

(2011) 08 SHI CK 0057
In the High Court Of Himachal Pradesh
Case No : CWP No. 2680 of 2011

Angdui Norbu and Others

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 18-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 234O, 243C, 40
Himachal Pradesh Panchayati Raj (Election) Rules, 1994 — Rule 85
Himachal Pradesh Panchayati Raj Act, 1994 — Section 127, 146, 159, 162, 163

Citation : (2011) 08 SHI CK 0057

Hon'ble Judges : Kurian Joseph, C.J;V.K. Sharma, J

Bench : Division Bench

Judgement

Kurian Joseph, C.J.—Dictionary defines democracy as " a system of government by the whole population usually through elected representatives" (The Concise Oxford Dictionary) . Democracy pre-supposes participation and involvement of the people governing systems. A village is the basic and indestructible unit of our social system. Article 40 of the Constitution of India obliged the State to take steps to organize village panchayats and endow them with such powers and authority, as may be necessary, to enable them to function as units of self-government, as a directive principle of a state policy. It took more than 40 years to give a meaningful translation of that principle, by introducing the 73rd amendment in the Constitution in the year 1992, providing for the conferment of powers on local self government institutions, in the process of de-centralization of democratic institutions and providing for greater accountability between the citizens and the State. It will be profitable in this context, to refer to the legislative intent as reflected in the statement of objects and reasons for the 73rd and 74th amendments, which read as follows:

73rd Amendment:

1. Though the Panchayati Raj institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the

status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged suppressions, insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources.

2. Article 40 of the Constitution which enshrines one of the directive principles of State policy lays down that the State shall take steps to organize village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. In the light of the experience in the last forty years and in view of the shortcomings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayati Raj institutions to impart certainty, continuity and strength to them.

3. Accordingly, it is proposed to add a new part relating to Panchayats in the Constitution to provide for among other things, Gram Sabha in a village or group of villages; constitution of Panchayats at village and other level or levels; direct elections to all seats in Panchayats at the village and intermediate level, if any, and to the offices of chairpersons of Panchayats at such levels; reservation of seats for the Scheduled Castes and Scheduled Tribes in proportion to their population for membership of Panchayats and office of chairpersons in Panchayats at each level; reservation of not less than one-third of the seats for women; fixing tenure of 5 years for Panchayats and holding elections within a period of 6 months in the event of supersession of any Panchayat.

74th Amendment.

1. In many States local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged suppressions and inadequate devolution of powers and functions. As a result, urban local bodies are not able to perform effectively as vibrant democratic units of self-government.

2. Having regard to these inadequacies, it is considered necessary that provisions relating to urban local bodies are incorporated in the Constitution, particularly for-

(i) Putting on a firmer footing the relationship between the State Government and the urban local bodies with respect to-

(a) the functions and taxation powers; and

(b) arrangements for revenue sharing;

(ii) ensuring regular conduct of elections;

(iii) ensuring timely elections in the case of supersession; and

(iv) providing adequate representation for the weaker sections like Scheduled Castes, Scheduled Tribes and women.

3. Accordingly, it is proposed to add anew part relating to the urban local bodies in the Constitution to provide for-

(a) Constitution of three types of municipalities:

(i) Nagar Panchayats for areas in transition from a rural area to urban area;

(ii) Municipal Councils for smaller urban areas;

(iii) Municipal corporations for larger urban areas.

(e) reservation of municipality-

" (i) for Scheduled Castes Scheduled Tribes and in proportion to their population of which not less than one-third shall be for women.

2. In this case, we are concerned with a peculiar situation in the matter of constitution of Panchayat at intermediate level - Panchayat Samiti and the election of Chairman and Vice Chairman thereof. Under Article 243-C of the Constitution of India, it is for the State legislature to make provisions in respect of constitution of Panchayats. Article 243-C(2) , reads follows:

All the seats in a Panchayat shall be filled by persons chosen by direct election from territorial constituencies in the Panchayat area and for this purpose, each Panchayat area shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the Panchayat area.

3. Article 243-C(3) provides for the composition of Panchayats, which reads as follows:

The Legislature of a State may, by law, provide for the representation-

(a) of the Chairpersons of the Panchayats at the village level, in the Panchayats at the intermediate level or, in the case of a State not having Panchayats at the intermediate level, in the Panchayats at the district level;

(b) of the Chairpersons of the Panchayats at the intermediate level, in the Panchayats at the district level;

(c) of 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 a Panchayat area at a level other than the village level in such Panchayat;

(d) of the members of the Council of States and the members of the Legislative Council of the State, where they are registered as electors within-

(i) A Panchayat area at the intermediate level, in Panchayat at the intermediate

level;

(ii) A Panchayat area at the district level, in Panchayat at the district level.

4. Article 243-C(5) provides for election of Chairperson, which reads as follows:

(5) The Chairperson of-

(a) A Panchayat at the village level shall be elected in such manner as the Legislature of a State may, by law, provide; and

(b) A Panchayat at the intermediate level or district level shall be elected by, and from amongst, the elected members thereof.

5. Article 243-O provides as follows:

243-O. Bar to interference by Courts in electoral matters.-Notwithstanding anything in this Constitution-

(a) The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243-K, shall not be called in question in any Court;

(b) No election to any Panchayats shall be called in question except by an election petition presented to such authority and in such manner as it provided for by or under any law made by the Legislature of a State.

6. In terms of the mandate under Article 243-C of the Constitution of India, the State of Himachal Pradesh has enacted the Himachal Pradesh Panchayati Raj Act, 1994, " with a view to ensure effective involvement of the Panchayati Raj Institutions in the local administrative and developmental activities." Section 77 of the Act provides for establishment of Panchayat Samiti, which reads as follows:

77. Establishment of Panchayat Samiti.-(1) For each Block there shall be a Panchayat Samiti, having jurisdiction, over the entire block excluding such portions of the block as are included in a Municipality constituted under any law for the time being in force:

7. Section 78 of the Act provides for constitution of the Panchayat Samiti, which reads as follows:

78. Constitution of Panchayat Samiti.-(1) Every Panchayat Samiti shall consist of-

(a) the directly elected members from territorial constituencies as determined under the Act;

(b) 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 Panchayat Samiti area;

(c) the members of the Council of States, where they are registered as electors within the Panchayat Samiti area;

(d) one-fifth of the Pradhans of Gram Panchayats in the Panchayat Samiti area, by rotation, for such period as the prescribed authority may determine, by lot: Provided that a Pradhan who was a member under this clause for one term shall not be eligible to become member for a second term during the remainder of his term of office as Pradhan.

(e) The member for the Zila Parishad, representing the ward which comprises wholly or partly the Panchayat Samiti area.

(2) The Pradhans of Gram Panchayat and other members of the Panchayat Samiti whether or not chosen by direct election from territorial constituencies in the Panchayat Samiti shall have the right to vote in the meetings of the Panchayat Samiti except in the election and removal of the Chairman or Vice Chairman only the elected members shall have the right to vote.

(3) The number of elected members of a Panchayat Samiti under Clause (a) of Sub-section (1) shall consist of persons elected from the territorial constituencies in the Samiti area as may be notified from time to time by the Government at the rate of one member for every three thousand five hundred population or part thereof:

Provided that in a Panchayat Samiti area having a population of not exceeding fifty two thousand five hundred there shall be minimum of 15 elected members:

Provided further that where the population of a Panchayat Samiti area is more than one lakh and forty thousand, it shall be divided into territorial constituencies in such manner that the total number of constituencies shall not exceed forty and the population of each constituency shall, as far as practicable, be the same in each constituency.

Provided further that the Government may, irrespective of the population of the Panchayat Samiti area, declare, by a notification, that the provisions of this section shall apply to a Panchayat Samiti in a scheduled area, subject to such exceptions and modifications as may be specified by it in such a notification.

Explanation.-For the purpose of Sub-section (3) of this section the word part thereof shall mean the calculation to the nearest multiple of one-half ignoring less than one-half and counting one-half or more as one for determining the population for fixing the seats.

(4) Seats shall be reserved in a Panchayat Samiti for the:

(a) Scheduled Caste; and

(b) the Scheduled Tribes;

and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat Samiti as the population of the Scheduled Castes in that Panchayat Samiti area or of the Scheduled Tribes in that Panchayat Samiti area bears to the

total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat in such manner, as may be prescribed.

5) Not less than one-third of the total number of seats reserved under Sub-section (4) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(5-A) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat Samiti shall be reserved for women.

(6) The State Government may, by general or special order, reserve such number of seats for persons belonging to Backward Classes in a Panchayat Samiti, not exceeding the proportion to the total number of seats to be filled by direct election in the Panchayat Samiti as the population of the persons belonging to Backward Classes in that Panchayat Samiti area bears to the total population of that area and may further reserve not less than one-third of the total seats reserved under this Sub-section for women belonging to Backward Classes.

(7) the seats reserved under Sub-section (4) , (5) , (5-A) and (6) shall be allotted by rotation to different constituencies in the Samiti area in such manner as may be prescribed.

8. In this case, we are concerned with the constitution of Panchayat Samiti Kaza and the election of Chairman and Vice Chairman thereof. It is significant to note that the Panchayati Raj Act itself has contemplated the constitution of a Samiti at the rate of one member for every 3500 population with the proviso that in a Panchayat Samiti which does not have a population not exceeding 52500, there should be a minimum of 15 elected members. The Kaza Block-Panchayat Samiti, is one such area and the number of elected members is 15. Section 2(20) defines member as including member of the Panchayat Samiti and Section 2(23) defines office bearer as including a member in the Samiti. Section 79 provides for election of Chairman and Vice Chairman of Panchayat Samiti, which read as follows:

79. Election of Chairman and Vice-Chairman or Panchayat Samiti.-(1) After the declaration of result of election of the elected members of the Panchayat Samiti in the prescribed manner, the Deputy Commissioner concerned or any Gazetted Officer appointed by him in this behalf shall as soon as possible but not later than one week of such declaration call under his President ship a meeting of all elected members for the purpose of oath, or the affirmation of allegiance u/s 127.

2) Immediately after oath or affirmation of allegiance u/s 127 is administered or made, the elected members of a Panchayat Samiti shall, in the prescribed manner, elect one of its members to be the Chairman and another member to be the Vice-Chairman of the Panchayat Samiti:

Provided that if the office of the Chairman or Vice-Chairman, as the case may be,

is vacated or falls vacant during the tenure on account of death, resignation or no-confidence motion, a fresh election within a period of two months from the date of occurrence of vacancy shall be held from the same category in the prescribed manner.

9. Section 127 provides for oath or affirmation of allegiance, which read as follows:

127. Oath or affirmation of allegiance.

(1) Notwithstanding anything contained in the Oaths Act, 1869 no elected office bearer of Panchayat shall enter upon his office, until he has, in the manner prescribed, taken oath or made affirmation of his allegiance in the form specified in Schedule-V.

(2) If any such person refuses to take or make such oath or affirmation, except on account of such disability for which permission of the prescribed authority is obtained, his election shall be deemed to be invalid and a fresh election shall take place.

(3) No person whose election has been deemed to be invalid under this section shall be eligible for election as the member, Pradhan or Up-Pradhan of Gram Panchayat or the member, Chairman or Vice-Chairman of Panchayat Samiti or Zila Parishad, as the case may be, for a period of two years from the date on which he ought to have taken or made such oath or affirmation.

10. Section 80 of the Act provides for the meeting of the Panchayat Samiti, which reads as follows:

80. Meetings.-(1) A meeting of a Panchayat Samiti shall be either ordinary or special and, except as otherwise provided under this Act, the meetings of the Panchayat Samiti shall be convened by the Chairman and in his absence by the vice-Chairman.

(2) A Panchayat Samiti shall ordinarily meet at its headquarters at least four times in each year for the transaction of its business and not more than three months shall be allowed to elapse between any two successive meetings.

(3) Notice of every meeting specifying the time and date thereof and the business to be transacted there at shall be sent to every member of the Panchayat Samiti and exhibited at the office of the Panchayat Samiti not less than ten clear days before an ordinary meeting and seven clear day before special meeting:

Provided that wherever it is considered expedient to do so in the public interest the requirement of the time limits specified in this Sub-section may be relaxed with the approval of the prescribed authority.

(4) The Chairman, or in his absence the Vice-Chairman, may whenever he thinks fit, and shall, on requisition made in writing by not less than one-third of the

total members of the Panchayat Samiti or if required by the Zila Parishad or the Deputy Commissioner, convene a special meeting within two weeks of the receipt of the written requisition.

(5) Any meeting of a Panchayat Samiti may, with the consent of the majority of the members present, be adjourned to any other date, but no business other than that left over at the adjourned meeting shall be transacted at the next following meeting:

Provided that additional agenda may be included for the adjourned meeting if the same is notified on the day of adjournment of the meeting or at least one week before the date fixed for the adjourned meeting: Provided further that when a special meeting is adjourned for want of quorum, fresh adjourned special meeting shall be convened by giving fifteen days notice to the members within one month from the date of adjournment of special meeting.

(6) At every meeting of a Panchayat Samiti, the Chairman if present, or in his absence the Vice Chairman, and if there be no Chairman or Vice Chairman present, then such one of its members, as the members may elect, shall preside.

(7) Except as otherwise provided by this Act or the rules made thereunder all questions coming up before any meeting of a Panchayat Samiti shall be decided by a majority of votes of the members present and voting and, in case of an equality of votes, the authority presiding at the meeting shall have a second or casting vote.

(8) Any matter finally disposed of by a Panchayat Samiti shall not be reconsidered unless the recorded consent of not less than two-thirds of its total members has been obtained there to or unless the Zila Parishad, or the Director has directed its reconsideration.

(9) Subject to the provisions of this Act and the rules framed thereunder, for the transaction of business at a meeting of a Panchayat of a Panchayat Samiti, the quorum shall be:

(a) if it is an ordinary meeting one-half of its members having right;

(b) if it is a special meeting, two-thirds of its members having right to vote.

11. The Himachal Pradesh Panchayati Raj (Election) Rules, 1994, under Chapter IX, have provided for election of Chairman and Vice-Chairman of Panchayat Samiti. Rule 85, as amended to the extent relevant, reads as follows:

85. Meeting for election.(1) After the declaration of results of the elected members of the Panchayat Samiti, the Deputy Commissioner concerned or any other officer authorised by him in this behalf except Block Development and Panchayat Officer shall fix a date of meeting under his president ship (hereinafter referred to as Presiding Officer) for the purposes of oath or the affirmation of allegiance u/s 127 of the Act as soon as possible, but not later than one week of the declaration of results as per Section 79 of the Act.

(1-A) . As soon as possible but not later than seven days after oath or affirmation of allegiance under Sub-rule (1) is administered or made, the Deputy Commissioner concerned or any other officer authorised by him in this behalf except Block Development Officer shall call under his president ship a meeting of all elected members to elect one of its members to be the Chairman and another member to be the Vice Chairman of the Panchayat Samiti:

Provided that the State Government may, be general or special order, allow holding of meeting for the election of Chairman and Vice-Chairman under this sub-rule after one week but not later than one month from declaration of result of election of the elected members of the Panchayat Samiti under the following circumstances:

(i) if it is not possible to convene meeting within seven days due to natural calamities;

(ii) If it is not possible or desirable to hold meeting within seven days due to severe law and order problem; and

(iii) If the election are declared exceeding the period of fifteen days prior to the expiry of the duration of the existing Panchayats.; and

(1-B) . As soon as possible but not later than seven days after the declaration of occurrence of the casual vacancy in the office of the Chairman or the Vice-Chairman or both, as the case may be, the Deputy Commissioner concerned or any other officer, except the Secretary of the Panchayat Samiti, authorised by him in this behalf shall call under his President ship a meeting of all elected members to elect the Chairman or the vice-Chairman or both, as the case may be:

Provided that if, owing to a natural calamity of great severity or a grave situation of law and order or a war or aggression by another country against India affecting the relevant area in Himachal Pradesh or any other cause beyond human control, it is not possible to hold such meeting within seven days, the government may allow such meetings to be held after seven days, but no later than thirty days after the occurrence of the vacancy in question.

(2) The Presiding Officer shall issue a notice to all the members entitled to take part in the proceedings in Form-40.

(3) A copy of such notice shall be exhibited on the notice board of the Panchayat Samiti Office.

(4) The Notice shall be despatched at least five days before the date of meeting at their permanent address and shall contain the date, time, place and purpose of the meeting.

(5) No quorum shall be required for the meeting for the purpose of oath or affirmation of allegiance under Sub-rule (1) . Quorum for meetings for the purposes of election of Chairman and Vice-Chairman or both, as the case may be

shall be two-third of the total elected members. If within two hours after the time appointed for the meeting, the quorum is not present, the meeting shall be adjourned. In the event of adjournment of the first meeting for want of quorum, the second meeting shall be convened within ten days from the date of first meeting and if the second meeting is also adjourned for want of quorum, the subsequent meetings shall be convened within ten days from the date of the last adjourned meeting and action under Clause (b) of Sub-section (1) of Section 146 of the Act shall be taken against those members who will not attend subsequent meetings for which specific mention shall be made in the notices of such meetings. Quorum for the second and subsequent meetings shall be the simple majority of the total elected members; and...

12. Having referred to the provisions, both the constitutional and statutory, we shall now refer to the factual matrix and the issues arising thereof. Election to the 15 wards of Kaza Panchayat Samiti was held on 4.1.2011. On 6.1.2011, the authorized officer issued notice (Annexure P-1) to the newly elected members of the Panchayat Samiti for oath or affirmation on 10.1.2011. On 10.1.2011, only members (6 Petitioners and one another member, by name Sh. Nawang Dodan) took oath and Ors. did not even attend the meeting. Proceedings of the meeting are at Annexure P-3. It is seen from Annexure P-3 that the authorized officer fixed 15.1.2011 as next date of meeting. On 12.1.2011, the Authorised Officer fixed 20.1.2011 as the date for administering oath to the remaining members and for election of Chairman and Vice Chairman. Except the 7 members who had already taken oath, nobody else turned up and hence the meeting was thereafter adjourned to 28.1.2011, 4.2.2011 and thereafter to 14.2.2011. On 14.2.2011, it is seen from Annexure P-2 that the Authorised Officer has administered the oath to six more members. According to the private Respondents, who had not taken oath on 10.1.2011 but took oath only on 14.2.2011, on account of bad weather condition, blockade of road, disruption of communication system and personal difficulties, they could not take oath prior to 14.2.2011 and they had given due intimation as per their letters dated 12.1.2011, 4.2.2011, which are marked as Annexures R-3/1 to R-3/5. Admittedly, the first letter written by the private Respondents who had not taken oath on 10.1.2011 is only on 12.1.2011, after 7 days of the election. It is also the contention of the private Respondents as well as the State that the Petitioners have the remedy only by way of election petition and no effective relief can be sought under Article 226 of the Constitution of India.

13. In the above factual matrix, 3 issues arise for consideration:

i) Is there any outer time-limit fixed in the Act and Rules for an elected member of Panchayat Samiti to enter office by taking oath or making affirmation? If the answer is in the affirmative, what is the consequence of elected member not entering office within the outer time thus fixed in the statutes?

ii) What is the quorum of the Panchayat Samiti for a special meeting, for election of Chairman and Vice Chairman? Is it two-third of the members elected and

entered office by taking oath or making affirmation or is it two-third of the membership of the elected members of the Panchayat Samiti?

iii) Whether an election petition would lie in the above factual matrix

14. We shall first deal with the contention regarding the maintainability. According to the State and the private Respondents, in view of Section 127(2) of the Panchayati Raj Act, 1994, whether a person elected has refused to take or make oath or affirmation cannot be gone into in writ proceedings under Article 226 of the Constitution of India and the remedy is only by way of election petition, particularly since the consequence is invalidation of the election. Chapter XI of the Panchayati Raj Act, 1994, provides for disputes relating to election. u/s 159(f) , "election" means an election to fill an office under the provisions of the Act and there is no dispute that office would include the elected membership in the Panchayat Samiti as well. Section 162 of the Act provides for election petitions, which reads as follows:

162. No election under this Act shall be called in question except by an election petition presented in accordance with the provisions of this Chapter.

15. Section 163(1) , provides that "Any elector of a Panchayat may, on furnishing the prescribed security in the prescribed manner, present within 30 days of the publication of the result, on one or more of the grounds specified in Sub-section (1) of Section 175, to the authorised officer an election petition in writing against the election of any person under this Act." Thus, an election petition would lie only on the ground specified u/s 175(1) . Section 175(1) provides for grounds for declaring the elections to be void, which read as follows:

175. Grounds for declaring elections to be void.-(1) If the authorised officer is of the opinion-

(a) that on the date of his election the elected person was not qualified, or was disqualified to be elected under this Act; or

(b) that any corrupt practice has been committed by the elected person or his agent or by any other person with the consent of the elected person or his agent; or

(c) that any nomination has been improperly rejected, or

(d) that the result of the election, in so far as it concerns the elected person, has been materially affected-

(i) by the improper acceptance of any nomination, or

(ii) by the improper reception, refusal

(iii) or rejection of any vote or the reception of any vote which is void, or by any non-compliance with the provisions of this act or of any rule made under this Act, the authorised officer shall declare the election of the elected persons to be void.

16. None of the grounds as specified u/s 175(1) is attracted in the instant case. It is a case of an elected member, not having taken oath or made affirmation, as provided u/s 127. Learned Additional Advocate General and learned Counsel for the private Respondents, though made an attempt to canvass for maintainability u/s 174, we are afraid, the said contention also cannot be appreciated. Section 174(1) of the Act reads as follows:

174. Decision of the authorised officer.-(1) Where an election petition has not been dismissed u/s 165, the authorised officer shall inquire into the election petition and at the conclusion of the inquiry shall make an order.

(a) dismissing the election petition; or (b) declaring the election of all or any of the elected persons to be void; or

(c) declaring the election of all or any of the elected persons to be void and the Petitioner or any other candidate to have been duly elected.

17. It may be seen that only an election petition can be looked into by the authorised office. A petition can be said to be an election petition u/s 162 only if the same is filed on any one of the grounds as prescribed u/s 175(1) of the Act. No ground as prescribed is available to the Petitioners u/s 175(1) to maintain an election petition u/s 162 of the Act. Therefore, the contention that there is an alternate remedy by way of election petition and the contention on the bar under Article 243-O also cannot be appreciated. Article 243-O of the Constitution of India provides for bar to interference by Courts in electoral matters, otherwise than by an election petition, which reads as follows:

243-O. Bar to interference by Courts in electoral matters.-Notwithstanding anything in this Constitution-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243-K, shall not be called in question in any Court;

(b) No election to any Panchayats shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.

18. Since an election petition in the prescribed manner is not maintainable, as stated above, the constitutional bar also is not attracted in this case. The contention that invalidation of an election is contemplated only in an election petition is also without any basis. Section 127(2) , provides for a statutory invalidation of the election in the event of an elected member not entering office within the prescribed period. Section 127(2) has provided that the election of a member who has not entered office within the prescribed period shall be deemed to be invalid. A consequence also is provided in the Act that a fresh election should take place. Thus, the statute has not only provided a deemed invalidity but has also provided for the consequence thereof. Having provided a deeming provision also providing for the consequence for the deemed event, is not

required under law that a particular authority should again declare or endorse what has taken place by the deemed event and the consequence thereof. The legislature has consciously intended to avoid such redundant provision action and a cumbersome procedure, with a view to effectively activate democratic institutions without wasting time. To hold otherwise would be doing violence to the scheme of the Act and would be a dis-service to a democratic set up. Therefore, in the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, only this Court can look into such issues and Election Tribunal is incompetent to deal with such matters. Thus, the Writ Petition is perfectly maintainable, nay, the Writ Petition is the only remedy.

19. Deeming provision in a legislative exercise is centuries old concept and practice. One of the earliest decisions in *Levy, Re, ex p Walton* 1881 (17) Ch. D 746 , wherein it has been held as follows:

...when a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. After ascertaining the purpose full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate.

20. Australian Courts have also dealt with this principle in *Hunter Douglas Australia Pty. v. Perma Blinds*, 1970 (44) ALJ 257, stating that the purpose of a deeming provision is "to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient device for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect of meaning which some matter or thing has the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion."

21. In a recent decision in *Ittiamam and Others Vs. Cherichi alias Padmini*, , it has been held that " it is well known when legislature uses a deeming provision to create a legal fiction, it is always used to achieve a purpose." (para-17) .

22. Thus, it is clear that a deeming provision is intended to create a legal fiction. It is intended to achieve a purpose. If the result intended to be achieved is also prescribed in the provision, it has to be taken that in the event of the legal fiction, the result also follows. It is not necessary to have any collateral proceedings for declaration of the result of a legal fiction, the deeming provision.

23. Now, we shall deal with the first question as to whether there is any outer time limit for an elected member to enter office. Section 127 starts with a non obstante clause so as to rule out the possibility of roping in the provisions of the Oaths Act, 1869, which provides for procedure for taking oaths. Section 127(2)

in unambiguous terms has provided that in case any person refuses to take oath or make affirmation, his election should be deemed to be invalid and there should be a fresh election. u/s 127(3) , a person whose election has thus been invalidated, would be ineligible for election for a period of two years. No doubt, Section 127 has contemplated and provided for the permission of the prescribed authority on account of disability to take the oath or make the affirmation as and when called for. Whether the prescribed authority has discretion beyond a certain period and whether such period has been prescribed is the moot question. Section 79 of the Act provides for election of Chairman and Vice Chairman. Section 79(2) provides that " immediately after oath or affirmation of allegiance u/s 127 is administered or made, the elected members of a Panchayat Samiti shall, in the prescribed manner, elect one of its members to be the Chairman and another member to be the Vice Chairman of the Panchayat Samiti." Section 79(1) has clearly provided for a period of one week to the authorised officer as the outer limit. Further it provides that after the declaration of the result of the election, a meeting of the elected members shall be convened for the purpose of oath or affirmation stipulated u/s 127,"as soon as possible but not later than one week of declaration."..... The question of a member seeking extension of time on account of any disability on the first day of the meeting thus convened after the declaration of the result of the election, is only for extension of time within seven days. In other words, in case the meeting is convened on the very next date of declaration of election and in case any elected member has any disability to take oath on that date, he can seek for permission to take oath on another date but not later than seven days of the declaration of the result of the election. Once, the law prescribes such outer limit and the prescription being clear and unambiguous and with the definite purpose, no authority is empowered to extend the time beyond seven days. In other words, the permission beyond seven days is inconsequential. In the case of an elected member, in case he has not entered the office within seven days of the declaration of the result of the election by taking oath or making affirmation, his election itself would be invalid on the 8th day and thereafter steps will have to be taken for fresh election.

24.. We are fortified in the view as above in view of the scheme of election of Chairman and Vice Chairman as provided under Chapter IX of the H.P. Panchayati Raj (Election) Rules, 1994. Under Rule 85, which is akin to Section 79, we have considered above, it is mandated that the Deputy Commissioner or the authorised officer shall fix a date of meeting for the purpose of taking oath or making affirmation as required u/s 127 of the Act, after declaration of the results, as soon as possible but not later than one week of the declaration of the result as per Section 79 of the Act. Section 79, as we have already seen, has specifically provided for a period within which the elected person should enter office. Rule 85(1A) further provides that, as soon as possible, but not later than seven days after oath or affirmation of allegiance " a meeting shall be convened to elect one person as Chairman and another as Vice Chairman". The proviso to Rule 85(1A) has also dealt with outer time limit for the purpose of

election of Chairman and Vice Chairman, providing that a meeting beyond seven days of the members entering office for the purpose of election of Chairman and Vice Chairman, is permissible for an outer limit of one month in the event of the three prescribed contingencies; 1) natural calamity, 2) law and order problem and 3) the declaration of the election is beyond 15 days prior to the expiry of the duration of the existing Samiti.

25. Rule 85(1B) has also provided for filling up the casual vacancies in the office of Chairman and Vice Chairman and there also the outer time limit is prescribed. Therefore, under the Scheme of the Act and Rules also, and as per the constitutional mandate as well, the democratic institution at the grass root level, in this case the intermediate level, is to be made functional within a prescribed period. No authority shall frustrate the scheme, is the mandate of the statute. That is why even the prescribed authorities also have been given discretion providing for outer limits.

26. Now, we shall deal with the second question as to whether a quorum is contemplated for election to the office of Chairman and Vice-chairman in the Panchayat Samiti and whether the quorum is of the membership of the Samiti or of the elected members having entered office. Article 243-C(5)(b) mandates that the Chairperson of a Panchayat at the intermediate level shall be elected by and from amongst the elected members thereof. Article 243-C(3) has left it to the legislature to provide for the composition of the Panchayat Samiti. Thus, u/s 78 of the Panchayati Raj Act, the Panchayat Samiti shall consist of the elected members from the territorial constituencies, 15 in the instant case, the members of the house of the people and members of the Legislative Assembly of the State representing the constituencies which comprise wholly or partly the Panchayat Samiti area, the members of the Council of the States, where they are registered as electors in the Panchayat Samiti area, one-fifth of the Gram Panchayats in the Panchayat Samiti area by rotation, for such period as prescribed authority may determine by lot and the member of the Zila Parishad representing the ward which comprises wholly or partly the Panchayat Samiti area. Section 78(2) of the Act provides that the Pradhans of the Gram Panchayat and other members of the Panchayat Samiti whether or not chosen by direct election in territorial elections of the Panchayat Samities shall have the right to vote in the Panchayat Samiti except in the election and removal of Chairman and Vice-Chairman. In other words, for the election and removal of the Chairman and Vice-Chairman of the Panchayat Samiti only the directly elected members from territorial constituencies, in the instant case 15, have the right to vote. The territorial constituencies are decided proportionate to the population in the Panchayat Samiti area, one member for every 3500 people and minimum of 15 where the total population does not exceed 52500. Thus, the elected members are the representatives of the people of the respective wards, 15 in the instant case, where the number is around 3500 in each ward. Section 80 of the Panchayati Raj Act provides for the meeting of the Samiti. Sub-section(9) of Section 80 provides that for an ordinary meeting of the Samiti, the quorum is half of its members

having right to vote and for special meeting two-third of its members having right to vote. Members having right to vote are specified under the membership of the Panchayat Samiti, in the instant case Kaza, having right to vote 15, representing 15 wards of people in the Panchayat Samiti, each member of the ward representing around 3500 people of the ward. Thus, the quorum can only be understood as the quorum of the membership of the elected members. Though, the learned Counsel for the Petitioners strenuously contended also that in the scheme and purpose of the Act, the quorum should be understood as the quorum of those elected and having taken oath or affirmation, we are afraid the contention cannot be appreciated. That would frustrate the democratic working of the institutions. In an unlikely event of only one or two members entering office by taking oath or affirmation within seven days of the declaration of the result, it would mean that the quorum for election of Chairman and Vice-Chairman should be taken as only two or even one, as the case may be. That would certainly frustrate the will of the people. The will of the people as per the statutory scheme is one representative for around 3500 people in the Panchayat Samiti. Therefore, the Chairman and Vice-Chairman of such a Samiti should have the mandate of two-third of the population in the Panchayat Samiti as represented by their elected members. Article 243C(5) has specifically provided that the Chairman should be elected by and from the elected members of the Samiti. The purport and purposive interpretation in the scheme of the Constitution and the Act and Rules in the context of Sections 78, 79, 80 read with Rule 85 of the Panchayati Raj (Elections) Rules, 1994, is that the original quorum for election of Chairman and Vice-Chairman of the Panchayat Samiti is two-third of the membership of the elected members having right to vote. The question of simple majority as provided under proviso to sub rule (5) arises only in a situation where a meeting with the required quorum could not be conducted. The required quorum is two-third of the elected membership of the Samiti with right to vote. In other words, only in a situation where two-third of the elected members are available for a meeting and still not present in the meeting, there arises the question of second meeting with simple majority. Then alone would it be the election by the people, in the sense, election by the elected members in the Samiti. In the instant case, the membership in the Kaza Panchayat Samiti, having right to vote is 15. Therefore, the quorum is ten. Until and unless, such quorum is constituted, there cannot be an election of Chairman or Vice Chairman. The Panchayat Samiti itself can be certainly constituted only when the elected members having right to vote are otherwise available for being invited to participate in the meeting for election of Chairman under Article 243C(5) of the Constitution of India and Chairman and Vice Chairman u/s 79 of the Act. In the case of any such vacancy, steps should be taken under the Act to immediately hold election and then constitute Panchayat Samiti and thereafter only the election to the office of Chairman and Vice Chairman can be conducted.

27. The whole purpose of constitution of Panchayats, be it at village level or intermediate level, is to set up vibrant democratic units of self governance.

Unlike other elected bodies at the Centre or State level, where the purpose is also to legislate and to form a government, in the case of Panchayats, it is only self-governance at the grass-root level. No doubt, it is a democratic institution and it has to be so also. If an institution is to be truly democratic, it shall be of all the people and by all the people. It shall not be of a few people governing all people and that is precisely the principle behind insisting for the quorum out of the total elected membership, for electing the Chairman and Vice Chairman. In such a situation only a Panchayat Samiti would be of the whole people from the Panchayat and by the whole people of the Panchayat and necessarily for all people in the Panchayat. Once, this equilibrium of "all the people and by all the people" is lost, then the institution would cease to be a democratic institution and if so, it will not certainly be in furtherance of the constitutional ethos apart from being in violation of the constitutional mandate.

28. In the above circumstances, this Writ Petition is disposed of as follows:

Steps shall be taken to conduct election forthwith to the 8 vacant seats in Kaza Panchayat Samiti. The process shall be completed at any rate within 60 days. Within 7 days thereafter, such newly elected members shall be administered oath of office and immediately thereafter election to the post of Chairman and Vice Chairman shall be conducted.

29. The Writ Petition is disposed of, so also the pending application(s) , if any.