

Anil Trivedi and Another Vs. State of M.P. and Others

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Court : Madhya Pradesh

Decided On : Nov-11-2014

Judge : P.K. Jaiswal & Prakash Shrivastava

Appeal No. : Writ Petition No.3538 of 2014

Appellant : Anil Trivedi and Another

Respondent : State of M.P. and Others

Judgement :

Prakash Shrivastava, J.

1. This public interest petition is directed against the Notification dated 17.2.2012 issued under Section 405(1) of the M.P. Municipal Corporation Act, 1956 (for short "the Act") as also the Notification dated 4.3.2014 issued under Section 405(3) of the Act.

2. In brief, the case of the petitioners is that they are the residents of Indore and the Notification dated 17.2.2012 was issued under Section 405(1) of the Act inviting objections for including 23 village panchayats (29 villages) specified in Schedule 1 of the notification within the limits of municipal corporation, Indore. Petitioners had submitted their objections on 16.3.2012. They had appeared before the Collector, Indore on 18.6.2012 to make submissions in support of their objections and the final Notification dated 5.2.2013 was issued for including the

Gram Panchayats and villages specified in Schedule 1 of the said notification within the limits of the Municipal Corporation, Indore. Petitioners had earlier filed W.P. No.5196/2013 challenging the Notification dated 17.2.2012 and 5.2.2013 and this Court by order dated 3.2.2014 had set aside the Notification dated 5.2.2013 on the ground that the objections were not decided before issuing the final notification. The challenge to the Notification dated 17.2.2012 was kept open directing the competent authority under Section 405(2) of the Act to decide all the objections including the challenge to Notification under Section 405 of the Act. Respondent No.4- Collector, Indore had issued the notice dated 6.2.2014 for hearing of the objections and the opportunity of hearing to the petitioners was given on 13.2.2014 by him. Thereafter, the fresh Notification dated 4.3.2014 has been issued under Section 405(3) of the Act for including 23 village Panchayats (29 villages) within the municipal limits of Indore, which has prompted the petitioners to file the present writ petition.

3. A reply has been filed by the respondents No.1 to 4 seeking to justify inclusion of 29 villages within the limits of Municipal Corporation, taking the stand that the impugned notifications have been issued after following due process and procedure as prescribed under Section 405 of the Act.

4. The petitioner No.1 present in person submits that the objections have not been decided by the Governor, as required by Section 405(3) of the Act and he has also referred the communication dated 9.1.2008 issued by the State providing the guidelines for including the limits of the local authorities and submitted that the factors contained in Section 7 of the Act have not been considered while including 29 villages within the municipal limits. He has also submitted that the issue relating to the exercise of the power by the Governor himself under Section 405(3) is concluded by the recent Division Bench judgment.

5. Learned Advocate General appearing for the State has questioned the locus of the petitioners to file the present petition and has submitted that the function of including the village panchayat and villages within the municipal limits is legislative function, therefore, rules of natural justice will not be attracted and that it is a policy matter. He has also submitted that under Section 405(3) of the Act as per rules of

business, Governor himself is not required to decide the objection but it is the State Government which has to take the decision. He has also submitted that the internal circular (Annexure P/5) has no force of law.

6. We have heard the learned counsel for the parties and perused the record.

7. We do not find any merit in the preliminary objection of the State questioning the locus of the petitioners in view of the undisputed fact that the petitioners are residents of Indore and the municipal limits of Indore are sought to be altered by the impugned notification. These very petitioners had earlier succeeded in their challenge to the Notification dated 17.2.2012 in W.P. No.5196/2013 and they had also submitted objection before the Collector and the Collector, Indore had given them hearing on the objections. The judgment of the Supreme Court in the matter of Holicow Pictures (Private) Limited Vs. Prem Chandra Mishra and others reported in (2007) 14 SCC 281, does not help the State since in that judgment also it has been held that a person acting bonafide having sufficient interest in the proceedings of public interest litigation, will have locus standi.

8. The learned Advocate General has also raised an issue that the inclusion of villages within the municipal limits is a legislative function, therefore, principles of natural justice is not attracted, but such an objection also has no merit in view of the fact that Section 405 of the Act itself provides for filing of objection to the notification issued under Section 405(1) of the Act and consideration of the objection by the Governor and issuance of final notification after considering the objection. The petitioners are alleging infringement of their statutory right under Section 405 of the Act. Hence this court is not precluded from examining if the requirement of Section 405 of the Act is satisfied while issuing the impugned notifications.

9. Petitioners have questioned the notification dated 4.3.2014 on the ground that the objections raised by them under Section 405(2) have not been considered by the Governor, as required by Section 405(2) and (3) of the Act, before issuing the impugned notification dated 4.3.2014 under Section 405(3) of the Act. It is not in dispute that the petitioners had submitted objection under Section 405(2) of the Act after issuance of the Notification dated 17.2.2012 under Section 405(1) of the

Act. Respondent No.4 Collector had issued notice dated 6.2.2014 (Annexure P/7) to the petitioner No.1 and given him an opportunity of hearing on 13.2.2014 on the objections submitted by him. The stand of the State in the reply is that the Principal Secretary, Govt. of M.P., Urban Administration and Development vide order dated 6.2.2014, had authorized the Collector to give hearing to all the objections raised in pursuance to the Notification dated 17.2.2012. The Collector had given hearing to all the objections and after consideration of objections in detail, he had sent the objections to the Governor/State Government for consideration and the State Government, thereafter, had considered all these objections and had rejected them and ordered for issuance of final Notification under Section 405(3) of the Act and the said decision was approved by the concerned Minister of the Department. The reply of the State Government as well as the concerning note-sheet (Annexure R/6) do not reveal that the objections were placed before the Governor and were considered by the Governor before issuance of Notification under Section 405(3) of the Act.

10. Stand of the petitioners is that the objections were required to be considered by the Governor himself, whereas the stand of the State is that the Governor himself is not required to consider the objection, and consideration by the Collector/Principal Secretary of the concerned department and approval of the concerned minister is sufficient compliance of the requirement of Section 405(2) and (3) of the Act.

11. This issue had come up recently before the Division Bench at the Principal Seat of this Court in W.P. No.1277/2014 in the matter of Abhinesh Mahore and others Vs. State of M.P. and others, wherein the similar notifications issued in respect of Municipal Council, Chhindwada were under challenge and the Division Bench by order dated 14.10.2014 while allowing the writ petition, has declared the final notification, including certain villages within the Chhindwada Municipality, as null and void taking the view that Section 5-A of the M.P. Municipalities Act mandates the Governor to consider the objection himself before forming subjective satisfaction about the necessity to exclude or include certain areas within the limits of the municipal area. The Division Bench of the Principal Seat of this Court in the matter of Abhinesh Mahore (supra) has held as under :-

"5. The question is: whether the power of the Governor to consider the objections to be taken by the interested persons could be delegated to the Collector? In absence of any express provision authorizing the Governor to do so such inference cannot be deduced to validate the impugned action. If the mandate of Article 243-Q predicates consideration of the objection by the Governor himself and which position is restated in Sub-section (2) of Section 5-A of the Act of 1961, there is no scope for argument that the Governor could delegate that power.

6. Reliance placed on Section 345 of the Act of 1961 by the learned counsel for the State, in our opinion, is inapposite and misplaced. Section 345 deals with delegation of powers by the "State Government" to designate Officers in relation to the powers to be exercised by the State Government. That will have no application to the provision such as Section 5-A which mandates the Governor to consider the objection himself before forming subjective satisfaction about the necessity to exclude or include certain areas within the limits of Municipal area.

7. Considering the indisputable fact in this case, that the objections submitted by the petitioner and similarly placed persons were considered by the Collector and disposed of at his level, it necessarily follows that the impugned decision is vitiated as the objections were considered by the Authority not competent to do so, if not a case of abdication of authority inspite of mandate of Article 243-Q and in particular sub-Sectin (2) of Section 5-A of the Act of 1961.

8. Taking overall view of the matter, the final notification issued for inclusion of the stated villages in the limits of the Chhindwara Municipality cannot stand the test of judicial scrutiny and will have to be declared as null and void. At the same time, the appropriate order that needs to be passed in this case is not only to set aside the said notification dated 28.8.2014 but also the decision of the Collector rejecting the objections of the petitioner and instead relegating the situation to the stage of collection of objection by the Collector and then to be placed before the Governor for his consideration as postulated in Section 5-A(2) of the Act of 1961.

9. The petition partly succeeds to this limited extent. In other words, the original notification dated 18.6.2014 will remain undisturbed and that the objections concerning that notification already filed by the interest persons, before the

Collector, be placed before the Governor for consideration whereafter the Governor may proceed as per law."

12. The State Government had filed Review Petition taking the same stand as has been taken before this Court that the decision under Section 5-A of the Municipalities Act is to be taken by the State Government and not by the Governor. This precise issue has been examined by the Division Bench by order dated 28.10.2014 while deciding the Review Petition Nos.667-669 of 2014. The Division Bench after elaborately dealing with the argument of the State while deciding the review petition by order dated 28/10/2014 has held as under :-

"The core question, therefore, is : whether the exercise of powers by the Governor to effectuate the action under Article 243Q falls in the first or second part of Article 163(1) of the Constitution?

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 243Q, 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 243Q, which stipulates that the Governor may specify the area "as he may deem fit". The expression "as he may deem 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 243Q in Part IXA of the Constitution, concerning constitution of Municipalities is juxtaposed with Article 243C 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.

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.

A priori, there is no room for argument that the discretion to be exercised by the Governor by virtue of Article 243Q 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.

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 or 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."

13. The provisions of Section 5(a) of the Municipality Act, 1961 is identical to the provisions of Section 405 of the M.P. Municipal Corporation Act, 1956 which is under consideration before this Court. Therefore, the order of the Division Bench in the matter of Abhinsh Mahore (supra) will apply in full force in the present case also and in terms thereof, the Governor himself was required to consider the objections under Section 405(2) and (3) of the Act before issuance of Notification under Section 405(3) of the Act. Since in the present case the consideration of the objections is not by the Governor but it is either by the Collector or by the Principal Secretary with approval of the concerned Minister, therefore, we have no hesitation in holding that the impugned Notification dated 4.3.2014 under Section

405(3) of the Act has been issued without complying with the provisions of Section 405(2) of the Act and without deciding the objections in terms of the requirement of the said provision. Hence, the Notification dated 4.3.2014 cannot be sustained.

14. Learned counsel for the State has placed reliance upon the judgment of the Supreme Court in the matter of State of U.P. and others Vs. Pradhan Sangh Kshettra Samiti and others reported in AIR 1995 SC 1512, in the matter of A. Sanjeevi Naidu etc. Vs. State of Madras and another reported in AIR 1970 SC 1102 and in the matter of Pu Myllai Hlychho and others Vs. State of Mizoram and others reported in 2005(2) SCC 92 in support of his submission that the power under Section 405(2) is to be exercised by the State Government and not by the Governor, but the Division Bench of this Court in the matter of Abhinesh Mahore (supra) has already rejected the similar submission based upon these judgments. The respondent's plea that the judgment of the Division Bench (supra) is per incurium, cannot be accepted since the judgments which the respondent is relying upon, have been noted by the Division Bench in the matter of Abhinesh Mahore (supra).

15/ At the fag end of the arguments, learned Advocate General has also raised the issue that since the elections have been declared now, therefore, in terms of Article 243-ZG of the Constitution this Court cannot interfere in the electoral matter and has no jurisdiction to decide the present writ petition.

16. We have minutely considered the said oral objection raised by the learned Advocate General. In this regard certain dates are relevant, which are mentioned hereunder :-

Sr. No. Date Event

1. 17.2.2012 Notification under Section 405(1) of the Act was issued declaring intention to include certain villages within the limits of Municipal Corporation Indore and inviting objections.

2. 5.2.2013 Final notification under Section 405(3) of the Act was issued including certain villages within the limits of the Municipal Corporation.

3. 3.2.2014 W.P. No.5196/2013 (Anil Trivedi and Another Vs. State of M.P. and others) was allowed by this Court quashing the Notification dated 5.2.2013.
4. 13.2.2014 Opportunity of hearing was given to the petitioners by the Collector.
5. 4.3.2014 Fresh final Notification under Section 405(3) was issued.
6. 2.5.2014 Present writ petition was filed before this Court.
7. 12.9.2014 I.A. No.4949/2014 filed by the State seeking adjournment on the ground that the matter is to be argued by learned Advocate General.
8. 22.9.2014 I.A. No.5100/2014 filed by the State seeking adjournment on the ground that the matter is to be argued by learned Advocate General.
9. 25.9.2014 Final arguments of the petitioners were concluded and the Dy. Govt. Advocate appearing for the State had sought time on the ground that the learned Advocate General will argue this matter.
10. 1.10.2014 The argument of learned Advocate General could not be concluded.
11. 17.10.2014 The argument of learned Advocate General could not be concluded.
12. 31.10.2014 Arguments of learned counsel for all the parties were concluded but after concluding the arguments, the Additional Advocate General had sought adjournment on the ground that learned Advocate General wants to argue the issue about dismissal of the review petition before the Principal Seat by order dated 28.10.2014.
13. 2.11.2014 Notification for holding the election of Municipal Corporation, Indore on 28/11/2014 issued.
14. 7.11.2014 Case closed for orders.
17. Above dates clearly reveal that when the writ petition was filed before this Court or when pleadings were completed or at the stage of commencement of final arguments, the elections were neither imminent nor declared. Even up to the stage

of conclusion of final arguments in the matter, the elections were not declared. Learned Advocate General had sought a week's adjournment after conclusion of final arguments and in the meanwhile, the elections have been declared. Thus, it is not a case where the writ petition has been filed to hamper the election process.

18. Under Article 243-ZG the bar is against interference in electoral matters, but the present is not an electoral matter but it relates to the validity of a notification including certain villages within the municipal limits.

19. As per Article 243-ZG, no election to any municipality can be called in question except by an election petition presented to such authority and in such manner, as is provided in the Act. Section 441 of the Act provides for Election Petition and Section 441-B of the Act enumerates the grounds for declaring elections or nominations to be void, but learned Advocate General has not pointed out that the challenge raised to the validity of the impugned notification can be raised under any of the grounds under Section 441-B of the Act.

20. Even otherwise, nothing has been pointed out to show that the election process will be hampered in any manner by excluding these villages, which have been included within the limits of the Municipal Corporation by the impugned Notification issued contrary to the provisions of Section 405 of the Act. Election can still be held in accordance with law by excluding these villages or by issuing a final notification in accordance with the requirement of Section 405 of the Act.

21. The three judge bench of the Supreme Court in the matter of Election Commission of India through secretary Vs. Ashok Kumar and others reported in 2000(8) SCC 216 after taking note of the principle laid down in the Constitution Bench judgment in the matter of N.P. Ponnuswami Vs. Returning Officer [AIR 1952 SC 64] and Mohinder Singh Gill Vs. Chief Election Commissioner [AIR 1978 SC 851] has, while considering Article 329(b) containing the similar bar, held that if the petition presented to the Court "calls in question an election" the bar of Article 329(b) is attracted. Else it is not. The Supreme Court in the matter of Election Commission of India Vs. Ashok Kumar (supra) has held as under :-

"31. The founding fathers of the Constitution have consciously employed use of the words "no election shall be called in question" in the body of Section 329(b) and these words provide the determinative test for attracting applicability of Article 329(b). If the petition presented to the Court "calls in question an election" the bar of Article 329(b) is attracted. Else it is not.

32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

2) Any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared

5) and stage is set for invoking the jurisdiction of the court.

6) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilize the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.

33. These conclusions, however, should not be construed as a summary of our judgment. These have to be read along with the earlier part of our judgment wherein the conclusions have been elaborately stated with reasons."

22. In the present matter also the election has not been called in question, therefore, the bar of Article 243-ZG will not be attracted. Even otherwise the term of the elected body of the municipal corporation, Indore is up to January 2015 and the elections can be held lawfully by complying with the requirement of the Act within time. The State which had taken adjournment after concluding the final arguments, is not justified in taking the plea that now the elections have been announced.

23. Counsel for the respondent has placed reliance upon the judgment of the Supreme Court in the matter of Meghraj Kothari Vs. Delimitation Commission and others reported in AIR 1967 SC 669, in the matter of Lakshmi Charan Sen and others Vs. A.K.M. Hassan Uzzaman and others reported in 1985(4) SCC 689, in the matter of State of U.P. and others Vs. Pradhan Sangh Kshettra Samiti and others reported in 1995 Supp (2) SCC 305 and in the matter of Boddula Krishnaiah and Another Vs. State Election Commissioner, A.P. and others reported in 1996(3) SCC 416, but these are the cases where the challenge in the writ petition was raised relating to the election process; such as defects in electoral roll etc. for which the remedy of election petition was available but the present

case stands on different footing, where neither the challenge has been raised after the commencement of the election process nor the dispute relates to the election.

24. Keeping in view the above aspect of the matter, we partly allow the writ petition by quashing the impugned Notification dated 4.3.2014. It will be open to the respondents to issue fresh Notification under Section 405(3) of the Act in accordance with law, keeping in view the observations made above. Issue of validity of first notification dated 17.2.2012 is kept open giving liberty to the petitioners to challenge the same in fresh writ petition, if the need so arises.

No costs.

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