

### ANALYSIS OF JUSTICE BHOSALE'S DISSENTING JUDGMENT

- Justice Bhonsale, first of all, records the findings (contained in Justice Radhakrishnan's judgment) **that he agrees with** [Para 144.1, Pgs 117 & 118]. These are as follows :
    - That the municipal laws in question, i.e. the Mumbai Municipal Corporation Act (MMC Act), & the Goa Municipalities Act (GM Act) do not cast any mandatory obligation to kill stray dogs, but only confer a discretion upon the Municipal Commissioner in that regard, which is not “*an unbridled discretion or an absolute power to destroy stray dogs*”.
    - That Section 191BA of the MMC Act which confers the discretion does not however lay down any parameters for exercising the same.
    - That there is no conflict between the ABC (Dogs) Rules and the MMC Act, and if there were any “*conflict between the MMC Act and the Act of 1960/ABC Rules, the Central Legislative Scheme will have primacy over the MMC Act*”.
    - “*In the present case, harmonious construction has to be adopted vis-à-vis the central legislative scheme and the local legislation being MMC Act and see that both can co-exist*”.
  - After recording that harmonious construction has to be adopted, he proceeds to disagree with Justice Radhakrishnan's finding that the ABC Rules prescribe the circumstances under which stray dogs can be put to sleep or exterminated, and the discretion to destroy which is conferred under the municipal laws in question, has to be exercised in the circumstances mentioned in Rules 9 & 10 of the ABC Rules.
- III. He then infers, after studying the scheme of the PCA Act, that insofar as dogs are concerned, the “*destruction of unwanted/stray dogs in lethal chambers or by such other methods as may be prescribed, whenever it is necessary to do so, would not constitute cruelty*” [Para 150], in view of the fact that,
- (i) The Central Government is empowered to make rules, and the AWBI is empowered to make regulations providing for methods of destruction of stray dogs, and
- The AWBI, under Section 9 (f) of the Act, ‘*shall take all such steps as it may think fit to ensure that unwanted animals are destroyed by local authorities*’.
- IV. He then proceeds to consider the ABC Rules, and notes that the same are in ‘*conformity with the “Guidelines for Dog Population Management” published by World Health Organization (WHO) and WSPA in 1990*’ [Para 151].

- V. The judge focuses on Rule 5 of the Rules, and while reproducing it, FAILS TO NOTE that the Committee formed under Rule 4, comprising of the Commissioner/Chief of the local authority, a representative of the Public Health Department of the local authority, and a representative of the Public Health Department if any of the local authority, among others, “*shall be responsible for planning and management of dog control programme in accordance with these rules*”.
- VI. He proceeds to infer that the “*main function of the committee is to issue instructions for catching, transportation, sheltering, sterilization, vaccination, treatment and release*” of dogs [Para 152.1], but falls short of concluding that the dog control programme is to be conducted in this manner, i.e. through sterilization and vaccination.
- VII. The judge, OSTENSIBLY, notices Rule 7 [Para 153]. He, however, extracts only sub-rules 3 and 6 out of the same, and proceeds to infer [Para 153.1] “*that the object of capturing dogs in normal course and releasing them after sterilization and vaccination is meant for controlling the dogs population*”. What he doesn't, however, do, is focus on or extract sub-rule (1), which mentions the terms ‘**dog nuisance**’ and ‘**nuisance or dog bite**’, and provides for the manner of dealing with the same.

In fact, reading sub-rule (1) together with sub-rule (3) of Rule 7 makes it apparent, that all **specific complaints** regarding dog nuisance are also to be dealt with in this manner, i.e. through sterilization and vaccination (so that a major source of dog nuisance is controlled, and dog population controlled as well, leading to a further reduction in dog nuisance).

- VIII. At para 157, pg 137, the judge concludes that the ABC Rules do not deal with the power of the municipal authorities to destroy stray/unwanted dogs, or control or dilute their power to do so. This conclusion is wrong, for the reasons set out at Paragraph VII hereinabove.
- IX. At para 158, pg 138, the judge states that “*Section 9 and 11(3)(b) empower the Board/Local Authority to destroy unwanted/stray dogs in lethal chamber or by such other method as may be prescribed. This power conferred upon the Board and Local Authority under the provisions of the Act of 1960, as observed earlier, is not curtailed by the ABC Rules.*”

In fact, Section 9 specifically empowers only the Board, i.e. the AWBI to destroy unwanted animals.

- X. At pg 139, para 159, the judge concludes that the power conferred under the PCA to put unwanted animals to sleep “*is unfettered and cannot be said to have been withdrawn or curtailed by introducing the ABC Rules*”. For the reasons set out at Paragraph VII, i.e., reading sub-rule (1)



together with sub-rule (3) of Rule 7 makes it apparent, that all **specific complaints** regarding dog nuisance are also to be dealt with in this manner, i.e. through sterilization and vaccination (so that a major source of dog nuisance is controlled, and dog population controlled as well, leading to a further reduction in dog nuisance), this conclusion is incorrect.

XI. At para 162, pg 143, the judge discusses **Section 191-BA of the MMC Act**. He notices that this section empowers the local authority to capture dogs that are found or reported to be a source of **nuisance** to the residents of any building or locality. Further, that these can be destroyed if not claimed within 3 days. What the judge has FAILED TO NOTICE however, while discussing this section, is that **sub-rule (1) of Rule 7 of the ABC Rules** also deals with **PRECISELY THIS ASPECT**, i.e. how dogs are to be dealt with upon receipt of specific complaints regarding ‘**dog nuisance**’ or ‘**dog bite**’. Under this sub-rule these dogs have to be captured by the ‘dog control cell’ set up by the local authority, in consultation with the monitoring committee (constituted under Rule 4), but cannot then be destroyed. These dogs have to be sterilized and vaccinated, and then returned to the area they were picked up from. Incurably ill (including perennially violent) and mortally wounded dogs have, however, to be destroyed in the manner set out in Rule 9.

XII. That is to say, Section 191-BA of the MMC Act, and sub-rule (1) of Rule 7 of the ABC Rules, are obviously in conflict ; and as rightly conceded by Justice Bhosale at Para 144.1, Pgs 117 & 118, ***“if there is conflict between the MMC Act and the Act of 1960/ABC Rules, the Central Legislative Scheme will have primacy over the MMC Act”***. The manner of dealing prescribed by sub-rule (1) of Rule 7 of the ABC Rules will therefore prevail over the manner of dealing with stray animals prescribed by Section 191-BA of the MMC Act.

XIII. Thereafter, the judge discusses the term ‘discretion’ in the legal context. He concludes [Para 166.2, Pg 149] that ***“Discretion has to be exercised within the four corners of the conscience; it has to be just and proper. It cannot clothe the person with arbitrary, capricious, or unrestrained power.”*** He also concludes [Para 166.3, Pg 149] that ***“It is thus clear that the discretion conferred upon the Commissioner under Section 191-BA to destroy dogs is not uncontrolled power of destruction of the dog.”***

XIV. The judge also notices, while discussing the term ‘nuisance’ [Para 165, Pg 151], that ***“The Supreme Court in State of M.P. Vs. Kedia Leather and Liquor Ltd and others, 2003 (7) SCC 389 has observed, the term “nuisance” as used in law is not a term capable of exact definition and it has been pointed out by Halsbury’s Laws of England that ; “even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisance or whether they do not rather fall under other divisions of law of tort.”*** He also observes in the same paragraph that the term nuisance is not capable of precise definition, but later [Para 165.1, Pg 152], also concludes that, ***“In other words, public nuisance, in the context of dog menace, means anything which endangers to life or injurious to health of public at large”***.

XV. At para 166, page 154 (towards the end) he leaves it entirely to the public authority to decide which dog is a source of public nuisance, meriting destruction.

After having noted that (i) discretion cannot be uncontrolled, and that (ii) the term nuisance is not capable of precise definition, leaving it to the civic authority to decide which dog is a nuisance, deserving death, **is tantamount to conferring unbridled discretion on the authority.**

XVI. At para 166.1, page 154 the judge observes that, *“It is pertinent to note that the ABC Rules are silent about nuisance of the dogs which are released after sterilization and vaccination.”* This statement reveals obvious lack of understanding of the effects of sterilization and vaccination, and the manner in which the animal birth control scheme is meant to work in the context of dogs.

In fact, through sterilization, dog behavior is known to alter, and causes of dog aggression, such as females in heat, males fighting over them, mothers protecting their young, are done away with. Dog nuisance is substantially controlled through sterilization and vaccination, and dog population controlled as well, leading to a further reduction in dog nuisance. The ABC scheme can run awry, if sterilized and vaccinated dogs are killed, permitting influx of other, possibly un-sterilized, un-vaccinated dogs into the territory vacated through the killing. In fact, destruction of sterilized, vaccinated dogs, can add to dog nuisance, with new dogs fighting for territory, earlier inhabitants (i.e. dogs) protecting territory, confusion in figures of dogs sterilized and vaccinated in each area, and of areas covered during the course of implementation of the scheme.

XVII. Justice Bhosale’s conclusions would in effect, render the ABC Rules redundant. The other view, i.e. Justice Radhakrishnan’s view, summed up at para 139 at page 116, allows for harmonious construction in the following manner :

*“In any event, by adopting the principle of harmonious construction, the Municipal Commissioner can exercise his discretion to kill stray dogs under Section 191-BA of BMC Act, subject to ABC Rules. In that process neither Section 191-BA nor ABC Rules are rendered ineffective or redundant.”*