

(2013) 09 BOM CK 0096

In the Bombay High Court

Case No : Writ Petition No. 7404 of 2013

Prashant Babusaheb Ghiramkar

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 21-09-2013

Acts Referred:

Bombay General Clauses Act, 1904 — Section 24
Bombay Provincial Municipal Corporations Act, 1949 — Section 3, 3(2), 3(3)
Constitution of India, 1950 — Article 226
Maharashtra Land Revenue Code, 1966 — Section 3, 4, 4(4)
Motor Vehicles Act, 1988 — Section 67, 68

Citation : (2014) 1 ALLMR 351 : (2013) 6 MhLj 703

Hon'ble Judges : V.M. Kanade, J;S.C. Gupte, J

Bench : Division Bench

Advocate : M.S. Karnik instructed by Mr. Sandeep Salunkhe, for the Appellant;
Nitin Deshpande, AGP for the State, for the Respondent

Judgement

S.C. Gupte, J.—Rule. Returnable forthwith. By consent of Counsel, the Petition is taken up for final hearing. By this Petition which is filed under Article 226 of the Constitution of India, Petitioner is seeking an appropriate writ, order and direction, directing Respondent Nos. 1 and 2 to shift the Headquarter and Sub-divisional Office at Daund as far as Daund and Purandar Taluka is concerned.

2. Petitioner is aggrieved by the Notification dated 26 June 2013 issued by Respondents in which the Headquarter and Sub-Divisional Office of Purandar and Daund Talukas is shown at Pune, though in the draft Notification, the Headquarter is shown at Purandar (Saswad).

3. Brief facts which are relevant for the purpose of deciding this Petition are as under:

On 26 June 2012, the State of Maharashtra issued a draft notification under Sub-section (4) of Section 4 of the Maharashtra Land Revenue Code, 1966 ("the MLR Code") calling for objections and suggestions for constituting/modifying 183

Revenue sub-divisions in the State u/s 4 of the MLR Code. The Talukas of Purandar and Daund in Pune District were proposed to constitute one such sub-division with the sub-divisional headquarters at Saswad, Purandar. It appears that in response to the publication of the draft notification, the Petitioner, who is a resident of Deolgaon Raje, Taluka Daund, had submitted his objections and suggestions. Amongst other things, it was submitted by the Petitioner that the population of Daund was more than Purandar and the headquarters of the sub-division at Saswad in Purandar, which was 100 kms. away from Daund, was not convenient to the people in Daund Taluka and that Daund being a big Railway junction as well as being located on National Highway No. 9, was a convenient place for the headquarters to people of both Talukas, namely, Purandar and Daund. It was, therefore, suggested that the sub-divisional headquarters of the sub-division should be at Daund instead of Saswad in Purandar. By the final notification published on 26 July 2013, the State Government declared the formation of sub-division constituted by the Talukas of Purandar and Daund with sub-divisional headquarters at Pune. The legality of this declaration is challenged in the Petition.

4. Section 4 of the MLR Code provides for the power of the State Government to constitute different revenue areas in the State, inter alia, by specifying Talukas as constituting sub-divisions. The MLR Code requires the State Government to hear the objections and suggestions from the public before notifying such sub-divisions. The short question which arises in the matter is whether the requirement of prior publication and consideration of objections and suggestions is satisfied in the case.

5. Section 3 of the MLR Code provides for division of the State into different revenue areas. It provides that for the purposes of the MLR Code, the State shall be divided into divisions (consisting of one or more districts), Districts (consisting of one or more sub-divisions), sub-divisions (of one or more Talukas) and Talukas (of one or more villages). Section 4 empowers the State Government to constitute such revenue areas by notification in the Official Gazette. Sub-section (4) of Section 4 provides as follows:

4(4) Every notification or order made under this Section shall be subject to the condition of previous publication; and the provisions of section 24 of the Bombay General Clauses Act, 1904, shall, so far as may be apply in relation to such notification or order, as they apply in relation to rules to be made after previous publication.

Section 24 of the Bombay General Clauses Act, 1904, in turn, provides as follows:

24. Provisions applicable to making of rules or by laws after previous publication.-

Where, by any Bombay Act or Maharashtra Act, a power to make rules or by-laws is expressed to be given subject to the condition of the rules or bylaws being made after previous publication, then the following provisions shall apply, namely:--

(a) the authority having power to make the rules of by-laws shall, before making them, publish a draft of the proposed rules or by-laws for the information of persons likely to be affected thereby;

(b) the publication shall be made in such manner as that authority deems to be sufficient or, if the condition with respect to previous publication so requires, in such manner as the Central Government, or as the case may be, the State Government prescribes;

(c) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(d) the authority having power to make the rules or by-laws, and, where the rules or by-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or by-laws from any person with respect to the draft before the date so specified;

(e) the publication in the Official Gazette of a rule or by-laws purporting to have been made in exercise of a power to make rules or by-laws after previous publication shall be conclusive proof that the rule or by-law has been duly made.

6. It is common ground of both the Petitioner and the State that the proposal of constituting a sub-division with sub-divisional headquarters at a particular place requires prior publication of the proposal and consideration of objections and suggestions before a final notification is issued u/s 4 of the MLR Code read with Section 24 of the Bombay General Clauses Act.

7. It is the contention of the State that establishment of a revenue sub-division is a legislative function of the Government and rules of natural justice do not apply to such subordinate legislation. At any rate, contends the learned AGP, the extent to which the suggestions and objections have to be considered is in the discretion of the legislating body and the exercise of such discretion is not open to challenge in the writ jurisdiction of this court. On the other hand, it is contended by the Petitioner that the members of public have had no opportunity to object to the proposal of a sub-division with headquarters at Pune at all. Counsel for the Petitioner accepts that once such opportunity is given, the merits of any decision taken in pursuance thereof are not open to challenge.

8. It is no doubt true that the power exercised by the State Government whilst specifying the sub-division with its headquarters is a legislative power, the incidents of which are different from, say, a judicial function. To what extent the principles of natural justice would apply to exercise of such power and the scope of judicial review in such matters, are matters which fall for consideration.

9. The Supreme Court has, in the case of Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., while dealing with the nature of the legislative action and applicability of rules of natural justice to it, observed as follows:

The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing—there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate—in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi-judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity. Occasionally, the legislature directs the subordinate legislating body to make "such enquiry as it thinks fit" before making the subordinate legislation. In such a situation, while such enquiry by the subordinate legislating body as it deems fit is a condition precedent to the subordinate legislation, the nature and the extent of the enquiry is in the discretion of the subordinate legislating body and the subordinate legislation is not open to question on the ground that the enquiry was not as full as it might have been. The provision for "such enquiry as it thinks fit" is generally an enabling provision, intended to facilitate the subordinate legislating body to obtain relevant information from all and whatever source and not intended to vest any right in anyone other than the subordinate legislating body. It is the sort of enquiry which the legislature itself may cause to be made before legislating, an enquiry which will not confer any right on anyone.

10. No doubt we are concerned here with legislative function of the State Government. But Section 4 of the MLR Code read with Section 24 of the Bombay General clauses Act makes it clear that the legislature itself has provided for a prior publication and notice of the proposal and consideration of objections and suggestions by the State Government before the power of legislation is exercised by the State Government. If the members of public have to have a prior notice and opportunity to object or make suggestions, they ought to know what the proposal is, and the notice and opportunity in that behalf must be effective. The procedure is mandatory and a substantial compliance thereof must be shown.

11. The Supreme Court in the case of *The Municipal Corporation Bhopal, M.P. Vs. Misbahul Hasan and Others*, struck down a notification by the State making alteration in the age of retirement of employees of the Corporation on the ground that the mandatory procedure as laid down in Section 24 of the MP General clauses Act (which is in the same terms of Section 24 of the Bombay General Clauses Act) was not followed, observing as follows:

13. The legislative procedure envisaged by Section 24, set out above, is in consonance with notions of justice and fair-play as it would enable persons likely

to be affected to be informed so that they make take such steps as may be open to them to have the wisdom of a proposal duly debated and considered before it becomes law. This mandatory procedure was not shown to have been complied with here.

12. It is, however, contended on behalf of the State that there was adequate notice of the proposal to the public and it was permissible to the State Government to make changes in the draft proposal on the basis of objections or suggestions received. On the other hand, Counsel for the Petitioner submitted that the changes made to the draft have to be ancillary to the draft proposal and not altogether foreign to the draft.

13. A Division Bench of Rajasthan High Court in the matter of *Maula Bux and Others Vs. The Appellate Tribunal of State Transport Authority and Others*, had occasion to consider this question. That was a case where the State Government had amended Rule 108 of the Rajasthan Motor Vehicles Rules, 1951 constituting the Appellate Authority with the Transport Minister as the Chairman of the Authority. The Petitioners, who were bus operators, objected to the amendment, inter alia, on the ground that the draft which was published had no mention of the person who was to be appointed as the Chairman, whereas in the rule framed after publication of the said draft, a specification was added that the Transport Minister was to be the Chairman of the Authority. It was contended that there was a failure to follow the procedure of Section 23 of the General Clauses Act (which is *pari materia* with Section 24 of the Bombay General Clauses Act). The Rajasthan High Court observed that the only difference in the draft that was published and the amendment that was subsequently made was that in the draft there was no mention as to which of the three persons named therein shall be the "Chairman", whereas the Rule provided that of the three named persons the Transport Minister shall be the "Chairman". Repelling the challenge, the Court held,

It is incumbent on the rule making authority to publish a draft of the rule u/s 23 of the General Clauses Act and to invite objections from all concerned. The authority has further to consider the objections, if any, and to make a rule in exercise of its rule making power. The powers of rule making under Sec. 68 of the Motor Vehicles Act are subject to the condition of previous publication only and after a draft of the amendment of rules is published as required by Section 23, it is open to the authority to make rules with or without changes in the previously published draft, subject however to the condition that the rule so made is not absolutely foreign to the draft. In the present case, the amendment of Rule 108 as finally made when compared with the previously published draft shows that the change is ancillary to the draft and it cannot be regarded as absolutely foreign to it.

14. We are in respectful agreement with the principle of law enunciated as above by the Rajasthan High Court. When a draft rule or bye-law is published and objections are invited to it as required u/s 24 of the Bombay General Clauses

Act, it is open for the rule making authority to consider objections and suggestions and thereafter make changes to it, but those changes must be incidental or ancillary to the draft rule or bye-law. Those changes must be conceivable within the frame-work of the draft proposal and not foreign to the draft. For example, in our case, when two or more Talukas are proposed to be included within a sub-division with headquarters at one Taluka, the proposal after consideration of suggestions and objections may well be altered by dropping one or the other Taluka/s from the proposal or changing the headquarters from one of those Talukas to the other of them. But providing for a headquarters at an altogether different place not included in any of the Talukas forming the sub-division was a proposal foreign to the draft. There was no opportunity afforded to the members of public to make objections or suggestions to such a proposal. Such a proposal was not conceivable within the framework of the draft proposal.

15. The learned AGP Relied on the decision of the Supreme Court in the case of Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others, to contend that the decision of the State Government in the matter is final and cannot be subjected to a judicial review by this Court. In the case of Sundarjas Bhathija, the Government of Maharashtra issued a draft notification u/s 3(3) of the Bombay Provincial Municipal Corporations Act, 1949 for formation of Kalyan Municipal Corporation. The draft notification suggested the merging of municipal areas of Kalyan, Ambarnath, Dombivali and Ulhasnagar in the Kalyan Corporation. Against this proposal, there were many objections and representations from various persons, companies and authorities. In particular, Sindhies of Ulhasnagar through their federation called All India Sindhi Panchayat Federation opposed the merger of Ulhasnagar with other municipal areas and claimed to have a separate identity for Ulhasnagar. The draft notification was challenged by the Federation before this Court by a writ petition. The Writ Petition was permitted to be withdrawn on an assurance given by the Government that the representatives of the Federation would be heard before taking a final decision in the matter. On such assurance, the Federation was given a personal hearing on the representations. Others, however, who had filed similar representations were not heard but their objections or representations were duly considered. Thereupon, the Government decided to exclude Ulhasnagar from the proposed Corporation and accordingly, issued a final notification u/s 3(2) of that Act. The Corporation was, thus, constituted without Ulhasnagar. The residents of Ambarnath Municipal area moved this court challenging the notification issued u/s 3(2) of the Act. One of the contentions raised by the Petitioners in that case was that there ought to have been a fresh draft notification after taking a final decision to exclude Ulhasnagar from the proposal. The High Court held the decision to exclude Ulhasnagar to be arbitrary and against the purpose of the Act and without setting aside the final notification directed the State Government to reconsider the proposal u/s 3(3) of the Act to exclude or include any area within a period of six months from the date of the order. It was in this backdrop of facts that the Supreme Court whilst reversing

the order of the High Court held as follows:

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. The decision became final when it was notified u/s 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 theirs

It is pertinent to note that in that case, the only requirement of Sub-section 4 of Section 3 of the Bombay Provincial Municipal Corporations Act was that the power to issue such a notification was subject to the condition of previous publication. There was no statutory requirement to invite objections and suggestions from the members of public and consider them. Secondly, even on the facts of that case, what was done in the final notification was to drop the Ulhasnagar Municipal area from the draft proposal earlier notified after consideration of objections and suggestions in pursuance of the statement made before the High Court in the earlier round of litigation. The dropping of one of the four areas from the proposed corporation can certainly be said to be ancillary or incidental to the draft proposal and not a proposal foreign to the draft notification. What was finally done was thus very much conceivable within the framework of draft proposal.

16. The learned AGP also relied on the judgments of the Supreme Court in the case of *Tulsipur Sugar Co. Ltd. Vs. The Notified Area Committee, Tulsipur*, and of our court in the case of *Sumati Bharat Ghule Vs. Regional Transport, Pune Region 2001 (supp. 2) Bom. C.R. 799* in support of his contention that the notification of the State Government was not vitiated for lack of adequate notice to the members of public.

17. The case of *Tulsipur Sugar Co. (supra)* considered the declaration of an area as town area u/s 3 of the U.P. Town Area Act, 1914. The contention of the Petitioner Sugar Company that the declaration was vitiated for not inviting and taking into consideration representations or objections of members of public was negated by the Supreme Court. The Court noted that the U.P. Town Area Act did not provide that the State Government should give previous publicity to its proposal to declare any area as town area or should make such declaration after taking into consideration any representation or objection filed in that behalf by

the members of the public. The other judgment of Sumati Bharat Ghule (supra) relied upon by the learned AGP considers the power of the State Transport Authority u/s 68 of the Motor Vehicles Act to issue directions to Regional Transport Authorities. It was held in that case that the power u/s 68 permits issuance of directions by the State Transport Authority for co-ordination and regulation amongst Regional Transport Authorities in order to have uniform policy in an area or region of the State, and is in the nature of a legislative power. Applying the principles enunciated in the case of Cynamide India (supra), the Court negated the contention of the Petitioners that the action of the State Transport Authority was vitiated for lack of hearing and consideration of objections and suggestions. The judgment in Sumati Bharat Ghule (supra) noted that unlike in the case of an action u/s 67 of the Motor Vehicles Act, an action u/s 68 does not contemplate a prior notification nor does it contemplate any hearing or consideration of objections or suggestions. The cases of both Tulsipur Sugar Co. (supra) and Sumati Bharat Ghule are thus clearly distinguishable. In our case, the State Government is expressly required by the Statute to publish a prior notification and consider objections or suggestions in terms of Section 4(4) of the MLR Code read with Section 24 of the Bombay General Clauses Act

18. The test in such matters is whether or not the legislature has provided an opportunity for making objections and suggestions before the subordinate legislation is made. This is clearly brought out by the Supreme Court in the case of State of Punjab Vs. Tehal Singh and Others, . The Supreme Court in that case observed as follows:

9. It is almost settled law that an act legislative in character primary or subordinate, is not subjected to rule of natural justice. In case of legislative act of legislature, no question of application of rule of natural justice arises. However, in case of subordinate legislation, the legislature may provide for observance of principle of natural justice or provide for hearing to the resident of the area before making any declaration in regard to the territorial area of a Gram Sabha and also before establishing a Gram Sabha for that area. We have come across many enactments where an opportunity of hearing has been provided for before any area is excluded from one Gram Sabha and included it in different Gram Sabhas or a local authority. However, it depends upon the legislative wisdom and the provisions of an enactment. Where the Legislature has provided for giving an opportunity of hearing before excluding an area from a Gram Sabha and including it in another local authority or body, an opportunity of hearing is sine qua non and failure to give such an opportunity of hearing to the residents would render the declaration invalid.

19. It is lastly contended by the learned AGP that the decision to create a sub-division for Daund and Purandar Talukas with headquarters at Pune is a policy decision of the State Government and cannot be struck down unless the same suffers from the vice of demonstrable arbitrariness or discrimination. Reliance is placed on various judgments of the Supreme Court in support of the proposition.

It bears repetition to observe that the decision of the State Government is faulted here on the ground of non-compliance with statutory requirements and not on the ground of the merits of that decision. We need not, therefore, go into this aspect or consider the judgments cited in support of the contention.

20. There is one more aspect of the matter, which needs to be discussed in the context of the submissions of the learned AGP concerning the justiciability of the policy decision here. It has been a well settled rule of administrative law that where the statute provides that power should be exercised in a specific manner, it should be done only in that manner. Any breach of statute in this behalf makes the exercise of power ultra vires the statute. See *Prabha Shankar Dubey Vs. State of Madhya Pradesh*, ; *Ram Phal Kundu Vs. Kamal Sharma*, ; and *Union of India (UOI) and Others Vs. Rajpal Singh*, . This rule is also applied to the exercise of the power of subordinate legislation. In *State of U.P. and Others Vs. Renusagar Power Co. and Others*, the Supreme Court observed as follows:

79. If the exercise of power is in the nature of subordinate legislation the exercise must conform to the provisions of the statute. All the conditions of the statute must be fulfilled.

21. To summarise the position, the notification of the State Government is bad in law by reason of non-compliance with the statutory requirement of prior publication and consideration of objections or suggestions in terms of Section 4(4) of the MLR Code read with Section 24 of the Bombay General Clauses Act. The Rule is, therefore, made absolute. The notification of declaration of the sub-division of Daund and Purandar Talukas with headquarters at Pune under the Notification of 26 July 2013 is struck down. There shall be no order as to costs.