

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.3682 OF 2019**

AMALNER MUNICIPAL COUNCIL, AMALNER ..PETITIONER

VERSUS

THE STATE OF MAHARASHTRA AND ORS. ..RESPONDENTS

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Mr. R. N. Dhorde, Senior Advocate a/w Mr. V. R. Dhorde, Advocates for the Petitioner.

Mr. S. G. Karlekar, AGP for Respondent Nos.1 to 3.

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**CORAM : S. V. GANGAPURWALA &
SHRIKANT D. KULKARNI, JJ.**

Closed for Orders on : 10.02.2020.

Order Pronounced on : 15.05.2020.

FINAL ORDER (Per S. V. Gangapurwala, J.) :-

1. The petitioner assails Clause 3 of Government Resolution dated 03.10.2018 appointing respondent no.3 Public Works Department (P.W.D.) as implementing agency being illegal, arbitrary and violative of Article 14, 19(1) (g) and Article 243-W of the Constitution of India and in contravention to the provisions of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act 1965 (hereinafter referred to as 'Act, 1965'). On the same ground the petitioner assails Clause 5 of Government Resolution dated 17.11.2017. The petitioner also assails letter dated 04.12.2018 issued by respondent no.1 sanctioning 13 works to be carried out within the limits of the petitioner-Municipal Council and further letter dated 19.12.2018 issued by respondent no.2. The

petitioner further seeks direction to release fund of Rs.2 crores in favour of petitioner and allow the petitioner to carry out the work as reserved under the Resolution No.607 passed by General Body Meeting held on 26.11.2018.

2. Mr. Dhorde, learned senior counsel eruditely made submissions. According to the learned senior counsel:-

(A) The government under Government Resolution dated 17.11.2017 laid the modalities for Vaishishtyapurna Yojna. Under Clause 5 it kept the power unto itself to appoint implementing agency. Clause 5 appointing implementing agency as per its discretion is without guidelines. The discretion can not be unfettered. The Municipal Council run by the Councilors of ruling party are appointed as implementing agency, whereas in case of Municipal Council under control of opposition party P.W.D. is appointed as implementing agency. The same is arbitrary and illegal.

The learned senior counsel relies on Article 243-W of the Constitution of India to contend that the provisions are required to be made with respect to the performance of function and the implementation of the schemes as may be entrusted to the Municipalities including those in relation to the matters listed in 12th Schedule of the Constitution of India. The 12th Schedule of the Constitution includes work provided under the

Government Resolution dated 17.11.2017 and therefore, only the Municipal Council has right to carry out the work enlisted in Government Resolution dated 17.11.2017 inter alia would be the implementing agency. Clause 5 of the Government Resolution dated 17.11.2018 and Government Resolution dated 03.10.2018 is illegal and violative of Article 14, 19(1)(g) of Constitution of India.

(B) Section 90 of the Act, 1965 provides that funds received from the Government constitute Municipal funds. Rs.2 crores has been sanctioned under Vaishishtyapurna Yojna. The said fund would be a Municipal fund and as such Municipal Council only has authority to carry out the work. The respondent is encroaching upon the powers of the Municipal Council bestowed by the Act, 1965.

(C) It is only for political consideration P.W.D. is appointed as implementing agency. For other Municipal Councils the respective Municipal Councils are appointed as implementing agency to carry out the work under Vaishishtyapurna Yojna. The wife of local MLA contested the election for the post of President of the petitioner Municipal Council. She was defeated and as such local MLA has a grudge and he is instrumental in appointment of P.W.D. as implementing agency.

(D) The petitioner had passed Resolution bearing No.607 in its General Body Meeting dated 26.11.2018

detailing the work to be carried out under Vaishishtyapurna Yojna. The same was in consonance with the scheme.

(E) The works detailed by the State under Government Resolution are not warranted. The same are not the works to be carried on public place. Some works are on non existent lands. Arbitrariness is writ large.

(F) The respondent be directed to disburse the amount of Rs.2 crores to the petitioner and permit the petitioner to carry out the work as per its resolution dated 26.11.2018 bearing No.607. The learned senior counsel to buttress his submissions relies on the following judgment:

1. State of Pubjab and Another Vs. Brijeshwar Singh Chahal and Another reported in (2016) 6 Supreme Court Cases 1.
2. Gautam Baburao Maske and Another Vs. The State of Maharashtra and Others reported in 2017 (6) ALL MR 639.
3. Charan S/o Sovinda Waghmare Vs. State of Maharashtra and Others reported in 2012 (7) ALL MR 9.
4. State of M.P. and Anr. Vs. Baldeo Prasad reported in AIR 1961 Supreme Court 293.
5. Devendra S/o. Sureshrao Wankhede Vs. The State of Maharashtra and Ors. in Public Interest Litigation No.86 of 2016 dated 26.08.2016.

6. Nandkishor S/o. Rangraoji Warhade and Ors. Vs. The State of Maharashtra and Ors. reported in 2015 (1) ALL MR 711.

7. Sau. Banotai w/o. Usman Garwe Vs. The Divisional Commissioner (Revenue) and Ors. reported in 2013 (4) ALL MR 585.

8. Surendra Hematdas Popli and Ors. Vs. The State of Maharashtra and Ors. in Writ Petition No.1573 of 2011 dated 08.07.2011.

3. Mr. Karlekar, learned Assistant Government Pleader in lucid manner submits that:

(A) As per Government Resolution dated 17.11.2017 the Municipal Councils are eligible for funds to carry out the development work in their area under the Vaishishtyapurna Yojna. The said fund is the State fund. The State has every right to decide the implementing agency to carry out the work under the Scheme. The work decided under the communication dated 04.12.2018 are permissible as per the Government Resolution dated 17.11.2017.

(B) As per Clause 4 of the Government Resolution dated 17.11.2017 the State Government has every right to finalize the work to be carried out from the funds allocated under the Vaishishtyapurna Yojna.

(C) The appointment of P.W.D. as implementing agency is under the Government Resolution dated 03.10.2018. Under the same Government Resolution funds are allocated for the development work to be

carried out in the area of petitioner under the Scheme. The appointment of P.W.D. as implementing agency is within the power of Government.

(D) The funds sanctioned under the Vaishishtyapurna Yojna is not the Municipal fund. The same is not disbursed/transferred to the petitioner.

(E) The learned A.G.P. relies on Section 49(A) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act 1965 and judgment of the Division Bench of this Court at Nagpur in Writ Petition No.2608/2016 dated August 26, 2016.

(F) The petition by a Councilor representing Municipal Council is not tenable.

4. We have considered the submissions canvassed by the learned counsel for respective parties.

5. The Vaishishtyapurna Yojna and allocation of the funds for implementation of the said scheme is in vogue from the year 2000. Some modification appears to have been made under Government Resolution dated 16.02.2008 and 06.09.2013 for implementation of the Scheme.

6. Under the Government Resolution dated 17.11.2017 the earlier Government Resolution

governing the Scheme are superseded and modified guidelines for implementation of the Vaishishtyapurna Yojna are formulated.

7. Clause 2 of the Government Resolution dated 17.11.2017 prescribes that all Municipal Councils in the State shall be entitled to the grants under the Vaishishtyapurna Yojna.

8. Clause 3 details the works permissible under the Scheme. The works to be carried out under the Scheme should be the one that the Municipal Council is duty bound to perform and that in future the same would be source of revenue to the Municipal Council.

9. Clause 4 of the Government Resolution states that the works from the works detailed in Clause 3 shall be finalized by the State Government and if the State Government does not finalize it then the Municipal Council may by resolution finalize the work to be performed.

10. Clause 5 gives powers to the State Government to appoint the implementing agency.

11. Clause 6 mandates obtaining technical sanction. The report to be submitted to the collector and technical sanction to be obtained from the P.W.D or M.J.P.

12. The Collector is given authority to accord administrative sanction to the work under Clause 7.

13. Clause 8 deals with the financial responsibility. 90% contribution shall be by the State Government and 10% by the Municipal Council.

14. The other general clauses are also detailed in the Government Resolution.

15. The State Government has evolved a policy to allocate special funds for the special work to all Municipal Councils throughout the State. The predominant object appears to be that the work should be of such nature that it would be source of revenue to the Municipal Council inter alia make the Municipal Council financially self reliant.

16. The petitioner has only challenged Clause 5 of the Government Resolution dated 17.07.2017. Clause 5 empowers the State Government to appoint an implementing agency. The State Government in its discretion may appoint the Municipal Council / P.W.D. / M.J.P. or any other institution as an implementing agency. The petitioner has not assailed Clause 4 of the Government Resolution dated 17.07.2017 whereby the State Government is authorized to finalize the work to be carried out by the Municipal Council under the Scheme.

17. The Vaishishtyapurna Yojna is introduced by the State Government under executive fiat. The

Statue or the Rules do not mandate the State Government to allocate the funds under the Vaishishtyapurna Yojna.

18. Rs.2 crores are sanctioned by the State Government under the Vaishishtyapurna Yojna pursuant to Government Resolution dated 03.10.2018.

19. All money received by or on behalf of the Council under the provisions of Act, 1965 or any other law for the time being in force, all taxes, fines and penalties paid to or levied by it under this Act, other than fines imposed by any Courts, all proceeds of land or other property sold by the Council, and all rents accruing from its land or property, and all interest, profits and other moneys accruing by gift or transfer from Government or private individuals or otherwise is a Municipal Fund as per Section 90 of the Act, 1965. The allocation of Rs.2 crores is not under Act, 1965 but for the performance of the work under Vaishishtyapurna Yojna as provided under the Government Resolution issued by the State Government under the executive powers. Moreover, the same amount is not transferred to the petitioner. The said amount would not constitute Municipal fund as provided under section 90 of the Act, 1965.

20. As per Clause 4 the work to be performed by a particular Municipal Council under the Scheme is to be determined by the State Government. The

State Government has retained the power to appoint the implementing agency. The Statute does not mandate that for the work under the Vaishishtyapurna Yojna, the Municipal Council shall be the implementing agency. Clause 5 of the Government Resolution dated 17.07.2017 is not against the statutory provisions or the Rules. Section 49-A of the Act, 1965 empowers the State Government to determine the terms and conditions while discharging the work by the agency. The work to be implemented under the Scheme is not pursuant to the Statute but regulated by the Government Resolution issued by the Government under its executive power referable to Article 162 of the Constitution of India. The State Government would be within its authority and power to appoint the implementing agency.

21. Clause 5 of the Government Resolution dated 17.07.2017 gives discretion to the State Government to either appoint Municipal Council / P.W.D. / M.J.P. or any such body as implementing agency. The State Government may appoint an implementing agency depending upon the nature of work to be performed under the Scheme.

22. The power of the State Government to appoint an implementing agency for performance of Vaishishtyapurna Yojna is not circumscribed by the Statute or Rules. In such a case, the power retained by the Government to appoint an implementing agency of its choice for implementing

the scheme can not be said to be illegal or arbitrary and the same would be beyond the pale of Judicial review. The Government is disbursing the amount. It should have confidence that the implementing agency would execute the work properly.

23. If the appointment of particular implementing agency smacks of malafide or is for unjustifiable reason, then the same can be subject matter of Judicial review. In the present case, the State has appointed P.W.D. as an implementing agency under the Government Resolution sanctioning amount of Rs.2 crores to the petitioner for implementation of the Scheme. The Government Resolution issued by the Government also provides for the work to be carried out. We do not find anything on record to conclusively conclude that appointment of P.W.D. as an implementing agency is malafide or smacks of favoritism.

24. Framing a policy is within the competence of State in its executive authority. The policy decision is in the domain of the executive authority of the State. The efficacy or otherwise may not be questioned so long the same does not offend any provision of the Statute or the Constitution of India. It is not for the Courts to consider the relative merit of the different policies. The Court can not sit in judgment of the policy of the Legislature or the Executive. The Court can not strike down a policy decision taken

by the Government, merely, because it feels that another decision would have been more logical or wiser. It is not the domain of the Courts to embark upon an inquiry as to whether a particular policy is acceptable or whether a better policy could be evolved. The Court can only interfere if the policy framed is irrational, arbitrary, unreasonable and thereby offend Article 14 of the Constitution of India.

25. The Government has sanctioned works to be carried out. The said works to be carried out are within the purview of Vaishishtyapurna Yojna. The contention of the petitioner is that some of the works to be carried out are on private property or on non existent lands. The works to be carried out has to be on public place as per the Scheme. If some of the works carried out are not on the public place or on non existent properties, then the Government will have to reconsider the same. The Government shall once upon consider the works and the place of works that are to be carried out. It shall verify the same and take decision appropriately.

26. In light of the above impugned Government Resolution is not illegal nor same is arbitrary. Writ Petition as such stands disposed of.

(SHRIKANT D. KULKARNI)
JUDGE

(S. V. GANGAPURWALA)
JUDGE