P.P. Chaami Vs. State of Karnataka Represented by Its Principal Secretary, Department of Urban Development and ors.

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Court : Karnataka

Decided On : Mar-24-2008

Reported in : ILR2008KAR2832; 2009(2)KarLJ335; 2008(4)KCCR2703; 2008(4)AIRKarR354; AIR2008NOC2558

Judge : Ashok B. Hinchigeri, J.

Acts : Karnataka Municipalities Act, 1964 - Sections 3, 11, 11(1), 13, 18A, 21, 22, 23, 24 and 35(1); Constitution of India - Articles 74(2), 226, 227, 243ZA, 243ZG, 356 and 356(1)

Appeal No. : Writ Petition No. 14182 of 2007

Appellant : P.P. Chaami

Respondent : State of Karnataka Represented by Its Principal Secretary, Department of Urban Development and ors.

Advocate for Def. : Ramesh B. Anneppannavar, AGA for R1 and 3, ;K.N. Phanidra, Adv. for R2, ;K.M. Nataraj, Adv. for R5, 11, 12, 14-16, 22, 23, 25, 28, 29, 32, 34 and 36, ;N.K. Ramesh, Adv. for R6 and 7, ;S.K. Acharya, Ad

Advocate for Pet/Ap. : Abdullah, Adv. for ;Hegde Associates

Judgement :
ORDER

Ashok B. Hinchigeri, J.

1. The petitioner has called into question the notification, dated 15th June, 2007 (Annexure-B) issued by the first respondent and the consequential elections conducted to Madikeri City Municipal Council.

2. The brief facts of the case are that the Urban Local Bodies ['U.L.B.s' for short] are constituted on the basis of the population and other factors enumerated in Section 3 of Karnataka Municipalities Act, 1964 ['the said Act' for short]. Section 11(1) of the said Act states that the Municipal Council shall consist of such number of directly elected councilors specified in column 3 of the table below in respect of municipal areas specified in the corresponding entries in column 2 thereof, namely;

----------Sl. Population of the municipal area No. ofNo. Councilors----------1 2 3 ----------1. For a Municipal area with a population ofnot less than 20,000 but less than 40,000 23----------2. For a Municipal area with a population ofnot less than 40,000 but less than 50,000 27----------3. For a Municipal area with a population ofnot less than 50,000 but less than one lakh 31----------4. For a Municipal area with a population of not less than 50,000 but less than threelakhs 35----------

3. As per the afore extracted legislative prescription, the number of councilors for Madikeri City Municipal Council ['Madikeri C.M.C.' for short], is 23.

4. The first respondent brought an amendment to Section 3 of the said Act incorporating a second proviso to Sub-section (2), which reads as follows:

3(2) Provided xxx xxx xxx

Provided that if a District Head Quarters is situated in such smaller urban area the Governor may, specify such area to be a city Municipal area even though it contains population of less than fifty thousand.

5. In view of this amendment, Madikeri Town Municipal Council was upgraded; it attained the status of City Municipal Council from the year 2003.

6. The second respondent issued a Notification, dated 15th June 2007 (Annexure-B) for Madikeri C.M.C. fixing the number of wards at 31. This was objected to by some residents of Madikeri, including a former Minister, Sri M.C. Nanaiah. The second respondent State Election Commission, acting on the representation of the said Sri Nanaiah, pointed out the impermissibility of fixing the number of Madikeri C.M.C. at 31. However, the first respondent vide its letter, dated 21st August, 2007 justified the fixing of the number of councilors of Madikeri C.M.C. at 31 and called upon the respondent No. 2 to take necessary steps for holding the elections to Madikeri C.M.C. Therefore the second respondent had to start the process by issuing the calendar of events, dated 4th September, 2007. Pursuant thereto, elections have also taken place.

7. Sri Abdullah, the Learned Counsel for the petitioner urged the following contentions:

(i) The impugned notification at Annexure-B for the conduct of elections for 31 territorial wards in Madikeri City Municipal Council is in utter violation of Section 11 of the said Act. As per the table extracted hereinabove and as per the last population census, there can be only 23 wards.

(ii) The executive has no discretion in fixing the strength of a U.L.B. The fixation has to be strictly as per the legislative prescription.

(iii) Sri Abdullah has relied on a judgment of the Hon'ble Supreme Court in the case of State of Tamilnadu and Anr. v. P. Krishnamurthy and Ors. : AIR 2006 SC1622 in support of his demand that the impugned notification be quashed and the elections be declared as illegal. The relevant paragraphs of the said judgment

are extracted hereinbelow:

15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(a) Lack of legislative competence to make the subordinate legislation.

(b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statue under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules.)

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.

Based on the above-referred judgment, Sri Abdullah submitted that when the legislature did not give any authority under Section 13 of the said Act to vary the number of councilors prescribed under Section 11 of the said Act, the impugned act of the executive is unsustainable.

(iv) Nextly, Sri Abdullah relied upon a judgment of the Hon'ble Supreme Court in the case of Kerala Samsthana Chethu Thozhilau Union v. State of Kerala : (2006)IILLJ529SC wherein it is stated that a rule or a subordinate legislation cannot be violative of any plenary legislation made by the Parliament or the State Legislature. In the said reported judgment, the Hon'ble Supreme Court has this to say:

17. A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by Parliament or the State Legislature.

18. to 37. xxx xxx xxx

38. Neither Section 18-A nor Sub-sections (c) and (d) of Section 24S.R. Bommai and Ors. v. Union of India and Ors. : [1994]2SCR644 wherein the proclamations under Articles 356(1) of the Constitution of India were held as unconstitutional.

8. On the other hand, Sri Ramesh B. Anneppanavar, the learned Additional Government Advocate for the respondents No. 1 and 3 submitted that in response to the draft notification calling for the objections to fixing the number of territorial wards for Madikeri C.M.C. at 31, many people supported the move. The Government has thought it fit to fix the number of Madikeri C.M.C. at 31, as Madikeri is District Headquarters.

9. Sri K.N. Phanindra, the learned Counsel appearing for respondent No. 2 submitted that the elections to all 31 wards of Madikeri City Municipal Council have been completed and the results have been declared.

10. On the question of whether the writ petition is maintainable or an election petition has to be filed, if one has any grievance over the de-limitation of constituencies or the allotment of seats, Sri K.N. Phanindra fairly brought to my notice divergent views expressed by the two Division Benches. The Division Bench, in the case of T. Hanumanthappa and Ors. v. State of Karnataka and Ors. : ILR 2006 KAR2870 has observed thus:

18. A reading of the aforesaid provisions shows in what matters a bar is created for interference by courts in election matters. Clause (a) makes it clear that, the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies shall not be called in question in any court. Sub-clause (2) of Article 243-ZA empowers the legislature of a State to make law, make provisions with respect to all matters relating to, or in connection with, elections to the Municipalities. It is the validity of that law which cannot be gone into by the Courts. In the instant case the petitioners are not challenging the validity of any such law. On the contrary their grievance is that elections are conducted contrary to the law made by the legislature of the State. In other words they want the elections to be conducted in accordance with the law made by the legislature and when elections are not conducted in accordance with law they are challenging such action of the State. Therefore, there is no bar for this Court to go into the said grievance of the petitioners, as they are not challenging the validity of any law passed by the State Legislature under 243-ZA.

19. Next it was contended in view of Clause (b) of Article 243-ZG, the grievance of the petitioner could be agitated in an election petition and therefore, no election to any Municipality shall be called in question in a writ proceedings. The aforesaid provision only reiterates the settled legal position that matters which should be agitated in an election petition, when State Legislature has provided a remedy, the same cannot be agitated in any other proceedings. The Act provides for a remedy by way of election petition as contained in Section 21, the reliefs that could be claimed in such an Election Petition as provided in Section 22 and the grounds on which such an Election Petition could be instituted as contained in Section 23. A reading of the aforesaid provision sets out what could be the subject matter of an Election Petition. It is only the election of a Councilor. What could be the subject matter of that Election petition cannot be agitated or adjudicated in this Court. The bar contained in Clause (b) of Article 243-ZG is confined to the questions which could be the subject matter of an Election Petition only. The grievance made out by the petitioners in this Writ Petition cannot be the subject matter of an Election Petition. The Act do not provide for any machinery for adjudication of such dispute. No election Petition is maintainable for redressing the grievance of the petitioners. Under these circumstances, Clause (b) of Article 243-ZG is no bar for this Court to

entertain this writ petition.

11. The Division Bench in the case of Bharamraj S. Parmaj and Ors. v. State of Karnataka and Ors. : ILR 2006 KAR2896 had this to say in paragraph 12 of the judgment:

12. ...Moreover, the alleged violation of the provision contained in the statute would not in any way affect the interest of the public; that it may affect the interest of the candidates contesting the elections is no ground to entertain the writ petition under the PIL jurisdiction. Moreover, it is not as if the petitioners are not without any remedy. On the other hand as we have already stated the petitioners can certainly file the election petitions making this as one of the ground in the election petition. That is to say, the petitioners are not without any remedy because this would constitute one of the grounds in the election petition in terms of Section 35(1)(iv) of the Act....

12. Sri K.M. Nataraj, the Learned Counsel appearing for respondents No. 5, 11, 12, 14, 15, 16, 22, 23, 25, 28, 29, 32, 34 and 36 submitted that the petition has virtually become infructuous, as the elections are over in terms of the notification impugned herein. He further submitted that the petitioner has taken part in the election; the petitioner has lost the election. This being the case, according to Sri Nataraj, the petitioner is estopped from challenging the notification at Annexure-B and the elections held pursuant thereto.

13. Sri Nataraj submitted that the petitioner has not filed any objections in response to the draft notification. Having failed to file any objection, he cannot maintain this petition for considering his contention that the de-limitation of wards is not in accordance with law.

14. Sri Nataraj brought to my notice the Full Bench decision of this Court in the case of State of Karnataka and Anr. Etc. v. N.A. Nagendrappa and Ors. AIR 1991 Kar 317, wherein it is held that the remedy of writ petition under Articles 226 and 227 of the Constitution of India is not available to question the act or omission of an Election Authority arising from non-compliance of the provisions of the Act to challenge either such act or omission or the result of election taken place on the

basis of such act or omission after the issuance of election notification under Rule 12 of the Rules.

15. Nextly, Sri Nataraj submitted that the discretionary power under Article 226 of the Constitution of India will be exercised only in furtherance of interest of justice and not merely on the making out of a legal point. In support of this submission he has relied on the judgment of the Hon'ble Supreme Court in the case of Ramniklal N. Bhutta and Anr. v. State of Maharashtra and Ors. : AIR 1997 SC1236 . The relevant portion of the said judgment is extracted hereinbelow:

10. ...Whatever may have been the practices in the past, a time has come where the courts should keep the larger public interest in mind while exercising their power of granting stay/injunction. The power under Article 226 is discretionary. It will be exercised only in furtherance of interests of justice and not merely on the making out of a legal point. And in the matter of land acquisition for public purposes, the interests of justice and the public interest coalesce. They are very often one and the same. Even in a civil suit, granting of injunction or other similar orders, more particularly of an interlocutory nature, is equally discretionary. The courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226 - indeed any of their discretionary powers. It may even be open to the High Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirement that the persons interested shall also be entitled to a particular amount of damages to be awarded as a lump sum or calculated at a certain percentage of compensation payable. There are may ways of affording appropriate relief and redressing a wrong; quashing the acquisition proceedings is not the only mode of redress. To wit, it is ultimately a matter of balancing the competing interests. Beyond this, it is neither possible nor advisable to say. We hope and trust that these considerations will be duly borne in mind by the courts while dealing with challenges to acquisition proceedings.

16. Sri Nataraj also brought to my notice the Hon'ble Supreme Court's judgment in the case of reported in State of Rajasthan and Ors. v. D.R. Laxmi and Ors. : (1996)6SCC445 , wherein it is held that the Court may, in appropriate cases, may

decline to grant the relief, even if it holds that the order is void.

17. Sri Nataraj has also relied upon a decision in the case of M. Kempanna and Ors. v. State of Karnataka and Ors. 1997 (7) KLJ 615 wherein it is held that this Court cannot substitute its concept of smaller urban area for that of the State Government; in the matter of defining the limits of an area, the Court cannot interfere on the ground of alleged inconvenience of the residents.

18. Sri N.K. Ramesh, the Learned Counsel appearing for respondents No. 6 and 7, sailing with the petitioner, submitted that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. When the statute prescribes for the fixing of number of councilors depending on the population, the executive cannot import some other factors or formula for determining the number of territorial wards of an U.L.B. In support of his submissions he relied on the judgments of the Hon'ble Supreme Court in the cases of Ramchandra Keshavadke v. Govind Joti Chavare and Ors. : [1975]3SCR839 and of Hukam Chand Shyam Lal v. Union of India and Ors. : [1976]2SCR1060

19. In the course of his rejoinder submissions, relying on the judgment of Hon'ble Supreme Court in the case of Hashanabbas Sayyad v. Usman Abbas Sayyad and Ors. : (2007)2SCC355 , Sri Abdullah contended that the principles of estoppel, waiver, acquiescence, res judicata, which are procedural in nature would have no application for a case where an order has been passed by the Tribunal/Court, which has no authority in that behalf. The relevant portion of the said judgment is extracted hereinbelow:

22. The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the tribunal/court which has no authority in that behalf. Any order passed by a court without jurisdiction would be coram non judice, being a nullity, the same ordinarily should not be given effect to....

20. On careful consideration of the submissions made at the bar, I am convinced that this petition cannot be thrown out on technicalities. Even when the petitioner has taken part in the elections he cannot be estopped from challenging the notification which is issued in violation of the statutory prescription contained in Section 11(i)(a) of the said Act. Nor can the petitioner be non-suited on the ground of his not filing the objections to the draft notification proposing to fix the number of territorial wards of Madikeri CMC. at 31. The requirements contained in the said Section are mandatory. The legislative prescription is such that it cannot be wished away as directory.

21. When the legislature, in exercise of its wisdom, has fixed the number of councilors at 23 for a Municipal area with a population between 20,000 and 40,000, the Executive has fixed it at 31. The timely and tenable objections raised by the second respondent State Election Commission, has not been considered by the first respondent. The Executive action is not in keeping with the legislative prescription. Further it is also in total disregard of the valid objections raised by the second respondent State Election Commission.

22. I have therefore no hesitation in quashing the impugned notification at Annexure-B. I direct the first respondent to fix the number of councilors of Madikeri C.M.C. at 23, so long as its population remains between 20,000 and 40,000 based on the last census.

23. I am nextly left with the question of whether the elections held pursuant to the impugned notification are to be declared as illegal and thereafter order fresh elections. As elections are already held after spending enormous amount of money and time, it may not be in public interest to issue any declaration nullifying the elections. The balance has to be struck by ensuring the convergence of the interests of justice and the interests of public. As laudably held by the Hon'ble Supreme Court in the case of RAMNIKLAL (supra), the discretionary power under Article 226 of the Constitution of India has to be exercised in furtherance of interest of justice and not merely on the making out of a legal point. This Court may, in appropriate cases, decline to grant the relief, even if it holds that the notification is void. All the relevant factors are to be taken into pragmatic

consideration. If the elections are ordered, it results in the postponement of the creation of a local self-government for Madikeri. Any denial of or delay in constituting a local self-government would be against the constitutional mandate itself. Besides, in absence of a local self-government for Madikeri, the implementation of many developmental works for Madikeri may be delayed. Viewed from any angle, directing re-election is not feasible. The subsequent event of holding the elections can not be erased, as the clock can not be put back.

24. It is also profitable to refer to the decision of the Hon'ble Supreme Court in the case of S.R. BOMMAI (supra) wherein the proclamations under Article 356 of the Constitution of India were declared as unconstitutional. But they (proclamations) were not formally struck down in view of the holding of the elections in the concerned States. In paragraph 365 (11) of the said judgment, the Hon'ble Supreme Court has this to say.

365 (11). The proclamation dated April 21, 1989 in respect of Karnataka (Civil Appeal No. 3645 of 1989) and the proclamation dated October 11, 1991 in respect of Meghalaya (Transferred Cases Nos. 5 and 7 of 1992) are unconstitutional. But for the fact that fresh elections have since taken place in both the States -and new Legislative Assemblies and governments have come into existence - we would have formally struck down the proclamations and directed the revival and restoration of the respective governments and Legislative Assemblies. The Civil Appeal No. 3645 of 1989 and Transferred Cases Nos. 5 and 7 of 1992 are allowed accordingly. Civil Appeals Nos. 193 and 194 of 1989 relating to Nagaland are disposed of in terms of the opinion expressed by us on the meaning and purport of Article 74(2) of the Constitution.

25. In the result, I allow this petition in part, I declare the impugned notification, dated 15* June, 2007 as illegal. However, in public interest, the subsequent event of holding of the elections is saved. The respondent No. 1 shall unerringly fix the number of councilors strictly in accordance with the prescription contained in Section 11(i)(a) of the said Act, whenever the next elections to the Madikeri C.M.C. take place. No order as to costs.