

(2014) 10 MP CK 0098

In the Madhya Pradesh High Court

Case No : Review Petition Nos. 667, 668 and 669/2014

State of M.P. and Others

APPELLANT

Vs

Abhinesh Mahore and Others

RESPONDENT

Date of Decision : 18-10-2014

Acts Referred:

Constitution of India, 1950 — Article 163, 163(1), 243(e), 243-C, 243-Q
Madhya Pradesh Municipal Corporation Act, 1956 — Section 405
Madhya Pradesh Municipalities Act, 1961 — Section 5-A

Citation : (2015) 1 MPHT 301

Hon'ble Judges : A.M. Khanwilkar, C.J.; Shantanu Kemkar, J

Bench : Division Bench

Advocate : R.D. Jain, Advocate General, P.K. Kaurav, Addl. Advocate General, Samdarshi Tiwari, Govt. Advocate and Swapnil Ganguly, Dy. Govt. Advocate, Advocates for the Appellant; A.M. Trivedi, Sr. Advocate, Ashish Trivedi, Vivek Rusia, Shekhar Sharma and R. Gupta, Advocates for the Respondent

Judgement

1. Heard Counsel for the parties. These review petitions have been filed for recalling of order passed by us on 14-10-2014 in Writ Petition No. 12777/2014 and companion cases heard on that day.

2. The principal objection of the State and which is the ground for review is about the observation found in the order that the Governor must consider the objections "himself" before forming subjective satisfaction about the necessity to exclude or include certain areas within the limits of Municipal area.

3. The argument proceeds that all decisions of the Governor are essentially on the basis of aid and advise of the Council of Ministers as is the mandate of Article 163 of the Constitution of India. According to the learned Advocate General, keeping in mind the observations of the Apex Court in Paragraphs 8 and 9 in the case of State of U.P. and others etc. Vs. Pradhan Sangh Kshettra Samiti and others etc., , the observations in our order that the Governor must consider the objections "himself", need to be recalled and in any case be explained or

modified accordingly.

4. On the other hand, the argument of the respondent (writ petitioners) is that the observation found in our order is most appropriate and needs no modification, much less deserves to be recalled at the instance of the State. It is argued by the Counsel for the respondents that the exercise of powers by the Governor by virtue of Article 243-Q is an exceptional and exclusive function of the Governor. Therefore, it is ascribable to the second part of clause (1) of Article 163 of the Constitution. In that, he exercises this power by or under the Constitution and which discretion cannot be delegated or made dependent on the aid and advise of the Council of Ministers as such. To buttress this submission reliance is placed on five decisions of the Apex Court, in the cases of *Clariant International Ltd. and Another Vs. Securities and Exchange Board of India*, ; *Smt. Sudha Rani Garg Vs. Sri Jagdish Kumar (Dead) and Others*, ; *Madhya Pradesh Special Police Establishment Vs. State of Madhya Pradesh and Others*, ; and lastly *Pu Myllai Hlychho and Others Vs. State of Mizoram and Others*, .

5. To analyse the controversy brought before us, it may be apposite to advert to Article 163 of the Constitution of India, which reads thus:--

"163. Council of Ministers to aid and advise Governor.--(1) There shall be a Council of Ministers with the Chief Minister as the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question arises whether any matter is or is not a matter as respects, which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court."

(Emphasis supplied)

6. Clause (1) of this provision is in two parts. The first part predicates exercise of functions by the Governor on the basis of aid and advise of the Council of Ministers with the Chief Minister as the head of that Council. That is the ordinary rule. However, the second part provides for excepted category in which the Governor may have to exercise discretion on his own and without the aid and advise of the Council of Ministers. For, it is provided that when the Governor exercises any function-which is by or under the Constitution required to be "exercised by him" or any of them "in his discretion", he may do so, without the aid and advise of the Council of Ministers. That is the settled legal position expounded in all the decisions pressed into service by both the sides.

7. The core question, therefore, is: Whether the exercise of powers by the

Governor to effectuate the action under Article 243-Q falls in the first or second part of Article 163(1) of the Constitution?

8. As observed by us in our earlier order, we have no hesitation in reiterating that the exercise of power or discharge of function by the Governor in the context of Article 243-Q, which has been introduced consequent to Constitution (Seventy Fourth Amendment) Act, 1992, is the function or discretion to be exercised by the Governor falling under the second part of clause (1) of Article 163 of the Constitution of India. This position is reinforced from the very language of Article 243-Q, which stipulates that the Governor may specify the area "as he may deem fit". The expression "as he may seem fit" leaves no manner of doubt that the discretion must be exercised by the Governor and no one else. Further, if the provision in Article 243-Q in Part IX-A of the Constitution, concerning constitution of Municipalities is juxtaposed with Article 243-C read with Article 243(e) of the Constitution concerning the Panchayat in Part IX of the Constitution, it is amply clear that there is marked distinction between the procedure to be followed in the case of constitution of Municipalities.

9. Be that as it may, considering the provisions of the M.P. Municipal Corporation Act, 1956 or be it M.P. Municipalities Act, 1961, it is noticed that the Governor has to take the final decision and consider the objections regarding inclusion or exclusion of certain areas in the limits of Corporation or the Municipalities, as the case may be, as can be seen from Section 405 of the Act of 1956 and Section 5-A of the Act of 1961.

10. A priori, there is no room for argument that the discretion to be exercised by the Governor by virtue of Article 243-Q is not ascribable to the second part of clause (1) of Article 163 of the Constitution of India. The concomitant of this finding, is that, it is for the Governor to consider the objections and take a final decision, as he may deem fit. While doing so whether he should call for the aid and advise of the Council of Ministers before taking any decision on the objections received qua the proposed change of limits of the Corporation or Municipal area, as the case may be, is also his prerogative. That discretion inheres in the Governor and is ascribable to clause (2) of Article 163 of the Constitution. Indeed, the final decision to accept or reject the objections must be that of the Governor. Thus, it is not as if the Governor is precluded from requisitioning aid and advise of the Council of Ministers on the question of inclusion or exclusion of certain areas in the limits of the Corporation or the Municipality, as the case may be.

11. Suffice it to observe that the grievance of the State brought before this Court in the form of present review petitions is untenable. Rather the provisions referred to above make it amply clear that the "objections must be considered by the Governor" before exercising "his discretion" to specify any area as excluded or included in the limits of Corporation or Municipality, as the case may be. As a result, we decline to entertain these review petitions, with the above observations. Disposed of accordingly.