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Court : Mumbai Aurangabad

Decided On : Feb-20-2014

Judge : S.C. DHARMADHIKARI & RAVINDRA V. GHUGE

Appeal No. : Writ Petition No. 8800 of 2011

Appellant : Jaishri and Others

Respondent : State of Maharashtra, Through Its Secretary, Urban Development Department and Others

Judgement :

S.C. Dharmadhikari, J.

1. Rule. The Advocates for respondents waive service. By consent Rule is made returnable forthwith.

2. By this petition under Article 226 of the Constitution of India, the petitioners are challenging the constitutional validity of Section 3 of the then Bombay Provincial Municipal Corporations Act, 1949, now, the Maharashtra Municipal Corporations Act, 1949.

3. It is prayed that subsection (4) to Section 3 of the Bombay Provincial Municipal Corporations Act, 1949 and proviso to subclause (d) of subsection (1) to Section 6 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, (hereinafter referred to as,?the Municipal Councils Act? for short), are ultravires Articles 13(2), 14, 243Q and 368 of the Constitution of India.

4. A further prayer is to quash and set aside the notification dated 1st November, 2011, issued by the Deputy Secretary to the Government of Maharashtra, Urban Development Department, Mantralaya, Mumbai, declaring the Municipal Council, Parbhani as a larger urban area and constituting the Corporation for the same by dispensing with the condition regarding previous publication.

5. The further prayers are also incorporated, but for our purposes, it is not necessary to refer to them in details.

6. As far as this writ petition is concerned, we would have thought that by now, and by passage of time, the controversy therein is rendered purely academic. However, Mr. S.B. Talekar, learned counsel appearing for the petitioners submits that this conclusion cannot be drawn merely because of pendency of the writ petition and enforcement of the Amendment Act or the notification in question. He submits that serious and fundamental issues have been raised, of constitutional and general public importance and hence, this Court be pleased to adjudicate upon the same.

7. Acceding to this request of Shri Talekar, that we proceed to refer to the facts and the challenge laid before us.

8. The petitioners are the residents and members of the Municipal Council, Parbhani, which is since dissolved by the Government of Maharashtra. At the outset, they contend that, they are not opposed to the constitution or establishment of the Municipal Corporation for the city of Parbhani. However, their case is that, elections of this Municipal Council were held on 19th November, 2006. The election of the President of the Municipal Council was held on 21st December, 2009. The term of office of the members of the Municipal Council would end on 20th December, 2011.

9. The petitioners would have thus remained in office, but for the notification issued on 1st November, 2011, by the Government of Maharashtra, appointing the Collector as Administrator/Authorized officer under Section 452A of the then Bombay Provincial Municipal Corporations Act, 1949. It is the case of the petitioners that they were busy in some meeting and particularly, on the subject of the Water Conservation and Water supply schemes. However, they were never aware, nor were made aware of any decision of the State to convert the Municipal Council into Municipal Corporation. It was revealed lateron, that the Government is considering a proposal of converting the Municipal Councils of Chandrapur, Latur and Parbhani into Municipal Corporations.

10. The Government, however, notified the elections of the Municipal Councils in the State, including Chandrapur and Latur. The petitioners pointed out that there was a Code of Conduct in force and what came to their notice is, that one Member of the Parliament and from Parbhani, threatened to go on a hunger strike, so as to pressurize the Government to convert the Municipal Council into a larger municipal area i.e. Municipal Corporation.

11. It is submitted that, in terms of the earlier decision, the State did not accept this proposal and hence, the matter was not referred to the Honourable Governor of Maharashtra. Lateron, the constitutional mandate has not been adhered to, in converting the Municipal Council Parbhani into a Municipal Corporation.

12. It is submitted that neither the Municipal Council was consulted, nor objections or suggestions were invited from the elected representatives and the residents. It is in these circumstances, that it is submitted that, the exercise of power to convert any area having population of not less than 3 lakhs, into a larger urban area and thereafter to form a Municipal Corporation for such larger urban area, is not in conformity with Article 243Q of the Constitution of India. Thereunder, the power to constitute either a smaller area or a larger urban area is reserved to the Governor of the State.

13. There is no scope of delegation of such powers by the Governor of the State. In these circumstances, the decision now taken, can not be said to be in consonance with the constitutional mandate. It is submitted that presuming that the Governor has to act on aid and advice of the Council of Ministers for constitution of a smaller or larger urban area, but, the Council of Ministers held meeting on 2nd November, 2011. The notification issued is of a prior date. In these circumstances, when a decision is taken on a later date, that could not have been published in the Government Gazette on 1st November, 2011. Thus, not only the Sections which are referred to above, but, equally the notification is also bad in law and deserves to be quashed and set aside.

14. Mr. S.B. Talekar, learned counsel appearing on behalf of the petitioners submitted that the constitutional challenge has been summarized in paras. 26, 27 and 28 of the present writ petition. He submits that this constitutional challenge is being elaborated and by pointing out that the term œGovernor? does not include the œGovernment?.

15. There is a distinction in law between œGovernor? and the œGovernment.? The power in this case is conferred in the Governor and not in the State Government. Under such circumstances, it is evident that the State has taken over this power and usurped it to itself.

16. It is submitted that the petitioners were never consulted. The Government ought to have followed the

procedure of publishing a draft notification, inviting objections and consulting the municipal council before declaring this smaller urban area of Municipal Council, Parbhani as a Larger urban area. The conversion is not automatic on the population figure reaching 3 lakhs. That is only to enable the Government to constitute a Municipal Corporation for the larger urban area. However, that power does not necessarily dispense with the requirement of consultation with the Municipal Council.

17. Mr. Talekar, therefore, submits that Section 3 of the Act is repugnant to the extent that it is inconsistent with the provisions contained in Article 243Q of the Constitution of India.

18. Mr. Talekar has laid special emphasis on the wording of Article 243Q and submits that there is no scope for diluting its rigour and reading into it something, which, the constitution does not permit or envisage. Hence, by allowing the notification to be issued without consultation with the Municipal Council, the State has violated the constitutional mandate.

19. Mr. Talekar has then submitted that even if the Governor acts on the aid and advice of the council of Ministers, yet, in the constitutional scheme, there are certain matters exclusively reserved for the Governor to exercise his powers. In the present case, the matter was not referred to the Governor at any time by the State. The Government cannot exercise powers vested in the Governor and for all these reasons, it is submitted that the impugned provisions are ultravires the constitutional mandate and deserve to be struck down. Equally, the notification is also bad in law. It is submitted by Shri Talekar that even otherwise, the requirement of Section 3 of the Bombay Provincial Municipal Corporations Act has not been fulfilled because there isno previous publication in the official gazette. In support of this submission, Shri Talekar relies upon the judgment of the Honourable Supreme Court, in the matter of œState of Maharashtra and others Vs. Jalgaon Municipal Corporation? reported in 2003(9) SCC 731.

20. On the other hand, Shri Karlekar, learned AGP relies upon the affidavit in reply filed and submits that the affidavit points out as to how the constitutional requirements and equally, the statutory requirements have been satisfied.

21. Mr. Karlekar submits that as per the letter dated 17th October, 2011, received from the Director of Census Operations, Maharashtra, Ministry of Home Affairs, Government of India, the provisional population figure in respect of Parbhani city as per the 2011 Census, was 3,07,191. That is more than 3 Lakhs. The State Government may, having regard to the factors in clause (2) of Article 243Q, specify,by notification in the official Gazette any urban area with a population of not less than 3 lakhs, as a larger urban area, for which Municipal Corporation shall be constituted.

22. The Government of Maharashtra issued an ordinance No. XX of 2011, on 24th October, 2011, amending Section 3 of the Bombay Provincial Municipal Corporations Act and Section 6 of the Maharashtra Municipal Councils Act, enabling the Government to dispense with the condition of previous publication of notification under the Bombay Provincial Municipal Corporations Act, 1949. Equally, the provisions, dispensing with the previous consultation with the municipal council, while constituting a corporation, without changing the boundaries of the urban area, whose population exceeds 3 lakhs, have been adhered to or followed. Later, this ordinance has been converted into an Act and published in the Government Gazettee on 28th December, 2011.

23. The notification dated 1st November, 2011, which is challenged in this writ petition is issued in accordance with the provisions of the said ordinance. It is in these circumstances, that he submits that there is absolutely no question of the State Government overriding the constitutional provisions. There is also no merit in the argument that factors envisaged by the constitution and particularly, by Article 243Q(2), were not considered. By dispensing with the requirement of consultation, there is no violation of Article 14 and 243Q of the Constitution of India.

24. Mr. Karlekar submits that the requirement of previous publication can be dispensed with in law. It is not

correct to state that it can be dispensed with only in an exigency. For all these reasons, he submits that there is no merit in the writ petition. The same may be dismissed.

25. In rejoinder, Mr. Talekar has urged that if requirement of previous consultation, previous publication have all been dispensed with, and not as a matter of exception, but as a general rule, then, all the more, the power and authority reserved in the Governor has been taken over by the State Government and hence, the constitutional challenge be upheld.

26. With the assistance of the learned Advocates appearing for the parties, we havecarefully perused the writ petition and all its annexures. We have carefully perused the affidavit in reply, the constitutional provisions and the statutory provisions as well. We have also perused some of the decisions brought to our notice.

27. As far as the Constitution is concerned, Article 243P onwards have been inserted by amendment to the Constitution and by insertion of Part IXA. Article 243P, contains definitions and the term, œMunicipality? is defined to mean, œAn institution of SelfGovernment, constituted under Article 243Q?. The term œPopulation? means, œpopulation as ascertained at the last preceding census of which latest figures have been published?.

28. Article 243Q of the Constitution of India, reads as under:

œ243Q (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 areas 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 may deem fit, by public notification, specify to be an industrial township.

(2) In this article, œa transitional area?, œa smaller urban area? or a œlarger 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 nonagricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this part.

29. A bare perusal of this Article would indicate that, there shall be constituted in every State, a Nagar Panchayat, for a transitional area, that is to say, an area under transition from rural to urban area, a Municipal Council for a smaller urban area and a Municipal Corporation for a larger urban area.

30. The proviso to sub-article (1) of Article 243Q states a Municipality under sub Article (1) of 243Q, may not be constituted in such urban areas 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 may deem fit by public notification, specify to be an industrial township.

31. Sub-article (2) provides that a transitional area, a 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 nonagricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this part.

32. Thus, the proviso to sub-article (1) comes into play only when Governor is of the opinion that the

Municipality may not be constituted in an urban area or part thereof, because 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 may deem fit by public notification, the industrial township can be specified.

33. In other words, all that the Governor may form is, an opinion that it is not necessary to constitute a Municipal Corporation for such larger urban area, as there is an industrial establishment in that area, and having regard to the size of that area, and the municipal services being provided or proposed to be provided by an industrial establishment in that area, and such other factors, it would be proper to specify that area as an Industrial township, rather than a Municipality.

34. We fail to see, as to how in issuing the impugned notification, the government has in any way usurped, taken over or interfered with the power of the Governor enacted by the proviso. The proviso covers a distinct area and field. The proviso is not, conflicting, leave alone, inconsistent with or repugnant to the provisions, of which the constitutional validity is challenged.

35. In no way, can the power of the Governor to issue a public notification contemplated by proviso to sub-article (1) or public notification for the purposes of this part of the constitution, namely, Part IXA, is affected by incorporating amendments to the Bombay Provincial Municipal Corporations Act or the Maharashtra Municipal Councils Act.

36. Article 243Q is thus not violated at all. There are yardsticks provided to identify a transitional area, a smaller urban area or a larger urban area. This is then to be notified and by the Governor. What is to happen after the areas are notified as such, is provided in the Bombay Provincial Municipal Corporations Act and Maharashtra Municipal Councils Act. There is, therefore, no conflict nor is any State Act repugnant, leave alone, inconsistent or in conflict with the constitutional provisions. The provisions in the State Act cannot be said to be ultravires Article 243Q(2) of the Constitution of India.

37. In this regard, a careful perusal of the relevant provisions of the Maharashtra Provincial Municipal Corporations Act is necessary. Mr. Talekar submits that Section 3 of the Maharashtra Municipal Corporations Act, is entitled, œspecifications of larger urban area and constitution of corporations?. Therefore, we have to reproduce this provision and for a better understanding of the same, which reads as under:

œ3. Specifications of larger urban areas and constitution of corporations:

[1. The Corporation for every City constituted under this Act, existing on the date of coming into force of the Maharashtra Municipal Corporations and Municipal Councils(Amendment) Act, 1994, specified as a larger urban area in the notification issued in respect thereof under clause (2) of Article 243Q of the Constitution of India, shall be deemed to be a duly constituted Municipal Corporation for the larger urban area so specified forming a City, known by the name? The Municipal Corporation of the City of ...?

[1A. The Corporation of the City of Nagpur incorporated under the City of Nagpur corporation Act, 1948 for the larger urban area specified in the Notification issued in this respect under clause (2) of Article 243Q of the Constitution of India shall, on and from the date of coming into force of the Bombay Provincial Municipal Corporations (Amendment) and the City of Nagpur Corporation (Repeal) Act, 2011, be deemed to have been constituted under this Act, and accordingly the provisions of this Act shall apply to the area of the City of Nagpur.

(2) Save as provided in subsection (1), the State Government may, having regard to the factors mentioned in clause (2) of Article 243Q of the Constitution of India, specify by notification in the Official Gazette, any urban area with a population of not less than three lakhs as a larger urban area;

(2A) Every larger urban area so specified by the State Government under subsection (2) shall form a City and there shall be a Municipal Corporation for such larger urban area known by the name of the Municipal

Corporation of the City of ....?;

(3) (a) Subject to the provisions of subsection (2), the State Government may also from time to time after consultation with the Corporation by notification in the official Gazette, alter the limits specified for any larger urban area under subsection (1) or subsection (2) so as to include therein, or to exclude therefrom, such area as is specified in the notification.

(b) Where any area is included within the limits of the larger urban area under clause (a), any appointments, notifications, notices, taxes, orders, schemes, licences, permissions, rules, byelaws or forms made, issued, imposed or granted under this Act or any other law, which are for the time being in force in the larger urban area shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise provided in Section 129A or any other provision of this Act, apply to and be in force in the additional area also from the date that area is included in the City.

(4) The power to issue a notification under this section shall be subject to the condition of previous publication :Provided that, where the population of any urban area, in respect of which a Council has been constituted under the provisions of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, as per the latest census figures has exceeded three lakhs, the State Government may, for the purpose of constituting a Corporation under this Act for such urban area, with the same boundaries, dispense with the condition of previous publication of the notification under this section.?

38. Perusal of Subsection (1) of Section 3 would reveal that, on coming into force of the Maharashtra Municipal Corporations and Municipal councils (Amendment), Act, 1994, an existing corporation for a city constituted under the Bombay Provincial Municipal Corporations Act as amended, specified as a larger urban area in the notification issued in respect thereof under clause (2) of Article 243Q of the Constitution of India, it shall be deemed to be a duly constituted Municipal Corporation for the larger urban area. That is by a deeming provision. Subsection (1A) clarifies that in so far as the corporation of city of Nagpur is concerned, the City of Nagpur Corporation Act, 1948 would stand amended, in terms of the amendment made to the Maharashtra Municipal Corporations Act, 1949.

Subsection (2) provides that, Save as provided in subsection (1), the State Government may, having regard to the factors mentioned in clause (2) of Article 243Q of the Constitution of India, specify by notification in the Official Gazette, any urban area with a population of not less than three lakhs as a larger urban area.

39. We do not see, how the power of Governor to notify any larger urban area, as an industrial township, and for provision of municipal services therein, or the issuance of notification by Governor, in terms of sub-article (2) of Article 243Q, is in any way affected.

40. It is only when the factors enumerated in sub article (2) are taken into consideration by the State Government that it may specify, by notification in the Official Gazette, any urban area with a population of not less than 3 Lakhs as a larger urban area. That this provision only enables the State to notify any urban area with the population of not less than three lakhs as a larger urban area. This is a discretionary power to be exercised only having regard to the factors mentioned in Article 243Q (2) of the Constitution demonstrates that there is no conflict.

41. In the present case, what has transpired is that, Government has issued anotification on 1st November, 2011, firstly, under the Maharashtra Municipal Councils Act, and secondly, under the powers conferred by subsection (2) of Section 3 of the Bombay Provincial Municipal Corporations Act, 1949, now known as Maharashtra Municipal Corporations Act. That is in exercise of the powers conferred by amendment to the Maharashtra Municipal Corporations Act.

42. We do not see how the State Government was prevented from issuing a notification in the Official Gazettee in terms of Section 3(2) specifying the urban area as a larger urban area and in relation to Parbhani

city. The Government has adhered to the very factors which are enumerated by the subarticle (2) of Article 243Q in issuing the subject notification.

43. It has taken into consideration all the factors as set out in this sub-article. Once there was no conflicting or contrary notification by the Governor within the meaning of sub-article (1) of Article 243Q of the constitution in the field, then, the State Government was not prohibited from issuing the notification specifying the urban area with a population of not less than 3 lakhs, as a larger urban area, within the meaning of this subsection of Section 3.

44. This subsection will have to be read in harmony with all subsections of section 3 and equally, other provisions of the Act, because, as far as the present case is concerned, what is relevant is the amendment to the subsection (4) of Section 3 of the Maharashtra Municipal Corporations Act, by which, a proviso has been inserted and which states that, where the population of any urban area in respect of which there is an existing council constituted under the provisions of the Maharashtra Municipal Councils Nagar Panchayats and Industrial Townships Act, as per the latest census figures has exceeded 3 Lakhs, the State Government may, for the purposes of constituting a Corporation under this Act for such urban area, may issue a notification within the meaning of Section 3 and in doing so, it can dispense with the condition of previous publication.

Thus, only to enable to publish a notification under section 3 in relation to an existing municipal council and when the urban area for which it is constituted, has a population in terms of the latest census figures exceeding 3 lakhs, that the said proviso has been added.

45. The proviso, therefore, cannot be read in isolation and it only comes into play when there is an existing municipal council for an urban area. Equally, when the population of such urban area exceeds 3 lakhs, then, the State Government, for the purpose of exercising its discretion to constitute a corporation under the Maharashtra Municipal Corporations Act, for such urban area, with the same boundaries, dispense with the condition of previous publication.

46. That dispensation is in larger public interest and so as to avoid repetition of the exercise required to be undertaken by previously publishing a notification. The previous publication of the notification would delay the process. That is how, the State Government is conferred with a discretion to dispense with the previous publication of the notification under proviso to subsection (4) of Section 3. There is no question of dispensation of the constitutional requirement or factors as enumerated in Article 243Q and, as apprehended by Mr. Talekar. It is only previous publication which is dispensed with and nothing more.

47. Therefore, subsection (2) of Section 3 enables the State Government to specify by notification in the official Gazette, any urban area with a population of not less than 3 lakhs, as a larger urban area and, thereafter, to form a Municipal Corporation for such larger urban area. Subsection (4) enables the State Government, to issue a notification without previous publication so as to make or convert the existing municipal council into a Municipal Corporation, on the population of the said urban area, as already indicated, exceeding 3 lakhs. We do not see any conflict, nor do we see any constitutional mandate being infringed, much less, of equality, fairness and justice.

48. It has already been held by the Honourable Supreme Court that rules of natural justice are not applicable to legislative actions. In œSundarjas Kanyalal Bhatija Vs. Collector, Thane, Maharashtra? reported in AIR 1991, SC 1893, the Honourable Supreme Court has held as under :

œGovernment published draft notification to form a Corporation comprising certain areas in Thane District. After hearing representations certain area was excluded from the proposed Corporation. Whether Court can interfere in such a decision. It is not necessary for Government to hear all parties. Power of Government to constitute Municipal Corporation is neither executive nor administrative. It is in the nature of legislative process. Court can not interfere if statutory provisions have been complied with. Rules of natural justice are

not applicable to legislative actions œ

49. Lastly, Mr. Talekar questions the validity of proviso to clause (d) of subsection (1) of Section 6 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. That provision reads as under:-

œ6. Alteration of the limits of a municipal area :

(1) Subject to the provisions of subsection (2) of Section 3, the State Government may by notification in the Official Gazette :

(a) alter the limits of a municipal area so as to include therein or to exclude therefrom such local area as may be specified in the notification;

(b) amalgamate two or more municipal areas so as to form one municipal area;

(c) split up any municipal area into two or more municipal areas;

(d) declare that the whole of any local area comprising a municipal area shall, cease to be a municipal area;

Provided that, no such notification shall be issued by the State Government under any of the clauses of this subsection without consulting the Municipal Council or Councils and other local authorities concerned.

(2) Prior to the publication of a notification under subsection (1), the procedure prescribed in subsections (3) (4) and (5) of Section 3 shall mutatis mutandis be followed.

Provided that, the State Government may dispense with the provisions of subsections (3), (4) and (5) of section 3 regarding proclamation and of the proviso to subsection (1) of this section regarding consultation, in respect of the municipal area, where the population, as per the latest census figures has exceeded three lakhs; and a Corporation under the provisions of the Bombay Provincial Municipal Corporations Act, 1949, is being constituted for such area, with the same boundaries.

50. A perusal thereof would indicate that subject to the provisions of subsection 2 of section 3, the State Government, may by notification in the official Gazette, alter the limits of a municipal area so as to include or to exclude such local area, as may be specified in the notification therefrom.

51. The State can also amalgamate, two or more municipal areas so as to form one municipal area. The State can also split up any municipal area into two or more municipal areas. The State can also declare that whole of any local area comprising of a municipal area shall cease to be a municipal area, provided that no such notification shall be issued by the State Government, under any of the clauses of the subsection, without consulting the municipal council or councils, and other local authorities concerned.

52. This power is of alteration of limits of the municipal area and, therefore, it is obvious that municipal council or councils and other local authorities have to be consulted. However, what this argument forgets is that Chapter 2 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, is entitled œMunicipal Councils? and part I thereof, is entitled, œMunicipal Area and their classification?.

53. Section 3 of the Maharashtra Municipal Councils Act, by subsection (1) enacts that there shall be a council for every municipal area specified as a smaller urban area in Article 243Q of the Constitution of India and the power to alter the limits of the councils conferred by section 6 can only be exercised subject to sub section 2 of section 3 of the Municipal Councils Act.

54. We do not see how any conflict is created, inasmuch as, by subsection (2) of Section 3, the power to publish the notification under subsection 2 cannot be exercised unless a proclamation announcing the intention of the Government to issue notification under subsection 2 of Section 3 is issued.

55. That is because, the Government for the first time is specifying any local area as smaller urban area. The transition of local area to a smaller urban area is for the purpose of constituting a municipal council, after this local area becomes a smaller urban area.

56. The people are going to be affected and that is why they are required to be given an opportunity to object to the proposal and the Government has to reach a satisfaction or opinion that such objections are insufficient or invalid. It is the Government who can effect the change or transition so that this local area can be governed by a different legal entity. This different and distinct legal entity is covered by Maharashtra Municipal Councils Act, 1965 and would then be known as a Municipal Council. The Government cannot bring about a drastic change in the administration of the local set up unless it gives an opportunity to the people to object to the transition or the change sought to be made or effected. Ultimately, it is the people, who are going to be affected and that is why the requirement of considering the objections and prior thereto, giving an opportunity to object have to be fulfilled.

57. This aspect becomes very clear if one peruses Section 4 of the Maharashtra municipal Councils Act, that is dealing with classification of smaller urban area. The classification is based on population. The classification is based on the factors enumerated in sub-article 2 of Article 243Q of the Constitution of India. The classification can be reviewed by the Government as well through subsection (5) of Section 4 the Maharashtra Municipal Councils Act. The effect of reclassification of municipal area is set out by section 5 and then comes Section 6, which permits alteration of the limits of a municipal area. Thus, the local area becomes a smaller urban area. There is classification of smaller urban area as well. There is a power to reclassify the municipal area and equally, there is a power to alter the limits of a municipal area. The smaller urban area is formed so as to make a municipal council for that area. That area has to be classified in terms of the population figure, so that an area with more population is classified as œA? class smaller urban area. An area, with a population of less than 1 lakh but more than 40,000 is œB? class smaller urban area, and lesser than 40,000 is œC? class smaller urban area. This classification can be reviewed and altered. The effect of reclassification of municipal area had to be provided for, because it will be a council of a smaller urban area, as reclassified. If that classification undergoes a change, then, the municipal area will have to be reclassified. Equally, alteration of limits of municipal area is permissible so as to achieve optimum administrative efficiency and to facilitate in managing the affairs of the area effectively and properly. We do not see, therefore, as to how there can be any conflict and as emphasized by Shri Talekar.

58. Section 6, as reproduced above, would indicate that the challenge before us is erroneously founded on the proviso below clause (d) of subsection (1) of Section 6 of the Municipal Councils Act. That this proviso below clause (d) could not have been impugned by the petitioners because that provides for consultation with the Municipal Council or Councils and other local authorities before any of the measures or steps contemplated by subsection (1) of Section 6 are initiated and taken. The requirement of this proviso has to be complied with before the notification in terms of subsection (1) of clause (a) to (d) can be issued by the State Government.

The power which is conferred by subsection (1) has to be exercised subject to subsection (2) of Section 3of the Maharashtra Municipal Councils Act. Thus, the requirement of this subsection of Section 3 together with its proviso, has to be fulfilled and that is obvious. Thus, the power conferred by subsection (1) of Section 6, cannot be exercised without complying with subsection (2) of Section 3. The challenge before us is not any alteration of the limits of the Parbhani Municipal Council or amalgamation of two or more municipal areas, so as to form one municipal area. Similarly, the challenge does not envisage splitting up of any municipal area into 2 or more municipal areas. The challenge is also not in regard to the declaration contemplated by clause (d) of subsection (1) of Section 6.

It may be that Parbhani Municipal Council will cease to be a council governed by the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. However, there need not be any compliance with the mandate of Section 3 and proviso below subsection (1) of Section 6 of the Municipal Councils Act, when the population of the Municipal area as per the latest census figures has exceeded 3 lakhs in a

Corporation under the provisions of the then Bombay Municipal Corporations Act, 1949, being constituted for such area with the same boundaries. That is the challenge. Thus, there need not be any notification and proclamation as contemplated by Section 3 of the Municipal Councils Act and there need not be any consultation as contemplated by the proviso to subsection (1) of Section 6 of the Municipal Act. It is this proviso, which is challenged as ultravires the constitutional provisions, namely, Article 243Q and Article 14 of the Constitution of India.

We see no force in the argument of Mr. Talekar with regard to the dispensation of the previous publication of the notification, and a proclamation and equally, consultation. As all this is envisaged in relation to an existing municipal council and for a municipal area, there cannot be any modification or change which is of substantial nature in the composition, boundaries, the extent of the existing municipal council unless the residents or the people are consulted. There cannot be modification or change unless the municipal council in question or other municipal councils or local authorities are consulted. However, when under a distinct Act, namely, the Bombay Provincial Municipal Corporations Act, a Municipal Corporation is to be constituted for the same municipal area, and with the same boundaries, that is because the population in respect of the Municipal area, for which there is an existing municipal council, as per the latest census figures, has exceeded 3 Lakhs.

59. Once again we emphasize that the reason for all this is obvious. The distinct Act, namely, the Bombay Provincial Municipal Corporations Act, 1949, and now styled as the Maharashtra Municipal Corporations Act, has provisions enabling the Government to constitute a Municipal Corporation so as to govern a larger population. The provisions under this Act contain all the safeguards and has enough checks, balances and inbuilt so as to avoid abuse of the powers conferred thereunder. Once there is a strong mechanism under the Maharashtra Municipal Corporations Act, then, we do not see how any constitutional guarantee or constitutional mandate is violated by insertion of the proviso, by the Maharashtra Act No. 42 of 2011, w.e.f. 24th October, 2011. Once this proviso has been added and is operative since 24th October, 2011, then, all the arguments of Shri Talekar, based on the unamended provisions of the Maharashtra Municipal Councils Act, 1965, must fail.

60. In all fairness Shri Talekar, argues that requirement of previous publication of the notification and consultation, as incorporated in the Municipal Councils Act could not have been dispensed with by making a Municipal Corporation of a municipal area, under existing municipal council. What the State has, in effect, done is, to declare that the existing municipal area shall cease to be a municipal area under the Parbhani Municipal Council. Therefore, the requirement of previous publication and consultation with the existing municipal council is mandatory.

61. We do not agree. The Municipal area remains the same. Its boundaries are the same. All that has happened is, the population of that area has exceeded 3 lakhs. Once it has exceeded 3 lakhs and the Corporation for such area is being constituted under a distinct and different Act, then, we do not see how the local area comprising of a municipal area has ceased to be as such. This aspect becomes clear if one peruses para.4 and 5 of the additional affidavit in reply filed by the State. All that has happened is, governance of that area is by a separate legal entity. Initially, it was governed and administered by a Municipal Council covered by the Maharashtra Municipal Councils Act, now, it will be covered by the Maharashtra Municipal Corporations Act. The unit of self-governance is now covered by a distinct but wider statute. Therefore, the dispensation as contemplated by proviso inserted by Maharashtra Act No.42 of 2011, does not suffer from the vice of unconstitutionality, as urged by Shri Talekar.

62. If the constitutional and municipal legislative scheme is properly understood, then, there can never be scope for any inconsistency, leave alone, repugnancy. The argument based on paras. 28,29,30 and 32 to 35 of the petition, is thus, based on misconception. There is no consultation with the Municipal Council if it is to be made a Municipal Corporation because the effect of such conversion is not necessarily adverse.

63. The effect would be for the better. The administration of such increased area, styled as a larger urban

area, requires a more enhanced set up. For that set up to be introduced, brought in and established, it is necessary that the enactment is incorporating or having a provision so as to enable the authority to convert the existing administrative and managerial set up, into a capable and efficient one. The Municipal Corporation functions at the higher level. When the municipal corporation comes into being or is established, there is a different regime, and which is in a position to give quality services to the residents. It has more administrative and financial backing than the smaller entity, namely, Municipal Council.

64. Once such is the scheme of the legislation, then we do not see as to why there is any requirement of consultation with the municipal council or municipal Councillors or the residents as well. They are not going to be in any way adversely affected nor are their rights in any way jeopardized. Once they have a guarantee of a strong and comprehensive unit of Government, then, we do not see how any constitutional guarantee is in any way infringed or violated. The constitution envisages establishing and incorporating and as set out in its scheme, the institutions at the local level by taking recourse to the provisions in part IX and IXA. They have to be endowed with such powers and authority, as may be necessary to enable them to function as institutions of self-governance. That is achieved by all these provisions.

65. For these reasons, we do not find any merit in the challenge raised by the petitioners. The same, therefore, fails.

66. Mr. Talekar has placed reliance on some paragraphs in the judgment in the case of œState of Maharashtra and others Vs. Jalgaon Municipal Corporation? reported in 2003(9) SCC 731.

67. Reliance on this judgment of the Supreme Court is, with respect, misconceived. After this judgment of the Honourable Supreme Court was pronounced, the Acts in question have been extensively amended. By addition of the proviso by Maharashtra Act No.42 of 2011, the requirement of consultation has been dispensed with in the cases covered by the proviso, as added or inserted. Therefore, any decision of either the Honourable Supreme Court of India or this Court, prior to insertion of this provision and amendments to the Acts in question, can hardly assist Mr. Talekar in his submission.

Far from assisting Mr. Talekar, this judgment supports the conclusion reached by us.

68. It is clear from a reading of this judgment, that in the year 2001, Jalgaon was an urban area administered by the Municipal Council. The State decided to convert the Municipal Council of the city of Jalgaon, into a Municipal Corporation. It issued two proclamations under the provisions of the unamended Bombay Provincial Municipal Corporations Act and the Maharashtra Municipal Councils Act. Thereafter, what transpired is that, the Governor of Maharashtra promulgated Maharashtra Ordinance No. 47/2001 on 15th November, 2001 and that was Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships (Second Amendment) Ordinance 2001. The result was that there were two proclamations which were issued and Corporators had invited attention of the Municipal council to consider the issue so as to place on record the suggestions and objections of the municipal council, with regard to the proposed change and forward the resolution for consideration to the State Government.

69. The ordinance already issued became an Act. There were objections received and what transpired is that, 7 urban areas including Jalgaon were sought to be converted by the State Government from Municipal Council into a Municipal Corporation. While the final notification was yet to be issued, some writ petitions were filed challenging the proposal of the State Government.

70. The facts were then noted by the Supreme Court and it held that the notifications and proclamations in respect of Jalgaon Municipal council which were quashed and set aside by the High Court, ought not to have been so quashed, because, on the 3 grounds, that the Supreme Court noted, the judgment of the High Court cannot be sustained.

71. It is in that context that the emphasis laid by Mr. Talekar on the paragraphs must be seen. Paragraphs, 27

to 32, read as under :œ

27. In the opinion of the High Court, the notifications dated 16102001 appointed a period of 60 days for preferring objections against the proposed constitution of a Municipal Corporation in place of a Municipal Council. This period of 60 days would have expired on 15122001. However, in between, on 15112001 when a period of only 30 days had expired, an Ordinance was promulgated whereby the period of 60 days appointed under Section 6(1)(d) of the Act was reduced from 60 days to 30 days. The Ordinance was followed by two notifications amending the earlier notifications dated 16102001 and limiting the period for preferring the objections up to 21112001. The notification is required to be published not only in the Official Gazette but also in the local newspaper. Though the notification was published in the Official Gazette dated 15112001, however, in the local newspaper the publication took place on 19112001 and the time for preferring the objections expired on 21112001. The High Court held that the opportunity of hearing statutorily mandated to be afforded to the people of Jalgaon was drastically curtailed, and in the light of the subsequent notification, for all practical purposes the effective opportunity available was just two days i.e. commencing 19112001 and expiring 21112001 which cannot, in the facts and circumstances of the cases, be said to be effective opportunity and, therefore, the mandate spelled out by unamended sub-section (3) of Section 3 of the MRMC Act was violated.

28. The finding as to violation of principles of natural justice arrived at by the High Court is founded on two bases: (i) the time of 60 days originally appointed for preferring the objections could not have been curtailed; (ii) looking at the drastic consequences involved on the population of the urban area, by converting the Municipal Council into a Municipal Corporation, the effective opportunity for preferring objections having been made available only for two days i.e. between 19112001 and 21112001 was in fact no opportunity in the eye of law. The submission on which these findings are based appears to be attractive but on a little probe and tested in the correct perspective the fallacy in the submission is exposed.

29. The requirement of inviting all persons who entertained any objection to the proposal of a municipal Area ceasing to be so and being classified as a larger urban area to be administered by a Municipal Corporation as required by subsection (3) of Section 3 read with Section 6 of the MRMC Act has to be complied with for two reasons: firstly, it is recognition by statute of the principles of natural justice and, secondly, it is mandatory procedural requirement which must be satisfied as a precondition for the validity of subsequent final decision on the principle that if the statute requires a particular thing to be done in a particular manner then it shall be done either in that manner or not at all.

30. It is a fundamental principle of fair hearing incorporated in the doctrine of natural justice and as a rule of universal obligation that all administrative acts or decisions affecting rights of individuals must comply with the principles of natural justice and the person or persons sought to be affected adversely must be afforded not only an opportunity of hearing but a fair opportunity of hearing. The State must act fairly just the same as anyone else legitimately expected to do and where the State action fails to satisfy the test it is liable to be struck down by the courts in exercise of their judicial review jurisdiction. However, warns Prof. H.W.R. Wade that the principle is flexible:

œThe Judges, anxious as always to preserve some freedom of manoeuvre, emphasise that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter. Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant: there is no such thing as a merely technical infringement of natural justice.? (Wade and Forsyth: Administrative Law, 8th Edn., 2000, pp. 49192.)

31. The learned authors quote from two authorities in support of preserving flexibility. In Russell v. Duke of Norfolk1, All ER at p. 118 E, Tucker, L.J. Opined:

œThe requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.?

In Lloyd v. McMahon2, AC at p. 702, Lord Bridge stated in his speech: (All ER p.1161c-e)

œThe so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.? (Administrative Law, ibid., at p.493.)

32. The caution of associating rules of natural justice with the flavour of flexibilities would not permit the courts applying different standards of procedural justice in different cases depending on the whims or personal philosophy of the decision maker. The basic principles remain the same; they are to be moulded in their application to suit the peculiar situations of a given case, for the variety and complexity of situations defies narration. That is flexibility. Some of the relevant factors which enter the judicial process of thinking for determining the extent of moulding the nature and scope of fair hearing and may reach to the extent of right to hearing being excluded are: (i) the nature of the subject-matter, and (ii) exceptional situations. Such exceptionality may be spelled out by (i) the need to take urgent action for safeguarding public health or safety or public interest, (ii) the absence of legitimate expectation, (iii) by refusal of remedies in discretion, (iv) doctrine of pleasure such as the power to dismiss an employee at pleasure, and (v) express legislation. There is also a situation which Prof. Wade and Forsyth term as œdubious doctrine? that right to a fair hearing may stand excluded where the court forms an opinion that a hearing would make no difference. Utter caution is needed before bringing the last exception into play. (Administrative Law, ibid., at pp. 54344.)œ.

72. The Honourable Supreme Court held that the larger public interest was achieved by reducing the period for inviting objections. However, what the Supreme Court has held with regard to consultation with the municipal council, and the discussion on question No.4, is important for our purpose.

73. Paragraph Nos. 38 to 41 of this decision read as under :œ

38. The learned counsel for the appellants submitted that steps for constitution of a Municipal Corporation fell within the purview of Section 3 of the BPMC Act which requires the specification of larger urban area, and constitution of Municipal Corporation therein, to be preceded by a notification subject to the condition of previous publication. Consultation is not one of the requirements of Section 3 and therefore the High Court went wrong in holding that for want of consultation, the process of constitution of a Municipal Corporation of the city of Jalgaon was vitiated. With this submission we do not agree. Jalgaon Municipal Council was already in existence, Jalgaon being a smaller urban area. It was proposed to be converted into a larger urban area. This process would involve abolition of œmunicipal area? as defined within clause (24) of Section 2 of the MR Municipal Councils Act. Any of the events provided by clauses (a), (b), (c) and (d) of subsection (1) of Section 6 must satisfy the requirement of consulting the Municipal Council provided for by proviso to subsection (1) before issuing the notification and before that, notification should also follow the procedure prescribed by Section 3 mutatis mutandis. Section 6(1) (d) covers within its scope any event, the declaration whereof has the effect of the whole of any area comprising a municipal area ceasing to be a municipal area. Thus conversion of Jalgaon Municipal Council to Municipal Corporation involves not only specification of large urban area and constitution of Municipal Corporation of the city of Jalgaon, it also involves the whole of the local area comprising the Municipal Area of Jalgaon ceasing to be a municipal area with effect from the date of change. Therefore consulting the Municipal Council is mandatory.

39. However, no provision of law has been brought to our notice which requires that even a proposal for

constitution of a Municipal Corporation cannot be published without consultation. Consultation must take place at any one stage before the finalisation of the proposal. By the time the writ petitions came to be filed before the High Court all that had taken place was the publication of the notification proposing to constitute Municipal Corporation of the city of Jalgaon. Objections were invited. The final decision was yet to be taken which was stayed by the High Court. The requirement of consultation could have been satisfied at any time before publishing the final notification. The High Court was not right in finding fault with the process of constitution of the Municipal Corporation of the city of Jalgaon for want of consultation at the stage to which it had reached when the writ petitions came to be filed in the High Court.

40. For the foregoing reasons we are of the opinion that the judgment of the High Court cannot be sustained on any of the grounds upheld by it.

41. It is unfortunate that the litigation stalled the process of the Municipal Corporation of the city of Jalgaon being constituted. The expenditure, the time and the energy of the State machinery which was intended to be avoided by the State Government came to be wasted and the elections had to be held for constituting the successor Municipal Council, as on the day the Municipal Council is in place. Inasmuch as it has been held that the process for constituting the Municipal Corporation of the city of Jalgaon in place of the Municipal Council does not suffer from any infirmity up to the stage to which it has proceeded, the State Government may now take a final decision and issue a final notification depending on the formation of its opinion. The process of consultation within the meaning of proviso to Section 6(1) of the MR Municipal Councils Act shall now be completed if not already done. Needless to say, the objections preferred by the Municipal Council of Jalgaon and 239 other objections shall be considered and disposed of in accordance with law, if not already doneœ.

74. The Honourable Supreme Court thus held that no provision of law was brought to the notice of the Supreme court, which requires that even the proposal of constitution of municipal corporation cannot be published without consultation. The consultation ought to take place at any one stage before the finalization of the proposal. Therefore, that conversion of Jalgaon Municipal Council into a Municipal Corporation involves not only classification of a larger urban area and constitution of Municipal Corporation for the city of Jalgaon, but the cessation of local area comprising municipal area as a council. Therefore, consultation with the council was held to be mandatory. However, before the final decision was taken, the process could have been completed. Thus, in the given circumstances, it was not necessary to interfere with the process of constitution of Municipal Corporation for the city of Jalgaon. The above conclusions, with respect, are based on the unamended provisions of the Acts in question. The legal position has undergone a drastic change.

75. Now, the challenge is with regard to dispensation with the requirement of consultation and previous publication. In that regard, we have noted the changes brought about in the Acts after the decision of the Honourable Supreme Court. In so far section 6 of the Maharashtra Municipal Councils Act, we have already made our observations.

76. In so far as the provisions contained in the Maharashtra Municipal Corporations Act, is concerned, we have adverted to the said provision and by which, it has been clarified that for the purposes of a area being notified as an urban area, the guiding factors are to be found in the constitution itself and population of area is one such factor. If the population has reached a figure of 3 lakhs, then, any urban area can be specified as a larger urban area, and if the power is to be exercised in connection with the constitution of the corporation, under the Maharashtra Municipal Corporation Act, then, if the latest census figures are available, the State need not previously publish a notification within the meaning of Section 3.

77. In the present case, the affidavit filed in reply clearly indicates that the population figures were received and after they were received, then, having regard to the amendments made in the Act in question, the State Decided to constitute Municipal Corporation for, namely, the Parbhani Municipal Corporation.

78. The entire process has been explained and we do not see, any serious legal infirmity and of the nature, enabling us to interfere under Article 226 of the Constitution of India. The State Government has had regard

to the factors mentioned in sub-article (2) of Article 243Q and this is how it exercised the powers to constitute the Municipal Corporation for the city of Parbhani. The exercise of powers in that behalf nor the notification in question has been challenged. We have noted that but for the validity of the Sections in the Acts, the notifications issued thereunder are not challenged on other grounds. In other words, the challenge is that because the provisions are bad in law, the notification issued thereunder will not survive after the proviso/Sections in issue are struck down. We do not see any merit, therefore, in the challenge raised in the writ petition, either to the constitutional validity of the sections of the Acts, referred to above, or to the notification, constituting the Parbhani Municipal Corporation.

79. In fact, by passage of time, the controversy is really academic but we were still called upon to decide it. Hence, the above observations. We clarify that in the event and in a given case, the statutory mandate is flouted, a challenge to the changes or modifications in the governing set up can be raised and that will have to be decided independent of the attack on the constitutional validity of the provisions. Under such circumstances, the writ petition fails. Rule is discharged. There would be no orders as to costs.