A CHAMPA LAL

v.

STATE OF RAJASTHAN AND ORS.

(Civil Appeal No. 4554 of 2018)

B APRIL 26, 2018

[J. CHELAMESWAR AND SANJAY KISHAN KAUL, JJ.]

Constitution of India: Art.243Q – Interpretation of – Notification dated 6.10.2008 envisaging upgradation of Gram Panchayat of Napasar Village as Nagar Palika (Municipality) – On challenge to the validity of said Notification, the State withdrew it by Notification dated 18.09.2009 – Validity of Notification dated 18.09.2009 challenged – Fresh Notification issued again for establishing a Nagarpalika for the Napasar village – Validity of, challenged – Held: Art.243Q contemplates constitution of three different categories of bodies known as Nagar Panchayat for a transitional area, Municipal Council for a smaller urban areas and Municipal Corporation for a larger urban area – It is declared under Art.243Q(2) that the expressions "a transitional area", "a smaller urban area" and "a larger urban area" ('Areas') would mean such areas as may be specified by the Governor by a public notification for the purpose of Part IX A of the Constitution of India – Art.243Q(2) further obligates the Governor to have due regard to the various factors mentioned therein before specifying the Areas i.e. population of the area, the density of the population, the revenue generated in the area for local administration, percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit – It, therefore, appears from the scheme of Art.243Q(2) that the Governor is not free to notify 'Areas' in his absolute discretion but is required to fix the parameters necessary to determine whether a particular Area is a transitional area or a smaller urban area or a larger urban area with due regard to these factors – Such parameters must be uniform for the entire State – It is only after the determination of the parameters, various municipal bodies contemplated under Art.243Q(1) could be constituted – In the absence of any notification which meets the requirements of Art.243Q(2), the entire

exercise undertaken by the State of Rajasthan in upgrading the Napasar village Gram Panchayat to be a Nagarpalika is unconstitutional – Therefore, the initial notification dated 6.10.2008 itself is unsustainable and, thus, the legality of various actions which followed that notification and the judgments of the High Court which examined the legality of those actions, need not be examined – All such subsequent action of the State which led to litigation suffer from a fundamental constitutional flaw – The impugned judgments of the High Court rendered without examining the true scope and scheme of Part IXA of the Constitution and more particularly Art.243Q(2) are per incuriam *– Rajasthan Municipalities Ordinance, 2008 – s.3(1)(A) – Municipalities.*

Disposing of the appeals, the Court

HELD: 1. The establishment of municipalities and their organisations is governed by Part IX A (consisting of Articles 243P to 243ZG) of the Constitution of India inserted in the Constitution by the Constitution 74th (Amendment) Act, 1992 with effect from 1.6.1993. Article 243P(e) defines the expression "Municipality" to mean an institution of self-government constituted under Article 243Q. Article 243Q contemplates the constitution of three different categories of bodies known as (i) Nagar Panchayat for a transitional area, (ii) Municipal Council for a smaller urban areas and (iii) Municipal Corporation for a larger urban area. It is declared under Article 243Q(2) that the expressions "a transitional area", "a smaller urban area" and "a larger urban area" ('Areas') would mean such areas as may be specified by the Governor by a public notification for the purpose of Part IX A of the Constitution of India. Article 243Q(2) further obligates the Governor to have due regard to the various factors mentioned therein before specifying the Areas i.e. population of the area, the density of the population, the revenue generated in the area for local administration, percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit. It, therefore, appears from the scheme of Article 243Q(2) that the Governor is not free to notify 'Areas' in his absolute discretion but is required to fix the parameters necessary to determine whether a particular AREA is a transitional area or a smaller urban area or a larger urban area

with due regard to the factors mentioned above. It is implicit that such parameters must be uniform for the entire State. It is only after the determination of the parameters, various municipal bodies contemplated under Article 243Q(1) could be constituted. [Paras 6, 7, 8 and 9] [632-F-G; 633-E-H; 634-A-B]

2. In response to a specific query whether any notification contemplated under Article 243(Q)(2) had been issued by the State of Rajasthan, two notifications dated 4.7.1995 and 30.4.2012 were produced. A plain reading of both the notifications shows that these notifications had been issued in exercise of the statutory powers conferred on the State Government by two different enactments known as "The Rajasthan Municipality Act, 1959 (since repealed) and the Rajasthan Municipalities Act, 2009. Apart from the declaration regarding the source of power for the issuance of these notifications to be authority conferred by the various provisions of these two enactments, it appears from the tenor and scheme of the notifications that these notifications purport to classify municipalities only on the basis of population. The various other parameters to which regard is required to be had under Article 243Q(2) were not taken into consideration for the purpose of classification made under the above mentioned two notifications. Therefore, these two notifications cannot be treated as notifications contemplated under Article 243(Q)(2). In the absence of any notification which meets the requirements of Article 243Q(2), the entire exercise undertaken by the State of Rajasthan in upgrading the Napasar village Gram Panchayat to be a Nagarpalika – [that is equivalent to Nagar Panchayat as mentioned in Article 243Q(1)(a)] is unconstitutional as it is inconsistent with the requirements of the Constitution under Article 243Q of the Constitution of India. Therefore, the initial notification dated 6.10.2008 itself is unsustainable. Unfortunately, this aspect was not noticed by the High Court obviously because it was not brought to the notice of the High Court. The fact that a litigant before the court does not point out the relevant principles and provisions of law does not prevent the court from examining the issues involved in the *lis,* more particularly, when the process which is the subject matter of litigation before the court is inconsistent with the mandate of the Constitution. It is a

settled principle of law that courts are bound to take note of the constitution and the laws. [Paras 10, 11] [634-C-G; 635-A]

3. The initial notification dated 6.10.2008 is unconstitutional. Therefore, the legality of various actions which followed that notification and the judgments of the High Court which examined the legality of those actions need not be examined. All such subsequent action of the State which led to litigation suffer from a fundamental constitutional flaw. The impugned judgments of the High Court rendered without examining the true scope and scheme of Part IXA of the Constitution and more particularly Article 243Q(2) are *per incuriam*. [Para 12] [636-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4554 of 2018.

From the Judgment and Order dated 12.09.2016 of the High Court of Judicature for Rajasthan at Jodhpur in D. B. Civil Special Appeal No. 667 of 2016.

Ms. Aishwarya Bhati, Amit Verma, Ms. Tanya Patra, Ms. Ritu Apurva, Vishwajeet Singh, Advs. for the Appellant.

Guru Krishna Kumar, Sr. Adv., Shiv Mangal Shrma, Jayant Bhatt, Umang Verma, Ms. Jyoti Sharma, Ms. Shikha Sandhu, Rohit K. Singh, A. Subba Rao, Annam D. N. Rao, A. Venkatesh, Sudipto Sircar, Rahul Mishra, Ms. Tulika Chikker, Advs. for the Respondents.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. These two appeals are inter connected tossing up an important question of law regarding the interpretation of Article 243 Q of the Constitution of India.

3. It is not necessary for us to give the complete factual details and history of the case for the purpose of this order except the bare minimum. The litigation revolves around the upgradation by a notification dated 6.10.2008 of Gram Panchayat of Napasar Village as Nagar Palika (Municipality) Class IV[1] category by the State of Rajasthan purportedly

[1] State Government while exercising power conferred to it under section 3 (1) (A) of the Nagar Palika ordinance 2008, State Government hereby declares Gram Panchayat Napasar as Nagar Palika Fourth category. Existing limit/area of the Gram Panchayat Napasar will be the area of Nagar Palika Napasar.

A in exercise of power conferred under Section 3(1)(A) of the Rajasthan Municipalities Ordinance 2008[2]. Legality of the said notification was challenged before the Rajasthan High Court in a writ petition. It was dismissed by a learned Single Judge. Aggrieved by the dismissal, the matter was carried in a writ appeal. During the pendency of the writ appeal, the impugned notification dated 6.10.2008 was withdrawn by another State of Rajasthan by a notification dated 18.9.2009. The writ appeal was therefore, rendered infructuous.

4. Challenging the notification dated 18.9.2009, another writ petition came to be filed. The said writ petition was allowed by a Division Bench by its judgment dated 13.5.2015 quashing the notification and directing the State to take consequential steps.[3] Aggrieved by the same, SLP(C)No.11091/2017 came to be filed. Pursuant to the direction of the High Court, a fresh notification dated 2.6.2016 came to be issued once again for establishing a Nagarpalika for the Napasar village. Challenging the said notification, another writ petition came to be filed before the Rajasthan High Court. It was dismissed by a judgment dated 3.8.2016. On appeal, the same was confirmed by the Division Bench by its judgment dated 12.9.2016. Aggrieved by the same, SLP(C)No.38618 of 2016 is filed.

5. The correctness of the two judgments of the High Court impugned in these two appeals, is questioned on various grounds. In our opinion, it is not necessary to examine the various submissions made before us. The impugned actions of the respondent State which culminated in the two impugned judgments of the High Court suffers from a fundamental infirmity which goes to the root of the matter.

6. The establishment of municipalities and their organisations is governed by Part IX A (consisting of Articles 243P to 243ZG) of the Constitution of India inserted in the Constitution by the Constitution 74th (Amendment) Act, 1992 with effect from 1.6.1993. Article 243P (e) defines the expression "Municipality" to mean an institution of self-government constituted under Article 243 Q. Article 243 Q of the Constitution of India declares as follows:

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[2] **The ordinance was eventually replaced by Rajasthan Municipalities Act, 2009.**

[3] The consequent act referred to by the court is that a new notification was directed to be issued.

"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 smaller urban area; and

(c) a Municipal Corporation for a larger urban area,

in accordance with 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."

7. Article 243Q contemplates the constitution of three different categories of bodies known as (i) Nagar Panchayat for a transitional area, (ii) Municipal Council for a smaller urban areas and (iii) Municipal Corporation for a larger urban area.

8. It is declared under Article 243Q(2) that the expressions "a transitional area", "a smaller urban area" and "a larger urban area" (hereinafter collectively referred to as "AREAS") would mean such areas as may be specified by the Governor by a public notification for the purpose of Part IX A of the Constitution of India. Article 243Q(2) further obligates the Governor to have due regard to the various factors mentioned therein before specifying the AREAS i.e. population of the area, the density of the population, the revenue generated in the area for local administration, percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit.

A 9. It, therefore, appears from the scheme of Article 243Q(2) that the Governor is not free to notify 'AREAS' in his absolute discretion but is required to fix the parameters necessary to determine whether a particular AREA is a transitional area or a smaller urban area or a larger urban area with due regard to the factors mentioned above. It is implicit that such parameters must be uniform for the entire State. It is only after the determination of the parameters, various municipal bodies contemplated under Article 243Q(1) could be constituted.

10. In response to a specific query whether any notification contemplated under Article 243(Q)(2) had been issued by the State of Rajasthan, Mr. Guru Krishnakumar learned senior counsel appearing for the State of Rajasthan, produced two notifications dated 4.7.1995 and 30.4.2012. On a plain reading of both the notifications, it appears that these notifications had been issued in exercise of the statutory powers conferred on the State Government by two different enactments known as "The Rajasthan Municipality Act, 1959 (since repealed) and the Rajasthan Municipalities Act, 2009. Apart from the declaration regarding the source of power for the issuance of these notifications to be authority conferred by the various provisions of the above mentioned two enactments, it appears from the tenor and scheme of the notifications that these notifications purport to classify municipalities only on the basis of population. The various other parameters to which regard is required to be had under Article 243Q(2) were not taken into consideration for the purpose of classification made under the above mentioned two notifications. Therefore, in our opinion, these two notifications cannot be treated as notifications contemplated under Article 243(Q)(2).

11. In the absence of any notification which meets the requirements of Article 243Q(2), the entire exercise undertaken by the State of Rajasthan in upgrading the Napasar village Gram Panchayat to be a Nagarpalika – [that is equivalent to Nagar Panchayat as mentioned in Article 243Q(1)(a)] is unconstitutional as it is inconsistent with the requirements of the Constitution under Article 243Q of the Constitution of India. Therefore, the initial notification dated 6.10.2008 itself is unsustainable. Unfortunately, this aspect has not been noticed by the High Court obviously because it was not brought to the notice of the High Court. The fact that a litigant before the court does not point out the relevant principles and provisions of law does not prevent the court

from examining the issues involved in the *lis,* more particularly, when the process which is the subject matter of litigation before the court is inconsistent with the mandate of the Constitution. It is a settled principle of law that courts are bound to take note of the constitution and the laws.[4]

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[4] ***S.C. Prashar & Another*** *v.* ***Vasantsen Dwarkadas & Others,*** AIR 1963 SC 1356
98. The Department in this case had relied on the amending Act of 1953 before the High Court. Though the High Court considered the case from the angle of the second proviso to sub-section 3 of Section 34 and also struck it down as unconstitutional it did not take into consideration Section 31. sub-sections (1), (2) and (3) of Section 34 of the principal Act (including **It was argued before us that we cannot take Section 31 into account if it was not referred to by the High Court. But a court is required to take judicial notice of statutes and if Section 31 of the Act 1953 said that** of course the amendments as made by the 1953 Act) shall apply and shall be deemed always to have applied to any assessment or re-assessment for any year ending before April 1, 1948, **it is the duty of court, and tribunals to read Section 34 in that manner and in no other.** In our opinion it was not open to the High Court to read Section 34 without Section 31 which contained a legislative construction and made Section 34 retrospective. This omission has vitiated the High Court's reasoning.

121. The questions as framed refer to the provisions of Section 34(3) of the Income Tax Act. They also mentioned two sets of dates, namely, the dates of the returns (7-3-1951 and 14-1-1952) and the date of the assessment (17-11-1953). Now we know that before the first day of April, 1952, there was a four-year limit for assessments or re-assessments under sub-section 3 of Section 34 but thereafter that limit was removed by the proviso added by Section 18 of the amending Act of 1953 and by Section 31 of the same Act assessments made before or after the commencement of the amending Act of 1953 (1-4-1-952) were declared valid if proceedings commenced after September 8, 1948. **The question as framed cannot be answered without reference to Section 31 and even if parties did not bring it to the notice of the High Court it was the duty of the High Court to look into the validating provisions of Section 31. If the High Court did not, we know of no rule or decision of this Court which prevents us from looking into a validating provision which existed at the time of the High Court's decision and was overlooked by it and which by itself furnished the answer to the question propounded for the opinion of the High Court.** No decision of this Court lays down that in determining the true answer to a question referred under Section 66, this Court is confined only to those sections to which the Tribunal or the High Court referred. Indeed, there are many cases which say the contrary: see *Kusumben Mahadevia* v. *CIT* [(1960) 3 SCR 417], *Zoraster & Co.* v. *CIT* [(1961) 1 SCR 210] and the recent case of *Scindia Steam Navigation Co.* v. *CIT* [(1961) 42 ITR 589]. We must, therefore, look into Section 31 to determine these appeals.

A 12. We, therefore, have no choice but to hold that the initial notification dated 6.10.2008 is unconstitutional. Therefore, the legality of various actions which followed that notification and the judgments of the High Court which examined the legality of those actions, in our view, need not be examined. All such subsequent action of the State which led to litigation suffer from a fundamental constitutional flaw. The B impugned judgments of the High Court rendered without examining the true scope and scheme of Part IXA of the Constitution and more particularly Article 243Q(2) are *per incuriam*.

13. Mr. A. Subba Rao, learned counsel appearing for the non-State respondents in SLP(C)No.11091/2017 submitted that in view of C the findings recorded by the High court that in the interregnum, lot of development (such as the establishment of industries, educational institutions and hospitals etc.) took place in the geographical area in question, and therefore, this Court may not interfere with the notification upgrading the area in question to a Nagarpalika as such interference D would have the effect of reducing the Nagarpalika into a Gram Panchayat once again. Confronted with the question as to what would be the prejudice the non-State respondents would suffer by such consequence, Mr. Rao submitted that there is a possibility of the industries being shifted away from the area in question. It is only an apprehension. We find no basis in the pleading for such apprehensions nor do we see any reason E which might lead to such a possibility. Therefore, the submission is rejected.

14. The appeals are disposed of accordingly.

Devika Gujral Appeals disposed of.