

Court No. - 21

Case :- WRIT - C No. - 26793 of 2022

Petitioner :- Sujit And 5 Others

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Vibhu Rai, Abhinav Gaur, Sr. Advocate

Counsel for Respondent :- CSC

Hon'ble Manoj Kumar Gupta, J.

Hon'ble Rajendra Kumar-IV, J.

(Per Manoj Kumar Gupta, J.)

1. The petitioners are elected Pradhans of Gram Panchayat Bhaishwali, Sansaarapur, Sidhwapaar, Kodhari, Bailey and Kalyanpur. They have called in question notifications dated 12.12.2020, 22.7.2022 and 10.8.2022 (all issued by respondent no. 2).

2. The notification dated 12.12.2020 was a draft of a proposal intended to be issued by the Governor in exercise of powers under clause (2) of Article 243Q of the Constitution of India, read with sub-section (2) of Section 3 of the U.P. Municipalities Act, 1916 and in partial modification of previous notification dated 16th March, 1875 and other notifications issued in this behalf for inclusion of ten villages in the transitional area of Nagar Panchayat, Badahalganj, Gorakhpur. The draft proposal was notified in order to ensure compliance of Section 4 of the U.P. Municipalities Act, 1916 which is as follows: -

"4. Preliminary procedure to issue notification. - (1) Before the issue of a notification referred to in Section 3, the Governor shall publish in the Official Gazette and in a paper approved by it for purposes of publication of public notices, published in the district or, if there is no such paper in the district, in the division in which the local area

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covered by the notification is situate and cause to be affixed at the office of the District Magistrate and at one or more conspicuous places within or adjacent to the local area concerned a draft in Hindi or the proposed notification along with a notice stating that the draft will be taken into consideration on the expiry of the period as may be stated in the notice.

(2) The Governor shall, before issuing the notification consider any objection or suggestion in writing which it receives from any person, in respect of the draft within the period stated."

3. Section 3 of the U.P. Municipalities Act, 1916, which is also relevant for deciding the controversy, reads as follows: -

"3. Declaration etc. of transitional area and smaller urban area. - (1) Any area specified by the Governor in a notification under clause (2) of Article 243-Q of the Constitution with such limits as are specified therein to be a transitional area or a smaller urban area, as the case may be.

(2) The Governor may, by a subsequent notification under clause (2) of Article 243-Q of the Constitution, include or exclude any area in or from a transitional area or a smaller urban area referred to in sub-section (1), as the case may be.

(3) The notifications referred to in sub-sections (1) and (2) shall be subject to the condition of the notification being issued after the previous publication required by Section 4 and notwithstanding anything in this section, no area which is, or is part of, a cantonment shall be declared to be a transitional area or a smaller urban area or be included therein under this section.

4. Article 243Q of the Constitution which confers power to the Governor to include or exclude any area, as well as power to constitute a Nagar Panchayat, a Municipal Council, or a Municipal Corporation, reads thus: -

"243Q. Constitution of Municipalities. —

(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 area 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 he may deem fit, by public notification, specify to be an industrial township.

(2) In this article, '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 non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part."

5. The Notification dated 22.7.2022 has been issued in exercise of power under clause (2) of Article 243Q of the Constitution of India, read with subsection (2) of Section 3 of the U.P. Municipalities Act, 1916. This provision, as would be clear from a bare perusal, confers power in the Governor to issue a subsequent notification under clause (2) of Article 243Q of the Constitution of India, thereby including or excluding any area, in or from a transitional area, or a smaller urban area. The notification gives final shape to the draft notification, thereby concretizing the proposal for inclusion of ten villages in the transitional area of Nagar Panchayat, Badahalganj, District Gorakhpur.

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6. The third notification, which has been called in question, is dated 10.8.2022 and it has been issued in exercise of power under sub-section (2) of Section 3 of the U.P. Municipalities Act, 1916, read with clause (2) of Section 243Q of the Constitution. It seeks to supersede the earlier notification dated 22.07.2022 on the ground that there was typographical error in the areas specified in the Schedule to the said notification. It now seeks to include seven more villages, which were not part of draft notification under Section 4, but have been notified for the first time. These villages are Garthauli, Sansaarpur, Baswanpur, Mishrauli, Sidhawapaar, Kuraon and Mahulia Khajuha.

7. The case of the petitioners is that under the Act, before including or excluding any area in a transitional area, or a smaller urban area, in exercise of power under Article 243Q, read with Section 3 of the Act, the proposal has to be notified in terms of Section 4, inviting suggestions and objections and after considering which, final notification is to be issued. This presupposes that the area, as notified in the proposal, cannot be increased, while issuing the final notification, otherwise, it will defeat the provision of Section 4 of the Act.

8. Having regard to the said submission, we passed the following order on 21.9.2022: -

"One of the contention is that as many as 7 villages which have now been notified under Section 3 of the U.P. Municipalities Act, 1916 for being included in the transitional area of Nagar Panchayat Badahalganj, Gorakhpur were not part of the notification issued under Section 4 of the Act. Consequently, the final notification is

bad in law.

Sri Manish Kumar, learned standing counsel appearing for the respondents seeks time to obtain instructions.

As prayed, put up tomorrow as fresh."

9. On matter being taken up today, Sri Rajiv Gupta, learned Additional Chief Standing Counsel, appearing for the State, on basis of instructions received by him, submitted that seven villages have been included in the final notification, on basis of objections and suggestions received in pursuance of the preliminary notification under Section 3 of the Act. He further submitted that there was typographical error in the notification dated 22.07.2022, which has now been corrected by issuing notification dated 10.08.2022.

10. Learned counsel for the petitioners submitted that the same is not permissible, as it will render Section 4 of the Act redundant.

11. We find considerable force in the submission of learned counsel for the petitioners. The Governor while being invested with power to include or exclude any area in a transitional area, or a smaller urban area, in exercise of power under clause (2) of Article 243Q of the Constitution, read with Section 3 of the U.P. Municipalities Act, 1916, has to follow the procedure prescribed under Section 4, which mandates that before issuance of notification under Section 3, a draft proposal has to be published in the manner provided under Section 4, so as to apprise the general public of the inclusions/exclusions and if any person has any objection, he may file objection/suggestion. Sub-section (2) of Section 4 enjoins upon the

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Governor to consider the objection or suggestion received in writing from any person in respect of the draft proposal within the period stated. Sub-section (3) of Section 3 explicitly and unequivocally prescribes that 'the notifications referred to in sub-section (1) and (2) shall be subject to the condition of the notification being issued after the previous publication required by Section 4.....”

12. It is implicit in the statutory provision that while issuing a final notification, the area as originally proposed to be included in the transitional area, cannot be increased in such a manner, so as to change the entire complexion and character of the preliminary notification. The object of Section 4 is to provide opportunity to the general public which would include the petitioners herein, to file objections against the proposal. The Governor exercises power under Article 243Q having regard to the factors laid down under clause (2), i.e., population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factor as he may deem fit. The objection could be on any of the above aspects, apart from inclusion/exclusion. This is an invaluable right conferred in the general public with avowed object of strengthening their hands in all facets of local self governance. In the absence of these villages being part of the proposal notified under Section 4, the right to file objection has been rendered illusory making Section 4 of the Act redundant. It amounts to notifying seven villages in the transitional area without there being any previous publication, as required by Section 4.

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What cannot be done directly cannot be done indirectly. It is nothing but colourable exercise of power.

13. Sri Rajiv Gupta, learned Additional Chief Standing Counsel, submitted that objections were invited from the general public in respect of the proposal for inclusion of seven additional villages. However, we find no such material on record. The constitutional scheme and the provisions of the Act lays down the manner in which objections/suggestions are to be invited and for such purpose, a notification under Section 4 of the Act is required to be issued. This notification is annexure 1 dated 12.12.2020 but it does not make any proposal for inclusion of the seven villages in question. As such, we find no force in the submission of Sri Rajiv Gupta.

14. In view of what has been stated above, we are of the considered opinion that the final notification dated 10.8.2022, in so far as it includes the villages Garthauli, Sansaarpur, Basawanpur, Mishrauli, Kuraon and Mahulia Khajuha, is illegal and unconstitutional and it is quashed to that extent.

15. Although, notifications dated 12.12.2022 and 22.07.2022 are also under challenge, but no argument has been advanced in respect thereto. Consequently, the challenge to these notifications fail.

16. As a result, the petition is allowed in part.

17. No order as to costs.

Order Date :- 27.9.2022
Jaideep/-

(Rajendra Kumar-IV, J.) (Manoj Kumar Gupta, J.)