
(1996) 08 PAT CK 0010

In the Patna High Court

Case No : C.W.J.C. No"s. 8525, 8862 and 11082 of 1995

Nand Kishore Singh Etc.

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 07-08-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 243, 243F, 243K

Citation : (1996) 2 BLJR 1289 : (1996) 2 PLJR 445

Hon'ble Judges : R.M. Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Radha Mohan Prasad, J.—The First writ petition, in which the petitioner who is an Advocate of this Court and has appeared in person has alleged failure on the part of the Government of Bihar to perform democratic and Constitutional duties including the one contained in part IX of the Constitution of India and thus, according to him it is not being run in accordance with the provision of the Constitution. Accordingly, the petitioner has prayed for issuance of a Writ in the nature, of writ of mandamus commanding the Union Government to act in terms to Article 355 and/or 356 of the Constitution of India to ensure that the Government of Bihar is run in accordance with the provisions of the constitution and to issue a writ of prohibition or quo warrant to or any other appropriate writ restraining and or commanding the special officer of Chapra Municipality (dissolved on 23.6.1995) (respondent No. 3) from acting and exercising powers in the said capacity after 22.12.1995, by which date the election of the Municipal Commissioners of Chapra Municipality (hereinafter referred to as "Municipality") were mandatorily due under the provisions of the Constitution of India.

2. The other two writ petitions have been filed by the outgoing Chairman and Vice-Chairman respectively of Municipality challenging the validity of the notification dated 23rd June, 1995 of the State Government dissolving the

Municipality on the ground of completion of its term of five years of elected Board of Commissioners and in its place appointing Special Officer for the Municipality. The petitioners in the third writ petition claims to have authority of the Municipal Commissioners to challenge the validity of the aforementioned notification.

3. In short, the relevant facts, as borne out from the reports of the three writ cases are that the petitioner of the first writ petition claims to be permanent resident of the area within the Municipality and also a voter of the Municipality and interested in administration of justice, rule of law and development of democratic institution and democracy in the country. The petitioners of the other two writ petitions claim to be duly elected as Municipal Commissioners of the Municipality and/or on 7.4.1989 Municipal Commissioners had elected them as Chairman and Vice-Chairman respectively and a notification to that effect was issued vide memo No. 154 dated 22.4.1989 by the District Magistrate, Saran A photocopy of the said notification has been annexed as annexure-T to the third writ petition.

4. u/s 29 of the un-amended Bihar and Orissa Municipal Act, 1922 (hereinafter referred to as "the un-amended Act") an elected Commissioner is to hold office for five years commencing from the date of the general election of Commissioners in the Municipality, and Chairman whether elected or appointed, Vice-Chairman and President, if any, are to hold office for five years from the date of his election or appointment as the case may be for the residue of the term of office of the Commissioners which ever be less. On 1.6.1993 Constitutional Seventy Fourth Amendment came into effect and the provision relating to constitution an Part IXA in the State was incorporated as Part IXA in the Constitution. The Bihar and Orissa Municipal Act was also amended in tune with the Constitutional amendment, but Rules have not been framed accordingly.

5. It is to be noted that within one year of the said amendment every State Government was required to amount its respective law in tune with the Constitutional amendment Vide Article 243N and 243F incorporation in Part-IX in the Constitution for holding the election of a Municipality according to the amended provisions without which the Legislative duty can not be said to have been complied with.

6. However, on 23.6.1995 the impugned notification was issued dissolving the elected Board of Commissioners of the Municipality on the plea of completion of their tenure and appointing Mahipal Singh respondent No. 3 in the first case respondent No. 4 in the second and respondent No. 5 in the third case), hereinafter referred to as respondent No. 3, Who was then acting as Executive Officer of the Municipality, as special Officer until further order to exercise powers, responsibilities and duties, which are vested in the elected Commissioners at a meeting or otherwise, without any guideline, who, according to the petitioners is misusing the said powers. Some of the commissioners and omissions amounting to arbitrary exercise of powers by respondent No.3 which

could not have even been done by the Municipal Commissioners, as alleged in paragraph 7 of the first writ petition, are quoted hereunder.

That after being authorised by Annexure-1 the Respondent No. 3 has done several omission and commission amounting to arbitrary use of power which could not have been done had the Municipal Commissioners not been removed by the alleged dissolution, such as:

- (a) Expenditure over marketing projects without inviting tenders.
- (b) Arbitrary demolition of regularity settled shops without complying the provisions of Section 194 and/or Section 359 of Bihar Municipal Act.
- (c) Constructing marketing complex by reducing width of public road.
- (d) Constructing marketing complex over Khanuanala putting entire chapra town to danger of flood in Rainy season etc.

It is also alleged that the expenditures are being made on projects involving huge investment of Municipal funds without inviting tender and respondent No. 3 is getting the work done at arbitrary extra-vagant cost through his own persons and the fund of the Municipality is being syphoned away by him.

7. In paragraph 9 of the writ petition it is contended that the election to constitute new Municipality is to be completed within six months under provisions of Article 243U of the Constitution read with Section 29 of the Municipal Act, but no notification has yet been issued under Rule 7. In paragraph 10 it is stated that neither the Act nor the Rules or even the Constitution makes alternative arrangement in case election is not held within the specified period. According to the petitioner there is no provision to extend the period of dissolution beyond six months and as such, on expiry of six months period of dissolution, if the election is not held, there is failure of Constitutional requirement including those contained in its part IXA. According to the petitioner, respondent No. 3 shall cease to have power u/s 386 of the Act after 22.12.95 and Annexure-1 appointing him as special Officer would be inoperative after the aforesaid date. It is contended that anything done and action taken by respondent No. 3 thereafter would be null and void.

8. In the supplementary affidavit filed on behalf of the petitioner it is stated that the election of not only Chapra Municipality has fallen due, but elections of most of Municipalities in Bihar have been due for a pretty long time, but the State of Bihar and its authorities are silent on the issue of holding election to such Municipalities. It is alleged that this Court in several cases pertaining to other Municipalities issued positive and specific direction for holding election for the Municipalities, but electoral process even for such Municipalities does not appear to be in sight. In paragraph 4 it is alleged that the elections of even Gram Panchayat at village level and Panchayat Samity at Block level have not been held despite direction of this Court to hold elections by specific date.

9. Counter affidavit and supplementary counter affidavit on behalf of the State and counter affidavit behalf of the Bihar State Election Commission which was added as respondent No. 6 vide order dated 18.3.96 have been filed only in the first writ petition and counter affidavits on behalf of the Special Officer of the Municipality have been filed in all the three writ petitions. Mrs. Renuka Sharwa, learned standing Counsel for Central Government who accepted notice on behalf of the Union of India through secretary, Ministry of Home affairs, New Delhi (respondent No. 4) vide order dated 14.2.96 was directed to file counter affidavit on behalf of the Union of India within a week. The learned Standing Counsel for the Central Government vide order dated 26.2.96, as a matter of last indulgence, was granted further time till 29.2.96 to file counter affidavit. On 29.2.96 Mr. Abhknanyu Sharma., learned Additional Standing Counsel for the Union of India appeared and stated that he has been instructed by the Ministry of Home that the matter relates to Urban Development Department, whereafter the Union of India through Secretary, Ministry of Urban Development was added as respondent No. 5 for whom the learned Additional Standing Counsel Took notice, The learned Additional Standing Counsel was directed to take instructions on behalf of respondent Nos. 4 and 5 file counter affidavit on the next date i.e. on 12th March, 1996. No counter affidavit has however, been filed on behalf of either of the aforesaid respondent Nos. 4 and 5.

10. In the counter affidavit filed on behalf of the State it is stated that Chapra Municipality was constituted by election on 26.2.89 for tenure of five years. As per the provision of the unamended Act the Municipal Board after the normal life of five years was automatically eligible for six months extension i.e. upto 26.8.94 and thereafter the Government had direction to grant extension for another six months, i.e. upto 26.2.95. It is stated that after the expiry of the said period, as per the provision u/s 386 of the Act, the special Officer has been appointed, which, according to them, is fully legal and duties of the Commissioner of the Municipality during the period of dissolution u/s 386 of the unamended Act read with the Bihar Municipal (Amendment) Act, 1995, hereinafter referred to as amended Act. It has been denied that there has been any violation of the constitutional provision. According to the State by the 74th Constitutional amendment, what is mandatory is to make amendment of the existing laws as per the said provision and it does not stipulate that elections are to be held within one year. It is stated that necessary change in the Municipal laws have been effected within the stipulated period of one year and preparations are being made for holding the election early. The plea in regard to non-holding of the Municipal election taken in the counter affidavit on behalf of the State is that the district administrative machinery is actively engaged in the preparation for the Panchayat elections and after that, through the same administrative machinery the Municipal elections of the State Election Commission. In paragraph 13 of the counter affidavit it is stated that the Government-respondents are making all sincere efforts to vest in the Urban local bodies all the powers and functions and for the constitution of the Urban local bodies in a democratic way, step are being

taken. The said counter affidavit was sworn on 22.2.96 and filed on 26.2.96.

11. In the supplementary counter affidavit sworn on 26.3.96 on behalf of the State it is stated that the Election Commission of India has already announced the programme of General Election to Bihar Parliamentary constituencies and as per the programme announced the notification is to be issued on 27th March, 1996, and the election is to be completed by 14th May, 1996. During this period, therefore, no election to Municipality can be held since the entire administrative machinery is to be engaged in the Parliamentary Polls. It is stated that further action regarding Municipal election shall be taken after the Parliamentary polls are over. However, nothing has been mentioned as to what actions have been taken for holding of Municipal elections so far except that the amendment was made in the Act.

12. In the counter affidavit filed on behalf of the State Election Commission (respondent No. 6) it is stated that in terms of Article 243K(1) of The Seventh third/Constitutional Amendment Act 1992 the State Election Commission, Bihar was constituted vide notification dated 21.1.94. Under Article 243 the Election Commission is vested with the power to exercise all superintendence, directed, and control of the preparation of electoral roll and conduct of the election of Municipality. According to Municipality. According to respondent No. 6 in order to hold election of the Municipality the Commission wrote letters, one to the Advocate General, Bihar and the other to the Chief Secretary to the Government of Bihar on 25.11.94 for the following purposes:

- (i) For notification of Municipal election Rules
- (ii) For preparation of list of Urban bodies with population and area
- (iii) Determination of population of Backward classes in the Urban bodies
- (iv) For making administrative arrangement for election.

It is stated that in reply the Urban Development Department. Vide latter No. 111 dated 27.2.96 informed the Commission that draft notification for making necessary amendment in the Bihar Municipality election and electoral Roll Rules 1953 and Patna Municipal Corporation Preparation of Voter List and Conduct of Election Rules, 1953 have been prepared and have been sent Finance Department after approval of the Law Department and the Advocate General for concurrence and that the same are to be notified after concurrence of the Finance Department and approval of the cabinet. It is stated that since the aforesaid two rules have not yet been notified but he State Government, the State Election Commission is not in a position to start the process of the Municipal elections in the State of Bihar.

13. In the counter affidavit filed on behalf of the special Officer, besides denying allegations made against him in the writ petitions, it is stated that the District Magistrate, Chapra had not sent a letter to the Secretary, Urban Development, Government of Bihar on 26th May, 95 (annexure-4 to the counter affidavit) for

supersession of the Municipality in the public interest on account of various lapses being made but here Chapra Municipal Board giving instances. He has also stated other facts to justify the dissolution of the Municipal Board and his appointment as special officer. As regard holding of the election, he stated that it is entirely an outlook of the State Government and the same must be done at the command of the Constitution as well as the Municipal Act.

14. It is contended by Mr. Singh that the provisions contained in Part IX and IXA of the Constitution as per its 73rd and 74th Amendment respectively are mandatory provisions and form part of the basic structure of the Constitution. According to him, non-compliance of the said provisions amounts to violation of the Constitutional mandate besides denial of democracy and thereby the basic structure of the Constitution is being interfered with and its Pre-emble is being violated by the State Government. It is submitted by him that a situation has arisen, particularly due to non-compliance of the repeated directives of this Court to hold Municipal elections for making declaration that the Government of Bihar is not being run in accordance with the provisions of the Constitution and thus the Union of India has mandatory duty to obey the mandate contained in Article 355 and 356 of the Constitution. While assailing the notification of dissolution of the Municipality contained in Annexure-1 it is contended that the same is wholly without jurisdiction, bad in law and violative of the principle of natural justice. According to him, in view of the provisions contained in Clause(b) of Article 243U(3) of the Constitution the Special Officer, in any case cannot continue in office beyond the period of six months from dissolution of the Municipality and his tenure cannot be extended beyond the aforesaid period. As such, respondent No. 3 has no right, to deal with the properties of the Municipality.

15. In reply the learned Additional Advocate General No. 3, appearing for the State of Bihar and its officers submitted that the Constitutional amendment does not fix any time limit for holding of Municipal election. According to him, as per the constitutional amendment the obligation of the State is only to bring the necessary amendment in the concerned legislation in conformity with the Constitutional seventy fourth Amendment within a stipulated period of one year, which according to him, has been complied. According to him, there has been no failure on the part of the State Government to comply the requirements of any of the provisions of the Constitution as alleged, much less to invoke the provisions of Article 355 and /or 356 of the constitution. It was further submitted by him that the respondent State has been very much interested in holding Municipal election and to introduce the democratic process at the grass root level, but under certain unavoidable circumstances referred to in the counter affidavit, the same could not be held so far. It was also submitted by him that the writ is not maintainable as right to fight in the election or right to stand in the election is not a fundamental right as has been decided by the apex Court in the case of N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, and as such no right, much less fundamental right of the petitioner has been infringed, which can be enforced in the present writ application.

16. In reply, it was submitted by Mr. Singh that the present case is a given example of State Government's failure to carry on and discharge its functions in accordance with the provisions of the Constitution, besides non-performance of its statutory duties, which entitled a citizen to invoke the jurisdiction of this Court under Article 226 of the Constitution seeking a declaration as prayed and also for issuance of an appropriate writ, order to direction to the Union of India to discharge its constitutional duty-enshrined in Article 355 and 356 of the Constitution of India. Besides this, the petitioners have also assailed the validity of the Government notification alleged and arbitrarily dissolving the Municipal Board and appointing respondent No. 3 as Special Officer, which according to them is wholly illegal and arbitrary.

17. I do not find any substantial grounds in submission of the learned Additional Advocate General that the present writ petition is not maintainable, 33 right to fight an election or right to stand in the election is into a fundamental right. The reliance placed by him on the Supreme Court decision in the case of N.P. Ponnuswami v. Returning Officer Namakkal (supra) is wholly misplaced. In the said decision the apex Court was considering the scope of Article 329(b) of the Constitution vis-a-vis the power of the High Court to invoke its writ jurisdiction under Article 226 of the constitution in matters connected with election under the provision of the Representation of People Act, 1951. In that context the apex Court held that the right to fight or stand as a candidate for election is not a civil right but is a creature of Statute or special law and must be subject to the limitation imposed by it. Considering the scope of Article 329(b) and 71(1) of the Constitution India, the Court held that Article 71(1) has put in an affirmative bar because it confers special jurisdiction on the Supreme Court which that Court could not have exercised but for this Article. Article 329(b) on the other hand, was primarily intended to exclude or oust the jurisdiction of all courts in regard to electoral matters and to lay down the only mode, in which an election could be challenged.

It was also held that "Article 329(b) oust the jurisdiction of courts with regard to matters arising between the commencement of the polling and the final election. If Part XV of the Constitution is a code by itself, i.e. it creates rights and provides for their enforcement by a special tribunal to the exclusion of all courts including the High Court, there can be no reason for assuming that the Constitution left some part of their election process namely, acceptance or rejection of nomination paper to be made the subject matter of content before the High Courts and thereby upset the time schedule of the election....

18. In the present case the petitioners have not sought for any relief from this Court relating to any matter arising out of during the process of elections and its completion, for which the Supreme Court in the said case held that whether a right or liability is created by a statute gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of and that the provision of Representation of People Act provides for only one remedy, that remedy being an

election petition to be presented after the election is over, there is no remedy provided at any intermediate stage.

19. In the present matter the reliefs sought for by the petitioners are completely different for which no other remedy is provided in any statute. Moreover, there is no bar imposed in invoking the writ jurisdiction of this Court for the aforesaid reliefs. Even in the aforesaid case the apex Court while expressing the importance and necessity for early introduction of democratic system, observed that having regard to the important functions when the Legislatures have to perform in democratic country it has always been recognised to be a matter of first importance that election should be concluded as early as possible according to time schedule and all controversial matters and all dispute arising out of election should be postponed till after the elections are over so that election proceedings may not be unduly retarded Or protracted.

20. I have not been able to find in the said decision that the Supreme Court has anywhere held that the right to fight in the election is not a fundamental right. It is true that there appears to be nothing in Part III of the Constitution to conclude that right to fight in the election is a fundamental right, but when the law/statute provides for introduction of democratic process for governance of the country/state or even at the grass root level within a stipulated time and/or at the earliest, the denial of the same on account of arbitrary or unreasonable actions executive or even of the Legislature, will amount to violation of Article 14 of the Constitution. It is well settled that every form of arbitrariness or unreasonableness is an anathema in our national scheme. It is now a basic requirement of Article 14 that the exercise of discretion must always be guided by some standard or norms so that it does not degenerate into arbitrariness and operate unequally on persons similarly situated. A reference in this connection can be made to the decision of the apex Court in the case of *Bachan Singh v. State of Punjab* reported in (1982) S.C.C. 24, However, I do not wish to delve into this question in any further detail as in my opinion, a writ petition is very much maintainable even for remedying any legal wrong or legal injury caused to a person or to a determinate class of person by reason of violation of any Constitutional or legal right. The Supreme Court in the case of *S.P. Gupta v. Union of India* reported in 1981 S.C.C. 87 held that any member of +- the public having sufficient interest can maintain an action for judicial redress from public injury arising from breach of public duty or for violation of some provision of Constitution or the law and seek enforcement of such public duty on observation of such Constitutional or legal provision, which has been held to be absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of constitutional objective. In the case of *State of Himachal v. Paranta of Students* reported in (1985) 3 S.C.C. 165 the Supreme Court while dealing with a public interest litigation held that the executive can be directed to carry out its constitutional or legal obligation. The petitioners in the present matters are virtually seeking for direction to the executive to carry out its constitutional and legal obligations. Thus, even if it is assumed for argument sake that no

fundamental right is sought to be enforced by the petitioner in the present writ applications, in my opinion, they can very well maintain the Writ applications.

21. Initially, the learned Addl. Advocate General took preliminary objection also on the question of maintainability of the writ application on the question on the ground that the State Election Commission was not made party. However, after addition of the Bihar State Election Commissioner as respondent No. 6 vide order dated 18.3.96 and on notice to them counter affidavit has been filed on their behalf, there is no substance in the said objection of the learned Addl. Advocate General.

22. The moot question which falls for consideration in the present matters is as to whether the 74th (Constitution Amendment) Act, 1992, which incorporates Part IXA relating to constitution of Municipalities provides for introduction of democratic process at the grass root level for governance of various Municipalities in the State within a stipulated time and the provision contained in Article 243U relating to duration of Municipalities, etc. has bearing in that regard and the same is mandatory and pre-emptory.

23. Earlier, various State Legislatures enacted laws relating to Constitution and powers of local government including relating to constitution and powers of the Municipalities in Bihar. The said enactment was called as Bihar orders as a Municipal Act. 1922 (unamended Act), which, after framing of the Constitution of India the State Legislature in exercise of the powers of the Municipalities under Clause 5 of List II of the 7th schedule of the Constitution also adopted the said Act.

24. Some of the relevant provisions of the said unamended Act are Section 29 which provides for tenure of office of Chairman, vice Chairman, President and Municipal Commissioner and Section 30 is in regard to the filling of vacancies and tenure of office of persons filling the vacancies in case of death, resignation removal or otherwise, unable to complete their full term of office. Section 385 vests power in the State Government to supersede Commissioners in cast of incompetency, default or abuse of power and Section 386 provides for consequences of supersession.

Under Section 29, save as otherwise provided under the Act-a) an elected Commissioner is to hold office for five commencing from the date of general election of Commissioners in the Municipality (b) a Commissioner co-opted u/s 14 is to hold office for five years, which is to commence from the date of general election of Commissioner and (c) a Chairman, whether elected or appointed a vice Chairman and President, if any, is to hold office for five years from the date of his election or appointment, as the case may be or for the residue of the office of the Commissioner whichever be less. In Sub-Section (2) of Section 29 the aforementioned term of office is deemed to include any period which may elapse between the expiry of the said period which or term and the date of the first meeting of the body of Commissioners newly elected an co-opted. Proviso to said

sub-section provides that the Commissioner, Chairman, Vice Chairman and President, if any, shall cease to hold office after six months from the date of expiry of their term unless extended by the State Government for a further period not exceeding six months and thereafter the State Government has been vested with the power to make such arrangement for the administration of the Municipality till the first meeting of the newly elected and co-opted Commissioner as it deems it proper, under its second proviso if on the date of promulgation of the Bihar Municipal. (Second Amendment) Ordinance 1977 a period of five years and three months or more had already elapsed after the date of the last election, the term of office of the Commissioner, Chairman, Vice Chairman and President, if any, is deemed to continue for another three months unless the State Government extended the period upto a maximum of six months, but in any case the total period of their term of office is not to exceed six years from the date of last election or co-option as the case may be Section 385 which deals with the power of State Government to supersede Commissioner in case of incompetency, default or abuse of power, provides that the State Government may by an order published with the reasons for making it in the official gazette, declare the Commissioner to be incompetent or any default, or to have exceeded or abused their power, as the case may be, and supersede them for a period to be specified in the order or may, after giving notice to the Commissioner of its intention, by a like order, direct that the office of the Commissioners shall be deemed to be vacant as from a date to be specified in the order and that a fresh election shall be held on or before that date. Under Sub-section (2) of Section 386, which provides for consequences of supersession, on the expiration of period of supervision specified in the order, unless the State Government otherwise directs, a Municipality shall be reestablished by election and appointment, and the persons, who vacated their office under Clause (a) of Sub-section (1) shall not to be deemed disqualified for election or appointment. Under Sub-section (3) of Section 386 when an order directing that the offices of the Commissioners shall be deemed to be vacant and that a fresh election shall be held has been passed under the last preceding section, all the Commissioners, then holding office, shall, notwithstanding anything contained in Section 29, vacate their offices as such Commissioners from the date specified in the order. Sub-clause (b) of the aforesaid Sub-section (3) provides that election shall be held and appointment made on or before the date specified in the said order for the purpose of filling the offices of the said sub-section and the persons who vacated their office under the said Clause (a), shall, unless the State Government otherwise directs, be eligible for re-election or re-appointment, if otherwise qualified. I have referred to the above provisions of Section 385 and said 386 of the unamended Act in view of the aforementioned plea of the State in counter affidavit that the Special Officer was appointed as per the provision contained in Section 386 when in fact the impugned notification does not even refer to the said provisions. It only refers to Section 29 of 1994 amended Act in the light of which it is purported to have been issued.

25. In part IXA of the Constitution the Article 243P to 243Z are provisions relating to constitution of Municipalities, its duration and its functions. Under the said provision certain powers have been vested in the State Government as well in the Legislature of the State to issue notification and frame law in that regard and to held election to constitute Municipality and complete the same accordingly within the time stipulated therein. Article 243ZA is in relation to the conduct of all elections to the Municipalities by the State Election Commission and under its Clause (2) the Legislature of a State has been vested with the power to make provision with respect to the same subject to the provisions of the Constitution. Articles 243ZB is in regard to the applicability of the provisions of the said Part, Constitution of Committees for district planning, and Metropolitan planning is different parts of the country. Article 243ZF, which deals with constinuanace of laws and Municipalities in existence immediately before the commencement of the Constitution (74th Amendment) Act, 1992, is as follows:

243ZF. Continuance of existing laws and Municipalities:

Notwithstanding anything in this part, any provision of any law relating to Municipalities in force in a State Immediately before the commencement of the Constitution (Seventy-fourth Amendment) Act, 1992, which in inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year form such commencement, whichever is earlier;

Provided that all the Municipalities existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that fact by the Legislative Assembly of that State, or in the case of a State having a Legislative Council, by each House of the Legislature of that state.

26. From the rending of the said provisions, I find that Article 243P to Article 243ZE and 243ZE of Part IXA in itself is a complete enactment for constitution of Municipalities, its duration and its function and under Article 243ZF the State Government/Legislature under the said provisions are to make necessary amendments in any law relating to Municipalities to force in a State immediately with the provisions of the said Part, latest within one year till when the existing laws until amended or repealed by a competent legislature or other competent authority is to continue to be in force. In other words Article 243ZF fixes the outer limit of one year to bring necessary amendments in any provision of any law relating to Municipalities in force in a State before the incorporation of Part IXA, consistent with the provisions contained in the said Part.

27. Article 243Q provides that there shall be constituted in every State (a) Nagar Panchayat (by whatever name called) for a transitional area, i.e. to any an area in transition from as rural area to an urban area; (b) a Municipal Corporation for a larger urban area in accordance with the provision of the said Part. Under Article 243U every Municipality Unless sooner dissolved under any law for the

time being in force, is to continue for five years from the date appointed for its first meeting and no longer. Clause (2) of the said provision provides that no amendment of any law for the times being in force shall have the effect of causing dissolution of a Municipality at any level till the expiration of its aforesaid duration. Clause (3) provides that an election to constitute a Municipality shall be completed (a) before the expiration of its duration specified in Clause (1); (b) before the expiration of a period of six months from the date of its dissolution provides that where the remainder of the period from which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election for constituting the Municipality for such period. Under Clause (4) a Municipality constituted upon the dissolution of a Municipality before expiration of its duration shall continue only for remainder of the period for which the dissolved Municipality would have continued under Clause (1) had it not been so dissolved. Thus/it is evident from the said provision that the object is to keep a Municipality dissolved for a maximum period of six months and no longer as is apparent from the time schedule given for every action to be taken after dissolution to bring into existence elected Municipal Commissioners.

28. Article 243ZG is provision relating to bar to interference by Courts in electoral matters. Under the said provision the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under Article 243ZA shall not be called in question in any court and no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.

29. In other words, on a conjoint reading of the provision contained in Article 243U and 243ZF in my opinion, the requirement to bring the necessary amendment in the existing law relating to Municipalities in force in a State immediately before commencement of 74th Constitutional amendment, which is inconsistent with the provisions of Part IX-A within one year of the commencement of the aforesaid 74th Amendment, as well as the time schedule for holding of election contained therein are mandatory Pursuant to the said provision necessary amendments have been made in the aforementioned 1992 Act vide Bihar Municipal (Amendment) Ordinance, 1994 (Bihar Ordinance No. 13, 1994). published in the Bihar Gazette on 30th. May, 1994 by making certain additions, substitutions, deletions and insertions in various sections of the unamended Act, besides complete deletion of Section 21, 22, 31 and 388, Learned Counsel for the parties informed that the said Ordinance later became Act.

30. In so far as the continuation of the Municipalities existing before the commencement of the Constitution (74th Amendment) Act, 1992, they are to continue till the expiration their duration unless sooner dissolved by a resolution passed by the Legislature of a State. Thus, it is evident that the Parliament allowed the existing Municipalities to continue till the expiration of its duration

and in case on Municipalities coming into existence after incorporation of Part-IXA for a maximum period of five years from the date appointed after its first meeting and no longer. The expression used "no longer" in Clause (1) of Article 243U in respect of Municipalities coming into existence after incorporation of Part IX-A is also, in my opinion, mandatory. This shows that the entire provision relating to the Municipalities being governed by elected body within the time stipulated in Article 243U are mandatory. This is also evident from Clause (3) of Article 243U which categorically provides that an election to constitute a Municipality shall be completed before the expiry of its duration specified in Clause (1) i.e. five years from the date appointed for its first meeting. In regard to existing Municipalities, Sub-clause (b) of Article 243U provides that an election to constitute a Municipality shall be completed before the expiration of period of six months from the date of its dissolution.

31. In other words, in case a Municipality is dissolved by the State Legislature in terms of the provision contained in Article 243ZF the election to constitute in Municipality has to be completed before the expiration of the period of six months from the date of such dissolution. The word "dissolution" in the Oxford's Dictionary means disappear or cause to disappear gradually; dismisses or disperse (Sep. the Assembly, Parliament) annul and put an end to. The expression used in Clause (3) to that an election to constitute a Municipality shall be completed. This expression obviously was used by the Parliament keeping in mind the basic structure of the Constitution, which provides for democracy at the grass root level. By incorporating Part IXA the smaller urban area and well as larger urban area have been fully covered for the purpose of providing democratic set up of administration by election bodies keeping in mind the interest of the public of that area, which, in my opinion, cannot be ignored or deferred. The democracy is the soul of the Constitution and thus, the Parliament has taken all precaution for providing elected bodies at the outlines for administration at the grass root level, such as Panchayat and the Municipalities, so much so, that the courts have also been debarred under Article 243ZO from interfering in election matters, except by an election petition.

32. In Article 243U of the Constitution, for every motion to be taken there under, the expression used is shall it is true that under certain circumstances, the expression "shall" may be considered as "may", but it is well settled that the "shall" in its ordinary significance is mandatory and the court shall ordinarily not come with interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequences or being at the variance with the intent of the Legislature to be collected from other parts of enactment. The construction of the said expression depends on the provision of the particular enactment, the setting, in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other conditions. A reference in this connection can be made to the decision of the Supreme Court in the case of *Khub Chand and Others Vs. State of Rajasthan and Others*, .

33. From the provision contained in Part IX-A which also provisions for the consequences that would flow from the infringement of the mandate contained therein, the object is clear to Introduce demarcation set up for administering the Municipalities by elected bodies within the time fixed under the said provisions as obviously it was considered by the Parliament, absolutely necessary to have elected bodies for administering the Municipalities and not to continue the administration in the hands of the single nominated person by the State Government beyond six months much less, for indefinite period as in the instant case.

34. Thus, I find it difficult to hold that the 74th Constitutional Amendment does not fix any time limit as suggested by the learned Add Advocate General No. 3. In my opinion, Part IXA was incorporated by the 74th Constitutional Amendment only to bring into existence an elected body at the grass root level for the proper administration of various Municipalities within a fixed time. An other interpretation, in my opinion, will frustrate the object of incorporating Part IXA in the Constitution. By addition of Part IXA in my opinion the Parliament was provided for a grass root democracy, which is foundation of our democracy and thus, form the basic structure. In para 198 on the case, reported in Mohinder Singh Vs. State of Punjab, the Supreme Court has taken note of the majority view in Keshvannada Bharati case reported in AIR 1975 S.C 1461 that democratic set up was part of the basic structure of the Constitution. Democracy postulates that there should be periodical elections, so that people made be in a position either to re-elected to the old representative or, if they so choose to change the representatives and elect in their place representatives. Their Lordships in paragraph 665 of the said judgment summarised what form basic structure of the Constitution, which includes that the Notice shall he governed by a Government of laws, not of, men, which are the pillar of our Constitutional philosophy, the pillars therefore of the basic structure of the Constitution. Local bodies including the Municipalities in my opinion, are also the part of the dramatics set up and thus, it will also form part of the basic structure of the Constitution. The Supreme Court, in the case or S.R. Bommai and others Vs. Union of India and others etc. etc., held that the Pre-amble of the Constitution is in integral part of the Constitution. Federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution.

35. Section 15 of the unamended Act which has not been amended by the amended Act, vests power in the State Government to prescribe of the qualification and disqualification and the manner of registration of voters at elections of Municipal Commissioners by framing of rules and Section 19, after amendment feat power of the superintendence, direction and control of the preparation of electoral rolls, for and the conduct of all elections to the Municipalities in the State under the Act and Rules made thereunder in the State Election Commission. Admittedly, necessary amendment in the Bihar Municipality and Election and Electoral Rolls Rules 1953 and Patna Municipal Corporation

Preparation of voters Rolls and Conduct of Election Rules, 1953 have not so far been framed in the light of the provisions contained in Part IX-A for preparation of list or urban bodies, the population and area, determination of population of backward classed in the urban bodies and for making administration arrangement for election, so that the Election Commission may take necessary steps for preparation of the electoral rolls and conduct of the election in accordance with the provision contained in Part IXA. Thus, unless the necessary amendments are made in the rules as per the provisions contained in Part IXA incorporated by the 74th Constitutional Amendment the Election Commission cannot initiate the election process and complete the same. Thus, I find that even the Legislative function has not been discharged by the State Government until now although almost three years have elapsed since the 74th Constitutional Amendment Act came into force and even according to the case the Respondent State within one year from that the necessary amendments were mandatorily required to be made.

36. Here, I would like to mention that their Court in several cases relating to the Municipalities in Bihar issued positive directions for holding of Municipal elections within fixed time, but admittedly till now even the necessary amendment in the Rules have not been made. Directions in some of the said cases were issued prior to the 74th Constitutional Amendment and in some direction was issued to hold election within fixed time after the incorporation of Part IXA by the 74th Constitutional Amendment. The cases prior to amendment in which directions were issued to hold election within fixed time is reported in 1992 (2) P.L.J.R. 263 Ram Swaroop Prasad v. State of Bihar and Ors. Nirmal Lal Prasad and others Vs. The State and Others, . and the cases in which direction was issued after the 74th Constitutional amendment is reported in Md. Wasi Ahmad and Others Vs. The State of Bihar and Others .

37. In C.W.J.C. Nos. 8394. of 1994 and 5 other analogous cases a common prayer was made on behalf of different adhoc committees of different respective Municipalities for issuance of direction to the respondent authorities to allow such committees to, function until regular election as per the provision of Sub-section (3) of Section 29 of the Bihar. Municipal Amendment Ordinance 1994 is held. The term of the Municipalities in the said case expired on different dates in the year 1989 to 1992. Thereafter the State Government, while exercising its power u/s 29 read with Section 385(1)(b) of the unamended Act constituted different ad-hoc committees to manage the various Municipalities. The validity to the said decision was also questioned in the said cases. The Court, vide judgment, contained in Annexure-B, having noticed different provisions of the Act up hold the Constitution of the ad-hoc committees. But since the term of the Municipalities has expired much before, the Court having regard to the well known principle that democratic process to conduct elections and constitute a body for indefinite period and side-tracked for extra and our consideration members in place of elected representatives. However, the learned G.P. after getting proper instruction of Municipalities would be completed within six months

from the date of the judgment i.e. 11.4.1994. Subsequently after expiry of the said period positions were filed on behalf of the members of the ad-hoc committee for extension of time fixed by the court so that they can continue until such election is over. On the submissions made by the learned Advocate of the Municipalities shall be completed, the Court accepted the prayer and direction the Secretary, Urban Development Department, Government of Bihar as well as other relevant authorities to complete the election process of the Municipalities by 30th June, 1995. However, whenever the process for holding the election was not started by 30th June, 1995, the Secretary, Urban Development Department along with learned Advocate General appeared in person pursuant to the order of the Court and pleaded that although on previous occasions undertaking was given to complete the election within a fixed time, but in view of the introduction of several new provisions in the Act process of election could not be taken up though new provisions were incorporated one year before the aforesaid date.. The learned Advocate appearing for the writ petitioners in the said cases objected to the said prayer for extension of time and contended that by allowing such extension from time to time the main purpose of direction of this Court in the writ application would be frustrated. The Court, to avoid practice to substitute nominated members in place of elected representatives for indefinite period held that it would not be proper to allow such committees to function, which would certainly defeat the main object behind the scheme.

38. The case of Md. Wasi Ahmad v. State of Bihar (supra) relate to Hunger Municipality. Earlier a writ petition bearing C.W.J.C No. 189 of 1989 was filed in this Court praying for quashing of the show cause notice issued to the Municipal Commissioner of the Hunger Municipality do supersession of the Municipality. A Division bench of the Court, on consideration that instead of the Municipality being under the control of Executive for a long time to come, if not infinite that the election of the Municipal Commissioner is already overdue, vide order dated 29.3.1989 disposed of the writ application with a direction to start and conclude the election of the Municipal Commissioners Within a period of four months from that date. When instead of taking any steps for holding of election a notification was issued on 7.12.92 purporting to be the exercise of powers u/s 386 of the Act constituting the ad-hoc committee for administration of the Municipality till further orders, another writ petition bearing C.W.J.C. No. 13570 of 1992 was filed challenging its validity. In the said writ petition on 22.4.93 pursuant to the direction of the Division Bench Secretary, Joint Secretary and too Deputy Secretary of the Department appeared and expressed regret for not complying with the direction made by this Court in the earlier writ case. They came an explanation that due to some change in law the direction could not be complied with and further stated that in any view of the matter the election shall be held by December, 1993 whereafter their personal appearance was disposed with. Later, when no election was held by December, 1993, a petition was filed in the writ petition to initiate a contempt of court proceeding which was taken up on 5.9.94. After hearing the learned Counsel for the parties a contempt proceeding

was intimate against the concerned officials and filially by the judgment reported in Md. Wasi Ahmad and Others Vs. The State of Bihar and Others the writ application was allowed, the impugned notification was quashed and in the contempt matter the respondents were held guilty of contempt of court and a sentence was passed against the contenders directing them to pay a fine of rupees two thousand, to be deposited in this Court. Further, the respondent a were directed to start the process of election and also to inform the State Election Commission of the order who shall comply the same and conduct the election without any further delay. The said matter was disposed of on 20th April, 1995 and we are now in August, 1996; yet admittedly the process of election in different Municipalities have not command, so much so, that even the necessary amendment in the Rules in that connection have not been brought in by the State Government.

39. The plea taken on behalf of the State in the counter affidavit filed on 26.2.96 for not holding of the Municipal election in the State since after the incorporation of Part IX-A by the 74th Constitutional Amendment on 1.6.93, is that the district administrative machinery is notively engaged in the preparation for the Panchayat elections and after that, through the same administrative machinery the Municipal election will be conducted. It has also, been claimed that the Government respondents are making all necessary efforts to vest in the urban local bodies all the power and functions and for the constitution of the urban local bodies in a democratic way, steps are being taken. I am unable to accept the said plea of the State Government. The plea of sincerity of the State Government in regard to the above, on the facts of this case, is wholly misleading and untenable. The aforesaid Constitutional amendment was brought into effect on 1.6.1993 and one year has been fixed as the maximum period for bringing in changes in law in conformity with Part IXA under Article 248ZF. Admittedly, till date even the election Rules have not been framed, though more than three years have elapsed since the 74th Constitutional amendment was brought into effect. Moreover, it is only in February, 1996 that the aforesaid plea has been taken about the engagement of the district administrative machinery. Before that this Court repeatedly issued directions in various writ cases to complete the election positively within the time fixed in the order. The Court also took into consideration early revival of democratic administrative machinery in the various Municipalities in the light of the various decisions of the apex Court. But till date even electoral process for holding of the election for the Municipalities does not appear to be in sight. The hearing of this matter concluded on 23.5.96 and by now more than two months have elapsed, but till date nothing has been brought on the record to show that even the Rules relating to holding of election have been framed/amended. No. justification for not framing of Rules during the last three years have been pleaded. There is no substances in the other plea also taken an behalf of the State regarding announcement of the programme of general election to Bihar Parliamentary constituency by the Election Commission of India. This plea also cannot justify

the inaction on the part of the State Government in not taking steps for holding of the Municipal elections during more than two and half years since after the 74th Constitutional amendment, so much so, that even the Rules have not been framed for the aforesaid purpose

40. From the facts aforementioned there cannot be any doubt that the State Government has completely failed in its duty to fulfill the mandate of the Constitution contained in Part IX-A and thereby has denied democratic right of the people of Bihar at the grass root level, which amounts to interference with the basic structure of the Constitution, as well as, its pre-emble is being violated and the Constitutional requirement has been breached with impunity. The State Government has also not bothered to carry out the directions of this Court given in various cases to hold elections in different Municipalities. The rule of law which is a basic feature of our Constitution, and people of India for its enforcement relies on the Courts of the land. Repented willful disobedience of the Court's order by the Government is nothing but to be little the majesty of the seat of justice and lower its esteem in the eye of general public, besides shaking its confidence in the very efficiency of the law and democracy and the guarantee under the Constitution for protection of citizen against the excesses of the executive and legislative powers through independence of judiciary. In the case of *Bachan Singh, Sher Singh and Another and Ujagar Singh and Another Vs. State of Punjab and Others*, , the apex Court, in paragraph 17 held that rule of law has really three basic and fundamental assumptions one is that law making must be essentially in the hands of a democratically elected legislature, subject of course to any power in the executive in an emergent situation to promulgate ordinance effective for a short duration while the legislature is not in session as also to enact delegated legislation in accordance with the guidelines laid down by the legislature the other is that, even in the hands of a democratically elected legislature, (here should not be unfettered legislative power, for, as person said Let no man be trusted with power but tie him down from making mischief by the chains of the Constitution and lastly there must be an independent judiciary to protect the citizen against excesses of executive and legislative power.

One cannot imagine a democracy with the executive refusing to obey judicial orders passed to enforce constitutional and legal rights of citizen. The apex Court in the case of *S.P. Gupta Vs. President of India and Others*, , held that the concept of independence of judiciary is a noble concept which inspires the Constitutional scheme and constitutes the foundation, on which rest edifice of our democratic polity. According to the Supreme Court, if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making rule of law meaningful and effective.

In the case of *State of Rajasthan v. Union of India* reported to AIR 1977 S.C 1951, in para 41 *Bag, C.J.* observed:

If the "basic structure" embraces basic democratic norms, the Constitutional machinery of Act 356 could conceivably be used but the Union Government for securing compliance with the view of such norms when, in its opinion, the State Government has failed to observe them....

In para 209 of the same judgment Fazal Ali, j. observed:

As our Constitution is wedded to a democratic pattern of Government, if a particular State Government causes to be democratic or not in an undemocratic fashion, it had not be said that the Government of the State is carried on in accordance with the provision of the Constitution. Such a course of action is opposed to the very tenor and spirit of the Constitution....

41. In the instant once there has been willful flouting of the orders of the Court by the State Government threatening one of the basic pillars of our Constitutional democracy amounting to a breaking down of the Constitutional machinery in the State calling for immediate remedial measure, more so when the State Government has also not shown any respect for the aforementioned Constitutional mandate for restoring democracy at the grass root level despite imposition of punishment in the aforementioned Contempt matter.

42. The other question, which falls for consideration is as to whether the impugned Government notification dated 23rd, June, 1995 appointing respondent No. 3 as Special Officer of Chapra Municipality until further orders can be held to be without jurisdiction, had in law and violative of the principle of natural justice and that in any case the respondent No.3 cannot as such beyond the period of dissolution, which can, in no case be extended beyond six months as per the provision contained in Sub-clause (b) of Clause (3) of Article 243U of the Constitution.

43. In the present case but the impugned notification the Municipality has been dissolved and respondent No. 3 has been appointed as Special Officer until further orders by the State Government in the light of the provisions contained in Section 29 of the amended Act, which is word by word same (a) of Article 243 of the constitution. In the said notification it is stated that the elected Boards of Commissioners in "Vighabit" (dissolved) as a consequence of completion of tenure of five years of elected Commissioners and in their respondent No. 3 has been appointed as Special Officer of the Municipality until further orders. In such case under Article 243U(3)(b) of the Constitution as well as under Clause (b) of Sub-section (3) of Section 29 of the amended Act, an election to constitute a Municipality has to be completed before the expiration of a period of six months from the date of its dissolution. Thus, in my opinion, "dissolution" cannot continue beyond six months and the Special Officer appointed by the State Government in exercise of the power under the first proviso to sub-section arrangements for the administration of the Municipality during the said period cannot also continue beyond six months, more so after the repealed Section 29 of the unamended Act and there being no such provision in Section 29 of the

amended Act. Accordingly, I hold that the continuation of respondent No. 3 in any case beyond six months was wholly without jurisdiction and had in law.

44. In fact, in my opinion, the respondent No. 3 could not have been validity appointed and continued as Special Officer of the Municipality. Admittedly, the Chapra Municipality was constituted vide notification dated 22.4.1989 by the District Magistrate, Saran contained in annexure-1 to the third writ petition and thus, completed its term five years on 21.4.1994. By virtue of the provisions contained in both the proviso to Sub-section (2) of Section 29 of the amended Act, the Commissioner Chairman, vice-Chairman of the Municipality continued to hold office till after six months from the date of expiry of their term, the State Govt. extended their term for a further period of six months with which we are not concerned in the present case. It is apparent that the Commissioners, Chairman and Vice-Chairman of the Municipality were entitled to hold office lawfully and quite validly till 20.10.1994 i.e. for a further period of six months from the date of completion of their five years term on 22.4.1989 on 30th May, 1994 itself the Ordinance amending the Bihar and Orissa Municipal Act came into force, which later on was made into an Act. From the provisions of Sub-section (1) of Section 29 as amended, it is manifest that the life of the Municipality under amended Act must come to an end after five years from the date appointed for its first meeting. In the amended Act no scope has been left for any extension of life of the Municipality by issuance of any notification by the Government. By Section 28 of the amended Act after Section 390 now Sections have been inserted as Section 390B and 390C dealing with removal of difficulties and savings respectively. The second proviso to Section 390C is as follows:

Provided further, notwithstanding the provisions of this Ordinance, the Municipality and the Notified Area Committee which were validly constituted under the B & O, Municipal Act 1992 (B & O. Act 7, 1992) shall continue to function till the constitution and the first meeting of the Municipality.

45. I have already mentioned above, that on May 30, 1994 when the aforementioned Ordinance came into force, Chapra Municipality as per Section 29 of the unamended Act, I was a validly constituted one, as it is within six months period from the date of expiry of the term of five years of the Commissioners. By virtue of savings clause contained in the second proviso to Sub-section (1) of Section 390C quoted above each a Municipality is to continue to function till the constitution and the first meeting of the Municipality, elected and constituted in terms of the amended Act, This aspect was considered by a Bench of this Court in the case of Satish Kumar Singh Vs. The State of Bihar and Others, in which under the aforesaid circumstances it was held that the Municipality cannot be dissolved on the ground of completion of five years term of its Commissioners, as provided in the amended Section 29 of the Act nor could it be dissolved under the amended Section 385 of the Act without giving an opportunity of hearing to him. It is not a case where the dissolution has been done u/s 385 too that too after giving opportunity of hearing to the Municipality.

Thus, the impugned notification dissolving the Municipality is wholly without jurisdiction and the same is fit to be quashed.

46. In the result, all the there writ applications succeed and the impugned notification are accordingly quashed. However, in the peculiar facts and circumstances of the case, there shall be no order as to costs.