

(1992) 07 GUJ CK 0028
In the Gujarat High Court

Nathabhai M. Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 29-07-1992

Acts Referred:

Constitution of India, 1950 — Article 222(1)

Gujarat Panchayats Act, 1961 — Section 9, 9(2), 9(2)

Citation : (1993) 2 GLR 992

Hon'ble Judges : S.D. Dave, J;G.T. Nanavati, J

Bench : Division Bench

Judgement

G.T. Nanavati, J.—By a notification dated 28th November, 1991, issued by the Development Commissioner in exercise of the powers u/s 9(2) of the Gujarat Panchayats Act, 1961, local area known as Rairinagar came to be separated from the local area comprising Bavala Nagar Panchayat and it was further declared that after division, the local area comprising Bavala Nagar Panchayat shall be known as Bavala Nagar Panchayat covering the area of Bavala Revenue village and Ramnagar Gram Panchayat covering the area of Ramnagar New Vasahat. This notification was challenged by the President of Bavala Nagar Panchayat by filing a petition in This Court, being Special Civil Application No. 9001 of 1991. The learned single Judge who heard the said petition, rejected the same summarily on the ground that the decision to bifurcate Bavala Nagar Panchayat cannot be said to be otherwise than in accordance with law and that it cannot be said that there was no consultation as required under the provisions of Section 9 of the Act. The President of Bavala Nagar Panchayat has, therefore, filed this appeal.

2. The Learned Counsel appearing for the appellant submitted that with respect to the proposal to split up Bavala Nagar Panchayat into Bavala Nagar Panchayat and Ramnagar Gram Panchayat, Bavala Gram Panchayat was earlier consulted and accepting what the Panchayat had to say in that behalf, the Government had on 24-12-1990 decided not to accept the said proposal. While taking that decision, the Government had taken into consideration the fact that the area for

which Ramnagar Gram Panchayat was to be constituted was neither a village nor a hamlet, but it was a settlement of agricultural labourers on four survey numbers and also the circumstances that the standard of revenue income laid down for constituting independent Gram Panchayat was not satisfied and the new Panchayat was not likely to be economically viable. Thus, the said proposal was dropped and the new proposal came to be accepted by the Government without consulting the Bavala Nagar Panchayat and therefore, the impugned notification issued u/s 9(2) of the Act deserves to be quashed. It was submitted that the prior consultation done before 24th December, 1990 cannot be treated as consultation as contemplated by Section 9(2) of the Act, for the purpose of the impugned notification. It is not in dispute that Bavala Nagar Panchayat was not consulted again after 24th December, 1990. The contention raised on behalf of respondents Nos. 1 to 4 is that with respect to the proposal for bifurcating Bavala Nagar Panchayat, the said Panchayat was consulted and it was not necessary to consult it again while reconsidering the said proposal. It was also submitted that Section 9(2) has been held to be directory in nature by This Court and, therefore, even if the Court proceeds on the basis that there is no consultation as contemplated by Section 9(2), the decision of the Government and the consequent impugned notification cannot be regarded as illegal or bad.

3. This Court, in the case of *Kalubhai v. State of Gujarat* (1965) VI GLR 459 has held that the provision contained in Section 9(2) is directory and not mandatory. It is further held that the provision about prior consultation of the Panchayat concerned has not been included in the section as a safeguard of a right of a person, but seems to be a mere direction to take the sense of the Panchayat before its limits are altered or added to. Since Section 9(2) provides for the reconstitution of a village, it also provides that the sense of the Panchayat should be taken before its limits are altered. The section, however, does not prescribe what consequences would follow if prior consultation is not made before taking an action under the section. Considering the consequences that are likely to follow on the taking of an action under the section and the effect of non-compliance with that part of the section which provides for a prior consultation, and considering the subject matter of the provision and its relation to the general object thereby intended to be secured, and upon a review of the matter according to the principles of construction, it appears that the provision is directory and although it does not indicate a duty to consult the Panchayat before passing an order under the section, it does not follow that every departure from that duty will taint the whole proceeding with a fatal blemish and render it void and ineffective.

4. The Learned Counsel for the respondents, however, submitted that this view is no longer good law as subsequently in *Bhalod Gram Panchayat and Anr. v. State of Gujarat* and Ors. 1986 (1) 27 (1) GLR 247 This Court has held that failure to comply with the requirement of consultation would render the exercise of power u/s 9(2) ineffective. In that case, the question which had arisen for consideration was different but while dealing with Section 9(2), the following observations have

been made:

It is clear on a plain reading of this Sub-section before the State Government exercises power under this provision, it must consult the Taluka Panchayats, the District Panchayat and the Gram Panchayat concerned. Failure to do so would render the exercise of power ineffective. Only after the concerned Panchayat has been consulted that the State Government can exercise power by issuing a notification in the Official Gazette....

... After the enactment of the Act, inclusion within or exclusion from any gram any local area or the alteration of its limits must be made after proper consultation as provided by Section 9(2) of the Act. To hold otherwise would be to render the solutary provision of consultation nugatory. Alteration of the limits of any local area of a Gram or Nagar has several far reaching consequences, i.e. it affects the delimitation of wards, the constitution of existing committees, the revenue and financial assistance, etc., and hence it is only just and fair to consult the concerned Panchayats before any such change is effected....

5. This contention raised on behalf of the respondents cannot be accepted for the reasons that Kalubhai's case was decided by a Division Bench of two learned Judges while the decision in Bhalod Gram Panchayat is by a learned single Judge and that the question whether Section 9(2) is mandatory or directory arose directly before the Division Bench whereas no such question was raised before the learned single Judge who decided Bhalod Gram Panchayat's case.

6. But the observations made in Bhalod Gram Panchayat's case do get support from the two decisions of the Supreme Court in Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, and Baldev Singh and Others Vs. State of Himachal Pradesh and Others, . In the case of Shankalchand Himatlal Sheth, the Supreme Court was called upon to construe the word "consultation" as used in Article 222(1) of the Constitution of India. Construing that word, the Supreme Court has observed that "consultation" means - full and effective and not formal or unproductive consultation. The Supreme Court also observed that there can be no purposeful consideration of the matter in the absence of facts and circumstances of the case and the nature of the problem involved. In Baldev Singes case, the Supreme Court has observed, though in a different context, that citizens of India have a right to decide, what should be the nature of their society in which they live - agrarian, semi-urban or urban. The Supreme Court has further observed in that case that admittedly, the way of life varies depending upon where one lives. Inclusion of an area covered by a Gram Panchayat within a notified area would certainly involve civil consequences. In such circumstances, it is necessary that people who will be affected by the change should be given an opportunity of being heard, otherwise they would be visited with serious consequences like loss of office in Gram Panchayat an imposition of a way of life, higher incidences of tax and the like.

7. It was faintly contended that the decision in Kalubhai's case stands impliedly

overruled by the decision of the Supreme Court in Shankalchand's case. But we have not thought it necessary to consider it, as even while proceeding on the basis that Section 9(2) is directory and not mandatory, we are of the view that the impugned notification deserves to be quashed.

8. If the provision is directory then even if it is not fully complied with, or not complied with at all, that by itself will not invalidate the action. But as pointed out by This Court in Kalubhai's case. Section 9(2) casts a duty on the State Government to consult the concerned Panchayat before changing its limit. The legislature must have provided for good reasons that before effecting a change, the concerned Panchayats should be consulted. If the object of consultation - namely, arriving at a decision objectively-is not to be frustrated, then it has to be full and real and not formal and in name only. Such purposeful consultation implies making available all relevant data to the person or authority to be consulted and to elicit its views thereon. If this be the nature of duty to consult, then exercise of power in breach thereon may render the action arbitrary in absence of a reason justifying the departure from its performance.

9. In the case, on basis of the material which was before the Government and the representation made by the Bavala Nagar Panchayat, the Government had on 24-12-1990, taken a decision not to accept the proposal for bifurcation of Bavala Nagar Panchayat. If it had been a case of mere reconsideration of the material which was already there and in respect of which the concerned Panchayat was already consulted earlier, then it could have been said that it was not necessary to consult it again. But it is an admitted position that, fresh material was placed before the Government after 24-12-1990.

10. For making consultation effective and real the Government ought to have disclosed ins new material to the Panchayat and ascertained its view thereon. No reason has been pointed out for not doing that. It is also not pointed out that if the action of the Government is regarded as invalid, it would be prejudicial to public interest. Therefore, the impugned action of the Government will have to be regarded as arbitrary and thus liable to be declared as invalid.

11. We, therefore, allow this appeal and set aside the order passed by the learned single Judge and quash the impugned Notification dated 28th November, 1991. No order as to costs.