

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18TH DAY OF APRIL 2022

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR.JUSTICE S. VISHWAJITH SHETTY

W.P. No.4457 OF 2022 (LB-ELE)

BETWEEN:

1. SRI. LAKSHMIKANTA K

2. SRI. C. VENKATESHAPPA

3. SMT. SOUBHAGYA M

4. SRI. GOPAL M

R

... PETITIONERS

(BY MR. S. SRIRANGA, SR. COUNSEL FOR
MRS. SUMANA NANAND, ADV.,)

AND:

1. THE STATE OF KARNATAKA
REP. BY THE PRINCIPAL SECRETARY
URBAN DEVELOPMENT DEPARTMENT
VIKASA SOUDHA
BENGALURU-560001.
2. THE TAHSILDAR AND ELECTION OFFICER
MALUR TALUK
MALUR, KOLAR DISTRICT.
3. THE MALUR TOWN MUNICIPAL COUNCIL
MALUR
REPRESENTED BY IT CHIEF OFFICER.
4. DEPUTY COMMISSIONER
KOLAR DISTRICT
KOLAR.
5. SMT. A. ANITHA NAGRAJ
6. M/S. BHAVYA M
M/S. M. CHANNAR
7. UNION OF INDIA
MINISTRY OF LAW AND JUSTICE
4TH FLOOR, A-WING
SHASTRI BHAWAN

NEW DELHI-110001
REP. BY ITS SECRETARY.

... RESPONDENTS

(BY MR. MAHENDRA GOWDA, ADV., FOR C/R
MRS. VANI H, AGA FOR R1, R2 & R4
MR. S.S. NAGANAND, SR. COUNSEL FOR
MRS. KUSUMA RANGANATH, ADV., FOR R5
MR. M.N. KUMAR, CGC FOR R7
R3 SERVED)

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THIS W.P. IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, PRAYING TO CALL FOR RECORDS PERTAINING TO LETTER BEARING NO. E.L.N / C. R /32 /2020-21 DATED 22.12.2021 ISSUED BY THE 2ND RESPONDENT (ANNEXURE - C). DECLARE THAT THE PETITIONERS AS NOMINATED COUNCILORS ARE ENTITLED TO CAST THEIR VOTE IN THE ELECTION FOR THE POST OF PRESIDENT / VICE PRESIDENT UNDER SECTION 42 (2) OF THE KARNATAKA MUNICIPALITIES ACT, 1964. DECLARE THAT THE VOTES CAST BY THE PETITIONERS IN THE ELECTION HELD ON 30.12.2021 FOR THE POST OF PRESIDENT IN THE RESPONDENT NO. 3 COUNCIL AS VALID AND SUSTAINABLE IN LAW.

THIS W.P. COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.**, MADE THE FOLLOWING:

ORDER

The petitioners who are nominated councilors of Malur Town Municipal Council (hereinafter referred to as 'the Council' for short) in this petition have prayed for the following reliefs:

- (i) Call for records pertaining to Letter bearing NO.ELN/CR/32/2020-21 dated

22.12.2021 issued by the 2nd respondent
(Annexure C)

(ii) Declare that the petitioners as nominated councilors are entitled to cast their vote in the election for the post of President/ Vice President under Section 42(2) of the Karnataka Municipalities Act, 1964

(iii) Declare that the votes cast by the Petitioners in election held on 30.12.2021 for the post of President in Respondent No.3 Council as valid and sustainable in law.

In the alternative

(iv) Declare that the proviso to Section 11(1)(b) of the Karnataka Municipalities Act, 1964 is ultra vires Article 14 of the Constitution of India and is unconstitutional.

Or read down the proviso to Section 11(1)(b) of the Karnataka Municipalities Act, 1964 as not applying to elections to the post of President and Vice-President of the

Municipal Council held under Section 42(2) of the Karnataka Municipalities Act, 1964 and the rules framed thereunder.

(v) Declare that the proviso to Article 243-R (2)(a) of the Constitution of India is ultra vires Article 14 of the Constitution of India and contrary to the basic structure of the Constitution.

Or read down the proviso to Article 243-R (2)(a) of the Constitution as not applying to the post of President and the vice president of the Municipal Council held under Section 42(2) of the Karnataka Municipalities Act, 1964 and the rules framed there under.

(vi) Declare that the Petitioners are entitled to participate and cast their vote in the election for the post of President, Malur Town Municipal Corporation by virtue of being nominated councilors of the Malur Town Municipal Council under the provisions of Karnataka Municipalities Act, 1964.

(vii) Grant cost of these proceedings; and

(viii) Pass such orders or directions as this Hon'ble Court may deem fit in the facts and circumstances of the case.

2. The Council was constituted on 20.05.2018, which has 29 elected members as well as 4 nominated members and one member of Legislative Assembly. The President of the Council was elected on 20.11.2020. The petitioners were nominated as Councilors of the Council on 27.02.2021. The Tahsildar and Election Officer issued calendar of events by which election to the post of President of the Council was notified and the same was scheduled to be held on 30.12.2021. The petitioners who are the nominated members of the Council, filed a writ petition, in which inter alia declaration was sought to the effect that they are entitled to participate in the process of election to the post of President of the Council. A bench of this court by an interim order dated 29.12.2021 permitted the petitioners to participate in

the process of election for the post of President of the Council subject to final decision of the writ petition.

3. An election was held on 30.12.2021, in which the petitioners cast their votes for the election to the post of the President of the Council. The petitioner in WP No.834/2022 filed an I.A. for impleading on 10.01.2022 in W.P.No.24308/2021, filed by the petitioners. The petitioner in WP No.834/2022 thereafter withdrew the interlocutory application for impleading on 07.02.2022. Thereafter, a bench of this court vide order dated 22.02.2022 permitted the petitioners in W.P.No.24308/2021 to withdraw the writ petition with the liberty as prayed for and extended the interim order for a period of 7 days. In the aforesaid factual background, this petition has been filed.

4. Learned Senior counsel for the petitioner submitted that the petitioners who are nominated councilors of Malur Town Municipal Council have assailed the validity of section 11(1)(b) of the Karnataka Municipalities Act, 1964 as well as the Constitutional validity of proviso to Article 243-R(2)(a) of

the Constitution of India on the ground that same is violative of Article 14 and is contrary to basic structure to constitution of India. It is urged that alternatively the petitioners have sought the relief of reading down the proviso to Section 11(1)(b) of the Karnataka Municipalities Act so as to not apply to the elections for the post of President and Vice President of Municipal Council held under Section 42(2) of the Karnataka Municipalities Act. It is urged that the provisions of Section 11(1)(b) of the Act do not apply to meeting held to elect the President and therefore, the petitioners have right to vote in the aforesaid election.

5. It is contended that Karnataka Municipalities (President and Vice President) Election Rules, 1965 (hereinafter referred to as 'the Rules' for short) does not bar the nominated members from participating in the election to the post of President in the Municipality. It is further contended that Article 243R and the Rules make a distinction between the right of members to vote in the election and the meetings of council as contemplated under Chapter III of the

Act. It is also contended that the definition of the 'councilor' in the Act and the language of Rules made thereunder does not exclude nominated councilors from voting in the election to the post of President. It is argued that the expression 'meeting' used in proviso to Section 11(1) of the Act is distinct from an election of the President of Municipal council. Our attention has also been invited to Section 42(2) of the Act and it is urged that scheme and arrangement of the Act indicates that detailed procedure for meetings envisaged under Chapter IIIA is distinct for the purpose of electing a President in the Municipal Council. It is contended that meeting under Section 47 of the Act is different from the election of President of the Council.

6. It is further contended that precedence must be read in the context in which they have been made. It is argued that decisions in '**SAVITRI VS. STATE OF KARNATAKA**', **ILR 2003 KAR 4653**, '**RAMESH MEHTA VS. SANWAL CHAND SINGHVI AND OTHERS**', (2004) 5 SCC 409, '**SMT.PRAMILA M. VS. STATE OF KARNATAKA**', **ILR 2015 KAR 5872** do

not have any application to the facts of the case in hand. In support of aforesaid submissions, reliance has been placed on decisions in **'KHALIQUZ ZAMAN VS. STATE OF U.P. AND OTHERS'**, 2004 SCC ONLINE ALL 1455, **'DADI JAGANNADHAM VS. JAMMULU RAMULU'**, (2001) 7 SCC 71, **'ROHITASH KUMAR VS. OM PRAKASH SHARMA'**, (2013) 11 SCC 451, **'ARASMETA CAPITVE POWER CO. (P) LTD VS. LAFARGE INDIA (P) LTD'**, (2013) 15 SCC 414, **'KRISHENA KUMAR VS. UNION OF INDIA'**, (1990) 4 SCC 207, **'ASHWANI KUMAR SINGH VS. U.P. PUBLIC SERVICE COMMISSION'**, (2003) 11 SCC 584, **'PADMA SUNDARA RAO VS. STATE OF T.N.'**, (2002) 3 SCC 533, **'RAEES AHMAD VS. STATE OF U.P.'**, (2000) 1SCC 432, **'YASHODAMMA G. VS. STATE OF KARNATAKA'**, ILR 2003 KAR 3414, **'THE NATIONAL COMMISSION AND ANOTHER VS. SRI.YUSUF SHARIF AND OTHERS'**, W.A.1349/2021, **'SHAMRAO VISHNU PERULEKAR VS. DISTRICT SHAMROA PERULEKAR'**, 1956 SCR 644, **'COMMISSIONER OF INCOME TAX, BANGALORE VS. VENAKTESWARA HATCHERIES'**, (1993) 3 SCC 632.

7. On the other hand, learned Senior Counsel for Respondent No.6 submitted that once the W.P.No.24308/2021 was withdrawn, the interim order merged with the final order and the effect of withdrawal of the writ petition is that the order dated 22.02.2022, by which writ petition was withdrawn and liberty was reserved to Respondent No.6 to file an application for restitution of his right has become final and therefore, the writ petition filed by the petitioners is liable to be dismissed. It is also submitted that the order dated 22.02.2022, permitting withdrawal of the writ petition does not permit the petitioners to challenge Article 243-R(2)(a) of the Constitution of India. It is pointed out that the relief claimed in prayer clause No.(ii), (iii) and (vi) have been rendered infructuous as meeting to elect the President of the Council has already been held. It is also submitted that the Petitioners have no right to get elected to the post of President and therefore, have no locus to question the further proceeding.

8. It is contended that there is no pleading in the writ petition as to what is the basic structure of the Constitution and how Article 243-R(2)(a) constitutes the basic structure of the Constitution. It is further contended that Article 243-ZF constitutes an embargo that voting rights cannot be given to nominated members. It is also urged that Section 11(1)(b) of the Act is in consonance with Article 243-R(2)(a) of the Constitution of India. It is urged that the right to vote and contest an election are not fundamental right but at best are constitutional rights. It is also urged that there is a presumption in favor of constitutionality of the provision and the petitioner have miserably failed to rebut the aforesaid presumption. It is contended that nominated members have no right to vote and the meeting recognized by the Act is either the special general meeting or an ordinary meeting and in a meeting of the Council, the President of the Council is elected. Our attention has also been invited to the Karnataka Municipalities (President and Vice-President) Election Rules, 1965 (hereinafter referred to as 'the Rules' for short). In support of the aforesaid submissions, reliance has been

placed on ***KALABHARATI ADVERTISING VS HEMANT VIMALNATH NARICHANIA & ORS (2010) 9 SCC 437, CHARANJIT LAL CHOWDHURI VS THE UNION OF INDIA AND OTHERS AIR 1951 SC 41, JYOTI PERSHAD VS THE ADMINISTRATOR FOR THE UNION TERRITORY OF DELHI AND ORS AIR 1961 SC 1602, JULLUNDUR RUBBER GOODS MANUFACTURERS'ASSOCIATION VS. THE UNION OF INDIA AND ORS. AIR 1970 SC 1589, RAJBALA VS STATE OF HARYANA 2016 (2) SCC 445, PUCL AND ANR VS UNION OF INDIA 2004 (2) SCC 476, GOVERNMENT OF AP VS P LAXMI DEVI (2008) 4 SCC 720, RAMESH MEHTA VS SANWAL CHAND SINGHVI AND OTHERS (2004) 5 SCC 409, SAVITRI VS THE STATE OF KARNATAKA ILR 2003 KAR 4653, M NAGRAJ AND OTHERS VS UNION OF INDIA AND OTHERS (2006) 8 SCC 212, IR COELHO VS STATE OF TN (2007) 2 SCC 1.***

9. Learned Additional Government Advocate submitted that the right to vote is a statutory right and in the absence of violation of any fundamental right, the writ petition is not

maintainable. It is also submitted that neither Article 243R (2) nor Section 11(1)(b) of the Act violate the basic structure of the Constitution of India. In support of the aforesaid submissions reliance has been placed on the decisions in ***JYOTI BASU VS DEBI GHOSAL AIR 1982 SC 983, SMT. SAVITHRI VS STATE OF KARNATKA ILR 2003 KAR 4653 AND SATINDER SINGH VS UNION OF INDIA AND ORS CWP NO.20346/2016.***

10. Learned Central Government Senior Panel Counsel submitted that petitioners have not pleaded in the writ petition that either the Parliament lacks power to amend the Constitution or Article 243R (2) violates the Fundamental Right guaranteed in Part II of the Constitution or is violative of basic structure of the Constitution of India. It is therefore submitted that the prayer for declaring proviso to Article 243R (2) as ultra vires cannot be granted. It is also submitted that nominated members of the Council fall in different class and therefore, cannot claim equality with the elected members of the Council. In support of aforesaid submissions,

reliance has been placed on the decisions of the Supreme Court in **OM NARAIN AGARWAL VS NAGAR PALIKA, SHAHAJANPUR AND OTHERS AIR 1993 SC 1440 AND ANKUL CHANDRA PRADHAN VS UNION OF INDIA AIR 1997 SC 2814.**

11. Learned Senior Counsel for the petitioner submitted that the petitioners had filed an application seeking amendment in W.P.No.24308/2021, and in view of the contention raised by the respondents that the proposed amendment changes the nature of the proceedings, the writ petition was withdrawn with liberty to file a fresh writ petition. Therefore, this writ petition has been filed and the same cannot be said to be not maintainable. It is further submitted that the proviso to Article 243R (2) (a) does not apply to manner of election for the post of President of the Council. It is further submitted that conjoint reading of Section 42(2) and Section 2(6) of the Act, it is evident that the nominated members have a right to vote in the meeting for election for the post of President of the Council. It is pointed

out that the decision of this Court in **SMT. SAVITHRI SUPRA** deals with amended Section 42(9) of the Act and is based on a concession that the nominated members do not have a right to vote. Therefore, the aforesaid decision is of no assistance to the Respondents. It is also argued that the decision in **Ramesh Mehta's** case Supra is in the context of Section 65 of the Rajasthan Act and there is no *pari materia* provision in the Act. Therefore, the same does not apply to the fact situation of the case. It is also urged that the decision reported in **ILR 2015 KAR 5872** is in the context of provisions of the Municipal Corporation Act, whereas, the provisions of the Act are different.

12. We have considered the rival submissions made on both sides and have perused the record. Now we may advert to the relevant constitutional and statutory provisions. Article 243-R (2) (a) read as under:

243R. Composition of Municipalities.—

(1) Save as provided in clause (2), all the seats in a Municipality shall be filled by

persons chosen by direct election from the territorial constituencies in the Municipal area and for this purpose each Municipal area shall be divided into territorial constituencies to be known as wards

(2) The Legislature of a State may, by law, provide—

(a) for the representation in a Municipality of—

(i) persons having special knowledge or experience in Municipal administration;

(ii) the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area;

(iii) the members of the Council of States and the members of the Legislative Council of the State registered as electors within the Municipal area;

(iv) the Chairpersons of the Committees constituted under clause (5) of article 243S:

Provided that the persons referred to in paragraph (i) shall not have the right to vote in the meetings of the Municipality;

Thus, Article 243R (2)(a) mandates that nominated members shall not have right to vote in the meetings of the Municipality.

13. The relevant sections of the Karnataka Municipalities Act, 1964:

Section 2. Definitions:

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(6) '**Councillor**' means a person who is legally a member of municipal council [or Town Panchayat]

Section 11. Constitution of municipal councils.—

(1) The municipal council shall consist of:

XXX

(b) not more than five persons nominated by the Government from amongst the residents of the municipal area and who are,—

- (i) persons having special knowledge and experience in municipal administration or matters relating to health, town planning or education, or
- (ii) social workers.

(c) the members of the House of the People and the members of the State Legislative Assembly, representing a part or whole of the municipal area whose constituencies lie within the municipal area ;

(d) the members of the Council of States and members of the State Legislative Council registered as electors within the municipal area:

Provided that the persons referred to in clause (b) shall not have the right to vote in the meetings of the municipal council.

Thus, proviso appended to Section 11 (1) of the Act, is in consonance with Article 243R (2)(a) of the Constitution of India.

Section 42. President and vice-president.—

(1) XXX

(2) Subject to the provisions of sub-section (2A) the Councillors shall at the first meeting of the Municipal Council after the general election and at a subsequent meeting held immediately before the expiry of term of office of the President and Vice-president choose two members from amongst the elected councillors to be respectively president and Vice-President and so often as there is a casual vacancy in the office of the President, or Vice President shall choose another member from amongst the elected councillors to be the President or Vice-president, as the case may be.

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(9) Every president and every vice-president of a municipal council shall forthwith be deemed to have vacated his office if a resolution expressing want of confidence in him is passed by a 1 [majority total number of councillors having voting right and by a majority of not less than two-thirds of the councillors having voting right present and voting]1 at a special general meeting convened for the purpose:

Provided that no such resolution shall be moved unless notice of the resolution is signed by not less than one-third of the total number of councillors having voting right and at least ten days' notice has been given of the intention to move the resolution

Provided further that where a resolution expressing want of confidence in any president or vice-president has been considered and negatived by a municipal council, a similar resolution in respect of the same president or vice-president shall not be given notice of or moved within one year from the date of the decision of the municipal council.

Section 47. Meeting.—

(1) The municipal council shall ordinarily hold at least one meeting in every month for the transaction of business, which shall be called an ordinary general meeting.

14. The relevant Rules of the Karnataka Municipalities (President and Vice-President) Election Rules, 1965:

Rule 3. Appointment of date of meeting-

The election of President and Vice-President shall be held in a meeting fixed by the Election Officer and he shall thereupon send to every councillor notice of dates so fixed not less than seven days prior to the date of meeting.

Rule 4. Filing of Nominations-

Not less than two hours before the time fixed for the meeting of for the election of President and Vice President any Councillor may nominate any other elected Councillor for being elected as President or Vice-President as the case may be, by delivering

to the Election Officer, a nomination paper completed in Form 1.

Rule 8. Procedure in contested and uncontested elections-

(1) After the time fixed for withdrawal is over if there is only one candidate who has been validly nominated , and has not withdrawn his candidature in the manner and within the time specified the Election Officer shall forthwith declare such candidate to be duly elected as President or Vice President, as the case may be.

Xxxx

(4) Any member present at the meeting may refrain from voting if he so chooses to do.

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(7) The election Officer shall cause a record of the minutes of the meeting which shall contain the names of all the Councilors present and in case of a division, the manner of their voting including their

absentations. The minutes shall be signed by the Election Officer as well as the Councillors present. The minutes shall be made available to any Councillor for inspection.

Explanation: For the purpose of this Rule, "Councilor present" means Councilor present at the meeting and whose names have been recorded before declaring the a Councilor duly elected under Rule 8 or before the commencement of the meeting after withdrawal of candidature under Sub-rule (4) of Rule 7 for the office of the President or Vice-President as the case may be.

15. Article 243R(2)(a) of the Constitution of India provides for composition of Council. Article 243R (1) provides that the Council shall have elected members whereas, Article 243R (2) provides that a member can also be nominated to the Council. The proviso to Article 243R (2) (a) mandates that nominated members of the Council shall not have a right to vote in the meetings of the Council.

16. Similarly, Section 11(1)(b) of the Act provides for composition of the Council. Section 11(1) (a) provides that the Council shall have elected members whereas, Section 11(1)(b) provides that not more than 5 persons can be nominated as Councilors. The proviso to Section 11(1) of the Act provides that the nominated members shall not have a right to vote in the meetings of the Council.

17. A three judge Bench of the Supreme Court in ***PEOPLE'S UNION FOR CIVIL LIBERTIES VS UNION OF INDIA (2003) 4 SCC 399*** has held that right to vote is not a fundamental right but is a constitutional right. Similar view was taken by the Supreme Court in *Rajbala Vs State of Haryana (2016) 2 SCC 445*. The elected members of the Council are chosen by popular vote and carry with them, the mandate of the people, whereas, nominated members of the Council are appointed as Councilors.

18. There is a presumption of Constitutional validity of a provision and the burden is on the person to plead and prove

its unconstitutionality. It is trite law that party invoking the protection of Article 14 has to make an averment with details to sustain such a plea and has to adduce material to establish its allegations and the burden is on the party to plead and prove that its right under Article 14 has been infringed [**SEE: STATE OF UP VS KARTAR SINGH AIR 1964 SC 1135**]. It is well settled legal proposition that Article 14 can be invoked if unequals are treated equally or equals are treated differently. It is equally well settled in law that mere differentiation or inequality of treatment does not per se amount to discrimination the inhibition of equal protection clause and to attract Article 14 it is necessary to demonstrate that selection or differentiation is unreasonable or arbitrary and does not rest on any rational basis having regard to the object which the legislature has in view while making the law in question.

[See: '**JAILA SINGH VS. STATE OF RAJASTHAN, AIR 74 SC 1436**]. It is trite law that party invoking the protection of Article 14 has to make an averment with details to sustain such a plea and has to adduce material to establish its allegations and the burden is on the party to plead and prove

that its right under Article 14 has been infringed [**SEE: STATE OF UP VS KARTAR SINGH AIR 1964 SC 1135**]. It is equally well settled that in the absence of any pleading, the challenge to the constitutional validity is to be rejected in limine. [**STATE OF HARYANA VS STATE OF PUNJAB 2004 (12) SCC 673**]

19. In the light of aforesaid well settled legal position, we may advert to the facts of the case. Article 243R (2) (a) has been assailed as violative of Article 14 and the Basic Structure of the Constitution of India. It is pertinent to note that the nominated and elected members cannot be treated as belonging to one class. The fundamental difference is that the elected Councillors are elected to the office by a popular vote whereas, nominated members are appointed as Councillors. The Supreme Court in **RAMESH MEHTA VS SANWAL CHAND SINGHVI (2004) 5 SCC 405** dealt with the question whether in counting 'the whole number of members of Municipal Board' in terms of Rule 3(9) of Rajasthan Municipalities (Motion of No-Confidence against Chairman or Vice-Chairman) Rules, 1974, nominated members have to be

taken into consideration. in Paragraph 11 of the aforesaid decision, it was held as under:

11. In the present case, on facts, we are concerned with post-1994 position. Article 243-R brought about a drastic change in the matter of composition of Municipalities. It lays down guidelines with regard to the constitution, composition, election and rights of the members of a Municipality. Under the said Act, members of a Municipality are persons chosen by direct election by the residents of a municipal area (ward). Article 243-R(2)(a)(i) allows the legislature of a State to appoint any person as a member of the Board who has special knowledge in the field of municipal administration, however, the proviso appended to the said article precludes persons nominated under sub-clause (i) from having a right to vote in the meetings of the Municipality. The Constitution, therefore, makes a distinction between elected members and nominated members who play essentially an advisory role. Pursuant to the Seventy-fourth

Constitutional Amendment of 1994, Sections 9, 65 and 72 of the Act were amended. Prior to the amendment the co-opted members were at par with the elected members, however, after 1994 only elected members and members of the Legislative Assembly have a right to vote under Section 9(1) of the Act. Under subsection (2) of Section 65, as amended, the Chairman has to be elected by “elected members of the Board”. This change is very important. Prior to 1994, the Chairman was to be elected by the “members of the Board”, which is the phrase used in the unamended Section 65(2), as the co-opted members had a right to vote. However, in 1994, Section 65(2) of the Act was amended and the expression “members of the Board” in the old section is substituted by the expression “elected members of the Board”. In fact, the expression “whole number of members” earlier appearing in Sections 65 and 72 of the Act has been deleted because in Section 65(2) it is expressly provided that the Chairman shall be elected only by

elected members of the Board from amongst themselves. Therefore, the scheme of post-1994 Act is that the Chairman/Vice-Chairman shall be elected by the elected members of the Board and their office shall stand vacated on passing of no-confidence motion by the elected members of the Board. The position which, therefore, emerges is that both before and after 1994, the no-confidence motion had to be voted upon by members who were entitled to vote. As stated above, Section 3 of the Act begins with the words “unless the context otherwise requires”. Section 3(36) defines the expression “whole number”/“total number” to mean total number of members holding the office at the given time. The said expression “whole number of members” finds place in Rules 3(5), (8) and (9). Hence, we have to read Rules 3(5), (8) and (9) in the context of the provisions of the said Act. As stated above, the basic scheme of the Act prior to 1994 and post-1994 has remained unchanged. In both cases, the legislative intent has been that the office of the

Chairman/Vice-Chairman shall stand vacated on passing of no-confidence motion by the members of the Board who are entitled to vote. Hence, in our view, the expression “whole number” or “total number” connotes the “total number of elected members”.

20. Thus, the Supreme Court itself while dealing with scope and ambit of Article 243R held that the Constitution itself makes a distinction between elected members and nominated members who play essentially an advisory role. The elected members of the Council are chosen by popular vote and carry with them, the mandate of the people, whereas, nominated members of the Council are appointed as Councilors. The elected members and nominated members cannot be said to be belonging to the same class and there is no pleading that differentiation between elected and nominated members is either unreasonable or is arbitrary or that it does not rest on any rational basis. In view of aforesaid enunciation of law, challenge to the validity of Article 243R (2) (a) that it violates Article 14 of the Constitution of India, fails.

21. It is pertinent to note that there is no pleading in the writ petition as to what is the basic structure of the Constitution and how Article 243R (2) (a) violates the basic structure of the Constitution. In the absence of any pleading on the aforesaid aspect of the matter, the challenge to Article 243R (2) (a) on the ground that it violates the basic structure of the Constitution deserves to be repelled *in limine*. Even otherwise, the right to vote is not a fundamental right and therefore, Article 243R (2) (a) which provides that nominated members shall not have right to vote in the meeting of the Council does not violate the basic structure of the Constitution. Article 243R (2) (a) does not suffer from any infirmity, therefore, the question of reading down the same does not arise.

22. Section 11(b) of the Act is in consonance with Article 243R (2) (a) of the Constitution and therefore, for the reasons assigned in the preceding paragraph, the same cannot be termed as unconstitutional. Section 11(b) of the Act does not

suffer from any unconstitutionality and therefore, the question of reading down the same also does not arise.

23. The contention that bar contained in proviso to Article 243R(2) does not apply to the election of Chairperson of Municipality concerned, the same also does not deserve acceptance, as the proviso specifically bars the nominated members who oath in the meetings of Municipality. A Conjoint reading of Section 42(2) of the Act and Rule 3 of the Rules leaves no iota of doubt that the President has to be elected in a meeting of the Council. Therefore, the contention that the bar which disentitles the nominated members to vote in the meeting for election to the post of President and Vice-President of the Council does not apply to a meeting held for election to the post of President and Vice-President of the Council does not deserve acceptance. Similarly, the contention that Section 2(6), Section 42(2) of the Act entitles the nominated member to vote for election for the post of President of the Council is concerned, the same deserves to

be repelled in view of bar contained in Article 243R(2) and in Section 11(1) of the Act.

24. So far as reliance placed on division bench of decision of Allahabad High Court in **KHALIQUZ ZAMAN SUPRA** is concerned, suffice it to say that division bench of Allahabad High Court held that the word 'meeting' used in Article 243R (2) (a) of the Constitution does not include a meeting held for election, as Section 54 (1) of the UP Municipalities Act would be rendered unconstitutional. Section 54(1) of the UP Municipalities Act provided that vice-president shall be elected from among the elected as well as nominated members. However, in the instant case, there is no provision like Section 54 in the Act and therefore, the aforesaid decision does not apply to the obtaining factual matrix of the case.

25. This writ petition has been filed in pursuance of liberty granted by a learned Single Judge of this Court, to file a fresh writ petition assailing the validity of Section 11(1)(b) of the Act. We have dealt with issue on merits and therefore, it

is not necessary for us to decide the issue with regard to maintainability of the writ petition.

In view of preceding analysis, we do not find any merit in the writ petition. The same fails and is hereby dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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