considers the provisions of Maharashtra Zilla Parishads and Panchayat Samiti Act, 1961, along with provisions of Maharashtra District Planning Committee (Constitution and Functions) Act, 1998. The consideration therein shows that it revolves around the question of scope of power available to Guardian Minister as a Chairman of District Planning Committee, to interfere with the powers of Zilla Parishad to undertake development activities. This judgment has been later on followed by the very same Bench in a later judgment in the case of Sau. Banotai Usman Garure vs. The Divisional Commissioner, Amravati, (supra). There again the question was in relation to the amount made available for development of a tourist place to the Zilla Parishad, Washim and to Panchayat Samiti, Karanja. Local MLA wrote a letter to Chief Executive Officer (CEO), Zilla Parishad, Washim, to transfer the entire amount to the Executive Engineer, Minor Irrigation Division, Karanja (Lad) for execution of works and those instructions were obeyed by the CEO. This Court noted that amount belonged to Zilla Parishad/Panchayat Samiti and not to any department of State Government and authority to spend the amount or to supervise the work to be undertaken, vested in Zilla Parishad and Panchayat Samiti. It has then drawn support from earlier judgment in the case of Charan Waghmare vs. State of Maharashtra (supra) and concluded that CEO has absolutely no business to order transfer of Panchayat fund to State department. The present controversy before us needs to be viewed in the background of these two reported judgments.

16. The funds constitute Municipal funds in terms of Section 82 and, therefore, vest in Municipal Corporation. The provisions of Section 63 of the Act enable respondent No. 5-Corporation to spend it for providing basic infrastructure and amenities. Municipal Corporation has accordingly passed appropriate resolutions.

Municipal Commissioner in the meeting of District Level Committee dated 13.09.2013 pointed out that entire amount of grants needed to be spent by Municipal Corporation only. His assertion only finds mention in the proceedings. However, later on, it is recorded that a list of works to be undertaken was submitted a day earlier by Respondent No. 3 to the Divisional Commissioner and that list was accepted subject to ceiling of amount of Rs. 12.5 crores. Again in Subject No. 5, it is noted that earlier 30 works were accorded administrative approval and five works out of it could not have been undertaken. Hence, new five works were sought to be approved. That subject is pertaining to facilities to be provided by State PWD.

17. Thus, when proceedings as recorded on Subject No. 1 with which this Court is concerned are seen, it is clear that some list of works was submitted by Respondent No. 3 to Respondent No. 4 on 12.09.2013. That list or details of works mentioned therein do not find mention in the proceedings. It is not very clear whether list of 196 works sent by Respondent No. 3 to Respondent No. 2 on 23.05.2013 and this list is identical. But if the works were same, there was no reason for the Respondent 3 to submit any list on 12.09.2013. The very fact that administrative approval has been given subject to ceiling limit of Rs. 12.5 crores again shows that the works enlisted were not technically processed or assessed by the competent body to find out the extent of funds required. This becomes relevant as in case of any dispute pertaining to works or about Municipal contribution, District Level Committee has to submit a report to the State Government by following the GR dated 29.08.2008. Here, Municipal Corporation has prepared the list which is placed as Annexure "R-5-C" along with its reply by Respondent No. 5. When Government Resolution dated 29.08.2008 obliges District Level Committee to consider the wishes or instructions of concerned Guardian Minister, we fail to see how list submitted by Respondent No. 3 to Respondent No. 4 on 12.09.2013 could have weighed with District Level Committee. Moreover, the works contained in said list are not one on which the State Government has directed special grants to be spent. In any case, it is apparent that neither Respondent No. 2 nor Respondent No. 1 could have ordered change of the implementing agency. The entrusting of said works to State PWD is, therefore, clearly unsustainable.

18. The power with the State Government to order execution of any work through the special grants does not enable it to exercise it arbitrarily. Basically, the need for any type of works in a particular area will first be realized by the Municipal Corporation & such works will first figure in its list. The State Government may, in a deserving situation substitute one or few works therein, or may at the threshold, direct particular works to be undertaken through said grants, if it finds execution of such works expedient. When the Act primarily obliges the Municipal Corporation to provide for all the municipal needs, such power given to the State Government to supersede or substitute the decision of the Municipal Corporation can be taken recourse to only in exigencies & after satisfaction that the work directed by the Government deserves precedence.

Normally, in the democratic set up, the desire of the general body of corporators in such matters of public interest, the works selected by general body of the Corporation must be given primacy. In present facts, there is nothing before us to comprehend any application of mind by the Government qua the list of works submitted by Respondent No. 3 or list handed over by him to the district level committee on 12.09.2013. In this situation, we find the order dated 03.06.2013 at Annexure 3 and communication dated 08.07.2013 at Annexure-4 unsustainable. The consequential direction dated 23.07.2013 sent by Respondent No. 4 to Respondent No. 5 at Annexure 8 is also unsustainable. Accordingly, all these communications are quashed and set aside. We direct Respondents No. 4 & 5 to process further the issue of appropriation of said amount of grants in accordance with law. Writ Petition is thus allowed. Rule is made absolute accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.