

(1986) 08 PAT CK 0030

In the Patna High Court

Case No : C.W.J.C. No's. 2087 and 2098 of 1986

Lalit Narayan Mishra Institute of Econmic Development and
Social Change and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 26-08-1986

Acts Referred:

Coking Coal Mines (Nationalisation) Act, 1972 — Section 14, 17, 4, 6
Constitution of India, 1950 — Article 123, 14, 16, 163, 19
Government of India Act, 1935 — Section 13, 3, 4, 42, 5

Citation : AIR 1987 Patna 53 : (1987) 35 BLJR 33 : (1986) PLJR 1067

Hon'ble Judges : S.S. Sandhawalia, C.J;Uday Sinha, J;N.P. Singh, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

S.S. Sandhawalia, C.J.—In these two connected writ petitions, laying a frontal challenge to the validity of the Private Educational Institutions (Taking Over) Ordinance, 1986 (Bihar Ordinance No. 15 of 1986), significant constitutional and legal issues come to the fore, which deserve formulation at the very outset. Inter alia, these are:

- (1) Whether the satisfaction of the Governor under Article 213 of the Constitution of India pertaining to the immediacy for the promulgation of an Ordinance is justiciable ?
- (2) Whether the exercise of legislative power by promulgation of an Ordinance by the Governor can be impeached on the ground of mala fides ?
- (3) If so, would the mala fides of a Chief Minister be tantamount to the mala fides of the Council of Ministers as a whole, and, may, consequently, vitiate the exercise of the legislative power of the promulgation of the Ordinarcc ?
- (4) Does the impugned Ordinance require the sanction of the President under the proviso to Clause (1) of Article 213 of the Constitution ?

(5) Is the impugned Ordinance void for lack of legislative competence ?

(6) Whether the impugned Ordinance is discriminatory and infracts Article 14 in so far as it chooses the petitioner Institute alone for nationalisation in its first phase ?

(7) Does the impugned Ordinance violate the fundamental right to form associations under Article 19(1)(c) of the Constitution ?

2. It is manifest that the primal issues aforesaid are pristinely legal and would consequently relegate the facts to a comparative background, despite the volume of the pleadings. Nevertheless, the terra firma of the matrix giving rise to the issues has necessarily to be noticed, albeit with relative brevity.

3. The petitioner Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna (hereinafter called the Institute), as its very name indicates, is in the memory of late Shree Lalit Narayan Mishra, who, during the sixties and the early seventies, was a towering political figure both in the State of Bihar and also at the national level as the Cabinet Minister for Railways. He fell to an assassin's bomb at Samastipur in 1974, apparently for reasons political. The petitioner Institute, though primarily, (if not wholly,) financed from the State coffers, has been nursed to its present stature by his brother, Shree Jagannath Mishra, who himself is a prominent political figure in his own right, having been earlier the Minister for Irrigation and later the Chief Minister of Bihar from April, 1975, to April, 1977, and then from June, 1980, to August, 1983, when he relinquished the said office.

4. Perhaps, at the very outset it may be noticed that the main writ petition, Civil Writ Jurisdiction Case No. 2098 of 1986, as drafted, is somewhat remarkable in the paucity of factual foundation, but replete with elaboration on the political and legal theory that despite the abrogation of the property clause, purporting to abolish the fundamental right to property by deleting Article 19(1)(f) and Article 31, the right to property nevertheless remains a fundamental right by being comprised in Article 21. Reliance is sought to be placed, with substantial quotations from articles and opinions rendered by A.M. Bhattacharya, J., and, Professor Tripathi in this context. The basic facts have consequently to be collected from the services to achieve a modicum of coherence. The Institute was originally established as the "Bihar Institute of Economic Development" in the year 1973 under Chairmanship of Shree Jagannath Mishra, who was then the Minister for Irrigation in the State, and, was registered under the Societies Registration Act, 1860, on the 28th of March, 1973. In the following year it was recognised by the Magadh University as an Institute for the purpose of research under the provisions of Section 2(I) of the Magadh University Act, and, a grant of Rs. 50,000 was released by the said University for the purpose of research. The Institute was re-named in the memory of Shree Lalit Narayan Mishra, with its present name in 1975, vide Bihar Government Resolution No. K. M. 1-031475-E-1084 of the 10th June, 1975. A grant of Rs. 3,06,000 only was received from

the Government on the 25th of November, 1975, and, it is not in dispute that thereafter liberal grants to the tune of Rs. 1,28,84,559 have been subsequently made by the State of Bihar. In that very year, the Government also sanctioned the posts of 2 Professors, 2 Readers, 3 Lecturers, 1 Director, 1 Librarian, and 6 Visiting Professors, apart from the requisite post of administrative and ministerial staff. On the 23rd of March, 1977, the Magadh University, u/s 73 of the Bihar State Universities Act, recognised the Institute as an autonomous one for a period of three years, subject to the concurrence of the University Grants Commission and the State Government, which was subsequently obtained, and, later this period of autonomy was extended for another three years in May, 1980. The rules and statutes of the Institute, as prepared by the Committee, were, approved by its governing Council on the 8th of July, 1978. In the year 1975, the Institute started one-year Diploma Course in Office Management, followed by a similar Diploma Course in Marketing and Sales Management and in Personnel Management and Industrial Relations, and later, a two-year Diploma course in Business Management. In 1981, the two-year Diploma course in Business Management was converted into Master in Business Management course, recognised by the Magadh University, and, later further changes in the courses conducted by the Institute were made, to which detailed reference is unnecessary.

5. It is averred on behalf of the petitioning Institute that it has close associations with a number of prestigious Institutions at the National level and presently the broad division of the Institute is in the Management Education wing and the Research wing. Recently on the 22nd of August, 1985, the State Government sanctioned the upgrading of the post of Director as the Director-General, carrying a salary of Rs. 3,500, with liberal perks of the office attached thereto and, Shree Jagannath Mishra was appointed to the said post on a permanent basis. It is alleged that relations between the Management Institute and Shree Bindeshwari Dubey, Chief Minister, got somewhat soured and the annual grant of the Institute was stopped by the State Government in spite of a no-objection certificate having been granted by the Education and Finance Department officials. This led to a loss of faith reposed in the Institute by the various Departments of the Government and the University Grants Commission.

6. It has been averred that on the 19th April, 1986, a meeting of the Council of Ministers of the State of Bihar was held at 1.30 p. m., and, apparently, in pursuance of their decision, the Private Educational Institutions (Taking Over) Ordinance, 1986 (Bihar Ordinance No. 16 of 1986: hereinafter called the impugned Ordinance), was thereafter promulgated on that very date. It is alleged that even before the Ordinance was printed and published in the Bihar Gazette, an armed police force was posted in the campus of the Institute at 3.30 p.m., alongwith the Commissioner of Patna Division, on the same day. Shree Jagannath Mishra, the Director-General, who was in his office, however, was not even extended the courtesy of a request to hand over the charge of the Institute. It is common ground that thereafter the Institute was taken over completely by

the State Government and both the Director-General and the Governing Council of the Institute were wholly ousted of all vestiges of control and association therewith.

7. As is manifest from the very outset, the impugned Ordinance has been assailed on a number of legal grounds, but, has been equally challenged on the ground of mala fides of the Chief Minister. In Paragraph 2(iv) it is averred that Shree Bindeshwari Dubey, the present Chief Minister of the State of Bihar, has of late been irked by the findings of the Institute in respect of some important administrative data, which runs counter to his official stand in regard to those matters before the House of the Legislature as well as before the Central Government, and, for that reason, has become biased and motivated to damage the political, social and educational image of the chief founder of the Institute, Shree Jagannath Mishra, in order to secure his own continuance in office. It is further alleged that some reports based on researches carried on by the Institute revealed large scale misuse of Government funds and suggested measures for full utilisation whereof, which, naturally angered the State administration headed by Shree Dubey and in reaction, the Chief Minister had stopped the annual grants to the Institute, without assigning any valid cause or causes. In Paragraphs 9, 10 and 11, it is suggested that the taking over of the Institute has been at the instance of by others in it. It is alleged that the take over of the Institute was made the Chief Minister and the speed with which the take over was made is suggested to be motivated. This is sought to be evidenced by the illegal termination of the permanent employees of the Institute made in violation of Section 6 of the impugned Ordinance and the relevant provisions of the Constitution itself.

8. These allegations are sought to be elaborated and supplemented in the reply to the counter-affidavit, and much store is set on the ground that the statements had not been controverted by Shree Bindeshwari Dubey the Chief Minister of Bihar, on his own affidavit, and, further, that Shree Bhashkar Banerjee, the Education Commissioner, who has sworn the counter-affidavit controverting the allegations, has not done so on his personal knowledge or instructions from the Chief Minister.

9. The counter-affidavit has been filed by Shri Bhashkar Banerjee Secretary-cum-Education Commissioner of the Government of Bihar. It is averred therein that incorrect and exaggerated accounts of fact have been laid in the writ petition, and, then, in particular, irresponsible imputations of mala fides have been levelled against respondent No. 2, the Chief Minister. The averments in the writ petition in detail and seriatim are traversed therein both on points of fact and the proposition of law. It is, however pointed out that the wild allegations against the Chief Minister are based on no tangible material whatsoever and what is more, there was no cogent connection between the need and circumstances leading to the promulgation of the Ordinance and any alleged animus on the part of the Chief Minister. Apart from the fact that the alleged research papers were

unnamed and untraceable in none of the research publications there was anything against the Chief Minister or the present Government at all. It is pointed out that the running of the Institute and the utilisation of funds was far from satisfactory and indeed, the affairs relating to the institution had already initiated the consideration as to whether the institution should be taken over by the State itself or not way back, 8 years earlier, in 1978, when, altogether a different person, Shree Karpuri Thakur, was the Chief Minister of the State. An extract of the order of the then Chief Minister, dated the 7th September 1978, has been quoted verbatim. The other insinuations against the Chief Minister have been denied as unjustified. It is pointed out that on the date of the promulgation of the Ordinance, the Police force had to be posted because of a very reasonable apprehension that the records of the institution might disappear and might be otherwise manipulated. It is categorically averred that the impugned Ordinance was promulgated and published in the Gazette on the 19th of April, 1986, and, because of the aforesaid apprehension possession of the Institute in accordance therewith was speedily taken soon thereafter. The allegation that even before the Ordinance was promulgated the Commissioner, Patna Division, took over the institution is averred to be totally false.

10. The allegations in Paragraph 9(c) are then denied as baseless and false. It is pointed out that the financial grant had to be stopped in order to prevent its misuse. The charge of political motivation for the promulgation of the impugned Ordinance has been expressly controverted and, indeed, as a counter-attack, it is averred that if politics formed any place, it has been nurtured in the Institute itself at the instance of Shree Jagannath Mishra, who, instead of looking after the teaching, started holding political activities in the premises of the Institute, and, utilised its funds intended for advancement of the education, for excessive telephonic calls in course of his political pursuits. The stopping of the annual grant of the Institute is alleged to be not the cause, but the consequence of the deterioration in the affairs of the Institute and the consequential loss of faith reposed only when other methods of improving the affairs of the Institute proved abortive. A chart, showing the remuneration and other facilities to the Director-General and his telephone bills has been annexed as Annexure "C" to the counter-affidavit. The charge that other institutions similar in nature have not been taken over due to any mala fide motive is denied and it is pointed out that there is no arbitrariness in starting the process of nationalisation with the Institute in question. The suggestions of mala fides repeated in Paragraph 11 of the writ petition are expressly controverted. Analogous allegations in the reply to the counter-affidavit have then been closely denied in the rejoinder on behalf of the respondent's to the petitioners reply to the counter-affidavit, by Shree R.N. Dash, the then Commissioner-cum-Secretary to the Government of Bihar, in the Department of Education, along with annexures, on which reliance has been placed.

11. For reasons of clarity, it is not only apt but indeed necessary herein to deal with the issues formulated at the outset separately and seriatim. One may

consequently first advert; to the question of the satisfaction of the Governor pertaining to the immediacy for the promulgation of the Ordinance and whether the same is justiciable.

Question No. 1: Whether the satisfaction of the Governor under Article 213 of the Constitution of India pertaining to the immediacy for the promulgation of an Ordinance is justiciable ?

12. Learned Counsel for the petitioner, Mr. Basudeva, Prasad, launched his attack on the impugned Ordinance by spearheading a challenge to the satisfaction of the Governor under Clause (1) of Article 218 of the Constitution. It was forcefully contended that even as regards the necessity for immediate action for the promulgation of the Ordinance, the satisfaction of Governor was subject to the closest judicial scrutiny, and, if it failed to stand the test, the Ordinance must be struck down on that ground alone. learned Counsel was categorical that this issue was necessarily justiciable. However, he was fair enough to take the stand that neither the statute nor president mandated or obliged the Governor to state or record the reasons for such immediacy. Nevertheless, the stand was that, if those reasons were some how indicated in the impugned Ordinance, then they must be tested on the anvil of a microscopic judicial examination, and, if basic infirmities were disclosed, the result would be the vitiation of the Ordinance. On this assumption, learned Counsel relied heavily on the first three paragraphs of the preamble to the Ordinance for contending that the indicated reasons for immediacy were extraneous and irrelevant to the necessity for promulgation of the Ordinance before the Houses of Legislative could meet. Apart from principle, the precedential reliance of the learned Counsel was on A.K. Roy and Others Vs. Union of India (UOI) and Others, of the report whilst analogous sustenance was sought: from the State of Rajasthan and Others Vs. Union of India and Others, and, R.K. Garg v. The Union of India and Ors. .

AIR 1981 SC 2138 13. On the other hand, Mr. Lal Narayan Sinha and the learned Advocate General, on behalf of the Respondents, took up a firm and categorical stand that the satisfaction of the Governor under Article 213 is beyond the pale of justiciability. It was submitted that both on principle and on a long line of precedent, the issue was well settled and the solitary and somewhat vague and vacillating doubt raised in A. K. Roy v. The Union of India and Ors. (supra), (Paragraphs 28 and 29 of the report) would not place the issue in a flux afresh. The latest re-affirmance in T. Venkata Reddy and Others Vs. State of Andhra Pradesh, was pointedly relied upon. On principle it was highlighted that Clause (2) of Article 213 declares that the Ordinance shall have the same force and effect as an Act of the legislature of the State assented to by the Governor. If any doubt remained, the Constitution Bench, in A.K. Roy v. The Union of India, (supra) had itself categorically held that an Ordinance is law for all purposes, barring permanency. Once it is held that it is law, the learned Advocate-General had contended that all the attributes which apply to an enacted law by the legislature are equally and fully applicable to an Ordinance as well. The ordinance

power is in pith and substance a legislative power and all the attributes of enacted legislation are attracted thereto *stricto sensu*. Counsel contended that any finical distinction, whether the source of legislation is the executive or the legislature, was rendered irrelevant. Therefore, if the motive or the satisfaction of the legislature enacting a law is admittedly not justiciable, then similarly, the motive or satisfaction of the Governor for the immediacy of an Ordinance is equally not justiciable by the Court.

14. Plainly enough the threshold question herein is whether the issue of immediacy necessitating the promulgation of an Ordinance is justiciable or not. Ere one inevitably adverts to precedent, it is apt to examine the issue on the language of the statute and the basic principle underlying the exercise of legislative power by the executive heads during the interregnum when the legislature is not in session. The relevant parts of the solitary Article 213 in Chapter IV of the Constitution, headed as the "Legislative Power of the Governor", may first be read for facility of reference:

213. Power of the Governor to Promulgate Ordinances during recess of Legislature, (I) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council, in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance, if

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or.

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or.

(c) an act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the same force and effect, as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance

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15. Even a plain reading of Clause (1) would indicate that the issue herein has two distinct aspects one being pristinely objective and the other being entirely subjective. The objective and the factual aspect is that the legislature, where it is a unicameral one, must not be in session, and, where it is a bicameral one, both

the Houses of the legislature should not be in session. This is a pre-condition and obviously is a factual one. If the legislature is in session, the power of the Governor to issue Ordinance is negated. On this aspect there is indeed no dispute whatsoever about the legal position. Equally, it is common ground that at the material time the Vidhan Sabha of the State of Bihar was not in session and, consequently, the Governor was clothed with the Ordinance making power. learned Counsel for the petitioners did not build any argument on this ground and further reference to it is thus wholly obviated.

16. Once the aforesaid factual pre-condition is satisfied the other one is the very opposite thereof and it is purely subjective with regard to the existence of circumstances which necessitate the immediacy of the promulgation of the Ordinance. It deserves pointed notice that it is well settled beyond cavil that the Governor is not obliged to record any reasons, for his satisfaction about the immediacy aspect and indeed this was not even remotely disputed on behalf of the petitioners. Consequently, the satisfaction of the Governor is subjective to that authority and is not to be placed on the anvil of any objective test.

17. Now, apart from subjectivity and the limitations, within which such subjective satisfaction can be probed, the issue herein, in the context of Article 213, is to be viewed in the larger framework of both the spirit of the Constitution and its mandates. It was authoritatively held by a Constitution Bench of 7 Judges in *Samsher Singh Vs. State of Punjab and Another*, as under:

for the foregoing reasons we hold that the President as well as the Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers.

Subsequent precedent has left it in doubt that even in the legislative field, the Governor equally, if not doubly, is bound by the aid and advice of the Council of Ministers. See *U.K. Garg v. The Union of India and Ors.* (supra). This constitutional position is undisputed, and, consequently in the promulgation of an Ordinance under Article 213, the Governor acts only as the Constitutional Head on the Cabinet's advice and not in his personal capacity. Therefore, when truly and correctly read, Article 213 when it talks of the satisfaction of the Governor, in essence and in substance, it is the satisfaction of his Council of Ministers. This factor again creates a crucial distinction. Whilst the subjective satisfaction of an individual may, perhaps, be possible of scrutiny and testing it on the anvil of extraneousness or otherwise, the satisfaction of a large body of persons, by the very nature of things, eludes such scrutiny at all and very far indeed from a precise judicial introspection thereof. One may probe the working of the mind of an individual, but even the attempt to probe the minds of 20 to 30 or more persons, acting as a body, and that too in strict confidence, is a vain, if not impossible attempt. It is well settled that the Cabinet in its collective decisions acts confidentially. It was authoritatively said long ago that the devil himself knows not what may be in the mind of a man, and, the situation is only

compounded beyond reprieve, when one is dealing with not one man but a large body of men. Consequently, where the core issue is the subjective satisfaction of the Council of Ministers as a body, on principle it becomes something beyond the ken of Courts, both on the doctrine of an *inconvenienti* and also perhaps the rule of *ad impossibilita*.

18. In the aforesaid context again the constitutional mandate in Clause (3) of Article 163 has to be recalled and it is in the following terms:

The question whether any, and, if so, what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.

In view of the above, the advice tendered by the Council of Ministers to the Governor is constitutionally privileged beyond any probe. Therefore, the result is that not only one cannot probe the mind and satisfaction of a body of persons, but, further, the materials on which such satisfaction is to be arrived at are again expressly barred from the scrutiny of the Court. It has already been noticed that under Article 213, the Governor is not obliged to record any reasons for his satisfaction with regard to immediacy. Equally well settled it is that the Council of Ministers, whilst arriving at a decision, are equally not obliged to record any reasons, and, as a matter of practice they never do. Therefore, in the absence of knowledge about the materials placed or considered by the Council of Ministers, the nature of discussions in the Cabinet meeting, the secrecy of the proceedings and the lack of requirement of recording any reasons, renders it not only undesirable, but, almost impossible to judicially test the consequential satisfaction of the Governor under Article 213, which is only a euphemism for the satisfaction of a large Council of Ministers. One may recall and remind oneself that the Cabinet of Ministers are under an oath of secrecy and the details of the proceedings of the Council of Ministers are confidential and sacrosanct.

19. Herein perhaps what is pre-eminent, if not conclusive, is the fact that the power under Article 213, though exercised by the executive head, is, in essence a pristinely legislative function. The Constitution, in Chapter IV, leaves this aspect in no manner of doubt, when in the very heading it proclaims it to be the "Legislative Power of the Governor", and, Clause (2) of Article 213 declares that an Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor. Now, once it is held, as it must be, that Article 213 envisages a legislative function, then it deserves highlighting that considerations pertaining to the exercise of executive or administrative actions are altogether alien thereto. These fall in an altogether different field than the one of the exercise of the sovereign function of legislation. Therefore, to draw any analogy from the field of subjective satisfaction of an individual acting administratively or executively, with the satisfaction of a legislative body is not only inapt but wholly misleading. By way of example, one may imaginatively consider a situation where the Constitution requires that the legislature itself must be satisfied regarding the immediacy of a legislative action. Could it possibly be said that the satisfaction of the legislature as a body

in this context would then be tested and become justiciable ? I believe the answer must necessarily be rendered in the negative. Even learned Counsel for the petitioners very fairly conceded that where the satisfaction is of the legislature itself, the matter would be beyond the pale of justiciability. Indeed, it is axiomatic that the propriety, expediency and the necessity of a legislative act are for the determination of the legislative authority and not for adjudication by the Courts. However, Mr. Basudeva Prasad had continuously harped on the supposed distinction that under Article 213, though the power was legislative, it was exercised by the executive, and, on that premise, it was contended that the test of an executive and administrative action can equally be applied under Article 213. This specious submission must fail, because, once it is held under Article 213 that it is a legislative power, then all the attributes of legislation must attach thereto, subject to the limitations under the aforesaid article. The mere fact that it is exercised by the Governor is thus irrelevant to its nature, force and effect. The exercise of this legislative power is neither to be bisected into its executive source and its legislative effect, nor thereafter to be dissected by the probing knife of justiciability.

20. In a way, herein one may also pierce the constitutional veil and recall afresh that the satisfaction here is not personal to the Governor, but of the body of men, who are his Council of Ministers at the material time. Similarly, the contents of the Ordinance are again not framed by the Governor, but, are the handiwork of the Council of Ministers. It is framed by and under the authority of the Cabinet. In a way, during the interregnum, when the legislature is not in session, the power to legislate, in emergent situations, is conferred on the Council of Ministers, acting through the Governor. Temporarily, during that interregnum, the Council of Ministers assumes the role of the legislature. Now, if the satisfaction of the legislature with regard to the necessity, immediacy or propriety of a legislation is beyond judicial scrutiny, the position, a fortiori, would be identical in the case of the issuance of an Ordinance on the aid and advice of the Council of Ministers, when the legislature is not in session.

21. Lastly, in construing Article 213(1), the historical retrospect of the Constitutional law relating to the power of the executive to promulgate Ordinances cannot be possibly lost sight of. For our purposes, it is unnecessary to delve beyond the Government of India Act, 1935, though, the Ordinance making power was even earlier vested in the Governor-General in terms of Section 72 of the Government of India Act, 1915. Mr. Lai Narayan Sinha rightly pin-pointed that the legislative power of the executive by way of the issuance of Ordinances under our Constitution was in a way a legacy from the Government of India Act, 1935. Therein, Section 42 of the said Act conferred such a power on the Governor-General, and, Section 88 thereof vested the same in the Governor. Article 123 and Article 213, respectively, of our constitution, are in the relevant parts in pari materia with the aforesaid provisions. To recall, the relevant parts of Section 42 and Section 88 of the Government of India Act, 1935, were in the terms following:

42. (1) If at any time when the Federal Legislature is not in session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may, promulgate such ordinances as the circumstances appear to him to require:

* * * * * 88. (1) If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:

* * * * *

22. In the pre-Constitution era, there existed a long line of unbroken precedent, holding that the satisfaction of the Governor-General or the Governor with regard to the immediacy in the Ordinance making power under the Government of India Acts of 1915 and of 1935 was not justiciable. It suffices to refer to AIR 1931 111 (Privy Council) AIR 1945 48 (Privy Council) AIR 1945 156 (Privy Council) and, the considered view in *Lakhi Narayan Das and Ors. v. The Province of Bihar* AIR 1950 FC 599 (which was a case from this High Court), holding as under:

It is admitted that the Bihar Legislature was not in session when this Ordinance was passed. It was urged, however, in the Court below, and the argument was repeated before us, that no circumstance existed as is contemplated by Section 85(1) which could justify the Governor in promulgating this Ordinance. This obviously is a matter which is not within the competence of Courts to investigate. The language of the Section shows clearly that it is the Governor and the Governor alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an Ordinance. The existence of such necessity is not a justiciable matter which the Courts could be called upon to determine by applying an objective test....On promulgating an Ordinance, the Governor-General is not bound as a matter of law to expound reasons therefor, nor is he bound to prove affirmatively in a Court of law that a state of emergency did actually exist. The language of Section 88 postulates only one condition, namely, the satisfaction of the Governor as to the existence of justifying circumstances, and, the preamble to the Ordinance expresses in clear terms that this condition has been fulfilled. The first contention of the appellants must therefore be rejected.

23. Now, once the judicial interpretation had placed the aforesaid firm construction on the Ordinance making power, it is reasonable to presume that the Constituent Assembly was fully aware of the same and intended to retain the same legal results by employing virtually identical phraseology in Articles 123 and 213 to give them the same meaning. It is well to recall that despite pre-independence criticisms of the Ordinance making power as being arbitrary and undemocratic, the founding fathers thought it necessary and imperative to retain this emergent legislative power in the hands of the executive. It is well to recall that Dr. Ambedker, in repelling the criticisms against the retention of the

Ordinance making power in the Constitution, forcefully pointed out that the legislative power conferred on the President and the Governor was not a parallel power of legislation, but one exercisable only when both the houses of the legislature were not in session.

24. In *Craies on Statute Law, Seventh Edition (1971)*, it has been authoritatively stated as under:

When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which had been so put upon them.

25. Apart from the pre-Constitution legal position, the post-Constitution construction of the Ordinance making power has been equally consistent on the point that the issue of immediacy is not one which is justiciable by the Courts. Reference in this connection may be made first to the *State of Punjab Vs. Satya Pal Dang and Others* and *Baldev Parkash and Others, Rustom Cavasjee Cooper Vs. Union of India (UOI)*, and, in particular, to the categorical enunciation of the law by the Constitution Bench in *S.K.G. Sugar Ltd. Vs. State of Bihar and Others*, :

It is, however, well settled that the necessity of immediate action and of promulgating an Ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole Judge as to the existence of the circumstances necessitating the making of an Ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on ground of error of judgment or otherwise in Court.

The aforesaid view has been tacitly reiterated in *R.K. Garg v. The Union of India*, (supra).

26. However, there is no gainsaying the fact that a Pandora's box seems to have been opened by a discordant note struck in *A. K. Roy v. Union of India*, (supra) in this context. Therein, whilst leaving the question open, it has been observed as under:

It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction.

And again:

That is why we do not feel called upon to examine the correctness of the submission made by the learned Attorney General that in the very nature of things, the "satisfaction" of the President which is the basis on which he promulgates an Ordinance is founded upon materials which may not be available to others and which may not be disclosed without detriment to public interest

and that, the circumstances justifying the issuance of the Ordinance as well as the necessity to issue it lie solely within the President's judgment and are, therefore, not justiciable.

27. Mr. Basudeva Prasad, learned Counsel for the petitioners pinned himself on the aforesaid observations for contending that the issue of justiciability with regard to immediacy has been again put in a ferment afresh. Not only, that counsel relied on further observations in the said case, with regard to the burden of proof in such a context. Equally reliance was placed by way of analogy on the observations of Bhagwati, J., (as his Lordship then was) in *The State of Rajasthan v. The Union of India* (supra), though made in the context of Article 356(1). On these foundations learned Counsel contended that the matter was justiciable and he was entitled to discharge the burden laid upon him by showing manifest extraneousness from the recitals in the preamble of the Ordinance in itself.

28. It is plain that in the context of a long consistent precedent, the issue is whether some vacillating doubt raised in *A. K. Roy's case* (supra), and the alleged conflict of high authority is now resolvable.

29. It deserves recalling that by the Constitution (38th Amendment) Act, 1975, a finality clause was inserted in the Constitution by way of Clause (4) to Article 213. This, however, was later dropped by the Constitution (44th Amendment) Act, 1978, with effect from the 30th of June, 1979. The necessary consequence is that in the constitutional position the status quo ante was restored as existing prior to the 38th Amendment in 1975. Inevitably the earlier precedents construing the ordinance-making power would be restored in their effect. Therefore the categorical enunciation in *S. K. G. Sugar Private Limited v. The State of Bihar and Ors.* (supra) wherein their Lordships held that it is well settled that the concept of immediacy is not justiciable would still hold the field. That view has, to my knowledge, not been distinguished or dissented from by the final Court. Consequently, what their Lordships opined to be well settled beyond cavil therein would continue to be so well settled. Merely because there was some discussion of the issue afresh and their Lordships left the question open and did not pronounce upon it in *A. K. Roy's case* (supra) it cannot be said that it in any way would unsettle the law and put it in a ferment afresh. At the highest it can be said in favour of the petitioners that a co-equal Bench has not itself independently chosen to decide the issue. On the theory of precedent, where co-equal Benches of the superior Court have considered the identical matter and one Bench has categorically decided the issue and the other has left it open, the High Courts would clearly remain bound by the categorical positive adjudication. Mr. Lai Narayan Sinha pointed out that to differ or vary from the *S. K. C.'s case* (supra) it was necessary to have a larger Bench opining to the contrary, which admittedly is not the position.

30. To my mind, all further doubts in this field are set at rest by the recent Constitution Bench judgment in *T. Venkata Reddy etc. v. State of Andhra Pradesh* (supra). Their Lordships therein not only referred to but indeed relied on *A.K.*

Roy v. Union of India (supra) for finally summing up the legal position with regard to the ordinance-making power. It was held in no uncertain terms that the exercise of this power is subject only to the limitations of being violative of the Constitution, i.e., either because of the lack of competence or because of the violation of a fundamental right or any other specific provision of the Constitution itself and on no other ground. Ordinance legislation is not to be tested on the anvil of those tests which are applicable to executive or administrative action. These tests are totally alien in this field. It has been concluded therein as under:

The above view has been approved by another Constitution Bench of this Court in A. K. Roy v. Union of India 1982 2 B.C.R. 272. Both these decisions have firmly established that an ordinance is a "law" and should be approached on that basis. The language of Clause (2) of Article 123 and of Clause (2) of Article 213 of the Constitution leaves no room for doubt. An ordinance promulgated under either of these two articles has the same force and effect as an Act of Parliament or an Act of the State Legislature, as the case may be. When once the above conclusion is reached the next question which arises for consideration is whether it is permissible to strike down an ordinance on the ground of non-application of mind or mala fides or that the prevailing circumstances did not warrant the issue of the Ordinance. In other words, the question is whether the validity of an ordinance can be tested on ground similar to those on which an executive or judicial action is tested. The legislative action under our Constitution is subject only to the limitations prescribed by the Constitution and to no other. Any law made by the legislature, which it is not competent to pass, which is violative of the provisions in part III of the Constitution or any other constitutional provision is ineffective. It is a settled rule of constitutional law that the question whether a statute is constitutional or not is always a question of power of the legislature concerned, dependent upon the subject matter of the statute, the manner in which it is accomplished and the mode of enacting it. While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motives of the legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the courts. An ordinance passed either under Article 123 or under Article 213 of the Constitution stands on the same footing. When the Constitution says that the ordinance making power is legislative power and an ordinance shall have the same force as an Act, an ordinance should be clothed with all the attributes of an Act of legislature carrying with it all its incidents, immunities and limitations under the Constitution. It cannot be treated as an executive action or an administrative decision.

31. Equally significant it is to notice that in the aforesaid case, Chandrachud, C.

J., and D. A. Desai, J. (who were party to the judgment in A. K. Roy's case) have unreservedly assented to the aforequoted view. Therefore, this must now be taken as the last word on the subject and in the long symphony of precedent extending over more than half a century a single discordant note is now overwhelmed and merges in a consistent harmony.

32. learned Counsel's for the petitioners reliance on the observations of Bhagwati, J., (as his Lordship then was) in *The State of Rajasthan v. The Union of India* (supra) are again of no aid to him. Admittedly that was a case under Clause (1) of Article 356. There is no dispute that the presidential action under the said Article is executive in its nature. The significant difference is that under Article 213 the exercise of the power is pristinely legislative. The language of Clause (1) of Article 356 and that of Article 213(1) is not in pari materia and the considerations for the exercise of the power under the two provisions are entirely different. Apart from principle in *T. Venkata Reddy's case* (supra), it has been now authoritatively said that the ordinance-making power is clothed with all the attributes of an Act of the legislature carrying with it all incidents, immunities and limitations and that it cannot be treated as an executive action or an administrative action. The case is thus entirely distinguishable.

33. learned Counsel for the petitioners was fair enough to concede that he could cite no positive authority in support of his stand in which an ordinance had been struck down on the ground of the lack of immediacy. It is significant to note that admittedly since the promulgation of the Constitution hundreds of ordinances have been promulgated by the President and undoubtedly those promulgated by the Governor in the States run into thousand. That not one such ordinance has ever been struck down by any Court on the absence of immediacy, is in itself a pointer that the requirement of immediacy is neither justiciable nor vulnerable, to any such challenge.

34. To conclude on the legal aspect, the answer to question No. 1 is rendered in the negative. It is held that both on principle and precedent the satisfaction of the Governor under Article 213 of the Constitution of India pertaining to the immediacy for the promulgation of an ordinance is not justiciable.

35. Though the aforesaid should, in a way, conclude the matter on this aspect, it has to be borne in mind that this is not the final Court. learned Counsel for the respondents indeed not only invited but pressed us to give a finding on the factual challenge to the immediacy aspect as well. learned Counsel for the petitioners was equally insistent in pressing his claim as already noticed on the basis of the observation in *A. K. Roy's case*. In fairness to the parties, this exercise, to my mind, cannot possibly be avoided.

36. Mr. Basudeva Prasad was fair enough to concede at the very outset that the Governor is not obliged or required to record any reason about existence of immediacy for the promulgation of the ordinance. However, his ingenious stand was that though he may give no reason at all, yet if gratuitously or otherwise any

reason is given or is discernible then the same has to be tested on the anvil of reasonableness. If such reason is extraneous or irrelevant to immediacy then the Governor cannot be said to be reasonably satisfied and the ordinance must be struck down on that score. In his search for the factual materials for his stand, learned, counsel leaned on the recitals in the preamble of the Ordinance itself. It was submitted that the alleged reasons for immediacy were both individually and collectively without any nexus or connection with the same and were, therefore, extraneous or perverse. Reliance was placed on *Ratan Roy Vs. State of Bihar and Others*, .

37. To appreciate the rival stand of the parties in this context, it is necessary to quote the preamble of the Ordinance;

Whereas, the State of Bihar has bright prospects of rapid growth of Industrial and Economic Development, the relevance and importance of specialised knowledge of Business Management has assumed great importance:

And, whereas, for that purpose it is necessary to ensure a high level of educational and training facilities and the co-ordination of the training with important industrial and business units.

And, whereas, it has been resolved to nationalise this branch of education in phases.

Preamble, Whereas the legislature of the State of Bihar is not in session;

And, whereas, the Governor of Bihar is satisfied that the circumstances exist which render it necessary for him to take immediate action to provide for acquisition and taking over of certain Scheduled institutions in the State of Bihar and for the matter corrected therewith or incidental thereto;

Now, Therefore, in exercise of the powers conferred by Clause (1) of Article 213 of the Constitution of India, the Governor is pleased to promulgate the following Ordinance.

38. Now a somewhat curious and ingenious argument of Mr. Basudeva Prasad is that the first three paragraphs of the aforequoted preamble are the alleged reasons for the immediacy of the promulgation of the ordinance. On that premise the counsel assailed them as being wholly irrelevant or extraneous to the issue. It was sought to be submitted that the prospects of rapid growth of industrial and economic development in the State of Bihar and the importance of the specialised knowledge of business management are in no way a matter so urgent that it cannot brook any delay or await the meeting of the legislature a few months hence. Equally it was contended that even though it may have been resolved to nationalise, no emergency or urgency for doing so is either indicated or could be imagined. Nor the avowed purpose of ensuring a high level of educational and training facilities and co-ordination of the training with important industrial and business units was a matter deserving an immediate legislative attention.

39. The submission aforesaid, though it might bring some credit to the ingenuity of the learned Counsel, is nevertheless obviously fallacious. The first three paragraphs of the preamble on a plain reading have no connection with the issue of immediacy. Plainly enough that aspect is dealt with in the succeeding three paragraphs, which are formally named as the preambles. To first read the reasons for the enactment of the Ordinance as the reasons for immediacy and then to contend that they have no nexus therewith is obviously begging the question, and, indeed, an acute logical distortion. To put it in homely language the argument is a proverbial example of the adage give a dog a bad name and hang him. As already noticed, if at all the recitals in the preamble are to be looked at for immediacy, the last three recitals clearly spell out the requisite requirement of the legislature being not in session and further about the satisfaction of the Governor for the necessity of immediate action directed to the object of acquiring and taking over of certain institutions. I am unable to even remotely agree with the learned Counsel for the petitioners that the first three recitals in the preamble have any relevance to the issue of immediacy.

39-A. In this context, Mr. Lai Narayan Sinha taking the line of least resistance himself relied on A. K. Roy's case (supra) for contending that the burden lay heavily on the petitioners for at least making out a prima facie case about the absence of immediacy. He submitted that there was no material whatsoever which has been brought on the record to doubt or assail the satisfaction of the Governor on the question of immediacy and consequently, without more, in line with the observations in A.K. Roy's case the stand of the learned Counsel for the petitioners must be rejected.

40. learned Counsel for the respondents is on the firmest footing in this context. It was rightly highlighted that the present case was one of take over and acquisition of institutions for the purpose of nationalising this branch of education. Mr. Sinha submitted that the underlying silent premises of all acquisitions by the State whether under the Land Acquisition Act or by independent legislative exercise is that the existence of a public purpose must pervade such an acquisition. That this is, in terms, expressly provided for in the Land Acquisition Act is undeniable. Even where it is not so, counsel highlighted that any acquisition by the State must be imbued with a public purpose and if this is totally absent, it would perhaps be challenge-able at the very root. Reliance was placed on The State of Bihar Vs. Sir Kameshwar Singh, despite the fact that Article 31 now stands repealed. Our attention was also rightly drawn to the Coking Coal Mines (Emergency Provisions) Ordinance, 1971 (Ordinance No. 12 of 1971) and the preamble, relevant part whereof is as under:

Whereas it is expedient in the public interest that the coking coal mines should be nationalised with a view to re-organising and reconstructing them for the purpose of protecting, conserving and promoting scientific development of the resources of coking coal needed to meet growing requirements of the iron and steel industry;

And whereas Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

It seems axiomatic and equally manifest from the above that in the instances of acquisition or taking over by the State for purposes of nationalisation the public interest therefore may be made specifically explicit or is necessarily implicit.

41. Once it is assumed, as it must be that there has to be some public purpose in an acquisition, it is at least apt, if not necessary, that this must appear from the legislative enactment which can either be by way of a preamble or may otherwise be clearly incorporated in the body of the Act itself. This is so because there is authority for the proposition that the requirement of a public purpose in a statute cannot be merely added on by subsequent averments or affidavits by its authors, but it is something which must spring from or be inherent in the state itself. Consequently it was incumbent that in the ordinance the requirement of public purpose is indicated and spelt out- The first two paragraphs of the preamble of the Ordinance were, thus, intended to satisfy the primary condition of the existence of public purpose for the acquisition and the enactment. They are in essence the reasons for the need of the enactment itself and have no relevance whatsoever to immediacy. To first mislabel the reasons for enactment and public purpose behind the same as the reasons for immediacy, and then to assail them on the ground that they were futile and extraneous thereto, is, thus an illogical exercise. The last three paragraphs of the preamble are the ones which alone are directed to immediacy and they in obvious strictitude conform to the same both with regard to the objective aspect of the legislature of the State of Bihar being not in session and the subjective aspect of the satisfaction of the Governor.

42. Learned counsel's for the petitioners reliance on *Ratan Roy v. State of Bihar* (supra) is yet again of little aid to him. That was a case in which on a difference of opinion between Chief Justice Meredith and Sarjoo Prosad, J., the case was placed before B. P. Sinha, J. (as he then was) who concurred with the view of Sarjoo Prosad, J. A close perusal of the judgment and in particular of paragraph 31 of the report would make it manifest that the issue of immediacy was not at all in doubt or controversy and all the learned Judges seemed agreed thereon. The pointed difference was that Chief Justice Meredith required another different condition for the validity of an ordinance and in his own words it must be incorporated in the preamble in the following terms:

and whereas these circumstances, in the opinion of the Governor, require the promulgation of an Ordinance in the following terms; now, therefore, etc. etc.

The learned Chief Justice observed in Paragraph 32 of the report that this point at first glance may appear highly technical or even trivial but never the less he opined that this was the rock whereon the Ordinance must founder. This hyper-technical view, however, was not agreed to by Sarjoo Prosad, J., for the detailed reasons, who reiterated the settled view that in all such cases it is for the

Governor alone to decide in the forum of his conscience, whether he has a reasonable cause to be satisfied of the necessity of promulgating an Ordinance of the nature promulgated by him. B. P. Sinha, J., (as he then was), unreservedly agreed with Sarjoo Prosad, J., on this point. The majority view thus boomerangs upon the stand taken on behalf of the petitioners. Even otherwise, this case has little or no relevance to the issue of the justiciability of immediacy for an Ordinance. Even as regards the necessity of the particular provisions of the Ordinance, the majority took a view contrary to that of Meredith, C. J.

43. Nor does *Rustom Cavasjee Cooper v. Union of India*, (supra)(Paragraphs 25 to 27 of the Report), in any way, advance the case of the petitioners.

44. To sum up on this aspect, even if it were to be assumed that the issue of immediacy was justiciable, I am unable to find any extraneous, irrelevant or perverse reasons for the promulgation of the Ordinance and no other material has been brought to our notice in this context. Since the petitioners have not even made out a prima facie case and laid no acceptable foundation for holding that no circumstances whatsoever existed which rendered an immediate action by the Governor necessary, I am wholly unable to entertain the contention that the ordinance is invalid for the reason that the pre-conditions for the ordinance-making power have not been fulfilled.

Question No. 2: Whether the exercise of legislative power by promulgation of an Ordinance by the Governor can be impeached on the ground of mala fides ?

45. We may now move on to question No. 2. Herein again Mr. Basudeva Prasad took the extreme and categoric stand that both malice in fact and malice in law can be laid at the door of the Governor for challenging the exercise of the legislative power of promulgation of ordinances. Yet again a distinction was sought to be drawn betwixt the exercise of legislative power by the legislature itself *stricto sensu* and such exercise by the executive under Article 213. Counsel was fair enough to concede that malice in fact cannot be levelled against the legislature as such but stuck to his guns for contending that malice in law can even be levelled against the legislature as well. However, as regards an ordinance, he was dogmatic that this can be impeached on the ground of malice in law and equally on the foundation of the mala fides of the executive. Basic reliance was on *S. Pratap Singh Vs. The State of Punjab*, for contending that herein personal allegations of mala fides had been expressly raised against the Chief Minister himself. According to counsel, these pertained to the state of the mind of the Chief Minister and his personal knowledge which he alone could deny. Consequently the rebuttal of the allegations of mala fides by Secretaries to the Government however highly placed, based as it was on the record, could not be accepted and the allegations must be deemed to be untraversed and consequently proved on the record. Pointed reliance was on paragraphs 8, 13 and 14 of the report in *Pratap Singh Kairo's case* (supra). On that premise we were invited to strike down the Ordinance on the alleged grounds of proven mala fides of the Chief Minister. Sustenance was also sought from observation in

Emperor v. Benoarilal Sharma and Ors. (supra) and The State of Rajasthan v. The Union of India and Ors. (supra) (Paragraph 144 of the report).

46. In elaborating the aforesaid stand, learned Counsel for the petitioners placed basic reliance on the concept of the colourable exercise of power by the legislature. It was contended that even where the legislature itself is enacting laws, they may be tainted with unconstitutionality on the ground of a colourable exercise of power. Reliance was placed on the observations of Mahajan, J. (as his Lordship then was), in *The State of Bihar v. Sir Kameshwar Singh* (supra) (Paragraph 61 of the report). Equally placing reliance on the observation that a colourable piece of legislation, with a different object altogether, is merely dressed up as a law pretended to give effect to the purpose which; would fail to pass the rigid constitutional test in *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, Counsel contended that both an Act and an Ordinance can be assailed on such grounds.

46-A. The aforesaid argument based on the two decisions relied upon, despite the ingenuity with which it has been projected, is, in my view, wholly untenable. In the field of constitutionality of legislation colourable exercise of the power is a thing distinct and apart from the ordinary concept of malice in law against executive or administrative action. Some confusion in this context needs to be lucidly corrected. The concept of colourable exercise of legislative power is not the concept of malice in law but in pith and substance is only a matter with regard to the issue of legislative competence. Where an enactment is made by a legislature not competent to legislate on the subject but is merely dressed up in a manner so as to bring it within the field, it is only then that the Courts have labelled such an attempt as a colourable exercise of legislative power. It has, to my mind, no relevance at all to any oblique motive therefor. The test in such a situation only is to see the true nature of the enactment and whether in pith and substance it comes within the ambit of the legislative entries for which a particular legislature may be entitled to legislate. If such an enactment does not come within the competence of the legislature in true essence but is merely clothed in such a garb to bring it within the legislative competence, it is only then that the theory of colourable exercise of legislative power can be invoked. No evil motive or any personal mala fides of the legislature as a whole or of the individuals composing the same can be attributed. The theory of colourable exercise of legislative power, in my view, is consequently a thing distinct and apart from the rule of attribution of any malice be it one of fact or in law to the legislature. Indeed, the following observations in *The State of Bihar v. Sir Kameshwar Singh* (supra) on which learned Counsel for the petitioners had himself placed reliance directly boomerangs on his stand:

The learned Attorney-General has contended that it is beyond the competency of the Court to enter into a question of "bona fides" or "mala fides" of the legislature. In a sense this is true. If the legislature is omnipotent, the motives which impel it to enact a particular law, are absolutely irrelevant; and, on the

other hand, if it lacks competence the question of motives does not at all arise. But when a legislature has a limited or qualified power and has got to act within a sphere circumscribed by legislative entries, the question whether in purporting to act under these, entries, it has, in substance, gone beyond them and has done certain things which cannot be accomplished within the scope of these entries, is really a question affecting the competency of the legislature. In such cases, although the legislation purports to have been enacted under a particular entry, if it is really outside it, it would be void. (See Lefroy and Canadian Constitution, pp. 79-80).

Yet the same view has then been more categorically reiterated in K.C. Gajapati Narayan Deo and Others Vs. The State of Orissa, in the terms following:

It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of "bona fides" or "mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power vide Cooky's Constitutional Limitations, Vol. 1, p. 379.

The aforesaid authoritative enunciations have not been deviated from and it is manifest that the colourable exercise of legislative power is in essence nothing more than the absence of legislative competence. It cannot even remotely buttress the learned Counsel's for the petitioners stand that an ordinance can be impeached on the ground of personal mala fides.

47. Once it is accepted (and indeed it was fairly conceded by the learned Counsel for the petitioners) that mala fides or malice in fact cannot be levelled against the legislature as such then it is illogical to contend that such mala fides can be raised against the same. Legislative exercise by way of an ordinance. It bears repetition that the tenuous distinction sought to be drawn on behalf of the petitioners betwixt exercise of the legislative power by the executive whilst promulgating ordinance and by the legislature itself is wholly untenable. It is now well settled that an ordinance is law for all purposes and has every attribute of a statute barring permanence. Clause (2) of Article 213 sets all doubts at rest by providing that the ordinance shall have the same force and effect as an Act of the legislature. A, K. Roy's case is positive authority for the proposition that an ordinance is law for all purposes and well within the meaning of Article 21 as well. The lack of permanence is not something which in any way goes to affect the ordinance being a law because as long as it subsists, no distinction can be drawn between a law promulgated by an ordinance and law promulgated by an enactment of the legislature. The source from which the law springs is thus irrelevant and in either case such law would enjoy the same protection. If the legislative enactment is immune to the challenge or mala fides and malice in fact, one fails to see why an ordinance otherwise duly promulgated should not be

in the identical position. The true test here is whether this is an attribute of the legislative function and not whether it has been enacted by the legislature as such or the executive in the exercise of its constitutional legislative power.

48. Apart from principle, I am inclined to take the view that *T. Venkata Reddy and Ors. v. State of Andhra Pradesh* 1983 3 S.C.C. 198 now directly covers the issue. Therein the question was frontally faced in the following terms:

When once the above conclusion is reached the next question which arises for consideration is whether it is permissible to strike down an Ordinance on the ground of non-application of mind or mala fides or that the prevailing circumstances did not warrant the issue of the Ordinance.

As has been noticed earlier in paragraph 15 of the judgment, the answer to this question was rendered in the categorical negative.

49. To conclude, the answer to question No. 2 is rendered in the negative. It is held that the exercise of legislative power of promulgation of an ordinance by the Governor cannot be impeached on the ground of mala fides.

50. Despite the aforesaid finding, one cannot in fairness obliterate altogether the rival stand of the parties with regard to the actual mala fides levelled and whether they stood established or otherwise. Whilst the learned Counsel for the petitioners was vehement that in the absence of any denial by the Chief Minister himself, these stood proved and consequently were fatal, the equally categorical stance of the learned Advocate General was that far from even making out a prima facie case these were so vague and unsubstantial as to not merit the compliment of any rebuttal whatsoever. It becomes necessary to advert to these stands, albeit with some brevity, in view of the finding on the legal issues arrived at above.

51. Adverting now to the actual allegations of mala fides, as already noticed, these are spelt out in Paragraphs 2 (iv)(1)(e)(i), and interspersed in Paragraphs 9, 10 and 11 of the writ petition. These have been expressly traversed in Paragraphs 3 and 12 of the counter-affidavit filed by Shri Bhaskar Banerji, Secretary-cum-Education Commissioner, Education Department, Government of Bihar. References were also made to some ancillary pleadings in the reply to the counter-affidavit, which has again been made by the rejoinder thereto, on the affidavit of Shree R.N. Dash, Secretary to the Government of Bihar, in the Cabinet Co-ordination Department- Supplementing those averments, Mr. Basudeva Prasad wanted to lean also on the action subsequent to the promulgation of the Ordinance and the removal of Shri Jagannath Mishra from the post of the Chairman-cum-Director General, and, Shri Jagadanand Jha from the post of the Registrar of the Institute, soon thereafter, on the 21st of April, 1986. Counsel's stand was that the totality of the circumstances had to be taken into consideration both before and subsequent to the Ordinance, to arrive at a correct conclusion of the mala fides of Governmental action, alleged as it was at the behest of the Chief Minister in particular. All these, according to the learned

Counsel, were clear pointers that from the very beginning right up to the stage of challenge to the Ordinance and the subsequent actions of removal were deeply rooted in the mala fides of the executive. Particular emphasis was placed on the fact that there was no denial on oath by the Chief Minister and no counter-affidavit and reply had been filed by him personally. The traverse by Shri Bhasker Banerji and Shri R.N. Dash was labelled as irrelevant, because it was merely a matter from the record and could not in the least be indicative of the mind of the Chief Minister and the personal mala fides therein.

52. The learned Advocate General, whilst unwavering in his stand that the issue of mala fides against the Chief Minister is doubly irrelevant and barred on legal grounds, nevertheless, took the stand that even assuming that this can be considered, then factually also they are wholly baseless and utterly tenuous. At the very threshold it was pointed out that the inordinately long Paragraph 2 of the writ petition, in which are interspersed the basic innuendos of mala fides, does not even pretend to be a factual statement. It begins as under:

That briefly stating, the following important questions of law arise for consideration in the instant case.

On the face of it, therefore, what is sought to be incorporated in Paragraph 2 are the conclusions or questions of law, according to the petitioners, which arise in the case and are not. the express pleadings of fact giving rise to them, far from being specific allegations of mala fides. Again, basic reliance, on behalf of the petitioners is on sub-paragraph (iv) of Paragraph 2, which might well be noticed in extenso:

(iv) Whether in the circumstances set forth herein above the impugned Ordinance is also mala fide issued at the instance of the present Chief Minister of the State of Bihar, Shri Bindeshwari Dubey, who of late has been irked by findings of the Institute in respect of important administrative data running counter to his official stand in regard to those matters before the House of Legislature, as well as before the Central Government, and, for that reason has become mala fide motivated to damage the political, social and educational image of the Chief Founder of the Institute, Dr. Jagannath Mishra, a former Chief Minister of Bihar, in order to secure his own continuance in office.

53. Learned Advocate General rightly pointed out that the gravamen of the charge herein is with regard to certain "findings of the Institute in respect of important administrative data". Plainly enough, as to what and where are those findings has not even been indicated far from being placed on the record. On such a slippery base, the allegation then is that those supposed data ran counter to the official stand in regard to certain matters, both before the Houses of the Legislature as well as before the Central Government. Again, it is left totally at sea as to what those findings or data ran counter to or the nature of the stand in the House of the Legislature, and, where and when, is again not even mentioned. In the context of such nebulous ollegations, the learned Advocate General was

not far wrong in saying that if the allegations of facts are themselves not there, what is there to be rebutted, and the Respondent Chief Minister cannot be pushed into an exercise of futility by combating airy nothings.

54. The other allegation relied upon by the petitioners is again in the following terms:

Paragraph 6 (e)(i). As reports based on researches carried out by the Institute revealed large scale misuse of Government funds, and suggested measures for full utilisation of funds, naturally angered the State administration, headed by Shri Dubey, and, in reaction Shri Dubey, the Chief Minister, stopped annual grant of the Institute in spite of no objection certificate having been granted by the Education and Finance Department Officials, and the amount of grant being a budgeted account.

Herein again, the allegation is basically rested on alleged reports based on researches carried out by the Institute. Yet, there is not the least indication as to where those reports are, what were their contents and which part of the vast coffers of the State are alleged to have been misused. Far from placing those research papers on the record, they remain totally untraceable even by any remote reference. It is alleged that those reports angered the State administration. But not a hint is there as to who are the particular persons who turned venomous on that basis. The learned Advocate General was equally on firm ground in pointing out that the allegations in Paragraphs 9 and 11 of the writ petition were again ethereal in nature with little or no relevance with the terra firma of facts. It was rightly contended on behalf of the respondents that far from individual allegations, even the totality of them does not give the impression that those were matters rested on facts and appear to be nothing more than a conclusions or inferences arrived at by the petitioners that the Chief Minister had turned hostile. Consequently, the first stand on behalf of the respondents was that the ethereal allegations, devoid of factual base, did not even rise to a prima facie case, and, all that has been pleaded are innuendos, conclusions and some subjective satisfactions of the petitioner Institute. Consequently, there was nothing which could possibly be refuted or replied to and the Chief Minister was, therefore, right in not stepping into the arena and start tilling at the imaginary wind-mills.

55. Now, apart from the pleadings in the writ petition, it deserves recalling that in the counter-affidavit and the rejoinder to the reply to the counter-affidavit, it had been categorically stated that the wild allegations made against the Chief Minister were based on no tangible material and that the alleged research papers, reports, etc., were neither traceable nor forthcoming. The factual allegations on the record stand categorically traversed. Despite the stand, the petitioners had still not chosen to concretise the airy allegations or even to attempt to place on the record the alleged reports, research papers and any other material on which they were supposedly relying. The learned Advocate General thus submitted that no case on facts whatsoever, far from establishing

the mala fides, was made out, which either needed rebuttal or could possibly be contradicted, in view of its utter vagueness. I am inclined to the view that the stand of the respondents is well based and the somewhat fragmentary allegations would not afford any basis upon which the petitioners could be entitled to any relief and thus they need not have been answered, far from the same being necessarily countered on oath by the Chief Minister himself. Herein one might well recall the observations in *S. Pratap Singh v. The State of Punjab*, (supra) on which case firm reliance was sought to be placed by the petitioners themselves:

Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by Government of powers. While the indirect motive or purpose, or bad faith or personal ill-will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the appellant has to establish in this case, though this may sometimes be done. See *Edgington v. Fitzmaurice* 1884 29 Ch. D. 459. The difficulty is not lessened when one has to establish that a person in the position of a Minister apparently acting in the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim.

In the light of the above, it has to be held that the petitioners failed in establishing even a prima facie charge of mala fides even if it be assumed, entirely for the sake of argument, that they were entitled to do so.

Question No. (3): Would the mala fides of a Chief Minister be tantamount to the mala fides of the Council of Ministers as a whole, and, may, consequently, vitiate the exercise of the legislative power of the promulgation of the Ordinance ?

56. Coming now to Question No. (3), Mr. Basudeva Prasad forcefully projected a somewhat novel then is that the mala fides of the Chief Minister, if established, would per se vitiate the exercise of the legislative power of the promulgation of the Ordinance. The core of the submission was that the Chief Minister occupied so paramount a position that his personal mala fides is tantamount to the mala fides of the Council of Ministers as a whole. It was contended that no further burden in this context would lie on the petitioners' shoulders.

57. I must confess that the novelty of the contention and its somewhat fragile base, at first flush, tempted me to ignore the submission. However, as it was seriously and vehemently pressed by the Counsel, the compliment of a rational refutation thereto cannot be avoided.

58. Now the corner stone of Mr. Basudeva Prasad's contention herein was rested on an analogy derived from the position and stature of the Prime Minister in England. Specific reliance was placed on the following extracts from the *British Political System* by Andre Mathiot, Professor in Law and Director of the Institute of Political Studies in the University of Grenoble:

Moreover, as the Prime Minister has to bear the chief burden of responsibility for

Cabinet decisions, he may always refuse to countenance the ideas of other Ministers and penalise those who refuse to conform by dropping them from his Government. This means that it is normally impossible for any Cabinet Minister to take an independent line on any issue.

Pinning himself on the above view and thereafter sliding into a logical extreme, Mr. Basudeva Prasad submitted with some vehemence that even the Chief Minister of a State in a Federal Constitution like that of India was in essence the Council of Ministers itself. It was the stand that since the Council of Ministers was appointed on the advice of the Chief Minister, the individual Ministers were, in fact, his personal appointees and had no independent status in opposition to him. According to him, for all practical purposes, the Chief Minister was the Cabinet and no decision in the Cabinet can possibly run counter to the Chief Minister's direction. On that premise, the submission was that constitutionally speaking, the satisfaction under Article 213 was the satisfaction of the Council of Ministers, which, in turn, was nothing but a satisfaction or the fiat of the Chief Minister. Relying in particular on Rule 15 of the Rules of Executive Business, Bihar, 1979, and Item 13 of the Third Schedule thereto, it was sought to be pointed out that with regard to the promulgation of an Ordinance as well the Chief Minister by himself could initiate emergent action in anticipation of the Cabinet's approval. It was submitted that since the allegations against the Chief Minister have not been rebutted by him personally on affidavit, these must be accepted as proved. Consequently, if the satisfaction of the Chief Minister was tainted with mala fides, the legislative power exercised for the promulgation of an Ordinance stood vitiated and must be struck down on the ground of mala fides.

59. Since the inspirational source of the argument above stems from the position of the British Prime Minister, it is apt at the very threshold to notice the significant and even crucial points of difference between his stature and that of a Chief Minister under the Indian Constitution. There is first the hall mark distinction of the un-written British Constitution, rooted in hoary conventions as against the relatively recent and exhaustively drafted and detailed Constitution of India, which has been classified as, perhaps, the most meticulous one in the world, and, in lighter vein has been described as a paradise for lawyers by an authority no less than Sir Ivor Jennings. Consequently, the constitutional position of the British Prime Minister is significantly different even from that of the Prime Minister of India under our Constitution. However, the position of a State Chief Minister is even more significantly different. This is so because not only India has an exhaustively written Constitution, but, in sharp contrast to the British one, it is Federal in nature, whereas the former is entirely Unitary. The limitations under which the State executive, including the Chief Minister (with the Governor at the apex), can act and function within the parameters of the Constitution, does not have any identity with that of the British Prime Minister. The power of the President to dismiss the, State Cabinet and proclaim Presidential Rule under Article 356(1) and other constitutional inhibitions are matters peculiar to our Constitution. Consequently, to compare a State Chief Minister in our Federal

written Constitution, with the British Prime Minister of an Unitary unwritten Constitution, is an exercise which provides no legal analogy worth the name and can only be misleading.

60. Now, apart from the above, the extreme stand of the learned Counsel for the petitioners herein suffers somewhat patently from the falsehood of extremes which must always be shunned. It is true that in a Parliamentary form of Government, the position of the Prime Minister or the Chief Minister is pre-eminent, in so far as the Council of Ministers is appointed on his recommendation, and, in the words of a well known constitutional authority, he acts as a hyphen betwixt the Executive and the Legislature. But, from this fact it is a wrong and unwarranted step to go to the extreme that the Chief Minister is himself the Council of Ministers. Though the learned Advocate General was unable to bring any specific provision in the Rules of Executive Business of Bihar with regard to the decision-making process in the Council of Ministers, yet, in a democratic system, to my mind, there is other principle to determine the decision of a constitutional body of persons, except by the settled rule of majority. It goes without saying that the only mode for arriving at an answer as to, what is the decision of a body of persons co-equal in status, is as to what was the majority opinion of such a body, unless the Statute prescribes otherwise or a different mode therefor. As already noticed, no such exceptional provision could be pointed out.

61. Yet again, the principle of joint responsibility of the Cabinet, which is the foundational base of the Parliamentary form of Government, is itself a pointer to the fact that the Ministers are not mere cyphers attached to the figure of the Chief Minister, but are jointly responsible to the legislature and through it to the people for the conduct of the Government. Again the well-known process of decision-making by the Council of Ministers would itself refute the stand that the Chief Minister's earlier predilections would necessarily be the decision of his Council of Ministers. The Cabinet is a constitutional and responsible consultative body. Democratic process works by expression and exchange of opinions and even a Chief Minister in a Cabinet meeting may well be first persuaded against any pre-conceived view or decision arrived at by him earlier. Further, he may even be outvoted in the Cabinet, if the matter comes to such a head. Therefore, to presume that the Chief Minister's prior decision or opinion alone, against the views of his Council of Ministers and dehors their concurrence, has an over-riding finality as such, would, to my mind, be running against the very concept of the principle of joint Cabinet responsibility and the democratic form of Government. Any such stand attributing such dictatorial and arbitrary power to the Chief Minister alone is not to be easily presumed or accepted in a democratic form of Parliamentary Government.

62. learned Counsel for the petitioners' reliance on Rule 15 of the Rules of Executive Business and Item 13 of the Third Schedule thereto, does not in any way advance his extreme proposition. The Chief Minister's power to take

emergent action on certain occasions in anticipation of the approval of his Council of Ministers in no way is symptomatic of the projection that he in himself embodies the whole of the Council of Ministers. The promulgation of an Ordinance would sometimes need urgent consideration, but it is not to be construed as a fire emergency in which even the Council of Ministers is not to be consulted. Indeed, herein coming to specific pleadings, the petitioners' own stand and positive pleading is that a meeting of the Council of Ministers was held on the very day and had approved the Ordinance, which was later promulgated. The immediacy in this context is primarily with regard to the need for action before the legislature can possibly assemble and enact a law. Rule 15 and Item 13 of the Schedule aforesaid cannot possibly be read to mean that the Chief Minister is in singularity entitled to promulgate an Ordinance by himself.

63. Apart from the above, the learned Advocate General himself leaned on the Rules of Executive Business, Bihar, 1979, for buttressing his submission that the satisfaction of Council of Ministers in *stricto sensu* the satisfaction of that collective body and not merely of the Chief Minister alone. Rule 9 was particularly highlighted to indicate and declare the collective responsibility of the Cabinet as such. Again, our attention was drawn to Rules 16 and 17 of the Rules of Executive Business, which clearly visualise the decision of the Council of Ministers by circulation as well, which would clearly imply the decision by majority and not by any Chief Ministerial fiat. Rules 16 and 20(5) would then indicate that the Cabinet decisions will be preceded by a discussion and even foresee the possibility of the Chief Minister being absent from such a Cabinet meeting. This is particularly indicative of the fact that the Cabinet decisions are not mere rubber stamps for the decision or whimsicality of the Chief Minister alone, because such a decision can be made entirely in his absence and obviously by majority.

64. Placing reliance on the latest enunciation of the rule in *K. Nagaraj and Others Vs. State of Andhra Pradesh and Another*, the learned Advocate General reiterated the stand that the satisfaction envisaged by Article 213 is in essence the satisfaction of the Council of Ministers and not the satisfaction of the Chief Minister alone. He highlighted that no precedent has been and could possibly be cited holding that the Chief Minister's satisfaction alone was the constitutional requirement. On the other hand, the consistent view of the Final Court is that the President's or the Governor's satisfaction is in terms the satisfaction of the Council of Ministers. When their Lordships have said so in as many words, they have meant it to be so in terms. This authoritative enunciation cannot be misread as being the satisfaction of the Prime Minister or the Chief Minister alone. It is, as a collective body bound by the principle of joint constitutional responsibility, that the State Cabinet has to act. The Chief Minister may be the first amongst equals and, even assuming that he is in a dominant position, still he does not become the Council of Ministers *stricto sensu*. It was pointed out on behalf of the respondents that even in England the position of the British Prime Minister, though preminent, has never been declared to be a substitute for the Cabinet itself. Even the views of Dr. Andre Mathiot, quoted above, and relied

upon by the learned Counsel for the petitioners, do not go to the logical extreme of saying that the Prime Minister of England was the Cabinet or the Council of Ministers in its totality. It is not easy to subscribe to the proposition that the Chief Minister is the Council of Ministers and the role of other Ministers in the Parliamentary democracy and the Cabinet system is that of a cypher or a dummy.

65. In the light of the above, it appears to me that the flamboyant but untenable argument that the Chief Minister of the State is in essence the Council of Ministers in himself must be rejected and indeed it is a somewhat feudal and dictatorial argument in a democratic Parliamentary set up. Once it is so, it will follow that the mala fides of the Chief Minister, even if established, cannot go to the root of the matter and invalidate the legislative exercise of power by the executive under Article 213 at the behest of the Council of Ministers in its collectivity. Even if established the mala fides of the Chief Minister are not the mala fides of the Council of Ministers as a body. There is sad indeed can be no such theory of transfer of malice to be attributed to the whole Cabinet on such sketchy foundations. On facts, it is well to recall that it has not even been alleged, far from being established, that the Chief Minister rode rough shod over the opinion of his Cabinet colleagues for ulterior motives. Consequently, the argument of mala fides of the Chief Minister slides into the deepest background, if not of total irrelevancy.

66. To conclude, the answer to Question No. (3) is rendered in the negative. It is held that the mala fides of the Chief Minister, even if established is not tantamount to the mala fides of the Council of Ministers as a whole and cannot, therefore, vitiate the exercise of the legislative power of the promulgation of an Ordinance.

Question No (4): Does the impugned Ordinance require the sanction of the President under the proviso to Clause (1) of Article 213 of the Constitution ?

67. Adverting now to Question No. (4), the firm stand of the learned Counsel for the petitioners was that the impugned Ordinance overrode the Societies Registration Act, 1860, which was a Central Act, having at that time been promulgated by the Governor-General, and, consequently, the Governor could not, without instructions from the President, promulgate the Ordinance. Our attention was drawn to Section 5 of the said Act with regard to the vesting of the property of the Society in its Governing Body, and to Section 13 pertaining to the dissolution of societies and the adjustment of their affairs, and, equally to other provisions pertaining to the management of the societies and their governing bodies, etc. It was submitted that by virtue of Clause (10) of Article 366, the Act was an "existing law", and Article 254 was attracted to the situation. The contention was that the impugned Ordinance impinged upon and affected and even overrode the field covered by the Societies Registration Act, and, therefore, the sanction of the President under Clause (1) of Article 213 was imperative. Reference was made to Section 3 of the Ordinance which transferred and vested the Institute and its properties absolutely in the State free from all

encumbrances, and, again, to Section 4, which provided that the Commissioner shall be deemed to have taken charge of the Institute and to perform all the functions and duties of the governing body and the managing committee under the direction and the control of the State Government. It was submitted that these Sections of the Ordinance overrode the corresponding provisions of the Societies Registration Act in its applicability to the petitioner Institute.

68. In elaboration of his aforesaid stand, Mr. Basudeva Prasad pointed out that the Societies Registration Act was enacted way back in the middle of the last Century in 1860. At that stage, perhaps there was no demarcation between the Central and Provincial legislature and the power to legislate vested entirely in the Governor General. Apart from that, there were at that time no legislative lists at all nor perhaps Central or State legislations, as now understood, and the Governor-General's power to enact a legislation was plenary. Therefore, it was the submission that the Act aforesaid is a Central legislation enacted by the Governor General. Referring to its preamble, it was pointed out that it pertained particularly to societies established for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge or for charitable purposes. On this premise it was submitted that the power to override the said Act can now stem only from the Centre and not from the State. According to the learned Counsel, the true test today would be that if such Central law were to be enacted today or were to be amended, it would draw its source from which of the three legislative lists of the Seventh Schedule to the Constitution now. The stand taken was that only the Parliament was competent to enact the same and not the State legislature. Reliance was placed on *R. Chitrallekha and Another Vs. State of Mysore and Others*, ; *Gujarat Pottery Works Vs. B.P. Sood, Controller of Mining Leases for India and Others*, and *D.A.V. College, Bhatinda, etc. Vs. The State of Punjab and Others*, and, lastly on *E. Balanandan and Anr. v. The State of Punjab and Anr.* 1979 Cr.LJ 187.

69. It is not possible to subscribe to the somewhat ingenious attempt of the learned Counsel for the petitioners to invoke the concept of repugnancy and the consequential requirement of Presidential sanction for the promulgation of the Ordinance. At the threshold, it may be noticed that the declared purpose of the Ordinance was to nationalise a particular branch of education in phases and consequently to take over the institution in the Schedule thereto. As the very name of the Ordinance indicates, it was a taking over Ordinance. Similarly, the very opening part of the Ordinance leaves no manner of doubt about the acquisition nature of the Ordinance and the taking over of the institutions in the following terms:

THE PRIVATE EDUCATIONAL INSTITUTIONS (TAKING OVER) ORDINANCE, 1986
AN ORDINANCE TO PROVIDE FOR TAKING OVER BY THE STATE GOVERNMENT OF
PRIVATE EDUCATIONAL INSTITUTIONS OF THE STATE OF BIHAR

70. Once the real purpose and the nature of the Ordinance is clear, then it is well to recall that the concept of repugnancy comes into play only if the two

competing statutes are genmically applicable in the same field and are contradictory to each other. Merely because of a valid take-over or acquisition of an institution any earlier law applicable to it may cease to apply to such an institution, would not bring in the concept of repugnancy of laws as such. Applicability or otherwise of a law to an institution cannot be confused with a head long conflict of laws in the same field. A salient example herein would be the acquisition by the State Government of a company registered under the Companies Act, which, undoubtedly, is a Central statute. It is obvious that on the acquisition or taking over of such a company and its properties vesting in the State, certain provisions of the Companies Act pertaining to its management by the share-holders, etc., may well cease to apply thereto. Could it, therefore, be said that there would arise a repugnancy between the Central Companies Act and the acquisition by the State by a statute ? learned Counsel for the petitioners fairly conceded that even if a regular enactment by the legislature was made later incorporating the terms of the Ordinance, it would still be bad because of such a repugnancy and it is not only that the Ordinance suffers from such infirmity. Plainly enough, if this argument of the learned Counsel were to be acceded to, then the States would be perpetually barred from all acquisitions or taking over of any institution or property to which a central statute may have some remote application. I am unable to accede to any such doctrinaire extension of the concept of repugnancy of law under Article 254. It has necesssarily to be contained and confined to competing statutes directly operating in the same field and in patent conflict with each other. A takeover or an acquisition or nationalisation of an institution, establishment, or a company does not involve any concept of repugnancy and the consequential requirement of the prior concurrence by the President.

71. Even assuming (without at all holding) that the Ordinance in a way impinged on the Societies Registration Act, the learned Advocate General dealt a hammer blow to the financial argument that after the enforcement of the Constitution, the States were incompetent to legislatur with regard thereto. Specific reliance was placed on Entry 32 of List II, which is in the following terms:

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; cooperative societies.

Relying on the latter part thereof, learned Advocate General submitted that the societies registered under the Act came squarely within unincorporated "literary, Scientific, religious and other societies and associations". The words are widely couched and even otherwise it is the settled law that the items in the Lists are not to be construed in a narrow or pedantic sense. So construing, it is plain that the Societies Registration Act, 1860, would now come squarely within the field of State legislation. This is manifest from the fact that the said Act has been amended not by one but nearly all the States of the Union and not only once, but on innumerable occasions. This apart, some doubt in this context seems to have

been set at rest by the recent decision of their Lordships in *S.P. Mittal v. The Union of India and Ors.* : [1983]1SCR729 (Paragraphs 67 and 68 of the report) which, in turn, places reliance on *The Board of Trustees, Ayurvedic and Unani Tibia College v. The State of Delhi* AIR 1962 SC 548 and *Katra Educational Society Vs. State of Uttar Pradesh and Others*, which are all indicative of the fact that the field covered by the Societies Registration Act, 1860, would now come well within the ambit of Entry 32 of List II of the Seventh Schedule to the Constitution.

72. To conclude on this aspect, the answer to Question No. (4) is rendered in the negative and it is held that the impugned Ordinance did not require the sanction of the President under the proviso to Clause (1) of Article 213 of the Constitution.

Question No. (5): Is the impugned Ordinance void for lack of legislative competence ?

73. Now another limb of the foresaid question, which was projected by Mr. Basudeva Prasad as ancillary thereto may be dealt with as a separate Question No. (5), for the sake of clarity. Herein, learned Counsel rested himself primarily on Entry 66 of List I, which is in the following terms:

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

Pinning himself upon the words of the aforesaid Entry and the identity of its language with second of the opening recital in the Ordinance, (which is, whereas, for that purpose it is necessary to ensure a high level of educational and training facilities and the co-ordination of the training with important industrial and business units"), it was forcefully contended that the Ordinance falls purely and completely within Entry 66 of List I of the Constitution, and consequently, was exclusively within the competence of Parliament alone. Counsel submitted that far from requiring prior concurrence of the President, the very competence of the State to enact a law of this nature was absent, because it fell exclusively within the Union List, and, consequently, entirely within the jurisdiction of Central or Parliamentary legislation. Reliance was placed on Clause (1) of Article 246.

74. The contention aforesaid, though plausibly projected on the basis of superficial similarity of Entry 66 and a recital in the preamble of the Ordinance, is nevertheless wholly untenable on a closer analysis. A deeper examination of Entry 66 would leave no manner of doubt that it is confined to the determination of standards for higher education or research, and scientific and technical institutions, and, co-ordinating them at the national level. Prescription of standards and co-ordination thereof is something entirely distinct and different from setting up institutions for higher education. Entry 66 of List I cannot possibly be a bar to the establishment of scientific and technical institutions for higher education by the States, which is now clearly a concurrent subject. Entry 25 of List III is in the following terms:

25. Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

Obviously, education generally including higher education and technical education and universities, would come within sweep of the aforesaid Entry. Consequently, by virtue of this Entry, the State Government is clearly entitled to legislate for setting up and establishing institutions of this nature, and, if it can do so, it can equally take-over and acquire them under its basic power of acquisition for the purpose of nationalisation. The learned Advocate General, in this context, rightly placed reliance on *The Gujarat University, Ahmedabad Vs. Krishna Ranganath Mudholkar and Others*, and, *Rustom Gavasjee Cooper v. The Union of India* (supra) (Paragraph 40 of the report).

75. In this context, the heart of the matter is as to what truly is the subject-matter of the impugned Ordinance. Herein, what first obviously catches the eye is the very name of the Ordinance, which states that it is a taking-over Ordinance. Yet again, the opening part of the preamble states that it is being promulgated to provide for taking-over by the State Government of private educational institutions of the State of Bihar. Section 3(1) is then in the following terms:

With effect from the date of this Ordinance, the institution as specified in the Schedule of this Ordinance shall stand transferred to and shall vest absolutely in the State Government free from all encumbrances.

The learned Advocate General was thus plainly right in his submission that in pith and substance the Ordinance is a legislation for acquisition and takeover and nothing else. In the 11 Sections of the Ordinance there is nothing whatsoever and not even a hint of any prescription of standards nor is there a remote reference to the co-ordination of any such supposed standard. To mis-label such a legislation as one pertaining to co-ordination and prescription of standards of higher education is thus wholly unwarranted. The learned Advocate General was clearly right that the rule of pith and substance requires one to go in depth as to the nature of the legislation, and, if the language of the statute is clear, then no external aid for determining the same is necessary or permissible. Once from the body of the impugned Ordinance it is manifest that the purpose and object is acquisition and take-over then any reference to the preamble is uncalled for because of the settled view that the resort to it is only made in the extreme cases of obscurity in the statute itself. Therefore, both by express declaration and the nature and purpose of the statute it has to be held that the Ordinance is Taking-over or acquisitioning legislative exercise.

76 Now, once it is held as above, it is plain that the State undoubtedly has legislative competence to acquire. It may be recalled, as a matter of history, that the earlier power of acquisition in Lists I and II have now been substituted by a single comprehensive Entry No. 42 in the Concurrent List III conferring both on

the Centre and the State, the power of acquisition and requisitioning of properties. Therefore, the State has the basic legislative competence to pass the legislation for the acquisition of the properties of the Institute. This being so, it is well settled that the power to acquire is independent and distinct from the power to legislate. On that premise if the matter falls, in pith and substance, under Entry 42 of List III then there can be acquisition by the State within its territory, irrespective of the fact whether it is a State or a Central subject in the legislative field. The learned Advocate General placed reliance herein on Paragraph 40 of the Bank Nationalisation case (Rustom Cavasjee Cooper Vs. Union of India (UOI),) and, with more particularity on Paragraphs 16, 19, 20 and 41 of the report in Ishwari Khetan Sugar Mills (P) Ltd. and Others Vs. State of Uttar Pradesh and Others, . It deserves notice that in this case, though there was some divergence of opinion in the Bench on another matter, on this specific issue there was total unanimity. It was on that assumption that the taking-over of the sugar factories in Bihar by the State was upheld, though admittedly, sugar was a subject on which only the Centre could legislate. The case is a binding precedent and, a manifest example of acquisition by the State with regard to something and properties which otherwise lay in the legislative field of the Centre alone.

77. To conclude on this aspect, it has to be held that the impugned Ordinance is not governed by Entry 66 of List I. It is well within the parameters of Entry 42 of the Concurrent List III. Therefore the impugned Ordinance is not void for lack of legislative competence. The answer to question No. (5) is thus rendered in the negative.

Question No (6): Whether the impugned Ordinance is discriminatory and infracts Article 14 in so far as it chooses the petitioner Institute alone for nationalisation in its first phase ?

78. The challenge on the basis of Article 14 is sought to be rested on the alleged indigos discrimination in choosing the petitioner Institute alone for take-over. The sketchy foundation base for this is on the pleading at page 43 of the writ petition, listing 11 institutions alleged to be similar some of them being older or more recent ones, out of which the petitioner Institute is alleged to have been arbitrarily picked up. It was contended that Xavier Labour Relations Institute Jamshedpur, Xavier Institute of Social Studies Ranchi, Birla Institute of Technology, Mesra, Indian Institute of CS Management, Patna, and 7 other similar institutions existed in the State and despite the passage of 3 months or more from the promulgation of the Ordinance, no other institution has been taken-over as yet. Reliance was placed on the undisputed fact that u/s 73 of the Magadh University Act the Institute had been declared as an autonomous body as recently as on the 28th of January, 1986. Therefore, it was the claim that it was in no way a case of any long standing mismanagement which necessitated its immediate take over. It was contended that even if nationalisation has to be done in a phased manner, such phasing also must stand the test of reasonableness. It was pointed out that in the counter-affidavits specific facts

had not been pleaded to indicate any basis for acquisition or for picking up the petitioner Institute for the take-over, whilst leaving the others out of the net of nationalisation. Indeed, Counsel pinned upon the averments in the counter-affidavit that the take over of this Institute was in fact long ago over due as an example of an evil eye roving over the Institute for long and striking at it at the opportune moment. Reliance was placed on *Ram Prasad Narayan Sahi and Another Vs. The State of Bihar and Others*, in which the Sathi land Restoration Act had been struck down.

79. To appreciate the aforesaid contention the significant factor which calls for pointed notice is that the ordinance itself declares that it has been resolved to nationalise this branch of education in phases. Section 3(1) declares that the petitioning Institute, which has been placed in the Schedule, shall stand transferred and vest absolutely in the State. However, Section 3(2) in terms provides that the State Government may from time to time amend the Schedule by inclusion of any institution therein and the same shall thereafter stand vested in and transferred to the State Government with effect from the date mentioned in the notification. Now it is well settled that phased nationalisation is perfectly legal and has the stamp of validity on it and thus deserves no great elaboration. It is well to recall that nationalisation in phased manner of Banks, Insurance business, collieries, transport, etc., has been undertaken in the country and has been upheld. Therefore, the contention that because all the 11 allegedly similar institutions have not been taken together in the very first phase, cannot possibly taint the Ordinance with discrimination.

80. On the issue of discrimination under Article 14, it has to be borne in mind that discrimination is a question of fact, which has to be pleaded and the burden is always on the petitioner to prove that persons in equal or in identical circumstances have been treated unequally. Herein, barring a bald assertion that the 11 institutions named are similar, there has been placed no factual data or proof on the record to show that the other alleged 11 institutions are in an identical situation, from the same having been actually established. Some similarity is not identity. Therefore, Mr. Lai Narayan Sinha's stand that the factual base has even not been prepared and the burden for establishing the alleged discrimination has not been discharged is meritorious. Reliance on behalf of the respondents was rightly placed on *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, ; *Board of Trustees, Ayurvedic and Unani Tibbia College, Delhi v. The State of Delhi (supra)* and, *Cochin Devaswom Board, Trichur Vs. Vamana Shetty and Others*, .

81. Now, apart from the above, the learned Advocate General highlighted the fact that since nationalisation herein was sought to be done in phases, in such a situation, inevitably a beginning has to be made by making an initial choice with regard thereto. If the compulsions of finance or management prevent a total take-over, there necessarily has to be a selection regarding the beginning to be made with one or two institutions. learned Counsel pointed out that herein there

were a host of factors which rendered the case of the petitioner Institute entirely distinct from others and there were obvious reasons for making the choice, which may well be noticed seriatim as under:

(i) That from its very inception, the total financial burden to the last penny from 1975 of this Institute has been borne by the coffers of the State.

(ii) That the prime land for housing the Institute had been gifted by the Government at the choicest part of the most prestigious high-way of the town on the Bailey Road and opposite the majestic High Court premises.

(iii) That the entire finance for the construction of the buildings of the Institute and its furnishing, etc., has been provided by the State and the construction has also been done through the agency of the Public Works Department of the State.

(iv) That the Institute was the only one in the State which had been given comprehensive grants of this nature, running to over a crore, in sharp contrast to many other institutions, (referred to by the petitioners,) who have chosen not to take even a penny of aid from the coffers of the State.

(v) That the petitioner Institute was the only institution of its kind located in the Capital City of Patna.

(vi) That the audit report of the Institute showed serious financial irregularities and the State, which had provided every penny of the finance thereto, was entitled and concerned to safeguard its heavy investments therein.

82. In the light of the aforesaid distinguishing factors, it is plain that when viewed in the larger perspective the choice of the petitioner Institute by the Respondent State cannot even remotely be considered as unreasonable, far from being discriminatory. Indeed, if once it is held, as it must be, that the nationalisation is to be in phases, the choice for those phases has to rest with the State and not with the Court, and, ample materials have been pointed out on behalf of the respondent State for the selection of the petitioner Institute as the very first in its phased programme.

83. Lastly, in this context it is well to recall the famous case of *R.K. Dalmia and Ors. v. Shri Justice S.R. Tendolkar* (supra) holding that even a single person or institution may be in such a class by itself as to form a valid basis of classification, thus rendering its choice immune from being challenged under Article 14. The petitioner Institute, on the admitted facts, does appear to be a class by itself and the respondent State cannot possibly be charged with discrimination in classifying the same as the first one in its programme of nationalisation.

84. In the light of the aforesaid discussion, the answer to the question No. (6) is rendered in the negative and it is held that the impugned Ordinance is in no way discriminatory, nor does it infract Article 14 of the Constitution in its choice of the petitioner Institute alone for nationalisation in its first phase.

Question No. (7): Does the impugned Ordinance violate the fundamental right to form associations under Article 19(1)(c) of the Constitution ?

85. Lastly, one may now advert to the challenge on the basis of Article 19(1)(c) of the Constitution, on the alleged ground of the violation of the fundamental right to form associations. It was contended that the registered society running the Institute and its founder-members had the right to form the association and to carry on the running of the educational institution as such and also to hold properties therein. By virtue of the impugned Ordinance and the take-over, the members of the society had virtually been denied the right to form and to carry on an association of their choice, both legally and financially, the latter because of the take over of the whole of the property of such a society. It was contended that the right under Article 19(1)(c) is not merely to form an association, but to also carry on and continue such an association.

86. In meeting the challenge aforesaid under Article 19(1)(c), learned Advocate General first pointed out that the registered society as such has not been taken over, and, in law and in fact, can continue, All other avenues of carrying on its activities as also of establishing or maintaining educational or charitable institutions are still entirely open to it, if it is so minded. Consequently, there is no violation of the fundamental right to either form an association or to continue the same. A distinction herein was sharply drawn betwixt the acquisition of the property of a person or a society and the society itself. A man or a legal entity's property can be taken over but this does not necessarily amount to take over of the person or the legal entity. In the context of the take-over of the property and the nationalisation, the learned Advocate General relied upon the change in the modern approach thereto as also the spirit behind the insertion of the word "socialist" in the preamble of the Constitution itself. Basic reliance on the earlier judgment in *All India Bank Employees' Association Vs. National Industrial Tribunal and Others*, and *Rustom Gavasjee Cooper v. The Union of India* (supra) was placed, apart from the larger philosophical approach in the *Menaka Gandhi's* case (Paragraphs 77, 81 and 81-A of the report).

87. Herein, the respondents' primal stand, however, was rightly on *Fertilizer Corporation of India Kamgar Union, Sindri v. The Union of India* AIR 1981 SC 344. Therein, in the context of the take-over and acquisition of a factory, it was held that it does not infringe the fundamental right of the workers to form Unions under the self-same Article 19(1)(c), and, to carry on their occupation or employment. Other avenues of employment or occupation and to form unions were open to them and were not barred. It was pointed out that even under Article 311, if the post is abolished, the right to the post is gone and the said article is not attracted. Reliance, by way of analogy, was also placed on *All India Bank Employees Association v. National Industrial Tribunal* (supra).

88. The case of *Smt. Damyanti Naranga Vs. The Union of India (UOI) and Others*, which was specifically relied upon by the learned Counsel for the petitioners, in no way aids or advances their stand. Plainly enough that was not a

case of either nationalisation or acquisition of property. Indeed it pertained to the mandatory induction of members into a society by the Hindi Sahitya Sammelan Act, 1962. Thereby the original Hindi Sahitya Sammelan was divested of its character and the right to carry on its activities by the mandatory induction of members in the society, by virtue of the provisions of the Act. It was in that context that their Lordships held that the right to form an association includes the right to continue the same and, in law, altering the composition of the association compulsorily will be a breach of the right to form associations. Plainly enough herein there is no compulsive induction of membership nor any forced alteration of the composition of the society. All that has been done is to take-over its property. The right of the members to continue the registered society they had founded is in no way taken away, nor impinged, nor is the composition of the membership of the society in any way altered or any forcible induction of unwanted persons into the society has been made. The mere divesting of one of the society's properties, when validly done by the State in its exercise of eminent domain and the power of acquisition and requisitioning therefore does not in any way infract or attract the provisions of Article 19(1)(c) of the Constitution.

88-A. To sum up on the last Question No. (7), the answer thereto is rendered in the negative and it is held that the impugned Ordinance does not violate the fundamental right to form associations under Article 19(1)(c) of the Constitution.

89. Before parting with this case, it may, perhaps, be noticed that despite some hint thereof in the pleadings, not a single argument under Article 21 was even raised, far from being pressed on behalf of the petitioners in course of exhaustive arguments extending over nearly two weeks. Equally, the suggested stand that the right to property remains intact as a fundamental right within Article 21 itself despite the designed repeal of Article 31 was not even remotely touched upon by the learned Counsel.

89-A. In the end, it seems to me that in this judgment, which could not avoid being exhaustive, it is apt to concisely collate the basic conclusions arrived at. It is consequently re-stated that:

(i) The satisfaction of the Governor under Article 213 of the Constitution of India pertaining to the immediacy for the promulgation of an Ordinance is not justiciable.

(ii) Even assuming that it was so, no extraneous, irrelevant or perverse reasons for the promulgation of the Ordinance are shown and no prima facie case has been made nor an acceptable foundation laid for holding that no circumstance whatsoever existed which rendered an immediate action by the Governor necessary.

(iii) The exercise of legislative power by promulgation of an Ordinance by the Governor cannot be impeached on the ground of mala fides.

(iv) Even if it is assumed that it could be so impeached, the petitioners have failed to establish even a prima facie charge of mala fides.

(v) The mala fides of the Chief Minister, even if established, is not tantamount to the mala fides of the Council of Ministers as a whole and cannot, therefore, vitiate the exercise of the legislative power of the promulgation of an Ordinance.

(vi) The impugned Ordinance did not require the sanction of the President under the proviso to Clause (1) of Article 213 of the Constitution.

(vii) The impugned Ordinance is not governed by Entry 66 of List I, and is well within the parameters of Entry 42 of the Concurrent List III, and, therefore, is not held for lack of legislative competence.

(viii) The impugned Ordinance is in no way discriminatory nor does it infract Article 14 in its choice of the petitioner Institute alone for nationalisation in its first phase.

(ix) The impugned Ordinance does not violate the fundamental right to form associations under Article 19(1)(c) of the Constitution.

90. in. the light of the above, the challenge to the validity of the Private Educational Institutions (Taking Over) Ordinance, 1986 (Bihar Ordinance No. 15 of 1986), must fail and the same is consequently upheld. The writ petition, (1986 C.WJC 2098) is hereby dismissed. However, in view of the significant constitutional issues, which have been ably projected by the learned Counsel, we leave the parties to bear their own costs.

CIVIL WRIT JURISDICTION CASE NO. 2087 OF 1986

91. Having dealt with and disposed of the main stream case one must now advert separately to its offshoot in Civil Writ Jurisdiction Case No. 2087 of 1986. This has been preferred by Dr. Jagadanand Jha, the Registrar of the Institute, and, is primarily directed against the termination of his service by the order dated the 21st April, 1986 (Annexure "7"). An ancillary challenge to the vires of Section 6 of the Ordinance as being ultra vires of Articles 14, 16 and 21 of the Constitution has also been laid. The basic averments with regard to the creation, history and growth of the Institute have already been noticed in detail earlier and do not call for repetition.

91-A. The petitioner herein, apart from other educational qualifications, avers that the Degree of Doctorate of Philosophy, for his thesis on Management of Khadi and Village Industries, has been conferred upon him and he was initially appointed as Lecturer-cum-Registrar-cum-Administrative Officer in the pay scale of Rs. 890-1415, on a purely temporary basis by the Director General of the Institute on the 1st of May, 1977. Subsequently, the Governing Council is said to have advertised for the appointment to the said post and the petitioner, in pursuance to the said advertisement, sent his application on the 15th of January, 1978. He was thereafter selected and appointed as Lecturer/Registrar-cum-

Administrative Officer of the said Institute, vide appointment letter dated the 29th July, 1978 (Annexure "2"). Consequent upon the sanctioning of the post of Registrar in the Institute by the State Government on the 21st of March, 1983, the petitioner apparently was appointed and confirmed on the said post at a basic salary of Rs. 2,000, vide letter dated the 1st February, 1984 (Annexure 4"). However, after the take-over of the Institute by the impugned Ordinance, on the 21st of April, 1986, the respondent State issued an order terminating the services of the petitioner as the Registrar of the Institute in alleged violation of Section 6(4) of the said Ordinance, vide order Annexure "7". The said order of termination is sought to be impugned on a wide variety of grounds under Articles 14, 16, 19(1)(g), 21 and 300-A of the Constitution, as also the alleged violation of the principles of natural justice.

92. A counter-affidavit on behalf of the respondents has been filed by Shree Bhasker Banerjee, Secretary-cum-Education Commissioner, Government of Bihar. Therein, it has rightly been pointed out that materially the facts herein are common with those in Civil Writ Jurisdiction Case No. 2098 of 1986, and leave is sought to rely on the pleadings of the respondents made in the said writ petition. On the peculiar facts of this petition, it is pointed out that the petitioner was initially the Private Secretary to Shree Jagannath Mishra even at the time he was the Irrigation Minister of Bihar, and continued as his Private Secretary till sometime in 1977, whereafter he was appointed in the Institute. It has been averred that the Institute only secured a sanction from the respondent State for the post of a Lecturer, against which the petitioner was appointed and was wrongly shown as Lecturer-cum-Registrar in the Institute's records, and he was given undue benefit of additional pay by showing his designation as Lecturer-cum-Registrar-cum-Administrative Officer. The sanctioned pay scale of the Lecturer was Rs. 890-1415 and the post of Registrar had not been sanctioned at all at the relevant time" It was only in the year 1983 that on the request of the Institute, a post of Registrar in the pay scale of Rs. 890-1415 was sanctioned. However, much in excess of the sanctioned amount, the petitioner was unduly favoured" by giving him a pay scale of Rs. 2,000 plus Rs. 630 as dearness allowance, whilst the sanctioned pay scale was only Rs. 890-1415.

93. It has then been pointed out that the petitioner admittedly possesses a second class Master's Degree and has secured lower Second Class, i. e., less than 52 per cent marks. According to the Statutes of the Bihar State Universities Act, the petitioner was consequently not even qualified for the post of a Lecturer, but, he has nevertheless been drawing the pay equivalent to or similar to that of a Professor, as his total emoluments as paid to the petitioner, were of the order of Rs. 2,738.40 Paise. The stand" taken then is that the high sounding function of the Registrar of the Institute in view of the modest number of the staff employed, is, in fact, merely equivalent to that of a Section Officer in the Government Department, and his duties are merely ministerial in nature. The respondent State duly constituted a Committee of Three Vice-Chancellors, in accord with Sub-section (2) of Section 6 of the Ordinance, which reported that

the appointment of the petitioner was against the Regulations of the University, and on examination, it was also found that the post, in the pay scale allocated to it is not even required in the Institute. Government, in accordance with the recommendations of the said Committee, then arrived at a decision to terminate the services of the petitioner u/s 6(4) of the Ordinance whilst acting bonafide and in public interest. "

94. A reply to the counter-affidavit has also been filed, controverting some of the averments therein. A supplementary counter-affidavit has then been filed on behalf of the respondents, alleging that the petitioner has falsely stated that he was appointed as Registrar-cum-Administrative Officer in pursuance of the advertisement made in the newspapers or that his selection was made by any Selection Committee. It is the stand that these averments are false, as borne out of the records of the Institute itself. The relevant documents have been annexed as Annexure A series.

95. As in the preceding writ petition so in the present one, certain pristinely legal issues have been raised which may perhaps be formulated at the very outset in the terms following:

1. Whether Section 6 of the Ordinance is violative of Articles 14 16 or 19 of the Constitution and is consequently invalid ? "
2. Whether the power conferred on the State Government to terminate the services of the staff of the institute is quasi judicial in nature and consequently attracts the principles of natural justice ?
3. Whether u/s 6(4) of the Ordinance the services of the non-teaching staff cannot be terminated at all ?

Question No. 1: Whether Section 6 of the Ordinance is violative of Articles 14, 16 or 19 of the Constitution and is consequently invalid ?

Inevitably the controversy herein would revolve around the language of Section 6 aforesaid and it is, therefore, apt to read the same at the very outset:

6. Determination of terms of services of the teaching staff and other employees of the institution, (1) As from the date of the notified order, all the staff employed in the institution shall cease to be the employee of the institution:

Provided that they shall continue to serve the institution on an ad-hoc basis till a decision under Sub-sections (3) and (4) is taken by the State Government.

(2) The State Government will set up one or more Committees of experts and knowledgeable persons which will examine the bio-data "of each member of the teaching staff and ascertain whether appointment, promotion or confirmation was made in accordance with the University Regulation or Government direction/ circular and take into consideration all other relevant materials, such as qualification, experience, research degree, etc. and submit its report to the State Government.

(3) The State Government on receipt of the report of the Committee or Committees, as the case may be, will decide in respect of each member of teaching staff on the merits of each case, whether to absorb him in Government service or whether to terminate his service or to allow him to continue on an ad-hoc basis for a fixed term or on contract and shall, where necessary, redetermine the rank, pay, allowance and other conditions of service.

(4) The State Government shall similarly determine the terms of appointment and other conditions of service of other categories of staff of the Institution on the basis of facts to be ascertained either by a Committee or by an officer entrusted with the task and the provisions of Sub-sections (2) and (3) shall apply mutatis mutandis to such case.

96. Taking the bull by the horns, Mr. Basudeva Prasad first assailed the very constitutionality of Section 6. It was contended that the petitioner and many others were permanent and confirmed employees of the institute and had inalienable contractual rights of service therein. Section 6 in terms took away all those valuable rights without even an express opportunity to show cause. The power was, therefore, labelled as arbitrary and discriminatory and equally violative of the fundamental right to practise any profession or to carry on any occupation. In sum, the contention was that the termination of the services of a permanent employee whether for nationalisation or otherwise is per se unreasonable and discriminatory and consequently violative of Articles 14, 16 and 19. Basic reliance was placed on the recent decision of their Lordships of the Supreme Court in *West Bengal State Electricity Board and Ors. v. Shri Desk Bandhu Ghose and Ors.* 1985 P.L.J.R.S.C. 9.

97. To my mind, the somewhat doctrinaire stand taken on behalf of the petitioner herein is a logical extreme which is hardly tenable. Section 6 inlaid as it is in the mosaic of the other provisions of this Ordinance is not to be construed in isolation. Therefore, the larger question herein is whether in the event of nationalisation or take-over of an institution by the State in its power of eminent domain it has authority to terminate the services of the existing employees ? Or, is it bound inflexibly in taking-over the property or an institution to take-over all its existing employees as well with all their subsisting contractual obligations ? I believe the answer is not in doubt either on principle or on long standing precedent. There is no gainsaying the fact that on a take-over or nationalisation of an institution the termination of the contractual rights of the erstwhile employer and employees may cause private hardship to both. There is, however, little doubt that the State's undoubted power of acquisition expressly recognised and conferred by the Constitution includes within its scope a discretion to either take-over or not the service of the employees and on such terms and conditions as it may deem fit. Indeed if it were not to be so, perhaps the very larger purpose of nationalisation or acquisition may be wholly defeated. To say that nationalisation must necessarily mean the absorption and continuance of all earlier employees on identical terms of employment would in a particular

situation be frustrating the very object of such a take over. Therefore, the larger public purpose herein would override the hardship of the private employer and employees. Equally the legal effect of a valid acquisition is that the property vests in the State and the former owner ceases to be so in his erstwhile role of the employment. There is thus no subsisting contract between the State taking over an institution and the employees whose contractual rights were obviously bilateral with the former employer. On an indepth analysis, no subsisting right whether contractual or otherwise survives qua the acquisitioning State when and if it chooses in terms to do so free of all encumbrances.

98. Now, apart from principle, there also exists a long line of precedent upholding nationalisation in various fields without taking over the services of the employees and, in fact, terminating them straightaway. Only as a representative example, reference may be made first to the Coking Coal Mines (Nationalisation) Act, 1972. Therein Section 17(3) categorically terminated the services of the employees in the terms following:

17(1).....

(2)...

(3) Save as otherwise provided in Sub-sections (1) and (2), the services of every person employed by the owner or occupier of a coking coal mine or coke oven plant before the appointed day shall stand terminated on and from the specified date.

* * * * *

Similarly Section 14(3) of the Coal Mines (Nationalisation) Act, 1973 declared that barring the persons excepted by Sub-sections (1) and (2) the services of every person employed by the owner or occupier of a coal mine before the appointed day shall stand terminated on or from the specified day. The aforesaid provisions have well withstood all challenges to their constitutionality. Within this jurisdiction, the aforesaid provisions have recently been authoritatively construed by the Full Bench in *Agent Muridhar Colliery of Bharat Coking Coal Ltd. Vs. Sital Chandra Pathak and Others*, . Once that is so, one fails to see any reason as to why Sub- (1) of Section 6 providing that the staff employed in the institution shall cease to be the employees of the institute is in any way unconstitutional. Indeed, the succeeding Sub-sections only soften and liberalise the determination of the services by providing for further consideration and, if found fit, for absorption or re-appointment in government service. No constitutional taint can thus attach to Section 6 of the Ordinance.

98-A. The answer to question No. 1 is, therefore, rendered in the negative and it is held that Section 6 of the Ordinance is not violative of Article 14, 16 or 19 of the Constitution and is perfectly valid.

Question No. 2: Whether the power conferred on the State Government to terminate the services of the staff of the institute is quasi judicial in nature and

consequently attracts the principles of natural justice ?

99. The challenge to the impugned order of termination (Annexure 7) was then sought to be rested on the basis of Section 6 itself. It was contended that Section 6 inherently confers only a quasi judicial power on the State Government. Emphasis was sought to be placed on the language of Sub-section (3) requiring the State to decide in respect of each member of the teaching staff on the merits of each case for considering whether to absorb him in government service or not. It was the submission that the phraseology employed has the trappings of a judicial determination and at the lowest could only be quasi judicial in nature. On these premises it was contended that the rules of natural justice must be read into such a provision and since admittedly no opportunity had been given to the petitioner, the termination was violative of the principles of natural justice.

100. In appraising the aforesaid argument, it is necessary to recall that the vires of Section 6 have already been upheld above. Once that is so, then by virtue of Sub-section (1) all the staff employed in the institution ceased to be employees of such institution. Once the provision is valid, because of nationalisation the relationship of employer and employees stood wholly abrogated and. apparently no right other than the one spelt out by the Section aforesaid survived to the employee. If Section 6(1) is valid, then all employees ceased to be so and one should not allow one's mind to boggle at the clear mandate of the law to that effect.

101. Though there was a clear determination of the terms of service of all the staff of the institute, apparently, to tide over the interregnum and avoid all disruption of work the proviso to Section 6(1) laid down that the staff would continue to serve the institution on an ad-hoc basis, till a decision with regard to their absorption or otherwise under Sub-section (3) or (4) by the State. It is manifest that this was purely a temporary measure and the continuation was purely on an ad-hoc basis. It needs no erudition to recall that such an ad-hoc employee is placed at the lowest rung of the employer-employee relationship, having virtually no legal right as such and, if any, the same is entirely ephemeral till its termination. However, if authority was needed in this context, reference may be made to the following observation of the Full Bench in *S.K. Verma and Others Vs. State of Punjab and Others*, :

To our mind, the term "ad-hoc employee" is conveniently used for a wholly temporary employee engaged either for a particular period or for a particular purpose and one whose services can be terminated with the maximum of ease. The dictionary meaning of ad-hoc in Webster's New International Dictionary has been given as "pertaining to or for the sake of this case alone." In the Random House Dictionary its meaning has been given as "for this special purpose, with respect to this subject or thing.

Therefore, having regard to the ordinary meaning of the term, no distinction can reasonably be drawn betwixt a temporary employee whose services are

terminable without notice or otherwise and an employee characterised as ad-hoc and employed on similar terms. Indeed, it appears to us that in the gamut of service law an ad-hoc employee virtually stands at the lowest rung. As against the permanent, quasipermanent, and temporary employee, the ad-hoc one appears at the lowest level implying that he had been engaged casually or for a stopgap arrangement for a short duration or fleeting purposes.

102. Once it is held as above, that the employment of the staff stood completely determined by nationalisation and all that remained was an ad-hoc continuation for the interregnum, then the provisions of Sub-section (3) would fall in proper perspective. To my mind, when read as a whole, the issue herein is not one of termination or removal, because that has already been done, but simply whether the employees should be absorbed in the government service or not to be absorbed and in the alternative to continue them further either on an identical basis or on a fixed term or on a contract, with absolute discretion, to redetermine the rank, pay and other conditions of service. Plainly enough, barring a quibble on the words, the substance of the provision is in terms a consideration for absorption in government service or a virtual fresh appointment on fresh terms. To my mind, such a power far from being judicial or quasi judicial one is purely an administrative one to appoint or not to appoint an employee or to freshly appoint one and involves no Us for the exercise of such power on judicial scales. By any stretch of imagination, such a power cannot be labelled as quasi judicial. Once it is so held, it is obvious that no question of any implied right of natural justice under the provision would arise. If at all, as a matter of abstruse argument, it could be there, it stands negated by the imperative terms of Sub-section (1). As has been noticed therein already, the provision visualises the total severance of employment as a matter of law without providing any opportunity to show cause, etc. If the very determination or termination of service is mandated by the Section without any further hearing, it seems some what illogical to thrust the same into a much lower level of the discretion of the State to absorb or not absorb the existing employees of the institute or to employ them afresh on altogether new terms and conditions of service.

103. To close on the above aspect, the answer to question No. 2 is rendered in the negative. It is held that the power conferred on the State Government to terminate the services of the staff of the institute is not quasi judicial in nature and consequently does not attract the principles of natural justice.

Question No. (3): Whether u/s 6(4) of the Ordinance the services of non-teaching staff cannot be terminated at all ?

104. In fairness to the learned Counsel for the petitioner, one must also notice his somewhat curious stand, which was seriously pressed, that as regards non-teaching staff, there was no power of termination at all under Sub-section (4) of Section 6 of the Ordinance. It was contended with some vehemence that as regards this category, the only power was to determine the terms of appointment and other conditions of service.

105. To my mind the submission is only to be noticed and rejected. It seeks to misconstrue Sub-section (4) in total isolation, as if the provision was in a vacuum. It needs no erudition to reiterate the well-settled cannon of construction that not only a Section has to be construed as a whole, but even the whole statute has to be interpreted harmoniously together. Consequently, Sub-section (4) is not to be separated and isolated from the preceding three Sub-sections and their plain import. The larger scheme is that both the teaching staff and the other categories were broadly treated at a par and even in identical terms and by virtue of Sub-section (1) both categories would cease to be the employees of the Institute and by virtue of the proviso thereto, both categories would continue to serve the institution on an ad-hoc basis till a decision under Sub-sections (3) and (4) is taken by the State Government. For the purpose of taking that decision, the Section provided in some detail, with regard to the teaching staff in Sub-sections (2) and (3). However, as regards the other categories, by Sub-section (4) it was provided that the State Government shall similarly determine the cases of the non-teaching staff also. The word "similarly" is crucial and what is more is the fact that this very Sub-section further provided that the provisions of Sub-sections (2) and (3) shall apply mutatis mutandis to such a case. Once such a language had been employed, it is vain on the part of the petitioner to contend that the services of the non-teaching staff cannot be terminated at all. The statute was not obliged to repeat the same provisions of Sub-section (2) and (3) ad nauseam and, it rightly adopted the course of declaring that these provisions would be equally applicable. Perhaps, the only distinction drawn herein is that whilst in the case of the teaching staff the statute envisaged a committee of experts and knowledgeable persons to examine their cases, with regard to the other categories of staff, an option was to act either on the basis of facts ascertained by such a committee or by an officer entrusted with the task. The somewhat tall submission of the learned Counsel for the petitioner has thus no factual or statutory legs to stand upon.

106. Consequently, the answer to Question No. (3) is rendered in the negative and it is held that Section 6(4) of the Ordinance squarely warrants the termination of the services of the non-teaching staff as well.

107. Now, apart from the aforesaid, three purely legal questions, learned Counsel sought to assail the impugned order of termination (Annexure "7") on the ground that it was stigmatic because of the observation that the continuance of Shri Jagannath Mishra, Chairman-cum-Director General, and the petitioner as the Registrar in the institution was not in the interest of the said institution. Reliance herein was placed on Jagdish Mitter Vs. The Union of India (UOI), , wherein it was observed that the language that a person was undesirable to be retained in Government service was stigmatic. Counsel contended that if undesirability to be retained is so, then holding that the continuance in service of the petitioner was not in the interest of the institution may be equally stigmatic.

108. Since the argument aforesaid must necessarily centre around the language

of the impugned order (Annexure 7), it is necessary to quote the same. A true translation thereof is in the terms following:

GOVERNMENT OF BIHAR EDUCATION DEPARTMENT NOTIFICATION

Patna, dated the 21st April, 1986.

No. 99/C: The Governor of Bihar, in exercise of the power conferred by Section 6, (2) (3) and (4) of the Bihar Private Educational Institution (Taking Over) Ordinance, 1986 (Bihar Ordinance No. 15, 1986), having considered the report of the Committee constituted under Notification No. 98/C dated 21-4-86 of the Education Department of the Government of Bihar, has come to the conclusion that the appointment/promotion/confirmation of the following authorities/employees of the Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna, was not made in accordance with the direction and circular of the Government and the University Regulation and their continuance in this Institution is not in the interest of the Institution. Therefore, their services in the aforesaid institution are terminated with immediate effect.

(1) Dr. Jagannath Mishra, Chairman-cum-Director General.

(2) Dr. Jagadanand Jha, Registrar.

By order of the Governor of Bihar Sd. R.N. Dash Secretary, Education Department, Government of Bihar, Patna.

In the context of the aforequoted order, the contention of the learned for the petitioner has, in my view, been ably refuted by the Advocate General. He rightly pointed out that the conclusion impugned order is not to be read in isolation, but as a whole in the notification This in terms refers to the report of the Committee constituted under notification No. 98/C dated the 21st April, 1986, of the Education Department. The detailed report of the three Vice-Chancellors has been placed on the record, to which fuller reference hereinafter would follow. The impugned order expressly points out that in accord with the said report the Governor has come to the conclusion that the appointment/promotion/confirmation of the petitioner and the Director-General was not in accordance with the direction and circular of the Government and the University Regulation. It is in the context of these basic facts that the Governor had come to the conclusion that the continuance of the petitioner and the Director General was not in the interest of the institution. It is thus obvious that no stigma or suspicion has been directly cast on the petitioner, but all that is kept in mind or concluded is that the institution no longer requires the continuance, of the services of the petitioner and those of the Director General. In the larger prospect. I am unable to hold that the impugned order of termination cast any stigma on the petitioner. The decision in Jagdish Mitter v. Union of India (supra) far from aiding the petitioner's stand would, in fact on closer analysis, boomerang upon him. Therein their lordships held that the language "not desirable to be retained in Government service" cast an aspersion on the discharged employee. No such

language has I used here" Indeed, their Lordships therein themselves observed:-

It is obvious that to say that it is undesirable to continue a servant is very much different from saying that it is continue him. In the first case, stigma attaches to the servant in the second case, termination of service is due to the consideration that a temporary servant need not be continued, and in that sense, no stigma attaches to him.

Herein the petitioner's case comes plainly within the aforesaid observation Reference herein may also be instructively made to a judgment of their Lordships of the Supreme Court reported in Union of India and Ors. v. R.S Dhaba 1969 SLR 442 which in turn has relied on The State of Bombay v. F.A. Abraham 1962 2 Supp. S.L.R. 92 and I. N. Saksena v. State of Madhya Pradesh 1967 S.L.R. 204

109. Yet another ground of challenge raised against the impugned order on behalf of the petitioner was that the reasons for the termination of the petitioner's service given in the impugned order were wholly extraneous. The main thrust of the argument was that the University Regulations were not applicable to the Institute, nor was it amenable to any Government direction, circular or memorandum. Reliance was placed on Section 73 of the Bihar State Universities Act, 1976 (Bihar Act XXIII of 1976), where-under the Institute had been declared an autonomous body. This was projected as a total bar, excluding the application of any other provisions apart from the bye-laws of the registered society. The firm stand was that the rules and regulations of the Institute, framed in 1979, were statutory in nature and had the force of law, especially applicable to it, and, was exclusionary of any other provisions. Reliance was placed on B.S. Minhas Vs. Indian Statistical Institute and Others, .

110. learned Counsel's stand, rested as it is on the ground that the rules and regulations of the Institute are overriding law, cannot possibly succeed. It is well settled that bye-laws of a society, corporation or company, including the societies registered under the Societies Registration Act, 1860, are not statutory and do not have the force of law. They may well be binding betwixt its members and the employees of such a society, but, they cannot be raised to the pedestal of a law in themselves, which can override the enacted law or to come in conflict therewith. Such provisions must give way and be subservient to statutory legislation. If authority was needed for this basic proposition, it is there in the binding judgment of their Lordships in Co-operative Central Bank Ltd. and Others Vs. Additional Industrial Tribunal and Others, in the terms following:

We are unable to accept the submission that the bye-laws of a cooperative society framed in pursuance of the provisions of the Act can be held to be law or to have the force of law. It has no doubt been held that, if a statute gives power to a Government or other authority to make rules, the rules so framed have the force of statute and are to be deemed to be incorporated as a part of the statute. That principle, however, does not apply to bye-laws of the nature that a co-operative society is empowered by the Act to make. The bye-laws that are

contemplated by the Act can be merely those which govern the internal management, business or administration of a society. They may be binding between the persons affected by them, but they do not have the force of a statute....The bye-laws that can be framed by a society under the Act are similar in nature to the Articles of Association of a company incorporated under the Companies Act, and, such Articles of Association have never been held to have the force of law.

111. In the light of the aforesaid authoritative enunciation, no rule or regulation of the Institute can possibly override Section 6 of the Ordinance. Once it is held as valid, as above, it must override, and, if necessary efface any bye-laws of the society to the contrary. Sub-section (2) of Section 6 in term provided that the absorption of the staff of the Institute was to be tested on the touch stone, of whether their appointment, promotion or confirmation was made in accordance with the University Regulations or the Government directions/circulars, apart from taking into consideration other relevant materials. So long as Section 6(2) retains its pristine force and validity, the argument that the University Regulations or Government directions and circulars are excluded or are to be ignored or be irrelevant for determining the absorption of former employees, must necessarily fail and is rejected.

112. Yet again, learned Counsel's reliance on Section 73 of the Bihar State Universities Act, 1976, for contending that the rules and regulations of the Institute are law, is entirely misplaced. However, to appraise the submission, Section 73 may be noticed in extenso:

Autonomous College or Institute. Notwithstanding anything contained in any provision of this Act, the University may, subject to its adequate supervision and the manner prescribed in the relevant statutes, confer upon any College or Institute, having outstanding caliber and fulfilling the prescribed conditions, the power to make changes or modifications in the courses of studies prescribed by the University for its students, and the privilege to take examinations in such modified course of study and management thereof, and such other powers in respect of other matters, as it may deem fit; and such Institute or College, as the case may be, shall be declared autonomous Institute or College.

Plainly enough the aforesaid provision is not even remotely for the conferment of any rule making power on the autonomous college or institute declared under the same. It only confers on such institute the power to make changes or modification in the courses of studies prescribed by the University for their students, and the privilege to take examination in such modified courses. In essence, it merely gives academic autonomy to prescribe syllabi and for consequential ancillary matters. Being declared an autonomous institute or college is not, in my view, a declaration of independence, which puts such a body above the law and beyond the pale of either the University Statutes or any other relevant and applicable Governmental direction, circular or memorandum. Reference in this connection may be made to Section 76 of the aforesaid Act,

which clearly visualises that Statutes, Ordinances and Regulations and Rules are to be made specifically under the appropriate provisions of the Act. Therefore, Section 73 and the autonomous status given to the Institute does not in any way aid or advance the case of the petitioner in this context.

113. Much ado was sought to be raised on the alleged ground of undue haste in terminating the services of the petitioner. It was contended that the Ordinance was itself promulgated on the 19th April, 1986, and the impugned order was passed two days later, on the 21st April, 1986. Imaginatively, learned Counsel sought to read much into the speedy action as being motivated by uncalled for hurry.

114. This ancillary submission, in my view, has been more than amply met on behalf of the respondent State. Taking the bull by the horns, the learned Advocate General candidly stated that the circumstances necessitating the promulgation of the Ordinance and the follow up action cried out for speed and quick action, and, merely because the executive did so, is not a matter for castigation, but, indeed, for commendation. learned Counsel reiterated the earlier stand that one of the many grounds for selecting the Institute in the first phase of nationalisation were the audit and other reports indicating both financial and academic mismanagement. Therefore, the respondent State apprehended rightly that a serious clash with regard to the administration and management of the Institute would have, inevitably arisen, if even after the nationalisation and take-over, the petitioner, who was hardly required for administrative reasons, was still allowed to continue administratively as incharge thereafter. Since the Government had taken-over the Institute, it was imperative that its control and administration in the very initial stage should expeditiously pass into its hands. The spirit of Section 4 of the Ordinance is manifest in passing immediate and total control into the hands of the Commissioner, who was deemed to have taken charge of the Institute and was directed to perform the functions and duties of the Governing Body forthwith, until such time as alternative arrangements were made by the State Government. The learned Advocate General forcefully highlighted and fell back on the earlier sorry experience of the State in the nationalisation of colleges and schools, wherein private managements had, in a short interregnum, inducted thousands of unauthorised persons into nonexistent posts, in order to pass on a back-breaking financial burden to the State and to saddle it with unworthy incumbents on unwanted posts. Consequently, it was submitted that the administration in this context was now taking no chances and deliberately acted with speed. It was not only admitted, but produly claimed on behalf of the respondents that immediately after the promulgation of the Ordinance the Commissioner, Patna Division, took over possession of the Institute with police help and froze everything in the Institute. It was the case that because of the fact that the State was acting determinedly with speed in the situation, is not by itself to be viewed with pointless suspicion, when it was done bona fide and with a designed public purpose. The State Government, u/s 4(2), immediately set up a Committee of three Vice Chancellors, who, admittedly,

submitted a report, and, accepting the same and in accord therewith, it was decided not to absorb the petitioner, as, in the view of the Committee, for a small Institute, his services were hardly required, nor his emoluments commensurate to a ministerial job.

115. Lastly, it appears that the piecemeal attack from various angles on the termination of the petitioner's services in a way obfuscates the broader picture and the larger vista in which the follow up governmental action in the wake of the provisions of the Ordinance has to be viewed. What, perhaps, deserves highlighting here is the uncontrovered fact that the Institute was very modestly staffed and did not have more than 20 teaching posts and a somewhat inflated ministerial staff of another 20 persons, the overall number being less than 40. The report submitted by the Committee of three Vice-Chancellors, namely, Dr. Devendra Nath Sharma, Dr. Kedarnath Prasad, and Dr. Chetkar Jha, which has been placed on the record, is illuminating in this context. It is manifest therefrom that the administrative posts were only two, namely, that of the Director General, held by Shree Jagannath Mishra, and the other of the Registrar, held by the petitioner. The record with regard to them consisted not more than a file or two. This was forthwith examined by the Committee and indeed, in its report, it was noticed as follows:

The Committee examined the papers concerning the appointment of the Registrar of the Institute. The Committee also examined the resolution of the Governing Council connecting with the appointment of the Registrar of the Institute and the letters of the Government in connection with the sanction of this post. The Committee also perused the sanction order of the Government for the post of Registrar. The Governing Council, vide letter No. 204/77 dated 24-6-1977, had requested the Government for the creation of the post of Registrar. The State Government, Vide its letter No. 328 dated 21-3-1983, sanctioned the post of Registrar in the pay-scale of Rs. 890-1450.

The Committee came to the conclusion that the appointment of the petitioner was both contrary to the procedures for appointment as also to the sanctioned pay-scale of the Registrar. It was pointed out that the petitioner was allegedly appointed even prior to the date of the sanction of the post of the Registrar and imposed a pointlessly heavy financial burden on the Institute. On examining the duties and functions of the Registrar, the Committee opined that these were purely ministerial and no better than a Section Officer's job in a matching Governmental or University set up. It was also noticed that the scale of pay given to the petitioner had virtually been doubled than the sanctioned scale and retrospective effect thereto had been given. There was thus not the least analogy between the alleged Registrar of the Institute and that of the Registrar of an University or any such matching organisation. The Committee summed up as under:

....Institute is a small institution, in which altogether 40 persons have been working. Hence, it is the conclusion of the Committee that the appointment of

the Registrar has neither been made in accordance with the rules nor in accordance with the directions given by the State Government. The post of the Registrar of the Institute, to a great extent, comes under the ministerial category. Hence, it cannot be said to be proper to pay him so much salary. In fact, this is an unnecessary financial burden on the Institute. It is neither necessary nor proper to keep the Registrar in this pay scale.

116. Relying basically on the report of the Committee of the three Vice-Chancellors, the learned Advocate General drew sustenance from Annexures T to "5" of the writ petition itself and Annexures "A", "A/1", "A/2" and "A/4", placed on the record by the respondent State, to contend that the petitioner had been appointed wholly irregularly in violation of even the bye-laws of the Society and had been pampered with emoluments which were disproportionate to his job and contrary to the sanctioned pay scale for the post granted later by the Government. It was highlighted that though some pretence was made, in fact, no advertisement for the post of this nature was at all made, nor any Selection Committee was constituted, and the petitioner was appointed primarily because of his previous long existing connection with the Director General of the Institute. Though the post of the Registrar was sanctioned only in May, 1983 and the pay scale therefore was Rs. 890-1450/-, yet the petitioner was drawing emoluments beyond Rs. 2,700 or even more, apart from other perks. Resting himself on the pleadings in the counter-affidavit, the respondent State's stand was that there was neither any valid appointment of the petitioner, nor any valid financial sanction for the amounts which were being doled out to him.

117. Against the aforesaid submissions, the learned Advocate General pinpointed that u/s 6(2) of the Ordinance, the Committee of Vice-Collectors" was duly constituted. It examined the record pertaining to the petitioner and opined about his appointment, promotion and confirmation on the basis of the University Regulations or Government directions and circulars and further took into consideration all other materials. It had come to the conclusion that it was neither necessary nor proper to keep the Registrar nor to give him the pay-scale he was drawing. Indeed, by virtue of the control having been passed completely to the Commissioner, the post of the Registrar was rendered superfluous. The State Government, u/s 6(3) was to consider whether to absorb the petitioner in the Government service or not. Accepting the report of the Committee aforesaid and in accord therewith the Governor issued the notification Annexure "7" and thereby declined to absorb him in Government service. In the context of Section 6 and the consequential action, the test is whether no reasonable man could have come to the aforesaid conclusion. To my mind, it cannot even remotely be said that the decision not to absorb the petitioner has in any way the hall mark of perversity or illegality, and, indeed, in my view, it suffers from no legal infirmity whatsoever. The challenge to the termination of the petitioner's service, therefore, is repelled.

118. As a necessary consequence, this writ petition (C.W.J.C. No. 2087 of 1986)

also fails and is hereby dismissed. However, there will be no order as to costs.