

(2020) 08 CAL CK 0069

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 5390, 5412(W) Of 2020, Civil Application
(CAN) No. 4060, 4061 Of 2020

Sharad Kumar Singh And Ors

APPELLANT

Vs

State Of West Bengal And Another

RESPONDENT

Date of Decision : 25-08-2020

Acts Referred:

Kolkata Municipal Corporation Act, 1980 — Section 2(81B), 3, 28, 29, 30, 39, 81, 634
West Bengal Municipal Act, 1993 — Section 14
Constitution Of India, 1950 — Article 123, 162, 164, 166, 213, 226, 243U, 246, 309

Citation : (2020) 08 CAL CK 0069

Hon'ble Judges : Sanjib Banerjee, J; Aniruddha Roy, J

Bench : Division Bench

Advocate : S. K. Kapur, K. Thakker, Vikash Singh, Joydeep Kar, Billwadal
Bhattacharya, Moyukh Mukherjee, Kishore Dutta, Abhratosh Majumder, Sayan
Sinha, Debanjan Mandal, Sandip Dasgupta, Ayan De, Deepan Sarkar, Kalyan
Bandyopadhyay, Gurudas Mitra, Sirsanya Bandyopadhyay, Subhrangshu Panda

Final Decision : Disposed Of

Judgement

@JUDGMENT-JUDGMENT

Sanjib Banerjee, J

1. This matter is born out of the situation brought about by the pandemic and the claustrophobic protocol woven around it. The propriety of an executive action that the State says it has been constrained to take in the polluted and suspicious atmosphere of Covid-19 has been called into question. Of course, there was a political colour to both the petitions at the time of their institution. Mercifully, however, the arguments have been of the highest order and upon maintaining a degree of etiquette and camaraderie only rarely seen in involved physical hearings, far less on the virtual platform.

2. The substance of the challenge in both sets of petitions is to an executive notification issued by the State in the name of the Governor, constituting a board

of administrators with a chairperson to supervise and oversee the functioning of the Kolkata Municipal Corporation upon the councillors' tenure expiring by the efflux of time and the State Election Commission, for valid reasons, being unable to conduct elections for a new set of councillors to be brought in. The notification is long and runs into several pages. It refers to the authority of the State in its executive functioning to act in terms of Section 634 of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as the said Act), the executive authority of the State to act in a situation without a parallel in history and to myriad other perceived sources of authority for exercise of such power, inter alia, under the Epidemic Diseases Act, 1897 and the Disaster Management Act of 2005. The impugned notification of May 6, 2020 refers to the measures adopted thereunder to be in public interest for "containing infections and taking measures to combat COVID-19" and "to facilitate seamless transition with a continuity in administration" of the services rendered by the Corporation. In substance, a board of administrators has been constituted with a chairperson.

The board comprises members who were a part of the outgoing Mayor-in-Council and the chairperson is the outgoing Mayor.

3. To be fair to the petitioners, they do not question the need for appropriate measures to be taken by the State in the wake of the pandemic and the impossibility of conducting any elections in the present circumstances. However, the petitioners question the propriety of the executive action and insist that if the elections of councillors could not be conducted for any genuine reason, appropriate steps ought to have been taken by the State legislature - and not the executive - to remedy the situation and provide for the functioning of the Corporation. The petitioners do not question the need to have the Corporation function in full throttle since it is the Corporation which has to be at the vanguard in tackling the spread of the pandemic, securing hygiene, providing appropriate sanitation and incidental activities to confront and contain the menace that is the dreaded disease. The petitioners primarily question the roadmap adopted by the State and maintain that if all councillors and the Mayor-in-Council lost their authority to act as such by efflux of time, the State, through an executive fiat, could not have done indirectly that which is prohibited from being done directly.

4. The several aspects of the petitioners' challenge to the impugned notification may be summarised. According to the petitioners, the Constitution does not provide for any executive authority to be exercised in such a situation, particularly when the functioning of the Corporation is governed by a statute.

The petitioners submit that when there is a law covering the field, no recourse may be taken to any executive action to do what is not mandated by the statute; and, in an extraordinary situation, only the deemed legislative mode of bringing in an ordinance could have been adopted, to take care of the difficulty that may have arisen. The petitioners suggest that there can be no executive action without the backing of law, particularly when such action infringes the right of an individual. The right of an individual in this case is cited as any citizen's privilege

to contest in an election to be anointed as a councillor. The petitioners next contend that the notification is illegal as being without constitutional authority; and merely because the Rules of Business may have been followed in bringing about the notification may not suffice when the substantive authority\ for the executive action is not backed by any constitutional provision. The petitioners ridicule the State executive resorting to the removal of difficulties provision in Section 634 of the said Act. They assert that such a provision is for ironing out the creases in the implementation of the relevant statute, particularly at its nascent stage; and such a provision cannot be an excuse to turn the mandate of the statute on its head. The petitioners refer to the principle enunciated by the Privy Council in *King Emperor v. Nazir Ahmed* [AIR 1936 PC 253(2)] and say that when something is mandated to be done by a law or by the Constitution in a particular manner, there can be no executive action which is at variance with the manner prescribed. In short, the petitioners maintain that the only route open to the State in the scenario was to promulgate an ordinance under Article 213 of the Constitution. As a corollary, the principal submission of the petitioners is that when the relevant business had to be transacted by way of an ordinance, the impugned notification issued under executive authority has to be seen as incurably bad.

5. The State and the Corporation oppose the petitions. It is their common submission that when a difficulty is seen to have arisen in giving effect to the provisions of a statute and such statute contains a mandate to the executive for the removal of difficulties, the executive action taken to remove the perceived difficulty cannot be questioned. The State maintains that, in any event, the executive possesses sufficient authority to tackle an unforeseen situation as the present one even in the absence of there being a provision for the removal of difficulties in a crucial statute. Both the State and the Corporation point out that since it cannot be anybody's case that that any elections could be conducted to bring in the new councillors of the Corporation, the unprecedented scenario called for an immediate and decisive action and, it can never be said that when public interest is at stake, the executive lacks the authority to take appropriate action. The State refers to the Acts of 1897 and 2005 and the spectre of death looming not only over the city and the State but all over the country and across the globe. The State and the Corporation refer to the special provisions in the said Act for dealing with infectious diseases and epidemics and the like to suggest that it was of paramount public importance that the functioning of the Corporation continued without any hindrance or disruption.

6. The State asserts that the installation of the board of administrators by the impugned notification should not be regarded as a backdoor entry for the erstwhile members of the Mayor-in-Council without such persons having the imprimatur of public backing in accordance with law to occupy such exalted position. The State maintains that the composition of the board of administrators should be viewed from the perspective of the need for the seamless functioning of the Corporation, for maintaining a degree of continuity to enhance the efficacy

of the Corporation functioning in the troubled times and the recognition by the executive of the experience of the members of the Mayor-in-Council since such members had occupied the positions for a considerable period of time and would be acquainted with the functioning of the Corporation. The Corporation is quick to indicate that there was no political consideration in installing the board of administrators as every outgoing councillor has been named as the coordinator or the pointsman to oversee the work and the activities of the Corporation in each of the 144 wards spread across the city.

7. The parties have referred to several provisions from the Constitution and the said Act that governs the constitution, composition and functioning of the Corporation. The petitioners claim that since the said Act enunciates in its preamble that it is an amending and consolidating Act, such statute has to be seen to be the entire repository of all matters pertaining to the Corporation and anything which appears to have been left unsaid in the said Act has to be regarded as not permissible.

8. Among the several provisions of the said Act that are relevant for the present purpose and to some of which the parties have drawn the attention of the court, are Section 2(81B) of the said Act which defines the State Government to mean "the Government of the State of West Bengal in the Department of Municipal Affairs"; Section 3 of the said Act that provides for the municipal authorities to be the Corporation, its Mayor-in-Council and the Mayor; Section 5 of the Act that charts out how the Corporation would be constituted; the general, obligatory and discretionary functions of the Corporation as recognised in Sections 28, 29 and 30, respectively, of the said Act; Section 33 of the Act which provides for the executive power of the Corporation to be exercised by the Mayor-in-Council; Section 39 of the Act which delineates the powers and functions of the Municipal Commissioner; Section 50 of the Act that charges the State Election Commission with the duty to conduct all elections to the Corporation; Section 81 of the Act that mandates that "a Councillor shall hold office for a term of five years from the date appointed for the first meeting of the Corporation under Section 95 and no longer"; and several other incidental provisions. At the heart of the dispute is the State government having taken recourse to Section 634 of the said Act.

9. Some of the key provisions of the said Act which have been stressed upon by the parties are set out:

"50. Election to Corporation. - The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Corporation shall vest in the State Election Commission."

"81. Term of office of Councillors. - (1) Subject to the provisions of section 83, a Councillor shall hold office for a term of five years from the date appointed for the first meeting of the Corporation under section 95 and no longer.

(2) A Councillor may, at any time, by giving notice in writing to the Chairman, resign his office and such resignation shall take effect from such date as may be

specified in the notice or, if no such date is specified, from the date of its receipt by the Chairman."

"634. Removal of Difficulties. - If any difficulty arises in giving effect to the provisions of this Act, the State Government may, as occasion may require, by order do or cause to be done anything which may be necessary for removing the difficulty."

10. In addition, the parties have also relied on several provisions from the Constitution of India, particularly, the following Articles:

"162. Extent of executive power of State.--Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

"174. Sessions of the State Legislature, prorogation and dissolution.-- (1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The Governor may from time to time--

(a) prorogue the House or either House;

(b) dissolve the Legislative Assembly."

"213. Power of Governor to promulgate Ordinances during recess of Legislature.--

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

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

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

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

or

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

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

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor.

Explanation.--Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void:

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him."

"243-U. Duration of Municipalities, etc.-- (1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer:

Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed--

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its

dissolution:

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under clause (1) had it not been so dissolved."

11. According to the petitioners, in keeping with the command of Article 246 of the Constitution read with the Lists in the Seventh Schedule to the Constitution, the legislature of a State has the exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule to the Constitution, which is referred to as the State List. The petitioners contend that the extent of the executive power of a State, under Article 162 of the Constitution, extends to matters with respect to which the legislature of the State has the power to make laws; but once an enactment is in place, the executive authority of the State is completely eclipsed by the law and no executive authority may be exercised at variance with such law or except in consonance therewith. In other words, the petitioners submit that there is no room for any executive authority to be exercised when an entry in the State List is governed by an appropriate statute covering the entry, whether in respect of the entire State or for any particular area as specified in the relevant statute. In this context, the petitioners refer to Section 14 of the West Bengal Municipal Act, 1993 that permits the State government to step in and appoint a board of administrators in certain situations. The submission in such regard is that when the corresponding provision is absent in a comparable statute as the said Act, the said Act must be read and understood not to have permitted the State government to flaunt its executive authority to supplant a body that has to be elected in terms of the said Act. The petitioners endeavour to establish that a provision for removal of difficulties as Section 634 of the said Act cannot be the basis for the usurpation of the legislative authority by the executive to flout the mandate of the statute governing the field. The petitioners say that such a provision for the removal of difficulties cannot be read as a Henry VIII clause for any autocratic executive dispensation to disregard constitutional propriety and the authority of the State legislature to deal with the situation, however insurmountable the difficulties may be, or however excruciating the circumstances. The petitioners are particularly critical of the narration of the sequence of events in the State's affidavit, culminating in the issuance of the notification. They say that the purported explanation or justification for the executive action amounts to flagrant disregard of the constitutional protocol and the blatant encroachment into the legislative arena of authority by the State executive. The petitioners also discern an underlying alternative argument to the

effect that since the State Assembly was in session at the time that the notification was issued, in such a scenario, no ordinance could have been promulgated under Article 213 of the Constitution.

12. On the various aspects in support of the petitioners' challenge to the impugned notification and the lack of the State's executive authority to install a board of administrators to supervise and control the functioning of the Corporation even in the most difficult and unforeseen times, they refer first to a judgment reported at (1967) 1 SCR 15 (*Jalan Trading Company Private Limited v. Mill Mazdoor Sabha*). However, it is only the minority view which is placed from paragraph 17 of the report and which clearly appears to be at variance with the majority view at paragraph 27 thereof. The petitioners next refer to a Full Bench decision of the Patna High Court reported at AIR 1988 Pat 9 (*Krishnadeo Misra v. State of Bihar*) where the ambit of a provision for the removal of difficulties in a statute fell for the court's consideration. The relevant provision is in *pari materia* with Section 634 of the said Act in the present case. The Full Bench referred to the Supreme Court dictum in *Madeva Upendra Sinai v. Union of India* [(1975) 3 SCC 765] and frowned upon the impugned executive action in that case to frame rules under any executive notification by resorting to the provision for removal of difficulties though the statute itself conferred the authority for subordinate legislation in specified fields under a rule-making provision. Further, as would be evident from the last sentence in paragraph 12 of the report, the Full Bench was not convinced that there was any difficulty in giving effect to any provision of the relevant statute that warranted the issuance of any of the impugned notifications. Thus, the ratio decidendi in the Full Bench judgment has to be seen to be that there must be a genuine difficulty upon the arising whereof a provision for removal of difficulties in a statute may be resorted to. As a corollary, it necessarily follows that as to whether any difficulty has arisen or not is justiciable.

13. The petitioners have next brought a Single Bench judgment of the Madras High Court reported at (1966) 2 Mad LJ 249 (*C.D. Sekkizhar v. The Secretary, Bar Council*). Again, as would be evident from the closing lines of the third paragraph of the report, the court found, as a matter of fact, that no difficulty had arisen within the purview of the relevant provision for removal of difficulties. It must also be acknowledged that the Single Bench also opined that no provision could be made by an executive action under a provision for removal of difficulties to "run counter to any of the express provisions in the Act."

14. The next authority cited by the petitioners is the Constitution Bench judgment in *Madeva Upendra Sinai*. The matter pertained to the erstwhile Portuguese territories becoming a part of the Union of India and the treatment of depreciation under the Income-Tax Act, 1961 as a consequence. The Central government issued an Order upon recognising that certain difficulties had arisen in giving effect to the Act of 1961 in the Union Territories of Goa, Daman and Diu. Two legal issues were framed by the Constitution Bench as evident from

paragraph 36 of the report: first, whether a difficulty within the contemplation of the relevant provision had arisen; and, secondly, whether the Central government in exercise of the power under the relevant provision was competent to supply a deficiency or *casus omissus*. The court observed that the existence or arising of a difficulty was the *sine qua non* for the exercise of any authority under the provision providing for the removal of difficulties. The Constitution Bench highlighted that the difficulty contemplated by the provision "must be a difficulty arising in giving effect to the provisions of the Act and not a difficulty arising *aliunde*, or an extraneous difficulty" (emphasis in original). The Bench went on to add, at paragraph 40 of the majority opinion, that a provision for removal of difficulties may be the source of authority "to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and the primary features of the Act." It is such aspect of the judgment that the petitioners lay stress on, to contend that under the guise of removing a difficulty, there can be no executive action to change the scheme or the essential provisions of the relevant enactment. The State is quick to retort that the judgment is not an authority for the proposition that a difficulty brought about in giving effect to an essential provision of the Act cannot be removed by executive action when the Act itself contains an enabling provision. The State maintains that the second part of the observations in the majority judgment must be seen in the light of the answer to the first legal issue: that there was no difficulty which had arisen for the relevant provision to be resorted to.

15. A further Constitution Bench decision of seven members is placed by the petitioners by way of the judgment reported at (1968) 2 SCR 1 (*Straw Products Limited v. Income Tax Officer, Bhopal*). Again, this was a case of the Central government issuing an Order on its perception that a difficulty had arisen in the implementation of the taxation laws to certain merged States. The Supreme Court observed, at paragraph 14 of the report, that the exercise of the power to remove difficulties "is conditioned by the existence of a difficulty arising in giving effect to the provisions of any Act" and a provision for the removal of difficulties "does not make the arising of the difficulty a matter of subjective satisfaction of the Government; it is a condition precedent to the exercise of power and existence of the condition if challenged must be established as an objective fact."

The State, however, refers to paragraph 10 of the report and the clear finding recorded therein that the impugned Order was invalid "because no 'difficulty' is proved to have arisen justifying the invocation of the power ...". The State in the present case stresses that the petitioners do not assert that the pandemic in the instant case has not brought about a piquant situation. The State contends that once the difficulty is admitted, the recourse to the relevant provision cannot be questioned. The petitioners, on the other hand, clarify that it is not their case that a peculiar and unforeseen state of affairs has not arisen in the wake of the pandemic; but the petitioners do not admit that the impossibility or impracticability of the holding of the Corporation elections is a difficulty within

the meaning of such word in Section 634 of the said Act.

16. The petitioners next rely on a judgment reported at (2009) 6 SCC 735 (Ram Deen Maurya v. State of Uttar Pradesh) to assert that the Nazir Ahmed principle continues to hold the field and has not been diluted in any manner or form.

Indeed, paragraph 41 of the report quotes the Nazir Ahmed rule that "where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all." The petitioners also rely on another Constitution Bench judgment reported at (1966) 3 SCR 682 (B.N Nagarajan v. State of Mysore). The matter pertained to certain rules framed under executive authority. The petitioners emphasise on a sentence at the end of paragraph 5 of the report that the petitioners say captures the enunciation of the law by the Supreme Court on the subject:

"... if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of the executive power under Article 162 of the Constitution ignore or act contrary to that rule or act."

The State, on the other hand, draws the court's attention to the previous sentence. The question before the Constitution Bench was whether the rules framed under the executive authority in the State were in derogation of Article 309 of the Constitution. In such context, the Supreme Court observed in the relevant sentence relied upon by the State that, "We see nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to act under Article 162 of the Constitution without a law."

17. The petitioners next cite an interim order of a Division Bench of the Allahabad High Court dealing with a similar situation as the present, as no elections had been held to elect the councillors in the Municipal Corporation of Allahabad. However, the judgment rendered on December 13, 2011 in Writ-C No.65013 of 2011 (Anugrah Narayan Singh v. State of U.P.) was an interim order and the petition was disposed of by an order of September 18, 2012 upon the court noticing that fresh elections to the local body had already been conducted and the elected members had also taken charge.

18. Another Constitution Bench judgment reported at (1967) 2 SCR 454 (State of Madhya Pradesh v. Thakur Bharat Singh) has been referred to by the petitioners for the proposition that there can be no executive action which operates to the prejudice of any citizen unless such action is supported by legislation.

19. Finally, the petitioners refer to a passage from Principles of Statutory Interpretation, (14th Ed.) by G.P. Singh at page 464 in the context of what may be impliedly prohibited in view of the express conditions laid down by a statute. The petitioners refer to the text to contend that a power inconsistent with the conditions laid down by the statute "is impliedly negatived". The textbook refers to an English rule of statutory construction that provides that "If an affirmative statute which is introductive of a new law directs a thing to be done in a certain

way, that thing shall not, even if there be no negative words, be done in any other way." The principle is pressed into service by the petitioners in the light of the tenure of all councillors of the Corporation under the said Act being limited to five years "and no longer" and the impermissibility of any executive action to continue with the Mayor-in-Council when its members no longer enjoy the authority to function as such.

20. The State underlines the uniqueness of the situation which has arisen as a consequence of the pandemic. The State refers to the Act of 2005, particularly Section 41 thereof, and the fact that municipalities are recognised as local authorities in such statute. The State places great stress on Chapters XXIX and XXX of the said Act and the duties of the Corporation to restrain infections and to provide for environmental sanitation and public safety. The State submits that in the wake of the pandemic it is the municipal authorities which ought to take adequate measures and, in such context, it was imperative that the functioning of the Corporation in this city should continue without any break, to tackle a problem of unforeseen magnitude endangering human lives. The State maintains that the clear words of a provision cannot be given a go-by and the words of a provision have to be read and understood in their ordinary meaning and sense without classifying a provision as one restricted to minor matters being covered thereby when its clear and unambiguous words give such provision a greater depth or wider area of influence. The State submits that when public interest so demands or when human lives may be at risk, niceties such as the strict separation of powers need not be adhered to at the cost of public interest or the lives of citizens. The State maintains that it is not as if the State did not make the environment conducive to conduct the elections or the State was loath to provide the machinery or support necessary to hold the same; but it was a situation never before experienced in human history that required lockdowns to be imposed and restrictions in the movement of citizens to be put in place that stood in the way of any elections being conducted. The State says that the petitioners have not questioned the State Election Commission's opinion that the situation may not be conducive to hold any elections immediately.

21. While the State is steadfast in its assertion that the impugned notification has been issued in due exercise of executive authority conferred by Section 634 of the said Act and the general authority available to the State executive under the Constitution, it submits that the State Assembly had only been adjourned sine die towards the end of March, 2020 and the budget session of the State Assembly for the year 2020 has not been closed nor the House prorogued. The State places Article 213 of the Constitution and the equivalent provision for the Union government in Article 123 thereof to suggest that an ordinance may be promulgated only when the Assembly is not in session. Without prejudice to its submission that the impugned notification of May 6, 2020 has been validly issued, the State says that in the present case there was no scope to bring an ordinance to deal with the situation since the Assembly was in session and no power to bring an ordinance could have been exercised in view of the restrictive

language of Article 213 of the Constitution. The State has also referred to its Rules of Business which derive authority from Article 166 of the Constitution. Such rules, the State points out, do not require the decision as reflected in the impugned notification to be brought before the Council of Ministers as long as it passes through the Chief Minister and is duly notified under the authority and in the name of the Governor.

22. The State has brought several authorities to bear on the expanse of the executive authority of a State government, the efficacy of the Rules of Business formulated under Article 166 of the Constitution, the residuary authority of the Chief Minister of a State and other related features. In the first of the judgments cited by the State, one reported at (2006) 8 SCC 352 (*Kishansing Tomar v. Municipal Corporation of The City of Ahmedabad*), the matter pertained to holding elections for constituting the Municipal Corporation in Ahmedabad. The legal question that was addressed by the Supreme Court is found at paragraph 5 of the report:

"whether Article 243-U of the Constitution, by which the duration of the municipality is fixed is mandatory in nature and any violation could be justified"

The Constitution Bench held that the mandate under Article 243-U of the Constitution was clear and unambiguous and it was incumbent on a State Election Commission to carry out the mandate of the Constitution and ensure that a new municipality was constituted in time. The State lays much stress on paragraph 21 of the report that deals with a scenario when man-made or natural calamities may prevent the conduct of the elections within time. The Constitution Bench held that "there may be certain man-made calamities ... or natural calamities which could distract the authorities from holding elections to the municipality, but they are exceptional circumstances and under no (sic other) circumstance would the Election Commission be justified in delaying the process of election ...". In the backdrop of such observation, the State claims that the present situation is an extraordinary case where the elections have been duly postponed for the very safety of the citizens who are entitled to participate therein.

23. The State has next brought a Division Bench judgment of the Karnataka High Court reported at 1996 AIHC 2539 (*G. Kuppaswamy v. State of Karnataka*). According to the State, the issues that arose in that case are closely relatable to the matter that falls for consideration here. In the reported case, administrators were appointed over municipal Corporations and municipal councils in Karnataka and such action of the State government was confronted by subjecting it to judicial review. The Karnataka High Court took the facts into consideration and came to conclusion, at paragraph 17 of the report, that "there were good and sufficient reasons not to hold the elections earlier ...". The State relies on the opening sentence at paragraph 20 of the report where it is enunciated that "executive power could be exercised in the absence of a constitutional bar so far as the same does not contravene any law on the matter or the rules having the

force of law." The petitioners, however, question the basis of the judgment by referring to paragraph 25 of the report. In its initial part, paragraph 25 deals with the propriety of appointing administrators to head municipal bodies and observes that "A perusal of the various provisions of the Constitution ... would indicate that ... an Administrator could be appointed after following the due procedure prescribed thereto." The petitioners submit that nothing in Article 243-U of the Constitution or in Part IXA of the Constitution provides for the appointment of any administrator or the like and the Karnataka High Court was clearly in error in reading words into the constitutional provisions that just were not there. The petitioners also claim that the later part of the paragraph 25 of the report indicates why some latitude may be allowed to hold the elections beyond the period of five years when the municipal body is sought to be constituted for the first time; but the judgment goes on to spell out that at a subsequent stage "it will not be permissible for the Government to appoint Administrators on the ground that elections could not be held to the Municipal body."

24. A seven-member Constitution Bench judgment of the Supreme Court is next placed by the State, reported at (1974) 2 SCC 33 (Presidential Poll, In re). The issue involved in that case was whether the election to the post of the President of India ought to be completed before the expiry of the term notwithstanding the fact that the legislative assembly of one or more of the States stood dissolved. In such context, the Constitution Bench referred to the rule embodied in the maxim *impotentia excusat legem* and observed that such maxim was inextricably linked to the maxim *lex non cogit ad impossibilia*. Paragraph 15 of the report is apposite in the context:

"15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that *impotentia* excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims 10th Edition at pp. 162-163 and Craies on Statute Law 6th Ed. at p. 268)."

25. A decision on another Presidential reference is cited by the State in placing

the judgment reported at (2002) 8 SCC 237 (Gujarat Assembly Election Matter, In Re). The advisory jurisdiction of the highest judicial forum in the country was invoked upon the Gujarat Assembly having been dissolved and the Election Commission expressing its inability to hold elections to such Assembly immediately. As a consequence of such elections not being held in time, the first sitting of the new House could not be convened within six months of the last sitting of the previous House, resulting in an infraction of the constitutional command in Article 174. In the discussion in the judgment as regards prorogation, adjournment and dissolution of a House of Assembly, the Supreme Court made a distinction between the three forms of suspension of sittings or sessions or the House itself. Elsewhere, the Constitution Bench observed that even if there was a constitutional mandate to hold any election within a specified time, there could be justifiable grounds for a delay; but the "reasons for deferring elections should be relatable to acts of God and normally not acts of man." The petitioners say that though this judgment clearly holds that the practices under the British parliamentary system "are extremely inappropriate in the Indian context", another judgment later cited by the State has relied on the similar passages from the same English texts. However, the more substantial submission of the petitioners on the present line of cases brought by the State is that nothing in such precedents authorises any executive action to override a statutory command. The State, on the other hand, reiterates that executive action can always cover up a gap which is not taken care of by a statute, unless the proposed action is specifically barred by the Constitution or any other law.

26. The State refers to a judgment reported at (2011) 5 SCC 214 (P.H. Paul Manoj Pandian v. P. Veldurai) on the power available to the State executive under Article 162 of the Constitution. In that case, the election of a legislator was questioned on the ground that such person had a subsisting contract with the State government. The defence was that the relevant contract had been cancelled prior to the submission of the nomination papers and the deposit made by the contractor had been forfeited. While considering the matter, the court took into account a government Order of 1951 that provided for the manner of termination of government contracts. The Supreme Court found that the government Order of 1951 did not offend any statutory or constitutional provision and held, on facts, that the contractor's relationship with the government had not been terminated in accordance with the government Order of 1951 for his election to be upheld. It is in such context that the Supreme Court observed as follows at paragraphs 46 to 50 of the report:

"46. Under Article 162 of the Constitution, the executive power of the State extends to matters with respect to which the State Legislature has power to make laws. Yet the limitations on the exercise of such executive power by the Government are twofold; first, if any Act or law has been made by the State Legislature conferring any function on any other authority, in that case the Governor is not empowered to make any order in regard to that matter in exercise of his executive power nor can the Governor exercise such power in

regard to that matter through officers subordinate to him. Secondly, the vesting in the Governor with the executive power of the State Government does not create any embargo for the legislature of the State from making and/or enacting any law conferring functions on any authority subordinate to the Governor.

"47. Once a law occupies the field, it will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an executive order.

However, it is well recognised that in matters relating to a particular subject in absence of any parliamentary legislation on the said subject, the State Government has the jurisdiction to act and to make executive orders. The executive power of the State would, in the absence of legislation, extend to making rules or orders regulating the action of the executive. But, such orders cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate legislature. Subject to these limitations, such rules or orders may relate to matters of policy, may make classification and may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State.

"48. The powers of the executive are not limited merely to the carrying out of the laws. In a welfare State the functions of the executive are ever widening, which cover within their ambit various aspects of social and economic activities. Therefore, the executive exercises power to fill gaps by issuing various departmental orders.

The executive power of the State is coterminous with the legislative power of the State Legislature. In other words, if the State Legislature has jurisdiction to make law with respect to a subject, the State executive can make regulations and issue government orders with respect to it, subject, however, to the constitutional limitations. Such administrative rules and/or orders shall be inoperative if the legislature has enacted a law with respect to the subject. Thus, the High Court was not justified in brushing aside the Government Order dated 16-11-1951 on the ground that it contained administrative instructions.

"49. The respondent could not point out that the said order was repugnant to any legislation enacted by the State Government or the Central Government nor could he point out that the instructions contained in the said Government Order dated 16-11-1951 were repugnant to any statutory rules or the Constitution. In fact, there was neither any enactment nor any statutory rule nor any constitutional provision as to how the contractor, who has entered into contracts with the Government, should be permitted to contest election, more particularly, when a request is made by the contractor to terminate his contracts so as to enable him to contest the election. "50. There is no manner of doubt that in this branch of jurisdiction there was absence of statutory enactment, regulations and rules and, therefore, this Court is of the firm opinion that the Government had all authority to issue the Government Order dated 16-11-1951 to fill up the gaps. ..."

27. A judgment reported at (1995) Supp 2 SCC 305 (State of U.P. v. Pradhan Sangh Kshettra Samiti) has been carried by the State for the proposition that even government notifications have the authority of law and there is a hierarchy of legal instruments "such as law, ordinance, order, bye-law, rule, regulation and notification." On the efficacy of the Rules of Business put in place under Article 166 of the Constitution, the State has relied on a judgment reported at (2018) 4 SCC 537 (A.A. Padmanbhan v. State of Kerala) and placed paragraph 16 of the report.

28. The State next relies on a Constitution Bench judgment reported at (2010) 4 SCC 1 (Ramdas Athawale v. Union of India) to sustain its contention that an adjournment of the House of an Assembly during a session implies that the House continues to be in session. The petitioners, however, say that the judgment is of no relevance in the present context in view of the question that fell for consideration of the Constitution Bench. The issue before the Constitution Bench was whether before the first sitting of the Parliament in a new year, a special address of the President was necessary. The Supreme Court held, on facts, that it was the winter session of the previous year that stood adjourned to the next year and, as such, it was neither the first session of the House nor was it even the first sitting of any session.

29. On the residuary authority of the Chief Minister of a State, the State has placed reliance on a judgment reported at (1996) 2 SCC 26 (Gulabrao Keshavrao Patil v. State of Gujarat). Paragraph 14 of the report, indeed, recognises the special position of the Chief Minister and the authority of the Chief Minister to call for a file relating to a decision taken by a Minister.

30. The Corporation informs the court that the tenure of the councillors ran out on May 7, 2020 and the board of administrators appointed by the notification of May 6, 2020 took charge the following day. It is the Corporation that points out that the petitioner in the first matter unsuccessfully contested the Corporation elections the last time and the first petitioner in the second matter is a functionary of an opposition political party in the State. The Corporation refers to the sources of the authority quoted in the impugned notification and emphasises that Section 39 of the said Act makes the functioning of the municipal commissioner "subject to the supervision and control of the Mayor". According to the Corporation, upon it not being possible to hold any elections thus far in 2020 to usher in a new set of councillors to replace those elected in 2015 and who demitted office by operation of law, the Kolkata Municipal Corporation could not be left headless, particularly when decisions of the moment had to be taken in the wake of the pandemic that has gripped human existence across the world.

31. The Corporation first refers to the Kishansing Tomar case to submit that in extraordinary circumstances the deferment of any election is permissible. As a corollary, the Corporation says that the functions of the would-be elected cannot be left in a limbo and the executive has the requisite residuary authority to step in and put appropriate measures in place.

32. The Corporation refers to a Constitution Bench judgment reported at (2018) 10 SCC 312 (*Bir Singh v. Delhi Jal Board*) for the proposition that there is no embargo on an executive action as long as it pertains to an aspect on which the State legislature is competent to legislate and there is no prohibition by any law to such action. Another judgment, reported at (1980) Supp SCC 374 (*L. G. Chaudhari v. Secretary, L. S. G. Department*), has been placed by the Corporation to assert that the provisions of Article 166 of the Constitution are directory and not mandatory and, even if they were not complied with, it was open to a State government to establish that the relevant order was issued by such State government. A further judgment reported at (1970) 1 SCC 443 (*A. Sanjeevi Naidu v. State of Madras*) is placed for the proposition that each and every decision of the executive need not be taken by the cabinet, though the cabinet remains accountable to the legislature for any action taken by any of the ministries.

33. There is only a further aspect of the rival contentions that needs to be discussed. In course of the petitioners' rejoinder, it is pointed out that just as the Assembly in the State was adjourned sine die in the end of March, 2020, the Parliament and the Assembly in the State of Maharashtra were similarly adjourned sine die at or about the same time. The point that the petitioners seek to make is that notwithstanding the indefinite adjournment of the Parliament and the Maharashtra State Assembly, without the relevant sessions in either case being terminated, the Union government has proceeded to promulgate as many as 11 Ordinances and the Maharashtra government has promulgated an ordinance on municipalities as the elections thereto cannot be held in the present situation. The petitioners seek to underscore the expression "during recess of Legislature" in the heading of Article 213 of the Constitution. According to the petitioners, if the legislative assembly in a State is not in a position to transact any business it should be deemed to be in recess whether or not the session continues. In other words, the petitioners contend that the expression "in session" appearing in Article 213 (1) of the Constitution must take colour from the word "recess" appearing in the heading of the provision; and, despite the session of an Assembly not being terminated, if such Assembly is not active, in the sense that it cannot transact any business, for the purpose of Article 213 of the Constitution, the Assembly will be deemed not to be in session.

34. The factual fallacy in the petitioners' submission is brought out by the State by relying on the Presidential and gubernatorial notifications issued qua the Parliament and the Maharashtra Assembly, respectively. The State demonstrates that the President of India had prorogued the Parliament and terminated the budget session and the Governor in Maharashtra had done likewise before the Central ordinances or the State ordinance in Maharashtra were promulgated.

35. The earlier of the writ petitions here was moved on May 7, 2020 before a Single Bench. Though no specific order was immediately required unless the court was minded to interfere with the operation of the impugned notification, an

order was passed on May 7, 2020 allowing the board of administrators as constituted under the impugned notification of May 6, 2020 "to continue in caretaker capacity until the matter is further adjudicated." The order of May 7, 2020 was carried in appeal by the writ petitioner. By an order of May 12, 2020, a Division Bench of this court declined to interfere with the Single Bench order of May 7, 2020 and merely extended the tenure of the board of administrators till July 20, 2020. The first writ petitioner carried the appellate order to the Supreme Court. The special leave petition was disposed of by the Supreme Court on June 3, 2020 with the observation that since the matter involved questions of public importance, this High Court should dispose of the same expeditiously. The second writ petition was filed as public interest litigation. Upon the Bench headed by the Hon'ble the Chief Justice noticing that the subject-matters of the previous petition and the subsequent public interest litigation were identical, both sets of petitions were assigned to this Bench. The board of administrators has been allowed to discharge its duties in accordance with the notification till the disposal of the petitions. The petitions have been heard simultaneously via video conference.

36. The core issue is whether the present environment, threatened as it is by the pandemic, has thrown up any difficulty in the functioning of the Corporation; and, if so, whether such perceived difficulty can be said to fall within the fold of the difficulties envisaged in Section 634 of the said Act. At any rate, the validity of the impugned notification of May 6, 2020 has to be assessed: whether it is justified on the anvil of Section 634 of the said Act, or it could have been founded on the general or residuary executive authority of the State government. The ancillary question which arises pertains to the import of the expression "in session" appearing in Article 213 of the Constitution which is in *pari materia* with the provision for a Central ordinance in Article 123 thereof.

37. The State perceives that the Kolkata Municipal Corporation cannot function without its management being in place and, since the regular body of management statutorily described as the Mayor-in-Council cannot be immediately installed, the previous Mayor-in-Council with its experience in municipal affairs ought to continue as a board of administrators because the Corporation has a vital duty to discharge to resist the spread of the pandemic and to provide for hygiene and sanitation in its wake. The petitioners join issue to suggest that the difficulty in installing the statutory management as visualised by the said Act is not a difficulty capable of being addressed under Section 634 of the said Act. They contend that a provision as the one that is Section 634 of the said Act to remove difficulties, is confined to the nitty-gritties of the functioning of the Corporation under the said Act and cannot be seen to be an enabling provision authorising any executive action to tinker with the substantial mandate of the said Act that affords a tenure of five years for the management team of the municipal body "and no longer" (Section 81 of the said Act) in harmony with the command of Article 243-U of the Constitution. The petitioners submit that if the said Act has to be seen as a complete code governing the functioning of the

Kolkata Municipal Corporation, the absence of any specific authority being conferred on the executive would imply a prohibition; thus, necessitating a legislative action, even in the form of the executive issuance of an ordinance, to take care of the exigency.

38. The State and the Corporation say that the failure to install a new set of councillors is a difficulty which arises in giving effect to the provisions of the said Act. The State rushes to add that the wide words of Section 634 of the said Act like "as occasion may require" and "do or cause to be done anything which may be necessary" justify the impugned executive notification and action. The higher case run by the State is that even if the source of authority of the State executive to issue the impugned notification were not to be found in Section 634 of the said Act, the residuary constitutional authority reserved unto a State executive may be seen as the foundation of the power to issue the impugned notification of May 6, 2020.

39. Whether it is the licence under Section 634 of the Act that could have been invoked in the present situation or the general and residuary authority of the State executive that could have been exercised, there has first to be a difficulty which is not created by the State. The justification or the propriety of the action taken may then be tested on the anvil of the doctrine of proportionality to assess the nexus of the action taken to the difficulty that had arisen or the breach that is sought to be remedied. To begin with, both aspects of the matter are justiciable. An impugned action founded on the premise of any difficulty having arisen has first to satisfy the judicial conscience of there being an overwhelming difficulty that could not have been overcome by taking prudent and reasonable measures to adhere to the regular course of action. Next, the action taken must be reasonable and commensurate with the difficulty that is seen to have arisen and the gap in the administration which is sought to be bridged. If there is no difficulty, nothing else need be seen. If there is a genuine difficulty, the impediment cannot be used as a ruse for the extraordinary exercise of authority beyond what is necessary to arrest the breach. The existence of any difficulty and the necessity for any executive intervention may, however, be seen in the context of a provision for removal of difficulties, if there is one which applies, or in the milieu of the general authority of the executive to fill in the gap, if there is a gap.

40. That the entire human fraternity is faced with a crisis of unforeseen magnitude and the current scenario is without any precedent is obvious. No elections to any municipal body in this State can be immediately held without willy-nilly exposing the electorate to the noxious contagion. Indeed, the State Election Commission's grounds indicating the impracticability of holding elections at this stage have not been questioned. Thus, there is a peculiar and extraordinary situation not brought about by human design or, at any rate, by the State. The tenure of the councillors of the Kolkata Municipal Corporation has expired by efflux of time without it being possible to conduct elections to bring in

a new set of councillors as mandated by the governing statute. It is not a contrived situation and the difficulty consequent upon the veritable impossibility of holding the Corporation elections has been the unfortunate fallout of the pandemic. There is, thus, a justifiable difficulty and that has not been questioned, except that such difficulty is not a matter relatable to Section 634 of the said Act or covered thereby.

41. Almost invariably, executive action must be backed by legislative or constitutional authority. Rules laid down in executive notifications and government orders sometimes possess as much force as any law enacted on such subject and it cannot be said that merely because a notification has been issued under executive authority it need not be adhered to. There is an overarching principle in government functioning. No executive action can be contrary to any legislative command. Such legislative command may be express or implied. An executive action at variance with or in derogation of any legislative instruction can be struck down easily. The clear distinction between the black and white is sometimes blurred in the grey when an executive action is questioned on the ground of an implied legislative prescription to the contrary.

42. The word "occupied" and the expression "occupied fields" are much maligned in their wide - and, sometimes, indiscriminate - use in the context of Article 246 of the Constitution and the extent of authority available to a State legislature qua the authority of the Parliament, both in respect of the exclusive authority of the Parliament pertaining to entries in List I of the Seventh Schedule to the Constitution and the concurrent authority of the State legislature and the Parliament in respect of entries in List III of such Schedule. In the framework of Article 162 of the Constitution read with the executive power of the State vested in the Governor under Article 164 of the Constitution and the real extent of gubernatorial authority being generally subject to the aid and advice of the Council of Ministers under Article 163 thereof, there is, indeed, a general authority in governance and administration that devolves on the executive in respect of matters not explicitly covered by legislation. For the purpose of governance, the executive authority is all pervasive as long as the actions conform to the constitutional philosophy and there is no contrary legislative prescription; express or implied. But an implied negative mandate must be strictly construed, if only to not inhibit the business of governance that the executive is charged with. There is no doubt that the said Act of 1980 is a complete code in respect of the Kolkata Municipal Corporation and all aspects of the functioning of such body. It is equally indisputable that Section 81 of the said Act is a reflection of the Constitutional command of Article 243-U and, in ordinary circumstances, the supervision and control of a Corporation passes from one set of councillors and Mayor-in-Council to the next set of councillors and the newly constituted Mayor-in-Council. In the usual course, the State government has no role to play in the supervision or control of the Corporation otherwise than as specified in the said Act and the day-to-day management vests in the municipal authorities as envisioned in the said Act in which arena the State government

may not intrude through any board of administrators or the like. It is also true that in a comparable statute in the State, the West Bengal Municipal Act, 1993, there is a provision in Section 14 thereof for the State to appoint administrators in municipalities in certain situations.

43. The problem that the Corporation, the State and the State Election Commission were faced with was extraordinary and without any parallel. High authorities instruct that notwithstanding Article 243-U of the Constitution, if there are exigencies when elections cannot be held, the functioning of the municipal body cannot remain suspended merely because the tenure of the old set of councillors may have expired by efflux of time. If the provisions of the Constitution, no less, have to be reasonably interpreted by being guided by the essence and the spirit of a provision and not necessarily the strict letter thereof, to make allowance for extraordinary situations, some form of measures could surely have been taken by the State for the continued functioning of the Kolkata Municipal Corporation in the present troubled times. The question that still looms is whether such measures could have been put in place by legislative action or deemed legislative action by way of an ordinance or by any independent executive action.

44. It appears to be clear from the said Act that Section 81 thereof read with Section 50 of the Act prescribes the usual course of action and the legislature may not have conceived of a possibility of the municipal elections not being conducted within the stipulated time since the extent of the tenure was governed by the constitutional directive under Article 243-U. The said Act does not, in its express provisions, imagine a situation where it would be impossible or impracticable to hold the elections and, to such extent, the said Act can be said to be silent on such aspect. The solution for an extraordinary situation when the elections cannot be held is not provided for in such statute. It was possible for the statute to preclude executive intervention by incorporating a provision that prohibited the State from interfering in the functioning of the Corporation or installing any board of administrators in any circumstances. But the said Act of 1980 does not contain any express provision prohibiting the State from installing a board of administrators even in the most extraordinary situation. The doctrine of implied prohibition is not so strict or ubiquitous that when the legislation is silent on an aspect it must be inferred that it precluded the exercise of executive authority altogether even in an extraordinary situation. Thus, even though the Act of 1980 is a complete code as to the functioning of the Kolkata Municipal Corporation in all its features, no implied prohibition of the exercise of executive authority need be read into it, particularly to deal with exigencies of such proportion as the present one. If, however, the said Act prohibited executive intervention or the installation of a board of administrators, only an ordinance to undo the same could have paved the way for administrators to be appointed and no independent executive action could have been taken in such regard.

45. Article 162 of the Constitution extends the executive authority of a State to

the matters with respect to which the legislature of a State has the power to make laws. As a necessary adjunct, such provision must be understood to make the executive authority of a State subservient to the legislation brought about in the relevant field. But a mere enactment does not erode the residuary executive authority recognised by the provision, particularly when such authority is sought to be exercised in public interest, upon a key facet of the field not being covered by the legislation. Again, if a permanent or all-time solution were to be attempted by executive action, such action would tantamount to an encroachment into the legislative domain. But if a one-off measure for the immediate purpose were to be devised by executive action in respect of a facet of a field not covered by any legislation, such executive action will pass muster. While assessing the propriety of an executive action in the face of a legislation covering the field, the extent of the executive action has to be limited to what is in consonance with the legislation and nothing can be done which is in derogation of or at variance with the legislation covering the field. The implied prohibition on an aspect which is left uncovered in the legislation must be such as to necessarily follow from the legislation or be understood to be the unavoidable necessary implication of the enactment. Uncovered aspects of the general field governed by the legislation may be addressed by executive action in public interest as long as the text and the spirit of the legislation are not desecrated.

46. It is a fundamental canon of statutory interpretation, notwithstanding the baggage of history that may be attached to a particular type of provision, that if the plain words of a provision as used and understood in the everyday sense allow a particular course of action, the court will not, ordinarily, restrain its operation or its full import or implementation by any imaginary imperative or implement of restrictive construction. The words used in Section 634 of the said Act are of the widest amplitude. Any difficulty in giving effect to the provisions of the said Act may be addressed by the State government. As noticed, Section 2(81B) of the said Act defines the State Government to be the State of West Bengal in the Department of Municipal Affairs. The impugned notification in this case emanated from the relevant department. There was a genuine difficulty in a new set of councillors being put in place in accordance with the mandate of Section 81 of the said Act and the procedure indicated in Section 50 thereof. It must also be understood that the avowed purpose of the said Act is to provide for municipal services and, towards such end, the Act also lays down the manner of the functioning of the Corporation and the persons through which the functioning would be undertaken; but the essence of the Act is to provide for the rendition of certain services in a demarcated area and the councillors and the Mayor-in-Council are only the means to reach the services to the residents and other concerned citizens. On a plain reading of Section 634 of the Act, it cannot be said that there was no difficulty within the meaning of the relevant word as used in the provision for the State government's impugned action to be nullified.

47. As noticed above, even if the authority of the State government under Section 634 of the Act has to be read down in the context of such provision being

a transient or initial provision, which class of provisions is historically of limited efficacy, the issuance of the impugned notification appears justified on the basis of the constitutional authority of the State executive in respect of a matter which is not covered by any legislation or for which there is no express or implied statutory prohibition.

48. In the light of the above discussion and the conclusion, it was not necessary for the State to resort to the ordinance route under Article 213 of the Constitution to address the problem that the Corporation faced or to take appropriate action in the circumstances. The measures adopted are well within the bounds of the State's executive authority. However, an issue has squarely arisen pertaining to the ambit of the expression "in session" in the body of Article 213 of the Constitution juxtaposed against the word "recess" in the heading of the provision which is materially identical to the corresponding authority of the Union under Article 123 of the Constitution.

49. Unlike other bodies of law, the Constitution of a country is regarded as the fountain-head of all laws. Constitutions may be of questionable legitimacy at the time framed; but once a Constitution is adopted, it becomes the supreme charter of the country and beyond question. It is for this reason that it is axiomatic that all laws must be subservient to the Constitution and, like a river, there can be no law which rises above its source. The validity of every law is tested on the anvil of the Constitution, the principles expressly enunciated therein and its general ethos based on the mores of the time.

50. But Constitutions are dated. There are Constitutions which go back several centuries and others, like ours, several decades. At the time that the people of India gave the Constitution to themselves, man had not broken into space, technology had not progressed to metamorphosing the entire planet into one big global village and communication had not extended its sometimes eerie tentacles so wide that almost no human or human activity is beyond its invasive bandwidth. In any event, whether it is the Constitution or any law to arrest a class of mischiefs or to provide for a code of conduct in some theatre of human activity, only so much can be imagined at the time that a statute is drafted and the textual and original meaning of the words used must later be seen in the context of the present so as to make the provisions dynamic and capable of addressing matters that may have been beyond the realms of imagination of the original framers. The idiosyncrasies of human conduct, the vicissitudes of nature and the new vistas opened up by the advancement of science and technology call for a lively and vibrant interpretation of the *suprema lex* in the milieu that prevails at the time of its interpretation. It is difficult to perceive that the framers of the Constitution would have foreseen the remorseless antics of the modern terrorist or the dangers presented by an invisible virus; though the Constitution is flexible in allowing room for exigencies without spelling out every species of impediment that the distant future could unleash.

51. It is conceivable that the exigencies of a particular situation require

immediate intervention in larger public interest or to save human lives and there is little or no time to wait for the niceties to be followed. There may be a situation where instantaneous action is called for within hours or days when the legislature may be, technically, in session but not actively transacting business. An emergency of hitherto unimaginable enormousness may arise on a public holiday or over a weekend or in the middle of the night and require immediate action of a nature that requires legislative sanction. In such a scenario, an ordinance may be promulgated notwithstanding the legislature being, technically, in session but the legislature not being available to address the situation which requires immediate attention. If executive action is not permissible without legislative backing, an ordinance to put in place the deemed legislative backing may be brought out immediately, even in the middle of the night if the situation so demands, though the legislature may, technically, be in session as the House may have been adjourned the previous evening and may be scheduled to reconvene the next morning. It is the gravity of the situation and the nature of the business that is sought to be transacted by way of an ordinance that will justify the promulgation thereof even when the legislature may, technically, be in session but may not be actively transacting business. The identical words used in both Article 123 and Article 213 are, "that circumstances exist which render it necessary for him (the President or the Governor) to take immediate action..." It is the immediacy of the necessity to make the law that is of paramount importance in the provision. The gravity and magnitude of the problem sought to be addressed and the requisite degree of promptitude ought to justify the action, if called into question. Theoretically, the constitutional provisions permit the promulgation of an ordinance in an instant as long as the relevant legislature is not active at that very moment. But only a once-in-a-lifetime kind of extraordinary situation will warrant such an exceptional action; it may be of no avail to a charlatan or a mischievous knave seeking to adopt a dramatic measure for some oblique purpose.

52. The argument that such a power must not be conferred on the executive, whether under Article 162 of the Constitution or to promulgate an ordinance when the legislature is, technically, in session, would defeat the purpose of the provisions. If the situation so demands, the sovereign has to act and, if the legislative wing of the sovereign is not active, the executive has to step in. For the sovereign never sleeps. The sovereign is not a person. The sovereign is not even a collection of persons. The sovereign is the abstract authority of the State. But the sovereign is an abstract like no other: it is omniscient and can feel and perceive and act. The promise that the Constitution holds out to the citizens envisages such a sovereign to deliver on the rights and aspirations enshrined therein. In a democratic republic wedded to the rule of law, the sovereign is deemed to possess feelings. The sovereign ought to hurt - and even cry or bleed - when the least favourite in its dominion is deprived of any basic right or dignity that inheres in such person as a citizen or a human. It is an entirely different matter that most of those charged with the duty to act in the name of the

sovereign may be drunk with the power that their positions bring and are oblivious to the pains of the citizen and indifferent to their obligation to act. There can be no greater reason than public interest or the safety of the lives of its citizens for the sovereign to act. The misuse of an executive action can be redressed, inter alia, by the appropriate legislature and the judiciary. But the mere possibility of the misuse or abuse of the authority cannot be an excuse for undermining or not recognising the authority of the executive which exists. It would amount to throwing the baby out with the bathwater if the extraordinary and the residuary authority of the executive were to be overlooked or understated. Public interest will be the casualty.

53. It is true that in the ordinary course of things when a statute mandates something to be done in a particular manner, it ought to be done in such manner and in no other. But there are only a few principles which are absolute and inviolable and most of them must be confined to those pertaining to the lives of citizens. Extraordinary situations call for extraordinary measures. As long as executive actions are justiciable and the executive remains answerable to the legislature, its wide general and residuary authority to take action and to act as the exigencies of the moment may demand cannot be overstated; the only caveat being that every executive action must adhere to the constitutional spirit and not be prohibited by any law.

54. In fine, it is held that the impugned notification of May 6, 2020 does not offend constitutional propriety or the mandate of any legislative provision. The authority to issue the notification can be found in Section 634 of the said Act and, in any event, in the general and residuary authority vested in the State executive. The situation sought to be addressed by the impugned notification of May 6, 2020 did not require any ordinance to be promulgated; not because the Assembly had been adjourned sine die and was deemed to be in session, but because the action taken was in pursuance of the executive authority available to the State and it was designed only to take care of the immediate difficulty which had arisen and its application is confined to the one-off situation and no more. If a generic solution to a problem of the present kind were to be fashioned, an ordinance ought to have been promulgated to take care of future situations when a comparable difficulty may arise. The impugned notification here is limited to only the present and the immediate. It remains open to the State legislature to make a provision to address a similar distressing situation in future; or even to prohibit executive intervention no matter what the exigency. What is sought to be achieved by way of the impugned notification has sufficient nexus with the difficulty that was justifiably perceived to have arisen and was attempted to be removed. Further, what has been done through the impugned notification is to ensure continuity in the functioning of the Corporation. If the executive sensed that such continuity was the order of the day, particularly to tackle the pandemic and its aftermath, it does not appear to be unreasonable or calling for any judicial interference in the jurisdiction available under Article 226 of the Constitution.

55. For the foregoing reasons, both writ petitions fail. However, it should be the honest endeavour of the State and the State Election Commission to ensure that the elections for the Kolkata Municipal Corporation are held as expeditiously as the improved situation may allow. Merely because the impugned notification has passed the test of judicial review does not imply that any undue delay in the conduct of the elections may also be found to be acceptable. The mandate of the statute remains suspended, but such suspension may not be indefinite unless it just cannot be helped.

56. WP 5390(W) of 2020 along with CAN 4060 of 2020, CAN 4061 of 2020 and WP 5412 (W) of 2020 along with CAN 3114 of 2020 are disposed of.

57. There will be no order as to costs.

58. Certified website copies of this judgment, if applied for, be urgently made available to the parties upon compliance with the requisite formalities.