Sudarjas Kanyalal Bhatija and Others

Vs

Collector Thane Maharashtra and Others

Prahalad Hiranand Advani and Others

Vs

Collector Thane Maharashtra

Civil Appeal Nos. 5735 of 1985 and 508 of 1986

(G. L. Oza, K. Jagannatha Shetty JJ)

13.07.1989

JUDGMENT

K. JAGANNATHA SHETTY, J. –

1. The case involved in these two appeals, with leave, seems indeed straightforward enough, but the High Court of Bombay made it, as we venture to think, unsatisfactory and in a sense against judicial propriety and decorum.

2. The facts which are of central importance may be stated as follows :

> On June 19, 1982, the Government of Maharashtra issued a draft notification under Section 3(3) of the Bombay Provincial Municipal Corporation Act, 1949 (the "Act"). The draft notification proposed the formation of what is termed as "Kalyan Corporation" (the "Corporation"). It suggested the merging of Municipal areas of Kalyan, Ambarnath, Dombivali and Ulhasnagar. Against this proposal, there were many objections and representations from persons, companies and the authorities. Ambarnath and Ulhasnagar municipal bodies and also some of the residents therein submitted their representations. They objected to the merger of there municipal areas into the Corporation. It is said that in Ulhasnagar municipal area, Sindhis are predominant. In 1947, they were the victims of partition of the country. Being uprooted from their homeland, they have since settled down at Ulhasnagar. They have formed union or federation called the All India Sindhi Panchayat Federation. It is interested in having a separate identity for Ulhasnagar. The Federation challenged the said draft notification by a writ petition before the Bombay High Court. The writ petition was not disposed of on merits. It was permitted to be withdrawn on an assurance given by the government. The government gave the assurance that the representatives of the Federation would be given an opportunity of being heard before taking a final decision. As per the assurance, they were given personal hearing on their representations. The others who have filed similar representations were not heard. But their objections or representations were duly considered. Thereupon, the government decided to exclude Ulhasnagar from the proposed Corporation.

> Accordingly, a notification under Section 3(2) of the Act was issued. The Corporation was thus constituted without Ulhasnagar. That was the only alteration made in the proposal earlier notified. All other areas indicated in the draft notification were merged in the Corporation.

3. The residents of Ambarnath municipal area were not satisfied. They were, perhaps, more worried by the exclusion of Ulhasnagar than the inclusion of their own area. They moved the High Court under Article 226 of the Constitution challenging the notification issued under Section 3(2) of the Act. They inter alia, contended that the action of the government affording an opportunity of being heard only to the Federation and not to other objectors was contrary to Article 14. It was a hostile discrimination to hear only one of the objectors. They asserted that the establishment of the Corporation without Ulhasnagar municipal area, having regard to the geographical contiguity was unintelligible and incomprehensible. It was arbitrary and opposed to the object of the Act. They also contended that there ought to have been a fresh draft notification after taking a decision to exclude Ulhasnagar from the proposal. With similar contentions and for the same relief, there was another writ petition before the High Court. It was filed by the National Rayon Corporation Limited which is a company located within the municipal limits of Ambarnath.

4. The Sindhi Panchyat Federation was not a party to the writ petitions. It was, however, allowed as an intervener. Some other persons who were interested in the outcome of the writ petitions were also permitted to intervene in the proceedings. They supported the stand taken by the government which was the main respondent in the writ petitions.

5. The state in its counter-affidavit resisted the petitioners' claim raising several grounds. The first point to be noted in this context is this :

> That the formation of Municipal Corporation under Section 3 of the Act is an extension of the legislative process and, therefore, Section 3 is nothing but a piece of conditional legislation. The principles of natural justice will not apply to such legislative function not it could be imparted into it even by necessary implication. The petitioners have not challenged the validity of the sub-section(2) of Section 3 of the Act and even otherwise the said validity has been upheld by a Division Bench of this Court (Shah and Deshpande, JJ.) in Writ Petition No. 706-A of 1982 (Village Panchayat Chikalthane v. State of Maharashtra) decided on December 23/24, 1982. Therefore, it cannot be said that the notification issued in exercise of the said legislative power is vitiated by non-compliance with the principles of natural justice. The conditions laid down by Section 3 are fully complies with; a preliminary notification was issued as contemplated by sub-section(4) of Section 3 of the Act; the objections and suggestions made by the various citizens and persons were duly considered by the State Government and thereafter the final notification was issued. In the every nature of things there is bound to be difference and variance between the preliminary notification and the final notification. Only because the Ulhasnagar Municipal Council is excluded from the final notification, it cannot be said that there was any major departure from the preliminary notification over again before the final notification was issued in that behalf.

6. The second factual point to be noted is this :

> Due to partition of India in 1947, the Sindhi people have been uprooted from their

> homeland and with hard labour they have settled themselves in different parts of the country. One can appreciate their feelings about their anxiety to maintain their separate entity. If such a large part is forcibly included in the Corporation ignoring their sentiments and wishes, it may not result in smooth working of the proposed Corporation which is necessary for proper development. It is, therefore, desirable to constitute the new Kalyan Corporation without including Ulhasnagar for the time being.

7. The High Court was not impressed with the above reasonings. The High Court said that the decision to exclude Ulhasnagar was taken by the government abruptly and in an irrational manner. The decision was arbitrary and against the purpose of the Act. On the legality of the procedure followed by the government, the High Court said :

> Once that decision was taken, it was obligatory on the part of the government to reconsider to proposal as a whole so far as the rest of the areas are concerned.

8. Reference was also made to the report of the "Sathe Commission" to fortify the conclusion that Ulhasnagar could not have been isolated. The "Sathe Commission" was a one man Commission appointed by the State Government to enquire and report on the establishment of new Municipal Corporations. The Commission in its report among others, seems to have indicated that Kalyan, Ulhasnagar and Ambarnath are one contiguous stretch of territory with a length of about 8 kms. from north-west to south-east.

9. The High Court then made some general observations as to the purpose for which Municipal Corporations should be constituted and went on :

> It was the avowed policy after independence to change the socio-economic map of the village and town. A corporate life can only be ensured if there is a corporate conscience and an attitude to live together. City is an epitome of the social world where all belts of civilization interact along its avenues. A Municipal Corporation is.... in nature, where people belonging to different cases, creeds, religions and language want to live with each other. Town planning cannot be denominational or fractional. It is not a museum of human being otherwise harijan bastis, mominpuras and such other mohallas will have to be preserved to maintain its separate identity and the socio-economic map of the village or city will never change. It cannot be forgotten that we are heading towards a global village. By saying this, we do not want to belittle the achievements of sacrifice of the Sindhi community. However, that is not very relevant for deciding the question of the establishment of a Municipal government Corporation. Its main object is to ensure better municipal government of the city. It appears that government was also aware of this and this seems to be the reason why the decision "for the time being" is pertinent and clearly indicates that the government wanted to reconsider the issue at a later stage. However, unfortunately till today government has not taken any decision in that behalf.

10. The High Court, however, felt that it was not necessary to quash the notification establishing the Corporation. This is how the conclusion was reached :

> It will not be fair to quash the notification as a whole and unsettled the municipal administration. In our view, that is also not necessary since from the affidavit of the

> government, it is clear that the decision taken in that behalf was tentative, i.e., for the time being and it is not all-time permanent decision. Under sub-section (3) of Section 3 of the Act, the State Government has power to exclude or include any area specified in the notification issued so far as Ambarnath Town is concerned, reconsideration of the present case of the whole matter was absolutely necessary when the decision to exclude the Ulhasnagar Municipal Council from the proposed Municipal Corporation, though tentative in nature, was taken.

11. Finally, the operative portion of the order was put in the following terms :

> Therefore, without setting aside the final notification, we direct the State Government to reconsider the proposal under sub-section (3) of Section 3 of the Bombay Provincial Municipal Corporations Act either to exclude or include any area, within a period of sic months from today. The writ of mandamus to be issued accordingly. It is needles to say that after the necessary steps are taken under Section 3(3) of the Act, the State Government shall make the necessary amends in the notification issued..... In the result, therefore, the rule is made partly absolute and the State Government is directed to exercise its power under Section 3 sub-section (3) of the Act in accordance with law within a period of six months. It is needless to say that the petitioners will be entitled to raise objections and make their suggestions in that behalf after a notification under sub-section (3) read with sub-section (4) of Section 3 of the Act is issued. Since the popular local self-government is not in existence in any of the municipal councils or even in the newly established municipal corporation and having regard to the peculiar facts and circumstances of the case, in our view, this is a fit case where the petitioners of these two petitions and All India Sindhi Panchyat Federation should be given a reasonable opportunity of being heard before any final decision in the matter is taken.

12. Against the judgment of the High Court, the State Government has not preferred any appeal. The Kalyan City Corporation though vitally concerned with the matter, has also not appealed to this Court. The present appeals are only by those who were impleaded as interveners in the writ petitions.

13. We have heard counsel for all parties and gave out best attention to the question raised by the appellants. Counsel for the appellants reiterated the stand taken by the government before the High Court. He urged that the State has a wide discretion in the selection of areas for constituting the Corporation and the court cannot interfere with such discretion. The court has no jurisdiction to examine the validity of the reason that goes into the decision of the government. The power to constitute Municipal Corporations under Section 3 of the Act is legislative in character. It is an extension of legislative process for which rules of natural justice have no application. He said that the government in the instant case has complied with the statutory requirements and it was not expected to do anything more in the premises. And, at any rate, it is wholly unnecessary according to the counsel to go through that exercise again as the High Court has suggested.

14. The other limb of the argument of counsel for the appellants relates to the manner in which the High Court disposed of the matter. It was said that a decision of this Court has been disregarded and a binding decision of a co-ordinate bench of the same court has been ignored.

15. The grievance of the appellants' counsel, in our opinion, is not wholly unjustified. At the

beginning of the judgment, we have said that the High Court rendered the judgment in a sense against the judicial propriety and decorum. We were not happy to make that observation, but constrained to say so in the premise and background of the case. It may be noted that the result of the writ petitions before the High Court turns on the nature and scope of the power conferred on the government under Section 3 of the Act. A Division Bench of the High Court has taken the view that that power is in the nature of legislative process. That judgment was rendered on December 23/24, 1982, by a bench consisting of Shah and Deshpande, JJ. It was in Writ Petition No. 706-A of 1982 - Village Panchayat Chikalthane v. State of Maharashtra. In that case, the challenge was to the validity of Section 3(2) of the Act on the ground that it suffers from the vice of excessive delegation for want of guidelines for the exercise of power. Repelling the contention, it was held that Section 3 is in the nature of a conditional legislation and, therefore, laying down the policy or guidelines to exercise the power was unnecessary. It was emphasized that the exercise of power under Section 3(2) is conditioned by only two requirements, viz., (1) previous publication as contemplated by sub-section (4) of Section 3 of Act, (2) issuance of a notification by the government after such previous publication. Once the government publishes such a notification the legislation becomes compete an the other provisions of the Act are ipso facto attracted to the Corporation so constituted. This was the view taken by the High Court in Chikalthane case. To reach that conclusion, the learned Judge relied upon the decision of this Court in Tulsipur Sugar Company case (Tulsipur Sugar Co. Ltd. v. Notified Area Committee, ((1980) 2 SCC 295 : (1980) 2 SCR 1111).

16. The attention of the High Court in the present case was drawn to the decision in Chikalthane case. Counsel for the State and interveners seemed to have argued that the present case really fell fairly and squarely within what was said there. They were indeed on terra firma since the decision in Chikalthane case was a clear authority against every contention raised by the petitioners. Faced with this predicament, counsel for the petitioners urged before the High Court that their case should be referred to a larger bench to reconsider the decision in Chikalthane case. But learned Judge, (Dharmadhikari and Kantharia, JJ.) did not pay heed to that submission. They neither referred the case to a larger bench not followed the view taken in the Chikalthane case. It was not as if they did not comprehend the issue to be determined and the principle to be applies. They were very much aware of it when they remarked :

> In our opinion, once it is accepted that this is a piece of conditional legislation, then it will have to be held that the principle of natural justice would not apply to such a case as held by the Division bench of this Court in Village Panchayat Chikalthane case not it could be said that because under a mistake notice the Federation was heard, the denial of such a right to the petitioners will amount to hostile discrimination within the contemplation of Article 14 of the Constitution of India.

17. After referring to these simple legal principles, it is unfortunate that the issue at stake was little explored. The key question raised in the case was side-tracked and a new strategy to interfere with the decision of the government was devised. The learned Judges directed the government to publish again a draft notification for reconsideration of the matter. They gave liberty to the writ petitioners and the interveners to submit their representations. They observed that "this is a fit case where the parties should be given a reasonable opportunity of being heard". They did to quash the impugned notification, but told the government to make necessary changes in the light of fresh consideration. All these directions were issued after recording a positive finding that the exclusion of Ulhasnagar from the Corporation was arbitrary and irrational. The net result of it is that there is now no discretion with the government to keep Ulhasnagar away from the Corporation.

18. It would be difficult for us to appreciate the judgment of the High Court. One must remember that pursuit of the law, however glamorous it is, has its own limitation on the bench. In a multi-judge court, the judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned Single Judge or a Division Bench does not agree with the decision of a bench of co-ordinate jurisdiction, the matter shall be referred to a larger bench. It is a subversion of judicial process not to follow this procedure.

19. Deprecating this kind of tendency of some judges, Das Gupta, J., in Mahadeolal Kanodia v. Administrator General of West Bengal (AIR 1960 SC 836 : (1960) 3 SCR 578 : (1961) 1 Ker Lr 64) said : (AIR p. 941, para 19)

We have noticed with some regret that when the earlier decision of two Judges of the same High Court in Deorajin case(Deorajin Debi v. Satyadhyan Ghosal, 58 Cal WN 64 : AIR 1954 Cai 119), was cited before the learned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger bench. Judicial decorum no less than legal propriety forms the basis of judicial procedure. If on thing is more necessary in law that any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decision.

20. The attitude of Gajendragadkar, C. J. in Lala Shri Bhagwan v. Ram Chand (AIR 1965 SC 1767 : (1965) 3 SCR 218) was not quite different : (AIR p. 1773, para 18)

It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer that matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the question himself.

21. Chief Justice Pathak, in a recent decision stressed the need for a clear and consistent enunciation to legal principle in the decisions of a court. Speaking for the Constitution on Bench (Union of India v. Raghubir Singh ((1989) 2 SCC 754)) learned Chief Justice said : (SCC p. 766, para 9)

The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transaction forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court.

22. Cardozo propounded a similar thought with more emphasis (The Nature of the Judicial Process, Benjamin N. Cardozo, p. 33) :

> I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevances and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history a custom or policy or

> justice. Lacking such a reason, I must be logical just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another.

In our system of judicial review which is a part of our constitutional scheme, we hold it to be the duty of judges of superior courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Sub-ordinate courts would find themselves in an embarrassing position to choose between the conflicting opinion. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute.

23. Judge Learned Hand has referred to the tendency of some judges "who win the game by sweeping all the chessmen off the table" (The Spirit of Liberty, Alfred A. Knopf, New York, p. 131 (1953)). This is indeed to be deprecated. It is needless to state that the judgment of superior courts and Tribunals must be written only after deep travail and positive vein. One should never let a decision go until he is absolutely sure it is right. The law must be made clear, certain and consistent. But certitude is not the test of certainty and consistency does not mean that there should be no word of new content. The principle of law may develop side by side with new content but not with inconsistencies. There could be waxing and waning the principle depending upon the pragmatic needs and moral yearnings. Such development of law particularly, is inevitable in our developing country. In Raghubir Singh case ((1989) 2 SCC 754), learned Chief Justice Pathak had this to say : (SCC p. 767, para 11)

Legal compulsions cannot be limited by existing legal pro-positions, because, there will always be, beyond the frontiers of the existing law new areas inviting judicial scrutiny and judicial choice-making which could well affect the validity of existing legal dogma. The search for solutions responsive to a changes social era involves a search not only among competing propositions of law, or competing versions of a legal propositions, or the modalities of an indeterminacy such as "fairness" or "reasonableness", but also among propositions from outside the ruling law, corresponding to the empirical knowledge or accepted value or present time and place, relevant to the dispensing of justice within new parameters.

24. And he continued : (SCC p. 767, para 12)

The universe of problems presented for judicial choice-making at the growing points of the law is an expanding universe. The areas brought under control by the accumulation of past judicial choice may be large. Yet the areas newly presented for still further choice, because of changing social, economic and technological condition are far from inconsiderable. It has also to be remembered, that many occasions for new options arise by the mere fact that no generation looks out on the world from quite the same vantage-point as its predecessor, nor for that matter with the same perception. A different vantage-point or a different quality of perception often reveals the need for choice-making where formerly no alternatives, and no problem at all, were perceived.

25. Holmes tells us (The Common Law, Oliver Holmes, p. 36 (1881)) :

> The truth is, that the law is always approaching, the never reaching, consistency. It is forever adopting new principles from life at the end, and it always retains old ones

from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

26. Apart from that the judges with profound responsibility could ill-afford to take stolid satisfaction of a single postulate past or present in any case. We think, it was Cicero who said about someone : "He saw life clearly and he saw it whose". The judges have to have a little bit of that in every case while construing and applying the law.

27. Reverting to the case, we find that the conclusion of the High Court as to the need to reconsider the proposal to form the Corporation has neither the attraction of logic nor the support of law. It must be noted that the function of the government in establishing a Corporation under the Act is neither executive nor administrative. Counsel for the appellant was right in his submission that it is legislative process indeed. No judicial duty is laid on the government is discharge of the statutory duties. The only question to be examined is whether the statutory provisions have been complied with. If they are complied with, then, the court could say no more. In the present case the government did publish the proposal by a draft notification and also considered the representations received. It was only thereafter, a decision was taken to exclude Ulhasnagar for the time being. That decision became final when it was notified under Section 3(2). The court cannot sit in judgment over such decision. It cannot lay down norms for the exercise of that power. It cannot substitute even "its juster will for theirs."

28. Equally, the rule issued by the High Court to hear the parties is untenable. The government in the exercise of its powers under Section 3 is not subject to the rules of natural justice any more than is legislature itself. The rules of natural justice are not applicable to legislative action plenary or subordinate. The procedural requirement of hearing is not implied in the exercise of legislative powers unless hearing was expressly prescribed. The High Court, therefore, was in error in directing the government to hear the parties who are not entitled to be heard under law.

29. Megarry, J., in Bates v. Lord Hailsham of St. Marylebone ((1972) 1 WLR 1373 : (1972) 3 All ER 1019) while dealing with the legislative process under Section 56 of the Solicitors Act, 1957 said : (WLR p. 1378 : All ER pp. 1023-24)

In the present case, the committee in question has an entirely different function : it is legislative rather that administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative authority is a common-place; but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections (see, for example, the Factories Act, 1961 Schedule 4). I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attack, whether by injunction or otherwise; but what is important is not

its form but its nature, which is plainly legislative.

30. There are equally clear authorities on this point from this Court. The case in Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur (Tulsipur Surgar Co. Ltd. v. Notified Area Committee, ((1980) 2 SCC 295 : (1980) 2 SCR 1111) was indeed a hard case. But then, this Court did not make a bad law. There a notification dated August 22, 1955 was issued under Section 3 of the U.P. Town Areas Act, 1914 covering the petitioner's factory. Consequently, the octroi was levied on goods brought by the factory management into the limits of the Town Area Committee. The company questioned the validity of that notification. The case pleaded was that the company had no opportunity to make representation regarding the advisability of extending the limits of the Town Area Committee. Venkataramiah, J., as the present learned Chief Justice then was, while rejecting the contention observed : (SCC p. 302, para 7)

The power of the State Government to make a declaration under Section 3 of the Act is legislative in character because the application of the rest of the provisions of the Act to the geographical area which is declared as a town area is dependent upon such declaration. Section 3 of the Act is in the nature of a conditional legislation. Dealing with the nature of functions of a non-judicial authority, Prof. S. A. De Smith in Judicial Review of Administrative Action (3rd edn.) observes at page 163 :

> However, the analytical classification of a function may be a conclusive factor in excluding the operation of the audi alteram partem rule. It is generally assumed that in English law the making of a subordinate legislative instrument need not be preceded by notice or hearing unless the parent Act so provides.

31. In Baldev Singh v. State of Himachal Pradesh ((1987) 2 SCC 510) a similar question arose for consideration. An attempt was made to constitute a notified area as provided under Section 256 of the Himachal Pradesh Municipal Act, 1968, by including portions of the four villages for such purposes. The residents of the village who were mostly agriculturists challenged the validity of the notification before the High Court on the ground that they had no opportunity to have their say against that notification. The High Court summarily dismissed the writ petition. In the appeal before this Court, it was argued that the extension of notified area over the Gram Panchayat limits would involve civil consequences and therefore, it was necessary that persons who would be affected thereby ought to be given an opportunity of being heard. Ranganath Misra, J., did not accept the contention, but clarified : (SCC p. 515, para 5)

We accept the submission on behalf of the appellants that before the notified area was constituted in terms of Section 256 of the Act, the people of the locality should have been afforded an opportunity of being heard and the administrative decision by the State Government should have been taken after considering the views of the residents. Denial of such opportunity is not in consonance with the scheme of the Rule of Law governing our society. We must clarify that the hearing contemplated is not required to be oral and can be by inviting objections and disposing them of in a fair way.

32. The principles and precedents thus enjoin us not to support the view taken by the High Court. We may only observe that the government is expected to act and must act in a way which would make it consistent with the good administration. It is they, and no one else - who must pass judgment on this matter. We must, therefore, leave it to the government.

33. In the result and for the reason stated, we allow the appeals and set aside the judgment of the High Court. In the circumstances of the case, we make no order as to costs.

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