(2016) 02 BOM CK 0267

In the Bombay High Court

Case No : Public Interest Litigation No. 20 of 2015

Padmatai APPELLANT

Vs

State of Maharashtra and Others RESPONDENT

Date of Decision : 10-02-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 243(Q), Article 243(W), Article 243Q, Article 243-Q

Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965 — Section 1, Section 3, Section 3(2), Section 341(A), Sect

Citation : (2016) 2 AIRBomR 730 : (2016) 6 BCR 94 : (2016) 4 MhLJ 306

Hon'ble Judges : B.R. Gavai and P.N. Deshmukh, JJ.

Bench : Division Bench

Advocate : R.L. Khapre, for the Appellant; S.M. Ghodeswar, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J.—1. Rule. Rule made returnable forthwith. Heard by consent of the parties.

2. The petitioner has approached this court being aggrieved by the notification dated 12.2.2015 issued by the respondent no.1 thereby constituting an area within the Amgaon Gram Panchayat area to be a Nagar Panchayat as provided under Section 341(A) of the Maharashtra Municipal Councils, Nagar Panchayats & Industrial Townships Act, 1965 (for short the said Act). The petitioner has also sought for direction to the respondent no.1 to declare ''Amgaon'' constituted urban area, by amalgamating areas of Gram Panchayats Amgaon, Bangaon, Risama, Kumbhartoli, Padampur, Malhi and Kidangipar as Amgaon Nagar Parishad as provided under subsection 2 of Section 3 of the Act.

3. The facts in brief giving rise to the present petition are as under :

The village Amgaon was a Gram Panchayat and has been declared as Tahsil headquarter. The area of Gram Panchayat is surrounded by the seven other Gram Panchayats namely Bangaon, Risama, Kumkbhartoli, Padampur, Malhi, Kidangipar and Birsi. Not only that, out of these seven Gram Panchayats, four Gram Panchayats are Group Gram Panchayats, which are having various other villages in the concerned Gram Panchayat area.

4. Since the said Amgaon is tahsil headquarter, it is having tahsil office, court of Civil Judge, Junior Division and Judicial Magistrate, First Class, office of Panchayat Samiti, Agriculture Produce Market Committee and various other departments of the government including the sport complex and Industrial Training Institute. It is not in dispute that though all these offices are named after Amgaon, for example, Amgaon Tahsil Office or Court of Civil Judge, Junior Division, and Judicial Magistrate, First Class, Amgaon, these are in fact situated within the jurisdiction of the various Gram Panchayats. For example, Amgaon tahsil office is situated in the area of Kumbhartoli Gram Panchayat whereas the office of Amgaon Panchayat Samiti is situated in the area of Bangaon Gram Panchayat. The Court of Civil Judge, Jr. Dn., & J.M.F.C., Amgaon, so also the Amgaon railway station and a nationalized bank at Amgaon, are situated within the area of Risama Gram Panchayat. The Amgaon Rural Hospital and Zilla Parishad School, Amgaon are situated within the area of Kumbhartoli Gram Panchayat. The Amgaon Tahsil Sports Complex and the Industrial Training Institute, Amgaon, are situated within the area of Kidangipar Gram Panchayat.

5. It appears that taking into consideration these aspects of the matter, resolutions were passed by all the Gram Panchayats referred to herein above in the year 2009 for amalgamating them and constituting a Municipal Council for them.

6. It further appears that the representations were made by various Gram Panchayats to the State Government for constituting Amgaon Municipal Council consisting of the aforesaid 8 Village Panchayats. It further appears that on the basis of the representations made, the State Government had called for necessary information from the subordinate revenue offices. After receipt of the requisite information from the various offices, the State Government issued a notification dated 1.3.2014 under the provisions of Section 341A of the said Act thereby proposing to specify the local area of the Village Panchayat Amgaon to be a transitional area and to constitute Nagar Panchayat by the name ''Amgaon Nagar Panchayat'' for the said local area. Vide the said notification, objections were invited and the objections were to be submitted in the office of the Collector, Gondia.

7. It further appears that various objections were raised before the Collector. The citizens residing in the area of Amgaon Gram Panchayat also raised objections. It was contended that instead of constituting a Nagar Panchayat, taking into consideration the relevant factors it was necessary that the area of aforesaid eight Gram Panchayats should be amalgamated and a Nagar Parishad as provided under Sub-section 2 of Section 3 of the said Act be constituted. It

further appears that various Gram Panchayats changed their stand on more than one occasions and accordingly submitted their objections for either inclusion or exclusion in the municipal area. It further appears that after receipt of the objections the report was forwarded by the Collector to the State Government. It further appears that in so far as constitution of Amgaon Nagar Parishad or Amgaon Nagar Panchayat is concerned, it was proposed that since Amgaon, Padampur and Kumbhartoli Gram Panchayats were willing for amalgamation and constitution of urban area, the Nagar Parishad should be constituted in the areas covering the areas of the aforesaid Gram Panchayats. However, it appears that the Hon''ble Minister on the file ordered to constitute the Nagar Panchayat. Consequently, vide the notification dated 12.2.2015, the area which constituted the area of Amgaon Gram Panchayat came to be specified as a smaller urban area and it was also notified to constitute a Nagar Panchayat under the name ''Amgaon Nagar Panchayat'' for the said area. Being aggrieved thereby the present petition is filed.

8. Shri Khapre, the learned counsel appearing on behalf of the petitioner, submits that the only ground on which the State has refused to constitute Nagar Parishad instead of Nagar Panchayat is that some of the village Panchayats had opposed for their inclusion in the Nagar Parishad area. The learned counsel submits that the willingness or otherwise of village panchayats are not relevant for taking a decision as to whether an area should be constituted as the smaller urban area or not. He submits that the factors which are required to be taken into consideration are given in sub-section 2 of Section 3 of the said Act. He further submits that though under Article 243(Q) a discretion is vested with the Governor to constitute an area into small urban area or not, in so far as the provisions of sub-section 2 of section 3 of the said Act are concerned, once the condition so specified in sub-section 2 are fulfilled then the State Government has no other option than to specify the local area as a smaller urban area and constitute a municipal counsel for the same. The leaned counsel relying on the judgment of the Hon''ble Supreme Court in the case of Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane Maharashtra and others (, AIR 1990 SC 261), submits that since the specification of an urban area and the constitution of the municipal council for the said area are the legislative functions, applicability of the rule of natural justice is excluded therefrom. The learned counsel further submits that the factors as to whether the residents of the Gram Panchayat after conversion of the said into municipal council are required to pay more taxes or not is a factor which is not relevant for exercising the jurisdiction under sub-section 2 of Section 3. The learned counsel in this regard relied on the judgment of Apex Court in the case of State of Mah. And another Vrs. The Jalgaon Municipal Council, Jalgaon and others Vrs. (, AIR 20034 SC 1659(1).

9. Per contra, Shri Kilor, the learned counsel appearing on behalf of the respondent nos. 6, 7 & 8, submits that under Article 243(Q) the various factors are required to be taken into consideration. He submits that the population of the

area and the percentage of employment in non-agricultural activities are not the only factors but the density of the population, the revenue generated for local administration, the economic importance etc. are also required to be taken into consideration, while taking a decision as to whether the area of village Panchayat is to be specified as a transitional area or a smaller urban area or not. The learned counsel submits that if these factors are taken into consideration, then since the area is not densely populated and since there are no industries located, the area of the said villages which is a rural area cannot be converted into an urban area. The learned counsel submits that if the provisions of Article 243(Q) read with 11th Scheduled are compared with Article 243(W) read with 12th Scheduled, then it can be seen that there is a vast difference of the powers and responsibilities of Village Panchayat and Nagar Panchayat. The learned counsel, therefore submits that the factor that the villagers will have to pay additional taxes on constitution of the Nagar Panchayat is also the relevant factor.

10. He further submits that if the area of Gram Panchayat is to be included into a Nagar Panchayat then such a local area shall cease to be a village and therefore unless the requirements under Section 4 of the Maharashtra Village Panchayats Act (hereinafter referred to Village Panchayat Act.) are not complied with, the same cannot be done.

11. Shri Ghodeshwar, the learned Additional Government Pleader appearing on behalf of the State, submits that the State has taken the decision after taking into consideration all relevant factors and as such no interference is warranted.

12. For considering the rival submissions it would be necessary to refer to Article 243(Q) of the Constitution of India which reads thus -

243Q. Constitution of Municipalities.-

(1) There shall be constituted in every State,-

(a) a Nagar Panchayat (by whatever name called) for a transitional area that is to say, an area in transition from a rural area to an urban area;

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

(2) In this article, "a transitional area", " as smaller urban area" or " a larger urban area" means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-

agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part.

13. It will be also appropriate to refer to sub-section 2 of Section 3 of the Maharashtra Municipal Councils, Nagar Panchayats & Industrial Townships Act, 1965.

3. Specification of areas as small urban areas

(1)............

(2) Save as provided in sub-section (1), the State Government may, having regard to the factors mentioned in clause (2) of Article 243-Q of the Constitution of India, specify, by notification in the Official Gazette, any local area as a smaller urban area:

Provided that no such area shall be so specified as a smaller urban area unless the State Government, after making such inquiry as it may deem fit is satisfied that, -

(a) the population of such area is not less than 25,000; and

(b) the percentage of employment in non-agricultural activities in such area is not less than thirty five per cent.

(2A).......

(3)...

(4).......

(5)....

14. It would thus be seen that under Article 243(Q) there is a constitutional mandate to constitute Nagar Panchayat by whatever name called for a transitional area that is an area in transition from rural area to urban area, a Municipal Council for a smaller urban area and a Municipal Corporation for a larger urban area. Sub-section (2) of Article 243Q would further reveal that the Governor is empowered to specify what would be a transitional area, a smaller urban area or a larger urban area by public notification having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as deemed fit.

15. Part IXA of the Constitution has been brought in the constitution by the Constitution 74th Amendment Act, 1992 with effect from 1.6.1993. Pursuant to the Constitution amendment, the provisions of Section 3 were amended by the Maharashtra Act 41 of 1994. By the said amendment, Chapter 26A which provide for specification of a transitional area and incorporation of a Nagar Panchayat came to be inserted in the said Act. The perusal of sub-section 2 of Section 3

would reveal that the State Government having regard to the factors mentioned in sub-section 2 of Article 243Q of the Constitution of India is empowered by notification in the official gazette to specify any local area as a smaller urban area. However, proviso thereto enables the State Government to specify such area as a smaller urban area only if the population of such area is not less than 25000 and the percentage of employment in non-agricultural activities in such area is not less than 35%. Sub-section 3 of Section 3 requires a proclamation announcing the intention of the government to issue a notification as provided under sub-section 2 and inviting and entertaining the objections to the said proposal before issuing a final notification under Sub-section 2. Sub-section 4 of the said section mandates the Collector to forward the said objections to the State Government. Sub-section 5 mandates the State Government to take into consideration the said objections.

16. The provisions of Section 341A of the said Act provide for specification of a transitional area and incorporation of the Nagar Panchayat. The provisions of Sub-section 1B thereto provides that that the procedure prescribed in Sub-sections 3,4 & 5 of Section 3 shall mutatis mutandis be required to be followed prior to the publication of a notification under Section 1 for specifying an area to be a transitional area.

17. By now, the powers of the nature which are conferred by Section 3 or Section 341A have been held to be legislative in nature. It will be relevant to refer to the observations of the Hon''ble Supreme Court in the case of Sundarjas Bhathija and others(cited supra) in para 23 of the said judgment.

"23. Reverting to the case, we find that the conclusion of the High Court as to the need to reconsider the proposal to form the Corporation has neither the attraction of logic nor the support of law. It must be noted that the function of the Government in establishing a Corporation under the Act is neither executive nor administrative Counsel for the appellants was right in his submission that it is legislative process indeed. No judicial duty is laid on the Government in discharge of the statutory duties. The only question to be examined is whether the statutory provisions have been complied with. If they are complied with, then, the Court could say no more. In the present case the Government did publish the proposal by a draft notification and also considered the representations received. It was only thereafter, a decision was taken to exclude Ulhasnagar for the time being. That decision became final when it was notified under Section 3(2). The Court cannot sit in judgment over such decision. It cannot lay down norms for the exercise of that power. It cannot substitute even "its juster will for heirs"

18. It can thus be seen that the Apex Court in clear terms has held that the function of the government in establishing a Corporation are neither executive nor administrative but is a legislative process. No judicial duty is laid on the government in discharge of the statutory duties. The only question to be examined is whether the statutory provisions have been complied with or not.

19. In paragraph 24, the Apex Court clearly held that the rules of natural justice are not applicable to legislative action plenary or subordinate. It has been held that the procedural requirement of hearing is not implied in the exercise of legislative powers unless hearing was expressly prescribed.

20. From the material placed on record it would reveal that the reports of the revenue authorities submitted to the State Government clearly show that the population of all eight Village Panchayats was 30173. The report also established that the village areas were adjacent to each other. The report which is at page 38-A to 38-E of the paper-book would also reveal that the percentage of employment in non-agricultural activities in all the villages was much more than 35%. It can thus be seen that requirements as provided in Sub-section 2 of Section 3 for specifying a smaller urban area are satisfied. However, the perusal of affidavit filed on behalf of the State would reveal that the only factor that weighed with the State Government was the opposition by some of the Village Panchayats for their inclusion in the smaller urban area. Perusal of resolution of the Gram Panchayats would reveal that they have opposed for inclusion of their Village Panchayats in the Municipal Council area only on the ground that after constitution of Municipal Council, the liability to pay tax would be increased. The resolution show that on comparative advantages and disadvantages of inclusion in the municipal area they were of the view that it would be more advantageous for them to continue as Gram Panchayat rather than including them in the municipal council area. We find that such a factor would not be relevant while taking into consideration a decision as to whether the area is to be specified as a municipal council area or not.

21. It will be appropriate to refer to paragraph 35 of the judgment of the Apex Court in the case of State of Maharashtra and others Vrs. Jalgaon Municipal Council, Jalgaon and others(cited supra).

"35. So far as the objections preferred by the Municipal Council collectively and the individual 239 objectors are concerned, no one has alleged that anyone of the factors contemplated as relevant by Article 243-Q proviso of the Constitution was absent or non-existent. None has disputed the correctness of the population figure as totalled by the census. The contentions raised are that the development works initiated by the Municipal Council may be adversely affected or that the taxes would increase while the quantum of State''s financial aid or grant may be reduced. Though it is for the State Government to apply its mind to the relevance and weight of the objections preferred still we may note the submissions made by the learned counsel for the appellant-State Government that a mere change in the constitution of the local self-government does not necessarily entail discontinuance of development projects and there is no reason to apprehend, that they would not be continued. A change in governance is involved at every election though the administration continues with Municipal Council. At the time of an election certain development works would be pending in progress which would naturally be taken over by the successor Municipal

Council. Just a any new Municipal Council would take over the on-going projects initiated by the predecessor Municipal Council so also a Municipal Corporation newly brought into being shall takeover the continuing projects of previous Municipal ? Council. Every change in mode of governance needs some readjustments. Ned for switching over from Municipal Council to Municipal Corporation mode of administration is occasioned by growth of population and prosperity in any particular urban area. People share the prosperity and so must be prepared to pay the additional price by way of additional taxes, submitted the learned counsel for the State Government and we found substance therein."

22. It can thus be seen that the Apex Court has clearly held that every change in mode of governance needs some readjustments. It has been observed by Their Lordships that a change in mode of administration is occasioned by growth of population and prosperity in any particular urban area. Their Lordships further observed that when the people share the prosperity, they must also be prepared to pay additional price by way of additional taxes. It can thus be seen that the only ground on which the State Government has decided not to specify a smaller urban area as provided under Sub-section 2 of Section 3 of the Act and for not constituting municipal council for the said area is on the ground of opposition of some of the Village Panchayats. As already stated herein above, the willingness or otherwise of the Village Panchayats is not a factor relevant for deciding the issue as to whether the smaller urban area needs to be specified or not and as to whether the municipal council needs to be constituted or not.

23. We are aware about the limitations for exercising the power of judicial review under Article 226 of the Constitution of India. We cannot sit in judgment over the decision of the State Government as to whether the State government has rightly or wrongly taken decision not to specify a smaller urban area and constitute a municipal council for the said area. However, while exercising our jurisdiction under Article 226, the limited inquiry as to whether the factors which are required to be taken into consideration have been taken into consideration or not and as to whether the factors that have been taken into consideration are relevant or not, can certainly be gone into.

24. We find that the only factors that could have been taken into consideration by the State Government are those which can be found in Article 243Q and Sub-section 2 of Section 3 of the said Act. However, perusal of the material which is placed on record, so also the affidavit filed by the State Government would reveal that though the entire material was available with the State Government, so as to consider as to whether the factors as specified in Sub-section 2 of Section 3 of the said Act and Article 243Q of the Constitution of India are satisfied or not, the same are not taken into consideration. The perusal of the file would reveal that though the department has proposed constitution of Nagar Parishad by inclusion of certain villages which were willing, the Hon''ble Minister has ordered of constituting Nagar Panchayat only for the area comprising of Amgaon Village Panchayat. We, therefore, find that the decision making process

of the State Government is vitiated by not taking into consideration the relevant factors and taking into consideration the irrelevant factors. If the decision is taken by not taking into consideration the factors which are required to be taken into consideration and is taken by taking into consideration the factors which are not relevant, such an exercise of power would not be sustainable in law. In that view of the matter, we find that the petition deserves to be allowed.

25. The impugned notification is quashed and set aside. However, the prayer made in the petition for a direction to the State Government to specify the area comprising area of eight Gram Panchayats mentioned herein-above and to constitute the municipal council for the said area would be beyond our jurisdiction. We find that if we issue such a mandamus, we will be clearly encroaching upon the jurisdiction of the State Government to exercise the powers under Section 3 of the said Act.

26. In that view of the matter, while quashing the impugned notification, we leave it to the State Government to decide as to what future course of action it proposes to take.

Rule is made absolute in the aforesaid terms. No order as to costs.

