

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

WA.No. 1817 of 2015 ()

AGAINST THE JUDGMENT IN WP(C) 16149/2015 DATED 05-08-2015

APPELLANTS/RESPONDENT NOS.1 & 2 IN W.P.(C) :

- 1. STATE OF KERALA
REPRESENTED BY THE PRINCIPAL SECRETARY TO GOVERNMENT
DEPARTMENT OF LOCAL SELF GOVERNMENT
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM - 695001.**
- 2. THE DIRECTOR OF PANCHAYATS
THIRUVANANTHAPURAM-695001.**

BY SR. GOVT. PLEADER SRI. BOBBY JOHN PULIKKAPARAMBIL

RESPONDENTS/PETITIONERS & RESPONDENTS 3 TO 5 IN WP(C) :

- 1. T. MOIDEEN KOYA
CHAIRMAN, TAX APPEAL, CALICUT CORPORATION (COUNCILOR,
DIVISION NO.46, CHERUVANNUR, CALICUT CORPORATION
CALICUT.**
- 2. T.RAJANI
COUNCILOR, DIVISION NO.48
CALICUT CORPORATION, CALICUT.**
- 3. THE KOZHIKODE MUNICIPAL CORPORATION
KOZHIKODE-673001, REPRESENTED BY ITS SECRETARY.**
- 4. THE KERALA STATE ELECTION COMMISSION
THIRUVANANTHAPURAM-695001.**
- 5. THE KERALA STATE DELIMITATION COMMISSION
THIRUVANANTHAPURAM – 695 033.**

**R1 & R2 BY ADV. SRI.S.M.PRASANTH
R3 BY ADVS. SRI.P.V.SURENDRANATH, SC
SRI. B.S. SYAMANTHAK
R4 & R5 BY ADV. SRI.MURALI PURUSHOTHAMAN, SC**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 21-10-2015, ALONG
WITH WA. 1832/2015 & CONNECTED CASES, THE COURT ON 03-12-2015
DELIVERED THE FOLLOWING:**

ASHOK BHUSHAN, C.J.

“C.R.”

&

A.M. SHAFFIQUE, J.

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W.A.Nos. 1817, 1832, 1838, 1839,
1898, 1910, 1911 & 1913 of 2015

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Dated this, the 3rd day of December, 2015

J U D G M E N T

Shaffique, J.

WA Nos.1817, 1898, 1910, 1911 and 1913 of 2015 are filed by State of Kerala challenging the common judgment dated 5/8/2015 in WP(C) Nos.14218, 14244, 14808, 16149 and 14144/2015. WA Nos.1832, 1838 and 1839/15 are also filed challenging the very same common judgment. WA No.1832/15 is filed by the additional 5th respondent in WP(C) No.14808/2015. WA No.1838/2015 is filed by additional respondents 5 and 6 in WP (C) No.14144/2015 and WA No.1839/15 is filed by the additional 3rd respondent in WPC No. 14244/2015.

2. Since the questions involved in all these writ appeals are the same and since it arises from a common judgment, all these appeals are heard and decided together.

3. The contentions urged on behalf of the writ petitioners, who are the respondents in these appeals are common in nature. The challenge in the writ petitions are with reference to delinking of certain wards from Thiruvananthapuram Corporation as well as Kozhikode Corporation and formation of such wards as Municipalities.

4. In WA No.1898/2015, which arises from WP(C) No.14808/2015, the petitioner sought to quash Ext.P12 notification issued under Article 243Q(2) of the Constitution of India and also the notification under Section 4 of the Kerala Municipality Act, 1994 (hereinafter referred to as the Act) by which Beypore, Elathur and Cheruvannoor-Nallalam Grama Panchayats were declared as smaller urban area, delinking the same from Kozhikode City Corporation and thereby making such smaller urban areas into Municipalities. It is inter alia contended that it was after conducting a detailed study that the aforesaid Grama Panchayats were notified as larger urban area in 2010. Now that by virtue of the impugned notifications, the said Panchayats had been degraded as smaller urban area and this according to the petitioners, is without conducting any proper

evaluation in terms with the provisions under Art.243Q(2) of the Constitution of India and that no power is vested in the Government to convert a ward coming within a Municipal Corporation to that of Municipality, which covers only smaller urban area.

5. In WP(C) Nos.14218, 14244 and 16149/2015, identical contentions are raised.

6. In WP(C) No.14144/2015, the notification under challenge is with reference to delinking of certain wards from Thiruvananthapuram Corporation and formation of Kazhakoottam Municipality.

7. In the notification dated 30/4/2015 issued under Art.243Q(2) of the Constitution of India, it is stated that ward Nos.1, 2, 3, 4, 5 and 75 of Kozhikode Municipal Corporation, Ward Nos.1, 2, 3, 4, 8, 9, 10, 11, 97, 98, 99 and 100 of Thiruvananthapuram Municipal Corporation, Ward Nos.40, 41, 42, 43, 44, 45 and 46 of Kozhikode Municipal Corporation and Ward Nos.47, 48, 49, 50, 51, 52 and 53 of Kozhikode Municipal Corporation are declared to be smaller urban areas. It is also mentioned that such notification had been issued in terms of

Art.243P(d) and 243Q(2) of the Constitution of India having regard to the population of the area, the density of population, the revenue generated for local administration, the percentage of employment in non agricultural activities and the economic importance. The State and the additional respondents filed counter affidavits before the learned Single Judge. In the counter affidavit filed on behalf of the State of Kerala, it was contended that constitution of 3 new Municipalities in Kozhikode District and one Municipality at Thiruvananthapuram was a long standing public demand. There were various representations received from the general public. Government constituted a Committee comprising of the Director of Urban Affairs, State Performance Audit Officer, Chief Town Planner and the Director of Panchayats. They submitted a report indicating the feasibility of forming new Municipalities. It is by virtue of Government order dated 10/6/2014 that the Committee has been formed. Guidelines were also specified based on which the Committee had to submit a report. The said guidelines is produced as Ext.R1(b) dated 27/11/2014. It is stated that the Committee constituted by the Government conducted a detailed study taking into account all

the parameters and submitted a final report on 29/12/2014 which is produced as Ext.R1(c). It is further stated that the Committee opined that certain areas which were added to the Corporation earlier were not getting the required development on a time bound basis and the general public is put to severe inconvenience and difficulties. That apart, it is submitted that Cheruvannur-Nallalalam, Beypore and Elathur were added to the Corporation in the year 2010. Those are areas which are comparatively under developed. Therefore, the Committee recommended that it would be better to form a new Municipality with respect to those areas which would give more impetus for development in a planned and balanced way.

8. In regard to Thiruvananthapuram Corporation also, the Committee opined that carving out Kazhakoottam, Chanthavila, Kattayikonam, Sreekaryam, Chellamangalam, Chempazhanthi, Powdikonam, Njandooekonam, Kulathur, Attipra, Poundkadavu and Pallithura wards from Thiruvananthapuram Corporation and forming a new Municipality would be beneficial for the development of the IT Sector in the area and by giving more impetus to the IT industry, a balanced development can be

implemented in the new Municipality. The Government took a contention that, thereafter objections were called for from the general public by issuing public notice, several objections were received and they were heard in person from 9th March, 2015 to 16th March, 2015 at Thiruvananthapuram. It is after considering the objections from general public and on the basis of the report submitted by the Expert Committee that the Government as per order dated 30/4/2015 issued the notification. Elathur Municipality was formed by excluding Ward Nos.1 to 5 and 75 from Kozhikode Corporation and annexing Thalakkulathoor Grama Panchayat. Cheruvannur-Nallalam Municipality was formed by excluding Ward Nos. 40 to 46 from Kozhikode Corporation and Beypore Municipality by excluding Ward Nos.47 to 53 from Kozhikode Municipal Corporation. In order to constitute Kazhakoottam Municipality, erstwhile Attipra, Kazhakoottam and Sreekaryam Grama Panchayats were excluded from Thiruvananthapuram Municipal Corporation. It is stated that these areas were Grama Panchayats and were annexed to the Corporation during 2010.

9. The State also contended that the notifications had been issued after complying with all the required statutory formalities

and there is no legal bar in converting a ward coming under Municipal Corporation area into a Municipal Council.

10. The learned Single Judge having considered the matter in detail allowed the writ petitions basically on two grounds. One is that, there is no provision in the Constitution of India as well as under the Act by which an area of a Municipal Corporation can be delinked and converted into a Municipality. Reliance is also placed by the learned Single Judge on the judgment in ***Ravindran v. State of Kerala*** (2006 (1) KLT 427). Secondly, it was observed that there is no material available to indicate that a proper study had been conducted in the matter before declaring an area covered by Municipal Corporation as a Municipality. It is observed that there is no relevant finding as to the density of population, income generated, percentage of employment in non agricultural activities or the economic importance in order to declare such areas which were notified as larger urban areas to that of smaller urban areas.

11. Heard the learned Senior Government Pleader Sri.Bobby John appearing on behalf of the State, Sri.George Poonthottam, Sri.A.Sudhi Vasudevan and Sri.C.P.Mohammed Nias

appearing on behalf of the other appellants, Senior counsel Sri.C.P.Sudhakaraprasad, senior counsel Sri.Nandakumara Menon, senior counsel Sri.P.V.Surendranath, and Sri.P.K.Vijayamohanan, learned counsel appearing on behalf of the writ petitioners/respondents, Sri.Adarsh Kumar appearing for the respondents who supports the appellants and also Sri.Murali Purushothaman appearing on behalf of the State Election Commission.

12. The arguments on behalf of the State and the learned counsel for appellants and respondents supporting the State are as under;

(i) That the writ petitions were not maintainable and though such a contention had been urged, the same was not considered by the learned Single Judge.

(ii) There is no bar either under the Constitution or under the Act which precludes conversion of a 'larger urban area' into a 'smaller urban area'. **Ravindran's case** relied upon by the learned Single Judge has no application, as in that case the learned Judge was considering conversion of a ward in a Municipal area coming under Chapter IXA to a Panchayat coming under Part

IX of the Constitution.

(iii) Article 243P(d) of the Constitution of India defines Municipal area in which there is no distinction between a Corporation and Municipality. Municipality is defined under Art.243P(e) as an institution of self-government constituted under Art.234Q. Though there is a distinction between a Municipal Council to be formed for a smaller urban area and a Municipal Corporation for a larger urban area as can be seen from Art.243Q (b) and (c), both the Municipal Council as well as the Corporation come under Municipal area as well as Municipality as defined under Art.243P. Further, Art.243Q(2) defines a smaller urban area or a larger urban area as meaning such area as the Governor may specify by public notification taking into account various parameters. Therefore, once such exercise has been conducted by the Governor or on behalf of the Governor by the State, there is no legal impediment in declaring a larger urban area as a smaller urban area taking into account the various parameters specified therein.

(iv) That after the notification is issued under Art.243Q(2), Government had issued the notification under Section 4(2)(d) and

(e) of the Act, which permits uniting of two or more Municipal areas.

(v) Sections 4(2)(f)(g) and (h) relied upon by the learned Single Judge have no application to the factual circumstances involved in the matter.

(vi) The objectors were properly heard in the matter and their objections were considered in accordance with law, prior to issuing notification under section 4 of the Act.

13. On the other hand, the main contentions urged on behalf of the writ petitioners are as under;

(i) There is no provision in the Constitution of India and under the Act permitting a ward or wards which had originally been notified as a Municipal Corporation to be carved out and converted as Municipality or as a Municipal Council.

(ii) Any notification in terms of Section 4(2) has to be preceded with a notification under Art.243Q(2). The materials placed on record do not indicate that any of the parameters coming under Art.243Q(2) has been factually evaluated before issuing the notification.

(iii) That a detailed study had been conducted by the

Government while converting these wards as Municipal Corporation during 2010 and the documents produced clearly indicate that a detailed study in terms with the mandate under Art.243Q(2) has been conducted. Once the Government had after conducting a detailed study declared a smaller urban area as a larger urban area, there cannot be a reconversion of such larger urban area to a smaller urban area. While delinking such wards from the Thiruvananthapuram Corporation as well as from Kozhikode Corporation, no such study worth mentioning has been done.

(iv) That the report now produced before this Court as the opinion expressed by the Committee does not disclose any material at all which can be considered as a proper study in terms of Art.243Q(2) of the Constitution of India, and it is well within the power of this Court to consider such facts by exercising the power of judicial review.

(v) **Ravindran's case** (supra) applies to the factual circumstances involved in the present case as there is no provision either in the Constitution of India as well as under Section 4 of the Act to degrade a ward coming within a Municipal

Corporation to that of a Municipal council.

14. Having regard to the aforesaid arguments raised on behalf of either side, following issues arise for consideration in the matter.

(i) Whether the writ petitions ought to have dismissed as not maintainable?

(ii) Whether the notifications issued under Art.243Q(2) and Section 4 of the Act, to convert a larger urban area as a smaller urban area are legally permissible?

(iii) If so, whether there is any material to indicate that a proper study in terms with Art.243Q(2) read with Section 4 of the Act has been complied?

15. Sri.George Poonthottam, learned counsel relied upon the judgment of the Supreme Court in ***Ayaubkhan Noorkhan Pathan v. State of Maharashtra and others*** [(2013) 4 SCC 465] to contend that the writ petitioners had no legal right to challenge the proceedings of the Government as they had not ventilated any grievance to show that they have suffered any legal injury. That was a case in which Supreme Court was considering a Public Interest Litigation. The Supreme Court also

considered as to who would be a person aggrieved. It is held at para 9 and 10, which read as under;

"9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the authority/court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order, etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can, of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that the relief prayed for must be one to enforce a legal right. In fact, the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant

himself, who complains of infraction of such right and approaches the Court for relief as regards the same. [Vide State of Orissa v. Madan Gopal Rungta, Saghir Ahmad v. State of U.P., Calcutta Gas Co. (Proprietary) Ltd. v. State of W.B., Rajendra Singh v. State of M.P. and Tamilnad Mercantile Bank Shareholders Welfare Assn. (2) v. S.C. Sekar.]

10. A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must, therefore, necessarily be one whose right or interest has been adversely affected or jeopardised. (Vide Shanti Kumar R. Canji v. Home Insurance Co. of New York and State of Rajasthan v. Union of India.)"

There is no doubt regarding the proposition of law, but we do not think that the writ petitions can be dismissed on the ground that no legal injury has been suffered by the petitioners. Petitioners are persons who have objected to the notification by which there is conversion of certain wards in a Municipal Corporation to Municipality. They are challenging the vires of the notifications on legal and factual grounds, making allegations that their

fundamental and legal rights are infringed by the said action. Hence we are of the view that the writ petitions are maintainable and the learned single Judge was justified in considering the writ petitions on merits.

16. Now, we shall consider whether the Governor while exercising power under 243Q(2) can issue a notification treating an existing larger urban area as a smaller urban area. Art.243P and 243Q of the Constitution reads as under;

“243-P. Definitions.—In this Part, unless the context otherwise requires,—

(a) “Committee” means a Committee constituted under Article 243-S;

(b) “district” means a district in a State;

(c) “Metropolitan area” means an area having a population of ten lakhs or more, comprised in one or more districts and consisting of two or more Municipalities or Panchayats or other contiguous areas, specified by the Governor by public notification to be a Metropolitan area for the purposes of this Part;

(d) “Municipal area” means the territorial area of a Municipality as is notified by the Governor;

(e) “Municipality” means an institution of self-government constituted under Article 243-Q;

(f) “Panchayat” means a Panchayat constituted under Article 243-B;

(g) "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.

243-Q. 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."

In fact, the learned Single Judge referred to **Ravindran's case** for

taking a view that such a conversion is not possible. First we shall consider whether **Ravindran's case** (supra) has application to the factual circumstances involved in the matter. Apparently in **Ravindran** (supra), this Court was considering conversion of a Municipal area into a Panchayat area. It was observed that there is no constitutional mandate to convert a Municipal area coming under Chapter IXA to that of a Panchayat coming under Chapter IX. It was held that Art.243G gives no constitutional yardstick for the Governor to ascertain and specify a Village whereas Art.243Q (2) provides sufficient yardsticks to identify transitional area, smaller urban area and larger urban area. Taking into account the said factual situation, it was observed that there cannot be a transition of the constitutionally created smaller urban area, larger urban area and a transitional area to be a village to fall into Part IX of the Constitution of India and such an exercise cannot be done under Part IXA of the Constitution. Paras 14 and 15 are relevant, which read as under;

"14. While Art.243(g) gives no constitutional yardstick for the Governor to ascertain and specify a village, Art.243Q (2) provides yardsticks to identify transitional area, smaller urban area and larger urban area. It has been held by the

Apex Court in State of U.P. v. Pradhan Singh Kshettra Samiti, (1995) Supp (2) SCC 305 that in specifying villages for the purpose of Part IX, the Governor is not bound by any particular yardsticks. Art.243Q(2) provides the yardsticks for the three types of areas mentioned in Art.243Q(2) and the municipal area as defined in Art.243P (d) is the territorial area of a Municipality as is notified by the Governor. These provisions would show that there cannot be a transition of the constitutionally created smaller urban area, larger urban area and a transitional area, to be a village, to fall into Part IX of the Constitution and such an exercise cannot be done under Part IXA of the Constitution. This is because the Municipality, in relation to a transitional area or a smaller urban area, or a larger urban area, on its coming into existence, becomes a constitutional institution and cannot be abolished by an act of the Legislature without specific authorisation in that regard in the Constitution. All that could be done, if a situation demands, is to exclude any particular urban area from a Municipality to be made part of another Municipality or merger of municipalities or creation of a new municipality, either by the area being excluded or by merging such excluded areas. However, there cannot be a transition of an urban area as a rural area. I may at once notice that unlike the Municipalities Act, 1960, which had provided for the abolition of Municipalities, there is no such provision in the Municipality Act, 1994. Such provisions

would be contrary to the constitutional provisions in Part IXA and hence, obviously, not made in the 1994 Act. However, S.4(6) provides for handling the situation, owing to such abolition. The said provision is superfluous.

15. The aforesaid view that I take is also fortified by the nature of S.4 of the Municipality Act, 1994 which provides for conversion of Village Panchayat into a Town Panchayat or a Municipal Council, for conversion of a Town Panchayat into a Municipal Council and for conversion of a Municipal Council into a Municipal Corporation. This shows that it had never been in the contemplation of even the State Legislature while making the Municipality Act, 1994 that a Municipality could be converted to a Village Panchayat. This was because it was wholly impermissible in the constitutional context in which Part IX and Part IXA have been separately provided, to govern two types of local self-government institutions.”

Taking cue from Section 4 of the Act, it was held that it was not the intention of the State Legislature, that a Municipality should be converted to a Village Panchayat. Having regard to factual circumstances considered in the said case, we are of the view that **Ravindran's case** (supra) cannot be a law that has been laid down to answer the issues raised in the present case.

17. There is no dispute about the fact that a Municipal area

is defined as the territorial area of a Municipality as is notified by the Governor. The notification apparently is to be issued in terms of Art.243Q(2). 243Q(1) indicates that there shall be constituted in every State a Nagar Panchayat for a transitional area, a Municipal Council for a smaller urban area and a Municipal Corporation for a larger urban area. What is the meaning of transitional area, smaller urban area or larger urban area is given under Art.243(2). It means such area as the Governor may specify by public notification, of course, having regard to the various parameters specified therein which includes population of the area, density of the population, revenue generated, percentage of employment in non agricultural activities, economic importance etc. The question is, can it be said that these parameters are to remain static or is it that Governor while exercising the Constitutional mandate, on the advice of Council of Ministers decide on whether the particular area coming within the Municipal area has ceased to be a larger urban area or has ceased to be a smaller urban area or that a transitional area has become smaller urban area or a larger urban area and vice versa. These are all factual matters which may arise for consideration before the

Governor, while exercising the power of issuing notification in terms of Art.243Q(2). As already stated, Municipal area is defined as an area of a Municipality as notified by the Governor. If such Municipal area is a smaller urban area, it will become a Municipal Council and if it is larger urban area, it becomes a Municipal Corporation, if it is a transitional area, it becomes a Nagar Panchayat. Therefore, it all depends on the question of a proper consideration of the available materials and the Governor forming an opinion that an area could be either a Nagar Panchayat, a Municipal Council or a Municipal Corporation. In ***Ravindran's case*** (supra), the learned Single Judge found that as far as Panchayats are concerned, Governor has no role to play in the matter. Here, the situation is different. Municipality comes under Part IXA of the Constitution and the Governor is empowered to specify by notification that an area is either transitional, smaller urban area or a larger urban area. Therefore, taking into consideration the fact that there is no specific mandate under Art.243P or 243Q which restricts the power of the Governor to specify by notification a particular area as either transitional area, or a smaller urban area or a larger urban area, we do not think

that the said finding of the learned Single Judge can be sustained. Sri.Mohammed Nias, learned counsel also relied upon the judgment of the Supreme Court in **Vipulbhai M.Chaudhary v. Gujarat Cooperative Milk Marketing Federation Ltd.** [(2015) 8 SCC 1] wherein the Supreme Court while considering the amendment to the Constitution by incorporating Part IX-B, held at para 25 and 26 as under:

"25. Silence in the Constitution and abeyance as well has been dealt extensively by Michael Foley in his celebrated work The Silence of Constitutions. To quote from the Preface:

"Abeyances refer to those constitutional gaps which remain vacuous for positive and constructive purposes. They are not, in any sense, truces between two or more defined positions, but rather a set of implicit agreements to collude in keeping fundamental questions of political authority in a state of irresolution. Abeyances are, in effect, compulsive hedges against the possibility of that which is unresolved being exploited and given meanings almost guaranteed to generate profound division and disillusionment. Abeyances are important, therefore, because of their capacity to deter the formation of conflicting positions in just those areas where the potential for conflict is most acute. So central are these abeyances, together with the social

temperament required to sustain them, that when they become the subject of heightened interest and subsequent conflict, they are not merely accompanied by an intense constitutional crisis, they are themselves the essence of that crisis."

In Part II, Chapter Four, the author has also dealt with the constitutional gaps and the arts of prerogative. To the extent relevant, it reads as follows (p. 82):

"Gaps in a constitution should not be seen as simply empty space. They amount to a substantial plenum of strategic content and meaning vital to the preservation of a constitution. Such interstices accommodate the abeyances within which the sleeping giants of potentially acute political conflict are communally maintained in slumber. Despite the absence of any documentary or material form, these abeyances are real, and are an integral part of any constitution. What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a constitution as its more tangible and codified components."

26. Where the Constitution has conceived a particular structure on certain institutions, the legislative bodies are bound to mould the statutes accordingly. Despite the constitutional mandate, if the legislative body concerned does not carry out the required structural changes in the statutes, then, it is the duty of the court to provide the statute with the meaning as per the Constitution. "[T]he

job of the Supreme Court is not to expound the meaning of the Constitution but to provide it with meaning.”^Z The reference obviously is to the United States Supreme Court. As a general rule of interpretation, no doubt, nothing is to be added to or taken from a statute. However, when there are adequate grounds to justify an inference, it is the bounden duty of the court to do so.

“... It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.”

According to Lord Mersey in Thompson (Pauper) v. Goold and Co.: (AC p. 420)

“... It is a strong thing to read into an Act of Parliament, words which are not there, and in the absence of clear necessity it is a wrong thing to do.”

In the case of cooperative societies, after the Ninety-seventh Amendment, it has become a clear or strong necessity to do the strong thing of reading into the legislation, the constitutional mandate of the cooperative societies to be governed as democratic institutions.”

Sri.Adarsh Kumar, learned counsel relied upon ***Bhanumati and others v. State of Uttar Pradesh*** [(2010) 12 SCC 1], wherein the Supreme Court had occasion to consider the constitutional

doctrine of silence. Reference is made to para 49 to 51, which read as under;

"49. Apart from the aforesaid reasons, the arguments by the appellants cannot be accepted in view of a very well-known constitutional doctrine, namely, the constitutional doctrine of silence. Michael Foley in his treatise on The Silence of Constitutions (Routledge, London and New York) has argued that in a Constitution "abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the Constitution that they evoke, rather than the content or substance of their strictures". (P. 10)

50. The learned author elaborated this concept further by saying, "Despite the absence of any documentary or material form, these abeyances are real and are an integral part of any Constitution. What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a Constitution as its more tangible and codified components." (P. 82)

51. Many issues in our constitutional jurisprudence evolved out of this doctrine of silence. The basic structure doctrine vis-à-vis Article 368 of the Constitution emerged out of this concept of silence in the Constitution. A Constitution which professes to be democratic and republican in character and which brings about a revolutionary change

by the Seventy-third Constitutional Amendment by making detailed provision for democratic decentralisation and self-government on the principle of grass-root democracy cannot be interpreted to exclude the provision of no-confidence motion in respect of the office of the Chairperson of the panchayat just because of its silence on that aspect."

The law in this regard is well settled. Despite the constitutional mandate, if the legislative body concerned does not carry out the required structural changes in the statutes, it is the duty of the Court to provide the statute with the meaning as per the Constitution. There is no prohibition in the Constitution which prevents the Governor to issue a notification treating a particular ward as a transitional area, smaller urban area or larger urban area or treating a larger urban area as a smaller urban area.

18. Now the question is whether there is any prohibition under Section 4 of the Act to convert a ward forming part of a Municipal Corporation to that of a Municipal Council. Section 4(1) and (2) read as under;

"4 . Constitution, alteration and conversion of Municipalities.-

(1) The Government shall, by notification in the

Gazette, constitute with effect from such date as specified in the notification,-

- (a) a "Town Panchayat" for a transitional area;*
- (b) a "Municipal Council" for a smaller urban area;*
- and*
- (c) a "Municipal Corporation" for a larger urban area, and specify the names of such Municipalities.*

(2) The Government may, by notification,--

- (a) exclude any municipal area from the operation of this act; or*
- (b) exclude from a municipal area comprised therein and defined in the notification; or*
- (c) divide any municipal area into two or more municipal areas; or*
- (d) unite two or more municipal areas; or*
- (e) unite the territorial area of a Panchayat geographically lying adjacent to a Municipal area, with the Municipality; or*
- (f) convert a village Panchayat into a Town Panchayat or a Municipal Council; or*
- (g) convert a Town Panchayat into a Municipal Council; or*
- (h) convert a Municipal Council into a Municipal Corporation:*

Provided that, before issuing such a notification the requirements under Art. 243Q and sub-s. (1) shall

be fulfilled and the suggestions and opinions of the Village Panchayat or Town Panchayat or Municipal Council or Municipal Corporation concerned, shall be considered.

Provided further that any notification issued under this sub-section shall not be brought into force except in such a way as to coincide with the expiry of the term of the existing Municipal Council or Village Panchayat in that territorial area."

As per Sec.4(1), the Government is entitled to issue a notification treating a transitional area as Town Panchayat, a Municipal council for a smaller urban area and a Municipal Corporation for a larger urban area. To enable such constitution of either Town Panchayat, Municipal Council or Municipal Corporation, sub section (2) of Section 4 provides that the Government may, by notification, divide any Municipal area into two or more Municipal areas, unite two or more Municipal areas etc., The argument of the appellants is that when a Municipal area as defined under Art.243P(d) can be divided into two or more Municipal areas, the act of carving out certain wards from the Municipal Corporation only amounts to division of a Municipal area into two or more Municipal areas. This argument, according to us, is sustainable on

account of the definition of Municipal area. A reference to the notification would show that certain wards from Kozhikode Corporation and Thiruvananthapuram Corporation which is a Municipal area is carved out and formed into separate Municipal areas and formed as a Municipal Council. The legislature was very conscious in using the words in Section 4(2)(c) as Municipal area and not either as Municipal council or Municipal Corporation. The learned Government Pleader placed reliance on the judgment in **Cantonment Board, Secunderabad v. G.Venketram Reddy** (1995) 4 SCC 561] wherein the Supreme Court while considering the right of the Cantonment Board of Secunderabad to levy and collect octroi on certain items, while interpreting Section 60 of the Cantonment Act, 1924, held that the word 'Municipality' has a very wide connotation and after referring to Art.243Q, it is held at para 3 as under;

"3. Section 60 of the Act reads as under:

"60. General power of taxation.— (1) The Board may, with the previous sanction of the Central Government, impose in any cantonment any tax which under any enactment for the time being in force, may be imposed in any municipality in the State wherein such cantonment is

situated."

A very perusal of it would indicate that this is a general power of taxation which is enjoyed by the Board which can be exercised with the previous sanction of the Central Government. There was no dispute that the octroi was levied by the Cantonment Board after obtaining sanction of the Central Government. But what has been found is that the ambit of the power being restricted to only those taxes which for the time being in force could be imposed by any Municipality in the State wherein such cantonment was situated, the appellant was precluded from imposing octroi as no such octroi was being levied by any Municipality in the State. How should the expression "Municipality in the State" be understood? The word 'Municipality' has been defined in Webster's New Dictionary as "a town, city or borough which has local self-government". In Black's Law Dictionary it is extended to "legally incorporated or duly authorised association of inhabitants of limited area for local governmental or other public purposes. A body politic created by the incorporation of the people of a prescribed locality invested with subordinate powers of legislation to assist in the Civil Government of the State and to regulate and administer local and internal affairs of the community". This word thus has a wide connotation. The Constitution also understands it in a broad sense. Chapter (IX-A) deals with the Municipality. Clause (e) of Article 243-P defines Municipality to mean "an institution of self-

government constituted under Article 243-Q". Article 243-Q reads as under:

"243-Q. 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...."

This definition indicates that a Corporation or a Municipal Council or Nagar Panchayat is constituted on the strength of population and the area or place where it is constituted namely rural or urban. But all the three are deemed to be a Municipality. A Municipal Corporation with a larger area is as much a Municipality as a council with a smaller area. The expression "Municipality in the State" thus has to be read in a broad and larger sense. The Hyderabad Corporation which came into existence in 1956 is as much a municipality as any other Municipality in the State. Since the Corporation is imposing octroi the Board could in exercise of power under Section 60 levy octroi."

19. The contention urged and relied upon by the learned Single Judge is with reference to clauses (f), (g) and (h) of Section 4(2) of the Act, which permits conversion of a Village Panchayat

into a Town Panchayat or a Municipal Council, conversion of a Town Panchayat into a Municipal Council or conversion of a Municipal Council to a Municipal Corporation. Under Art.243Q(1) it is stated that there shall be constituted in every State a Municipal Council for a smaller urban area and a Municipal Corporation for a larger urban area and the smaller urban area or larger urban area has to be specified by the Governor by notification under Art.243Q(2) of the Constitution. In fact, in the instant case, there is no conversion of a Village Panchayat to a Town Panchayat or a Town Panchayat to a Municipal Council or a Municipal Council into a Municipal Corporation and there is no vice versa effect. The notification presently issued is based on a notification issued by the Governor in terms of Art.243Q(2), which apparently permits and as we have already held, conversion of a larger urban area into a smaller urban area. Once such a notification is issued by the Governor, it is well within the power of the Government to issue a notification to form a Municipal Council for a smaller urban area and the power is also available to divide any Municipal area into two or more Municipal areas or to unite two or more Municipal areas. In other words, clauses (f), (g) and (h) do not

apply to the facts of the present case. The proviso to Section 4(2) further clarifies the situation which indicates that before issuing such a notification, the requirements of Art.243Q and sub section (1) shall be fulfilled which apparently means that there has to be a notification by the Governor under Art.243Q(2) declaring a particular area as a transitional area, smaller urban area or larger urban area and the Government notification which creates a Municipal Council for a smaller urban area as provided under sub section (1) of Section 4. Therefore, we are of the view that the State Government is enjoined with the power to create a Municipality or a Municipal Council for a smaller urban area which is declared to be so by the Governor in terms of Art.243Q(2).

20. The next contention is regarding the consideration of the suggestions and opinion of the concerned objectors. Though it is contended that their objections were not heard in the matter, a report produced in the case indicates that opportunities were granted to the public at large for raising objections and there is no material to indicate that the objectors were not heard by the Government. Therefore, it cannot be contended that no opportunity was given for a hearing in the matter.

21. The next issue, is regarding the validity of the enquiry conducted in the matter, before issuing notification in terms of Art.243Q(2). The learned Single Judge observed that there is no material evidence to indicate that such factual circumstances had been considered while issuing the notification. It is argued by the learned Government Pleader as well as the learned counsel for the appellants that the materials available on record clearly indicates a proper consideration of all the parameters specified therein in order to arrive at a conclusion that the larger urban area could be converted as a smaller urban area.

22. The learned Single Judge having gone through the available records also observed at paragraph 35 as under:

“35. The impugned orders proceed on the ground that the Governor of Kerala having regard to the population of the area, the density of population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities and the economic importance was pleased to notify certain areas as smaller urban area. The above includes Panchayat area, Municipal area as well as Corporation area. There is no relevant finding as to the density of population, income generated,

percentage of employment in non-agricultural activities or the economic importance. The classification of Panchayat area, Municipal area and Corporation area as smaller urban area by a common notification itself reflects the non-application of mind. The same is done only to facilitate the constitution of Municipalities by taking away the Panchayat areas, areas of existing Municipalities and of the Municipal Corporations. It cannot be said that due regard was given to the various factors such as population, density of population, income/expenditure, employment in non-agricultural activities and economic importance."

23. As already indicated by us, the power to form an opinion that a larger urban area to a smaller urban area can be exercised if sufficient facts are available on record. Sri. Sudhi Vasudevan, learned counsel relied upon judgment of the Privy Council in ***Ryots of Garabandho v. Zamindar of Parlakimedi*** (AIR (30) 1943 Privy Council 164) wherein the Privy Council while considering the requirement to "have regard to" the provisions, it is held that it has no more definite or technical meaning than that of ordinary usage and it only means that it requires that those provisions must be taken into consideration. Another judgment

relied upon is **Mohammad Sagiruddin v. The District Mechanical Engineer, N.E.F.Railways, Kathihar and others** (AIR 1966 Patna 184). In that case also, the Division Bench considered the words “have regard to” appearing in a statutory provision and it is held that it does not mean that there must be very strict compliance with regard to the statutory provision but that the provision should be taken for guidance only.

24. Sri. Mohammed Nias, learned counsel relied upon the judgment of a learned Single Judge of this Court in **Sreekala v. State of Kerala** (2010 (3) KLT 548). In the said case, the question was whether there was any restriction under the Constitution to merge the Village Panchayat to a Municipal Corporation. It was held that there is no restriction under the Constitution of India to merge a Village Panchayat to a Municipal Corporation.

25. Sri.Adarsh Kumar, learned counsel placed reliance on the judgment in **State of Punjab v. Tehal Singh** [(2002) 2 SCC 7] to contend that the scope of judicial indulgence in notification issued by the Government for constitutional and establishment of grama sabhas is very limited. He placed reliance on para 7, 8, 9

and 10, which read as under;

"7. The principles of law that emerge from the aforesaid decisions are: (1) where provisions of a statute provide for the legislative activity i.e. making of a legislative instrument or promulgation of general rule of conduct or a declaration by a notification by the Government that certain place or area shall be part of a Gram Sabha and on issue of such a declaration certain other statutory provisions come into action forthwith which provide for certain consequences; (2) where the power to be exercised by the Government under provisions of a statute does not concern with the interest of an individual and it relates to public in general or concerns with a general direction of a general character and not directed against an individual or to a particular situation; and (3) lay down future course of actions, the same is generally held to be legislative in character.

8. Viewed in the light of the statement of law stated hereinbefore, we find that the provisions of Sections 3 and 4 of the Act which provide for declaring territorial area of a Gram Sabha and establishing a Gram Sabha for that area do not concern with the interest of an individual citizen or a particular resident of that area. Declaration contemplated under Section 3 of the Act relates to an area inhabited by the residents which is sought to be excluded or included in a Gram Sabha. The declaration under Section 3 of the Act by the Government is general in character and not directed

to a particular resident of that area. Further, the declarations so made under Sections 3 and 4 of the Act do not operate for the past transactions but for future situations. Under the aforesaid situation, when declarations by issue of notifications by the Government are made under Sections 3 and 4 of the Act respectively, determining the territorial area of a Gram Sabha and establishing a Gram Sabha for that area, such declarations become operative at once. Once declarations are made under Sections 3 and 4 of the Act respectively and thereafter a Gram Panchayat is constituted under Section 10 of the Act, the entire remaining provisions of the Act become operative. On such declarations by a notification in the Gazette, the Gram Sabha, a body corporate comes into being with a number of powers and functions conferred upon it under the Act. As soon as a Gram Sabha is established and Gram Panchayat is constituted, they are entrusted with many general functions viz. construction, repair, and maintenance of community assets, agriculture including agriculture extension, animal husbandry, dairy and poultry, fisheries, social and farm forestry, minor forest produce, fuel and fodder, khadi, village and cottage industries, rural housing, rural electrification including distribution of electricity, non-conventional energy source, poverty alleviation programme, education including primary and secondary schools, adult and non-formal education, promotion of adult literacy, cultural activities,

fairs and festivals, public health and family welfare, women and child development, social welfare etc. Further, Gram Sabhas and Gram Panchayats have been conferred numerous other powers and duties enumerated in Section 35 of the Act. Besides that, the Gram Panchayat is entrusted with the judicial functions which are civil and criminal in nature. The power exercisable under Sections 3 and 4 of the Act respectively by the Government was, therefore, not an exercise of a judicial or quasi-judicial function where the very nature of function involves the principles of natural justice or in any case of an administrative function affecting the rights of an individual. We are, therefore, of the view that on making of declaration under Section 3 of the Act determining the territorial area of a Gram Sabha and thereafter establishing a Gram Sabha for that area is an act legislative in character in the context of the provisions of the Act.

9. Once it is found that the power exercisable under Sections 3 and 4 of the Act respectively is legislative in character, the question that arises is whether the State Government, while exercising that power, the rule of natural justice is required to be observed. It is almost settled law that an act legislative in character — primary or subordinate, is not subjected to rule of natural justice. In case of legislative act of legislature, no question of application of rule of natural justice arises. However, in case of subordinate legislation, the legislature may provide

for observance of principles of natural justice or provide for hearing to the residents of the area before making any declaration in regard to the territorial area of a Gram Sabha and also before establishing a Gram Sabha for that area. We have come across many enactments where an opportunity of hearing has been provided for before any area is excluded from one Gram Sabha and included in different Gram Sabhas or a local authority. However, it depends upon the legislative wisdom and the provisions of an enactment. Where the legislature has provided for giving an opportunity of hearing before excluding an area from a Gram Sabha and including it in another local authority or body, an opportunity of hearing is sine qua non and failure to give such an opportunity of hearing to the residents would render the declaration invalid. But where the legislature in its wisdom has not chosen to provide for any opportunity of hearing or observance of principles of natural justice before issue of a declaration either under Section 3 or Section 4 of the Act, the residents of the area cannot insist for giving an opportunity of hearing before the area where they are residing is included in another Gram Sabha or local authority. In Rameshchandra Kachardas Porwal v. State of Maharashtra this Court held as thus: (SCC p. 741, para 17)

"In one of the Bihar cases it was further submitted that when a market yard was disestablished at one place and established at another place, it was the duty of the

authority concerned to invite and hear objections. Failure to do so was a violation of the principles of natural justice and the notification disestablishing the market yard at one place and establishing it elsewhere was therefore, bad. It was said that even as there was express provision for inviting and hearing objections before a 'market area' was declared under the Act, so should objections be invited and heard before a 'market yard' was established at any particular place. The principles of natural justice demanded it. We are unable to agree. We are here not concerned with the exercise of a judicial or quasi-judicial function where the very nature of the function involves the application of the rules of natural justice, or of an administrative function affecting the rights of persons, wherefore, a duty to act fairly. We are concerned with legislative activity; we are concerned with the making of a legislative instrument, the declaration by notification of the Government that a certain place shall be a principal market yard for a market area, upon which declaration certain statutory provisions at once spring into action and certain consequences prescribed by statute follow forthwith. The making of the declaration, in the context, is certainly an act legislative in character and does not oblige the observance of the rules of natural justice."

10. In the present case, the provisions of the Act do not provide for any opportunity of hearing to the residents before any area falling under a particular Gram Sabha is

excluded and included in another Gram Sabha. In the absence of such a provision, the residents of that area which has been excluded and included in a different Gram Sabha cannot make a complaint regarding denial of opportunity of hearing before issue of declarations under Sections 3 and 4 of the Act respectively. However, the position would be different where a house of a particular resident of an area is sought to be excluded from the existing Gram Sabha and included in another Gram Sabha. There the action of the Government being directed against an individual, the Government is required to observe principles of natural justice. For the aforesaid reasons, we are of the view that no opportunity of hearing was required to be given before making declarations either under Section 3 or Section 4 of the Act by the Government.”

26. Sri.C.P.Sudhakaraprasad, learned senior counsel appearing on behalf of one of the respondents relied upon the report of the Government while issuing similar notification during 2010. He referred to the documents in detail to emphasise the fact that a detailed consideration of factual circumstances was made while preparing the said report. The notification during the relevant time was also under challenge before this Court which was negatived and therefore it had become final. He referred to Ext.P4 notification issued by the Government on 9/12/2009

pursuant to which notification dated 8/6/2010 was issued by the Governor linking various wards to the Municipal Corporation and the notification issued by the Government under Section 4 as well. It is argued that while issuing the present notifications there was absolute non consideration of any of the parameters that are required to be considered. He placed reliance on **Sreekala v. State of Kerala** (2010 (3) KLT 548) and the judgment of Supreme Court in **Bhikhubhai Vithlabhai Patel and others v. State of Gujarat** [(2008) 4 SCC 144] in regard to the scope of judicial review. He relied upon paragraphs 25, 28 and 33 which read as under:

“25. The formation of the opinion by the State Government is with reference to the necessity that may have had arisen to make substantial modifications in the draft development plan. The expression: “as considered necessary” is again of crucial importance. The term “consider” means to think over; it connotes that there should be active application of the mind. In other words the term “consider” postulates consideration of all the relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have become necessary. The word

"necessary" means indispensable, requisite, indispensably requisite, useful, incidental or conducive, essential, unavoidable, impossible to be otherwise, not to be avoided, inevitable. The word "necessary" must be construed in the connection in which it is used. (See Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edn., 2005.)

"28. In the case in hand, was there any material before the State Government for its consideration that it had become necessary to make substantial modifications to the draft development plan? The emphatic answer is, none. The record does not reveal that there has been any consideration by the State Government that necessity had arisen to make substantial modifications to the draft development plan. We are of the view that there has been no formation of the opinion by the State Government which is a condition precedent for exercising the power under the proviso to Section 17(1)(a)(ii) of the Act."

"33. The court is entitled to examine whether there has been any material available with the State Government and the reasons recorded, if any, in the formation of opinion and whether they have any rational connection with or relevant bearing on the formation of the opinion. The court is entitled particularly, in the event, when the formation of the opinion is challenged to determine whether the formation of opinion is arbitrary, capricious or whimsical. It is always open to the court to examine the

question whether reasons for formation of opinion have rational connection or relevant bearing to the formation of such opinion and are not extraneous to the purposes of the statute.”

27. Sri.P.V.Surendranath, learned senior counsel placed reliance on the judgment of the Supreme Court in ***Indira Sawhney v. Union of India*** [(2000) 1 SCC 168)] for the proposition that legislative declarations of facts can also be considered by this Court by exercising the power of judicial review. Reference is made to para 36 which reads as under;

"36. It is now fairly well settled that legislative declarations of facts are not beyond judicial scrutiny in the constitutional context of Articles 14 and 16. In Kesavananda Bharati v. State of Kerala⁴ the question arose — in the context of legislative declarations made for purposes of Article 31-C — whether the court was precluded from lifting the veil, examining the facts and holding such legislative declarations as invalid. The said issue was dealt with in various judgments in that case, e.g. judgments of Ray, J. (as he then was), Palekar, Khanna, Mathew, Dwivedi, JJ., and Beg, J. and Chandrachud, J. (as they then were) (see summary at pp. 304-L to O in SCC). The learned Judges held that the courts could lift the veil and examine the position in spite

of a legislative declaration. Ray, J. (as he then was) observed: (SCC Headnote)

"The court can tear the veil to decide the real nature of the statute if the facts and circumstances warrant such a course.

** * **

A conclusive declaration would not be permissible so as to defeat a fundamental right."

(emphasis supplied)

Palekar, J. said that if the legislation was merely a pretence and the object was discrimination, the validity of the statute could be examined by the court notwithstanding the declaration made by the legislature and the learned Judge referred to Charles Russell v. R.⁵ and to Attorney General v. Queen Insurance Co.⁶ Khanna, J. held that the declaration could not preclude judicial scrutiny. Mathew, J. held that declarations were amenable to judicial scrutiny. If the law was passed only "ostensibly" but was in truth and substance, one for accomplishing an unauthorised object, the court, it was held, would be entitled to tear the veil. Beg, J. (as he then was) held that the declaration by the legislature would not preclude a judicial examination. Dwivedi, J. said that the courts retain the power in spite of Article 31-C to determine the correctness of the declaration. Chandrachud, J. (as he then was) held that the declaration could not be utilised as a cloak to evade the law and the declaration would not

preclude the jurisdiction of the courts to examine the facts.

28. Sri.Nandakumara Menon, learned senior counsel further relied upon the judgment in ***State of Haryana v. State of Punjab*** [2002 (2) SCC 507] wherein the Supreme Court had considered the entire factual circumstances involved in the matter with reference to a suit filed under Art.131 of the Constitution of India. In the said judgment, the entire factual issues relating to a dispute relating to digging of SYL canal pursuant to an earlier agreement between the Governments was considered. He also relied upon the report produced in the case to contend that there is no material whatsoever to arrive at a conclusion that a larger urban area had been degraded to a smaller urban area as far as the wards in Thiruvananthapuram are concerned.

29. Sri.Vijayamohanan, learned counsel relied upon the judgment in ***BIMA Office Premises Co-operative Society v. Kalamboli Village Panchayat*** (AIR 2001 Bombay 83) wherein the Division Bench of the Bombay High Court held that in the absence of a notification issued under the signature of the Governor of the State in terms of Art.243Q(2) of the Constitution,

no area could be declared as a transitional area. It is held at para 38 that while invoking sub clause (2) of Art.243Q, the Governor has to issue public notification considering the population of the area, density of the population therein with other factors mentioned in the said Article. It is therefore argued that all the parameters specified under sub clause (2) of Art.243Q has to be observed before issuing the notification.

30. In fact, other than producing the materials now relied upon by the learned Government Pleader, no other materials are produced before this Court.

31. It is needless to state that though power is vested with the Governor to issue a notification treating a larger urban area as a smaller urban area, it has to be based on sufficient materials especially when certain parameters have to be followed while treating a particular area as either transitional area, smaller urban area or larger urban area. It is evident from the materials placed on record that before issuing a similar notification during 2010, a detailed consideration of various factors had been taken into account by the Government. But we do not find any such exercise being done in the present case.

32. The scope of judicial review in matters relating to legislative functions have already been settled by the Apex Court in **Indira Sawhney** (supra) and **Bhikhubhai Vithlabhai Patel** (supra). Further, in **Sreekala** (supra), learned Single Judge of this Court had occasion to consider addition of certain wards which were Panchayats to Thiruvananthapuram and Kozhikode Corporation wherein after considering the exercise of power by Governor under Article 243Q(2), placing reliance on the judgment of the Apex Court in **State of U.P and Others v. Pradhan Sangh Kshetra Samithi** [1995 (suppl) 2 SCC 305], it is held that the Governor is not exercising an executive function on his own and at his discretion. Therefore, the rules of business of the Government under Art.166 governs the field in the matter of advice rendered by the Government to the Governor who can act only with the aid and advice of Council of Ministers. In the said case, a contention was urged that there was no material for the Governor to declare the Village Panchayat as larger urban area and that no proper study was conducted in the matter. The learned Single Judge, relying upon the factual materials made available in the case, held at paragraphs 33 and 34 as under:

"33. The question is whether this Court, in exercise of judicial review, can consider the validity of the same which was relied upon by the Council of Ministers for inviting the proposal. It was argued that in the light of the decision of the Apex Court in Satpal's case ((2000) 5 SCC 170), if the decision taken by the Government is without any application of mind, this Court can quash the resultant order. Therein, the power to grant pardon or remission of punishment under Art.161 came up for consideration. It was held thus in para 4:

"4.....the power of granting pardon under Art.161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Art.161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a mala fide one or then Governor has passed the order on some extraneous consideration."

The circumstances which justifies judicial review are therefore delineated in the above decision. One of the circumstances is that the Governor exercises the power without being advised by the Government, which is clearly absent here. The question is whether there is any non application of mind also. Evidently, there is a material in the form of a report made by the Chief Town Planner. The provisions of Art.243Q enables the Governor to declare an area as a larger urban area having regard to the population, density of population, revenue generated for local administration, percentage of employment or such other factors. When the details are made available in the form of a report by the Chief Town Planner, which was relied upon by the respondents and the Governor in exercise of the power under Art.243Q, has chosen to declare that area in terms of the above criteria, unless it is shown that those are really absent, this Court will not be justified in interfering with the same. Here, there is no case that the essential details are lacking or that the figures are not correct. In that view of the matter, I do not find any reason to agree with the contentions raised by the learned counsel for the petitioners that there is total non application of mind. The report of the Committee on Decentralisation of Powers, was also placed for perusal by the learned Advocate General.

34. It was noticed that the report of the Town Planner refers to the criteria for being a larger urban area, smaller

urban area and transitional area under the caption "Scenario 1". It is mentioned therein that as far as "Larger Urban Area" is concerned, it is "an area of Municipal Council, together with or without the area of one or more neighbouring Village Panchayats or Town Panchayats, in which the total population is above 3,00,000, the density of population per square kilometer is 5000, not less than 70 percent of the population is engaged in professions other than agriculture and fisheries, the probable revenue that can be generated for local administration from taxes and the share of taxes, fees, etc. (other than grants from Government) is not less than Rs.25 lakhs per annum."

33. Hence it is the settled position of law that Court would be justified in interfering with an order passed by the Governor if it is found that power has been exercised without being advised by the Government or the Governor transgresses the jurisdiction in exercising his power or it is established that the Governor has passed the order without application of mind or the order in question is mala fide or the Governor has passed the order in some extraneous consideration. As already held by the learned Single Judge, the material available on record does not justify a proper application of mind. That apart, in Ext.R1(c), which is the report made available, with reference to delinking of certain

wards from the Kozhikode Municipal Corporation and Thiruvananthapuram Municipal Corporation, this aspect has been dealt with in three paragraphs, the translation of which reads as under:

"There are complaints from various quarters that by merger of areas into the Corporation, there is no time bound development of these areas and the services expected of from the Corporation are not being available to the people of these areas, and the demand made is to bifurcate those merged areas from the Corporation and constitute separate Municipalities, and based on such complaints, the Government have directed the Committee to consider these matters as well, and the Committee minutely examined this issue.

The representations/complaints received from the people residing in Cheruvannur, Nallalam, Beppur, Elathoor etc. which were added to the Corporation, praying that those areas may be bifurcated from the Corporation, were examined by the Committee. The Calicut Corporation, with a land area extending to 118.312 sq.kms and with a total population of 609224, the areas comprised in Cheruvannur, Nallalam, Beppur and Elathur, are comparatively less developed or undeveloped areas. These areas were added to the Calicut Municipal Corporation during the year 2010. When the Calicut Municipal Corporation revised and fixed the property tax in

respect of the properties in the area, properties lying in the areas of those un-development areas were fixed at a lower rate considering its undeveloped nature, whereupon, complaints arose and the Government had to intervene in the matter. Following this, even after the Municipal Corporation re-examined property tax structure and revised the tax structure in respect of the areas comprised in the above Panchayats, the rates fixed as property tax were comparatively lower than in other areas of the Corporation, especially in respect of the buildings used for residential purposes. The areas in these Panchayats continue to be un-developed compared to the developed areas of the Calicut Municipal Corporation. This could be evident from the areas comprised in Cheruvannur, Nallalam, Beppur and Elathur areas. The Committee is of the considered view that it will be more beneficial for the people of the area and for a balanced development, if a new Municipality is constituted with the old Cheruvannur-Nallalam Panchayats, still another Municipality could be constituted with the areas comprised in old Beppur Grama Panchayat, and a third Municipality to be constituted with the merger of the areas comprised in former Elathur Grama Panchayat and the nearby Thalikulathoor Grama Panchayat, which will give a planned and balanced development of the areas, and better services to the people.

On an examination of the representation submitted,

demanding constitution of a new Municipality with headquarters at Kazhakootam, from out of the Thiruvananthapuram Corporation, it is reckoned by the Committee that this area which has within it Technopark, I.T.Industrial belt, if upgraded and constituted into a new Municipality, it will help integrated development of the I.T.Industry in the State and giving more importance to this industry will help provide greater avenues for the development of the area and balanced and scientific development. In the proposed Kazhakootam Municipality, Ward No.1 (Kazhakootam), Ward No.2 (Chandavila), Ward No.3 (kattayikkonam), Ward No.4 (Sreekaryam), Ward No.8 (Chellamangalam), Ward No.9 (Chembazhanthi), Ward No.10 (Poudikkonam), Ward No.11 (Njandoorkonam), Ward No.97 (Kulathoor), Ward No.98 (Attipra), Ward No.99 (Poundkadavu) and Ward No.100 (Pallithura) could be included.”

34. Though it is stated in the notification issued under Art.243Q(2) that all the parameters specified in the provision had been complied with, the aforesaid report does not give an exact picture of the factual materials necessary for converting a ward which was part of a larger urban area to a smaller urban area. In other words, the materials were not sufficient enough and the study conducted in that regard was insufficient to arrive at such a

finding. Though it is argued that all the parameters specified under Art.243Q(2) is not required to be complied with on account of the words used in Art.243Q(2) as “having regard to”, still a detailed consideration of the necessity to convert a larger urban area to a smaller urban area should be available. The bifurcation apparently depends upon various parameters specified in Art.243Q(2) and also “such other factors as he may deem fit”. Perusal of the consideration made by the Committee, as aforesaid, does not instill confidence on this Court to arrive at a finding that sufficient materials have been placed before the Governor to issue notification to convert a larger urban area to a smaller urban area. When the scope of judicial review extends to such a field, we are of the view that the learned Single Judge was justified in interfering with the notification on that ground as well.

35. In the result, the issues are answered as under:

(i) The writ petitions are maintainable.

(ii) Notifications issued under Art.243Q(2) and Section 4 of the Act, to convert a larger urban area as a smaller urban area,

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are legally permissible.

(iii) Sufficient material is not available to indicate that a proper study in terms with Art.243Q(2) read with Section 4 of the Act has been done.

Hence we do not find any error in the judgment of the learned Single Judge quashing the notifications. Accordingly, these appeals are dismissed.

Sd/-

ASHOK BHUSHAN, CHIEF JUSTICE

Sd/-

A.M. SHAFFIQUE, JUDGE

Rp

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PS to Judge