

(1962) 08 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 34 of 1961

Prithi Chand

APPELLANT

Vs

Lieutenant-Governor

RESPONDENT

Date of Decision : 07-08-1962

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Punjab Municipal Act, 1911 — Section 16
Punjab Small Towns Act, 1921 — Section 7

Citation : AIR 1962 HP 59

Hon'ble Judges : C.B. Capoor, J.C.

Bench : Single Bench

Advocate : M.L. Aukta, for the Appellant; K.C. Pandit, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

C.B. Capoor, J.C. 1. This petition under Article 226 of the Constitution of India is directed against the Lieutenant-Governor Himachal Pradesh and arises in the following circumstances:

2. Theog was at first a notified area under the Punjab Municipal Act, 1911, hereinafter to be referred as "the Municipal Act", as applied to Himachal Pradesh. Subsequently, it was declared to be a small town under the Punjab Small Towns Act, 1921, hereinafter to be referred as "the S. T. Act" as applied to Himachal Pradesh. In accordance with Section 4 of the S. T. Act a small town committee of Theog was established on 25-4-1953. The committee consisted of six elected and two nominated members. Election to the small town committee was held in August 1960 and the petitioner was elected as a member from Ward no. 5 and a notification dated 4-10-1960 was issued by the Himachal Pradesh Administration notifying the names of six elected members. The Sub-Divisional Officer Public Works Department Theog and the Medical Officer Civil Hospital Theog were the ex-officio nominated members.

On 15-12-1960 the petitioner was elected as President and one Shri Ram, Pratap as Vice-President of the committee and the election of the petitioner as President was notified by the Himachal Pradesh Administration : vide Annexure "B" to the petition. The petitioner was also a member of the District Congress Committee and alleged to have criticized the Himachal Pradesh Administration and the respondent in particular at more than two public meetings held at various places in district Mahasu. This was not liked by the respondent. Two criminal cases had been pending against the petitioner in the Court of Magistrate first class Theog since about 1957 and in July 19.61 he moved an application before the Hon"ble Supreme Court for the transfer of those two cases to some Court situate Outside the Himachal Pradesh territory and in the affidavit filed in support of that application allegations were made against the respondent The application was rejected on 28-8-1961.

By a notification dated 21-9-1961 the respondent in the exercise of powers conferred by Section 7 of the S. T. Act removed, the petitioner from the membership of the small town committee Theog on the ground of unfitness. A copy of the order was served on the petitioner on 23-9-1961 at 5 P. M. As a result of the aforesaid notification the petitioner has been deprived not only, of performing his duties as an elected representative of his constituency but also incurred the disqualification of seeking election to any Municipal Committee, Territorial Council, Legislative Assembly arid Parliament for a period of five years. The gravamen of the petitioner is that the action taken by the respondent was arbitrary mala fide and was against the principles of natural justice inasmuch as no opportunity was afforded to him to show cause against the proposed action. According to the petitioner Section 7 of the S. T. Act was violative of Article 14 of the Constitution and was unconstitutional and ultra vires. The petitioner has accordingly prayed for the issue of a writ of mandamus directing the respondent to restore him to the office of the President and membership of the small town committee Theog and for the quashing of the order removing him from membership of the aforesaid committee.

3. The application is opposed on the following main grounds:-- The order sought to be quashed is entirely administrative and is not justiciable in a Court of law and as such the writ petition is not competent. There is no infringement of any fundamental right of the petitioner and on that score also the petition is not maintainable. It is denied that the respondent bore any ill-will against the petitioner or that the order of removal was actuated by bias or malice. The said order is stated to have been made in the public interest on the basis of reports submitted by the departments concerned. It has been admitted that the petitioner had criticized the administration of the Lieutenant-Governor on 17-9-1959 at a meeting held at Arki and on 28-9-1959 at another meeting held at Parala. It is, however, denied that the political views and activities of the petitioner were not liked by the respondent. The speeches made by the petitioner were political and there was no occasion for taking any action against him for the expression of views concerning the Administration.

The petitioner had alleged in the petition that two criminal cases were pending against him and particulars of those cases have been given in the written-statement. One of those cases viz. FJR No. 43 dated 8-5-1958 was registered for offences under Sections 420 read with 511 and 468 read with 471, IPC, and the other i. e., FIR No. 51 dated 17-1-1959 for offences under Sections 420 read with 511, 203, 182 and 109, IPC. On 17th April 1961 the petitioner was arrested by the Special Police Establishment of the Government of India, Ministry of Home Affairs in connection with a criminal case of cheating, forgery and criminal conspiracy registered against him and others at Ambala for offences under Sections 420, 468, 471 and 102, IPC. A case under Sections 408 and 416, IPC., was registered at P. S Theog against the members of the Executive Committee of the Tehsil (Co-operative Union Theog for misappropriating a sum of Rs. 50,000/- entrusted to the committee by the Himachal Pradesh Co-operative Department. The petitioner also figured as an accused to that case.

The petitioner is the manager and general attorney of the Mahasu Trading Company the partners of which firm are Pritam Chand and the petitioner's wife Smt. Jogendra Devi and his minor son, Hem Raj, has been admitted to the benefits of that partnership. The aforesaid company owns trucks Nos. Him-1202, 1897 and 1898 which were engaged by the Himachal Government Transport department and during the period of engagement the company committed various breaches of the provisions of Motor Vehicles Act and the rules made thereunder and several of the drivers in the employ of the aforesaid company were convicted and sentenced.

The Himachal Government Transport department ceased to engage the trucks of the company but on a representation made and oral and written apology submitted by the petitioner the respondent by an order dated 10-10-1959 directed that the aforesaid trucks be again engaged by the Transport Department : vide Annexure "A" to the affidavit sworn by Shri C. L. Rajput. Firms controlled by the petitioners near relatives are stated to be indebted to the various co-operative societies to the tune of Rs. 2,84,463.77 np. The reply submitted by the respondent is supported by two affidavits sworn by Shri Joseph Dina Nath, Superintendent of the Law Department Himachal Pradesh Secretariat and Shri C. L. Rajput Private Secretary to the respondent. The affidavits which were sworn in reply to the application made by the petitioner for the transfer of the two criminal cases pending against him have been annexed to the affidavit sworn by Shri Joseph Dina Nath.

4. In view of the contentions raised on behalf of the parties, the following questions arise for decision:

1. Whether Section 7 of the S. T. Act as applicable to Himachal Pradesh is in conflict with Article 14 of the Constitution of India?
2. Whether the order sought to be quashed was mala fide and actuated by bias and prejudice?

3. Whether the impugned order is in violation of the principles of natural justice and whether a writ of certiorari can issue to quash it?

4. Whether the petitioner is entitled to the issue of a writ of mandamus?

FINDINGS

5. Question No. 1: The vires of Section 7, of the S. T. Act has been challenged on the following two grounds:

(a) That the State Government has been armed with uncontrolled and unbridled powers in forming its opinion without any guidance from the Legislature?

(b) That Section 7, referred to above, is discriminatory inasmuch as the grounds on which a member can be removed have not been specified therein and no provision has been made for the affording of an opportunity to the member proposed to be removed to show cause against the proposed order Whereas such provisions do exist in the Municipal Act and the Legislature has thus treated that members of the small town committees differently from the members of the municipalities?

6. Section 7 of the S. T. Act and Section 16 of the Municipal Act read as below:

"S. 7. The State Government may remove any member, of a committee who is in its opinion unfit to act or persistently remiss in the discharge of his duties as a member and any person so removed shall not be eligible for election or appointment as a member of a committee for a period of five years from the date of his removal."

"16. (1) The State Government may, by notification, remove any member of committee,--

(a) if he refuses to act, or becomes, in the opinion of the State Government, incapable of acting, or has been declared a bankrupt or an insolvent or has been convicted of any such offence or subjected by a Criminal Court to any such order as implies, in the opinion of the State Government, a defect of character which unfits him to be a member;

(b) if he has been declared by notification to be disqualified for employment in, or has been dismissed from, the public service and the reason for the disqualification or dismissal is such as implies in the opinion of the State Government a defect of character which unfits him to be a member;

(c) if he has without reasonable cause in the opinion of the State Government absented himself for more than three consecutive months from the meetings of the committee;

(d) if his continuance in office is, in the opinion of the State Government, dangerous to the public peace or order;

(e) if in the opinion of the State Government, he has flagrantly abused his

position as a member of the committee or has through negligence or misconduct been responsible for the loss or misapplication of any money or property of the committee;

(f) in; the case of an elected member, if he has, since his election, become subject to any disqualification which, if it had existed at the time of his election, would have rendered him ineligible under any Rule for the time being in force regulating the qualifications of candidates for election, or if it appears that he was at the time of his election subject to any such disqualifications;

(g) if, being a legal practitioner, he acts or appears in any legal proceeding on behalf of any person against the committee, or on behalf of or against the Government where in the opinion of the State Government such action or appearance is contrary to the interests of the committee;

Provided that before the State Government notifies the removal of a member under this section, the reasons for his proposed removal shall be communicated to the member concerned and he shall be given an opportunity of tendering an explanation in writing.

(2) A person removed under this section or whose election or appointment has been deemed to be invalid under the provisions of subsection (2) of Section 24, or whose election has been declared void for corrupt practices or intimidation under the provisions of Section 225, or whose election the State Government has u/s 24 refused to notify shall be disqualified for election f?r a period not exceeding five years:

Provided that a person whose election or appointment has been deemed to be invalid under the provisions of sub-section (2) of Section 24, shall not be disqualified for election or appointment for a period exceeding two years from the date of disqualification.

(3) A person whose seat has been vacated under the provisions of Section; 14(e) may be disqualified for (election for a period not exceeding five years".

7. A comparison of the aforesaid two sections will indicate that while in the latter grounds on which a member can be removed have been specified and it has been provided that the reasons for the proposed removal should be communicated to the member concerned and an opportunity afforded to him of tendering an explanation in writing there are no such provisions in the former section.

8. The first question that arises for consideration is as to whether Section 7 is violative of Article 14 of the Constitution on account of the omission of the grounds justifying removal of a member. The latest reported case of the Supreme Court on the point under consideration is Mohammad Hussain Gulam Mohammad and Another Vs. The State of Bombay and Another, Section 29 of the Bombay Agricultural Produce Markets Act provided that the State Government may, by notification in the Official Gazette, add to, amend or cancel any of the items of

agricultural produce specified in the Schedule and it was submitted that the section gave a completely unregulated power to the State Government to include any crop within the schedule without any guidance or control whatsoever and as such was in conflict with Article 14 of the Constitution. In repelling the contention Hon^{ble} Mr. Justice Wanchoo who spoke for the Court observed as follows:

"It is true that Section 29 itself does not provide for any criterion for determining which crop shall be put into the schedule Or which shall be taken out therefrom but the guidance is in our opinion writ large in the various provisions of the Act itself. As we have already pointed out, the scheme of the Act is to leave out of account retail sale altogether; it deals with what may be called wholesale trade and this in our opinion provides ample guidance to the State Govt. when it comes to decide whether a particular agricultural produce should be added to, Or taken out of, the Schedule. The State Govt. will have to consider in each case whether the volume of trade in the produce is of such a nature as to give rise to wholesale trade. If it comes to this conclusion it may add that Produce to the Schedule. On the other hand if it comes to the conclusion that the production of a particular produce included in the Schedule has fallen and can be no longer a subject matter of wholesale trade, it may take out that produce from the Schedule. We may in this connection refer to *The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another*, In that case Section 27 or the Minimum Wages Act, 1948, which gave power to the appropriate Government to add to either part of the schedule any employment in respect of which it is of opinion that minimum wages shall be fixed by giving notification in a particular manner was held to be constitutional. It was observed in that case that the legislative policy was apparent on the face of the enactment (impugned there); it was to carry out effectively the purposes of the enactment that power had been given to the appropriate Government to decide with reference to local conditions whether it was desirable that minimum wages should be fixed in regard to a particular trade Or industry which was not included in the list. The same considerations in our opinion apply to Section 29 of the Act and the power is given to the State Government to add to or amend or cancel any of the items of the agricultural product specified in the Schedule to accordance with the local conditions prevailing in different parts; of the State in pursuance of the legislative policy which is apparent on the face of the Act. Therefore, in enacting Section 29, the Legislature had not stripped itself of its essential powers or assigned to the administrative authority anything but an accessory or subordinate power which was deemed necessary to carry out the purpose and policy of the Act.

9. The principle deducible from the aforesaid case and an earlier decision of the Hon^{ble} Supreme Court (S) *The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another*, is that if the legislative policy is apparent on the face of the enactment impugned and if the power given to the delegates is in furtherance of that policy the impugned provision will not be struck down even though it may not specifically give any guidance for the exercise of the power.

10. The policy of the Legislature underlying Section 7 of the S. T. Act appears to be that the order of removal is to be passed if in the opinion of the State Government a member is unfit to act or is persistently remiss in the discharge of his: duties as a member, The State Government is not expected to act capriciously or arbitrarily in forming its opinion. There are other, cognate Acts, such as the Municipal Act, in which the grounds justifying the removal of a member of a statutory body have been detailed and in exercising the power u/s 7, referred to above, the State Government may well refer to those provisions as at guidance. Thus even though on the face of it the power with which the State Government has been armed, is uncontrolled there are latent brakes to regulate it. The principle underlying the Supreme Court cases: *supra* is fully applicable to the instant case and the first of the grounds on which the validity and the constitutionality of Section 7, referred to above, is attacked therefore fails.

11. The second ground urged on behalf of the petitioner is also not tenable. The Municipal Act was passed in 1911 and the S. T. Act in the year 1921. The former dealt with municipalities while the latter with the small town committees and the Legislature in its wisdom may not have considered it proper to couch Section 7 in the same terms and language as Section 16 of the Municipal Act. The Legislature must have been alive to the provisions of the Municipal Act and if it did not make any provision for the giving of a notice to the member proposed to be removed or if it did not specify the grounds: on which a member may be removed it may well be inferred that the Legislature did so deliberately. Since the two Acts deal with different subject-matters it cannot be said that the Legislature was guilty of meting out discriminatory treatment to the members of the municipalities and small towns committees.

12. On behalf of the petitioner reliance has been placed upon a ruling of the Hon"ble Supreme Court in the case of *The State of Madhya Pradesh Vs. G.C. Mandawar*, The question that arose in that case was as to whether the difference in the dear-ness allowances admissible to the Central and State Government servants could be struck down as an unconstitutional discrimination and it was held that as the said allowances had been sanctioned by two different statutes of different authorities the provisions of Article 14 of the Constitution of India were not attracted. The question as to in what circumstances two different legislations passed at different times by the same Legislature would be hit by Article 14 was not considered in that case and the decision arrived at in that case cannot be an authority for the proposition which arises in the instant case and has been canvassed on behalf of the petitioner. Referring to Article 14, their Lordships observed that it does not contemplate a law of the Centre Or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments and these observations far from lending support to the contention advanced on behalf of the petitioner negative it.

13. Reliance on behalf of the petitioner has also been placed on the following

observations made in the aforesaid Supreme Court case:

"It is conceivable that when the same legislature enacts two different laws but in substance they form one legislation, it might be open to the Court to disregard the form and treat them as one law and strike it down, if in their conjunction they result in discrimination."

14. The Municipal and the S. T. Acts do not form one piece of legislation. The subject-matter dealt with by them, as has already been noticed, are different. The aforesaid observations do not lend support to the contention advanced on behalf of the petitioner that the two pieces of legislation referred to above were discriminatory and as such Section 7 of the S. T. Act was liable to be struck down.

15. The question is answered in the negative.

16. Question No. 2: The order of removal is stated to be mala fide and actuated by bias and prejudice on the following two grounds:

(1) That the petitioner had in the course of speeches made by him criticised; the Lieutenant-Governor, and his administration.

(2) That the petitioner had made allegations imputing partiality to the Lieutenant-Governor in the application which he moved in the Hon"ble Supreme Court for the transfer of two criminal cases pending against him.

17. The respondent has in the reply submitted by him stated that to his knowledge the petitioner had made two speeches only in which his administration was criticized. The petitioner has not filed: any rejoinder or any counter-affidavit controverting the aforesaid allegation. Those two speeches according to the respondent were made in the month of September 1959 and what one finds: is that on 10-10-1959 the respondent had made an order in favour of the petitioner directing the Transport Department to include the vehicles belonging to the company in which the petitioner was intimately interested in the list of vehicles to be engaged by title Transport Department vide Annexurel "A" to the affidavit filed by Shri C. L. Rajput in support of the reply submitted by the respondent. Such an order would not normally have been made if the respondent had any animus against the petitioner because of the delivery of the speeches by him. The petitioner, has not filed a copy of the application which he submitted to the Supreme Court for the transfer of the criminal cases pending against him to some place outside the territory of Himachal Pradesh or a copy of the affidavit filed in support of that application. It is, therefore, not known as to what was the nature of the allegations made therein. The present petition merely indicates that the affidavit filed by the petitioner in support of the application for transfer contained allegations particularly against the Lieutenant-Governor. It may, however, be assumed that the petitioner had alleged in the affidavit filed by him in support of the application for transfer that the respondent was taking personal interest in the criminal cases pending against him (the petitioner) and because of his influence he did not expect justice at the hands of

the Courts in the Himachal Pradesh. I, however, do not think that such an imputation would lead the respondent to the making of the order of removal in question particularly when the application for transfer had been rejected and in reply to the said, application it was said on behalf of the respondent that despite the falsity of the allegations made he had no objection to the transfer of the cases to some other State. A perusal of the written-statement filed by the respondent indicates that over and above the two criminal cases, referred to in the petition, there were other criminal cases against him which were under investigation and that in one of these cases he was arrested at the instance of the Special police Establishment, Government of India, Ministry of Home Affairs on 17-4-1961 and those cases may have induced the respondent to make the impugned order. It could not, therefore, be said with any degree of certainty that the order of removal was made because of the making of the application for transfer. Even though an affidavit has not been filed by the respondent himself, and I cannot help remarking that in order to controvert the allegations of mala fides and personal bias and prejudice an affidavit by the respondent would have been more in the fitness of things, the allegations made by the petitioner imputing bad faith and personal bias and prejudice to the respondent in the making of the order of removal has not been substantiated. The question is answered against the petitioner.

18. Question No. 3: No opportunity was afforded to the petitioner to show cause against the proposed order of removal and it has been vehemently contended on his behalf that the omission was a violation of the Principles of natural justice. One of the well-established principles of natural justice which is zealously guarded by the Courts of law is that no one should be condemned without being heard. The principle is contained in the maxim *audi alteram partem*. Byles J. had in the case of *Cooper v. Wandsworth Board of Works* (1863) 143 ER 414 made the following observations:

"It seems to me that the Board are wrong whether they acted judicially or ministerially. I conceive they acted judicially because they had to determine the offence and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions beginning with *Dr. Bentley's* case and ending with *Some very recent cases* establish that although there are not positive words in a statute that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature. The judgment of Mr. Justice Fortescue in *Dr. Bentley's* case is somewhat quaint but it is very applicable, and has been the law from that time to the present. He says "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have it observed by a very learned man, upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam" (says God) "where art thou. Hast thou not eaten of the tree whereof I commanded that thou shouldest not eat?" And the same question was put to Eve also ... "

"There has been neither notice of the one sort nor of the other; and it seems to me therefore, that whether the Board acted judicially or ministerially, they have acted against the whole current of authorities and have omitted to do that which justice requires and contravened the words of the statute."

19. The audi alteram partem principle as an implied common law requirement of administrative procedure has lately shown signs of debility, and the view, now prevailing is that the aforesaid principle is applicable only to judicial and quasi-judicial acts of an administrative body and not to administrative or executive acts of such body. In the case of *Franklin v. Minister of Town and Country Planning*, 1948 AC 87, an attempt was made to impugn an order relating to Stevenage in that the Minister had not called evidence at the inquiry in support of the draft order and had been biased in favour of the order when he had finally made it. The contentions were rejected and it was held that the inquiry was directed to the objections, not to the order itself, and was prescribed for the further information of the Minister and the criterion of bias appropriate to measure the conduct of a quasi judicial officer had no relevance to the functions of the Minister which were purely administrative.

20. The facts of *Nakkuda Ali v. Jayaratne* 1951 AC 66 were that the Controller of Textiles in Ceylone had cancelled a textile dealer's licence in pursuance of a statutory power to revoke a licence when he had reasonable grounds for believing its holder to be unfit to continue as a dealer. The dealer applied for certiorari to quash the order, contending that the Controller had not held an inquiry conducted in conformity with natural justice. The Judicial Committee of the Privy Council dismissed his appeal holding that the Controller, although obliged to act on reasonable grounds was under no duty to act judicially so that certiorari could not issue and compliance with natural justice was unnecessary.

21. The scope of a writ of certiorari is to a certain extent akin to the scope of the principle of audi alteram partem and at this stage the circumstances in which a writ of certiorari can issue may well be considered.

22. In *R. v. Electricity Commissioners* (1924) 1 KB 171 204 Atkin L. J. said "that certiorari and prohibition may issue wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority." This proposition has been approved in many subsequent cases. It would thus appear that according to the English Law the duty to act judicially is considered to be one of the conditions requisite for the issue of a writ of certiorari. Such a writ will not issue to quash the order of a body that has acted in a purely ministerial capacity notwithstanding that its ministerial order may have been preceded by a determination of a judicial character by another body: vide *Hetherington v. Security Export Company* (1924) AC 98S.

23. In the Union of South Africa the scope of the principle of audi alteram partem and a writ of certiorari appears to be wider. By the Suppression of Communism

Act 1950 the Executive acquired sweeping powers over persons and organisations in order to prevent the propagation of communism. Section 9 of the Act empowered the Minister of Justice to prohibit the attendance at an assembly of any person whose presence would in his opinion, further any of the objects of communism as defined in the Act. The Minister served a notice on Ngwevela forbidding him to attend any gathering for a period of two years that was not of a bona fide, religious, recreational or social character. The notice disobeyed the prohibition and was convicted of an Offence under the Act. His appeal to the Appellate Division of the Supreme Court was allowed and the notice was held invalid because the notice had not been given an opportunity of making representations to the Minister before the notice became effective vide R. v. Ngwevela 1954 (1) SA 123.

24. The scope of a writ of certiorari has come up for consideration before the Courts in India also and the leading case On the point is that of Province of Bombay Vs. Kusaldas S. Advani and Others, . The Bench which heard the case was composed of Kania C. J., Fazl Ali, Patanjali Sastri, Mahajan, Mukherjea and Das JJ. Mahajan and Mukherjea JJ. gave a dissentient judgment. The Governor of Bombay had promulgated the Bombay Land Requisition Ordinance V of 1947. The relevant portions of Sections 3 and 4 of that Ordinance ran as below:--

"3. Requisition of land.--If in the opinion of the Provincial Government it is necessary or expedient to do so the Provincial Government may by order in writing requisition any land; for any public purpose:

Provided that no land used for the purpose of public religious worship or for any purpose which the Provincial Government may specify by notification in the Official Gazette shall be requisitioned under this section.

4. Requisition of vacant premises.-

1982 Him. Pra. D.F./5 (1).

(1) If any premises situate in an area specified by the Provincial Government by notification in the Official Gazette are vacant on the date of such notification, and whenever any such premises become vacant after such date either by the landlord ceasing to occupy the premises, or by the termination of a tenancy, or by the eviction of a tenant, or by the release of the premises, from requisition or otherwise the landlord of such premises shall give intimation thereof in the prescribed, form to an officer authorized in this behalf by the Provincial Government.

....."

25. The questions arose as to whether an order of requisition made u/s 3 was a quasi judicial or an administrative order and as to whether a writ of certiorari could issue to quash the order of requisition. The majority of the Judges composing the Bench held that the order was an administrative one and could not be quashed by a writ of certiorari. Kania C. J in the course of his judgment

observed as below:--

"Because an executive authority has to determine certain objective facts as a preliminary step to the discharge of an executive function, it does not follow that it must determine those facts Judicially. When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of certiorari. (vide para 7)."

26. Das J., who subsequently became the Chief Justice of India, expressed his conclusion in the following words:--

"But, as I have already stated, the main body of Section 3, on a correct construction of it, expressly left the question of the existence or the public purpose along with the question of the necessity or expediency of requisitioning land to the subjective opinion of the Provincial Government and, therefore, its decision, if made in good faith, could not be questioned at all (vide para 177 at p. 261)."

27. The majority decision in the aforesaid case, so far as I am aware, has held the field.

28. In the case of *Radeshym Khare and Another Vs. The State of Madhya Pradesh and Others*, the question arose as to whether the function exercised by the State Government u/s 53-A of the C. P. and Berar Municipalities Act (2 of 1922) was administrative in nature and as such not amenable to a writ of certiorari. That section inter alia provided that if a committee is not competent to perform the duties imposed on it or undertaken by it by or under the Act or any other enactment for the time being in force and the State Government considers that a general improvement in the administration of the municipalities is likely to be secured by the appointment of a servant of the Government as an executive officer of the committee, the State Government may, by an order stating the reasons therefore published in the Gazette, appoint such servant as the executive officer of the committee for such period not exceeding 18 months as may be specified in such order. The majority of the Judges composing the Bench held that the function which the State Government exercises u/s 53-A is administrative in nature and hence its action under the section is not amenable to a writ of certiorari. S. R. Das C. J in the course of his judgment observed as follows:--

"Action to be taken u/s 53-A of the C. P. and Berar Municipalities Act may be an administrative action, but that does not absolve the State Government from observing the ordinary rules of fair play. Even where administrative action is taken it may be necessary to give an opportunity to a party to have his say before an order, is passed. But that is quite different from the well ordered procedure involving notice and opportunity of hearing necessary to be followed, before a quasi judicial action open to a writ of certiorari, can be taken. The

difference lies in the manner and the mode of the two procedures. For the breach of the rules of fair play in taking administrative action a writ of certiorari will not lie."

29. Thus at the outside it can be said that the impugned order was against the rules of fair play but according to the aforesaid observations of S. JR. Das C. J. the order cannot be quashed by a writ of certiorari.

30. It was contended in the Supreme Court cases *supra*, as it has been in the case before me, that if the delegated authority in forming its opinion has to take into consideration certain facts and circumstances the opinion formed by it cannot be said to be merely a subjective one. The contention did not find favour and was repelled by quoting the following passage from the classic judgment of Lord Atkinson in *Liversidge v. Anderson*, 1942 AC 206 at p. 227:

"If it is a condition to the exercise of powers by A that X has a right of way or Y has a broken ankle the authority is charged with determining these facts and it must ascertain: judicially whether the conditions are fulfilled or not. If on the other hand, the condition is that the authority thinks or is of opinion that X has a right of way or Y has a broken ankle the condition is a purely subjective condition and the act cannot be a judicial act, as the existence of the condition is incapable of being determined by a third party by application of any Rule of law or procedure.""

31. It will have been noticed that in Section 7 of the S. T. Act the words used are if the State Government is of the opinion that a member is unfit to act or is persistently remiss in the discharge of his duties as a member". The opinion formed by the State Government, therefore, in the exercise of power conferred by Section 7 of the S. T. Act is subjective and not objective and is not justiciable in a Court exercising jurisdiction under Article 226 of the Constitution.

32. The next contention urged on behalf of the petitioner is that the result of the order of removal is drastic inasmuch as the petitioner has been deprived of the right to seek election to the small town committee for a period of five years and that an action having such a serious consequence should not have been taken without affording an opportunity to the petitioner to show cause against the proposed order. The consequence which the order entails is immaterial and what has primarily to be seen is as to whether the order was a quasi judicial or a purely administrative one and if it is found to be of the latter character then in view of the decisions of the Hon"ble Supreme Court, if I have understood them rightly, it cannot be quashed by a writ of certiorari provided it is not held to be mala fide.

33. It has further been contended on behalf of the petitioner that in a democratically governed country like India the absence of a provision for the giving of a notice to a member of an elective body prior to ordering his removal from membership was out of place and should not be countenanced by a Court of law. The function of a Court of law is to declare the law as it finds it and not to

make it and if either the Jaw is hard or it otherwise need's a change in view of the altered conditions and circumstances the appeal, as, if J may say so with respect, was very aptly observed by Das J. in Province of Bombay Vs. Kusaldas S. Advani and Others, should be to the Legislature rather than to a Court of law.

34. On behalf of the petitioner reliance inter alia has been placed upon Cherukuri Pirchiah, Advocate and Municipal Commissioner, Gudivada Vs. Andhra University, Waltair and Others, in which the order of the Chancellor of the Andhra University setting aside the election of the petitioner to the Senate of that University was called in question. There was no specific provision for the appellate authority to issue notice to the successful candidate who is the party to be affected, before deciding the appeal against him and it was argued that the provision violated the principle of natural justice and the contention was accepted by the High Court. In that case the order made by the Chancellor was treated as a quasi judicial order and it is obvious that if it was a quasi judicial order the giving of notice to the parties before hearing the appeal was incumbent in view of the principles of natural justice.

35. Reference may also be made to the case of Sri Provash Chandra Sett and Others Vs. Gouripore Electric Supply Co. Ltd. and Others, By Section 51 of the Indian Electricity Act the State Government has been empowered to confer upon a licensee within the meaning of the Indian Electricity Act all or any of the powers which a telegraph authority possesses under the Indian Telegraph Act 1885 with respect to the placing of telegraph lines and posts for the purpose of a telegraph or maintained by the Government. The section does not require the State Government to determine or decide any dispute between two contending parties. In the aforesaid case a question arose as to whether it was incumbent upon the State Government to give notice to a party affected before exercising powers under the section. It was held that the State Government cannot be said to exercise a quasi judicial power while conferring upon the licensee powers u/s 51 whether general or special and it is not required to give the Party affected an opportunity of being heard. It was, however, observed: in the course of the judgment that though it was not incumbent upon the State Government to give notice of the proposed exercise of power under the section the omission to give the notice was a circumstance which might be taken into consideration in deciding whether the power had been exercised reasonably and in good faith it was, therefore, desirable that the State Government should in a given case exercised the powers conferred by the section after giving notice, if possible, to the persons interested The aforesaid observations, if I may say so with respect, were in the nature of a pious wish and the aforesaid case is not an authority for the proposition that an administrative order cannot be made without giving notice of the proposed order to the party affected thereby.

36. The case of Harnam Singh Modi and Another Vs. State of Punjab, is distinguishable inasmuch as the order of removal of a municipal member which was impugned was held to have been made u/s 16(1) (e) of the Municipal Act, a

section which specifically provided for the affording of an opportunity of tendering an explanation to the member proposed to be removed.

37. In, the case of *Pyare Lal Sharma v. University of Sagar*, reported in *Pyarelal Sharma Vs. University of Sagar and Another*, the passing of an order against a candidate disqualifying him from passing an examination and/or debarring him from appearing at the next examination the Executive Council discharges an administrative function and there is no obligation on the University Authorities to give any opportunity of hearing before imposing a penalty on an examinee for his alleged misconduct.

38. In the case of *Nathubhai Dhulaji and Others Vs. The Municipal Corporation, Bombay and Others*, it was held that the authority issuing notice u/s 354 of the Bombay Municipal Corporation Act has to ascertain facts objectively and then to satisfy himself. So long as the authority keeps himself within the limits of the authority given to him by that section his discretion is absolute. The authority must act bona fide and not capriciously or from an improper motive. But if he considers the facts objectively and comes to a particular conclusion his satisfaction would not then be open to challenge. The aforesaid section did not provide for the giving of a hearing- to the persons whose rights were to be affected and it was further held that when by statute a provision; was not made for hearing it was impossible to accept the contention that, the authority was bound to act judicially or that although the section did not provide for a hearing the rules of natural justice required that a party should be heard before his rights could be affected).

39. I do not think that in view of the decisions of the Hon''ble Supreme Court, referred to above, useful purpose will be served by noticing the other decisions of the High Courts.

40. Winding up the discussion it will not be out of place to refer to the lament on the present status of the audi alteram partem Rule in English administrative law made by S. A. de Smith in his treatise on the Judicial Review of Administrative Action, First edition, Second Impression. In an inimitable style he has made the following observations;--

"As a result of recent decisions the law relating to the application of the audi alteram partem Rule in English administrative law has become thoroughly confused. The old wine has not been poured into new bottle; it has been left to ferment in the cellar. The ancient presumption that the validity of the exercise of powers directly operating upon individual rights is conditional upon observance of the audi alteram partem, principle should be restored to its former status. In determining whether a right to notice and hearing is to be implied, the Court should disregard the right--privilege" dichotomy and choose more apposite criteria as their guides. The contention that it is contrary to public policy for the Courts to review the exercise of disciplinary powers should be viewed with suspicion. These changes of approach need involve neither a violation of the

doctrine of binding precedent--for many of the decisions are contradictory--nor a usurpation of the legislative function--for the principle is not to be applied where Parliament has clearly manifested an intention that it should be excluded or where to apply it would be impracticable or detrimental to the public interest.....

It would be rash to conclude from the experience of the past few years that the day of the *audi alteram partem* Rule in English administrative law is almost done. The time has not yet arrived to think of pronouncing obsequies or writing obituary notices. The comatose must not be assumed to be moribund. And the English Courts, which have it in their power to reanimate a great institution of the common law may profitably pay heed to the experience of the countries of the Commonwealth and the United States of America (see page 136)."

41. The Indian decisions on the scope of the aforesaid Rule are based on the English decisions and one feels like joining the distinguished author in wishing that the Rule be restored its pristine status and it be established that the rights of subjects shall not be affected as a result of orders of administrative bodies without affording them, an opportunity of tendering explanation.

42. In fine, in view of the pronouncements of the Hon'ble Supreme Court, I hold that the order sought to be impugned was not a judicial or quasi judicial order but was merely an administrative order and as it has not been found to be *mala fide* it is not amenable to a writ of certiorari.

43. Question No. 4: It has been urged on behalf of the petitioner that the primary relies claimed by him is for the issue of a writ of mandamus and that even if a writ of certiorari cannot issue a writ of mandamus may be issued. The contention is barren of substance. A direction that the petitioner be restored to the membership of the small town committee cannot be issued unless the impugned order is quashed and if it is beyond the competence of this Court to issue a writ of certiorari it cannot issue a writ of mandamus either. What cannot be done directly cannot be done even indirectly. The petitioner is not entitled to the issue of a writ of mandamus either.

44. In conclusion, the petition is dismissed with costs.