
(1990) 05 PAT CK 0026

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 4997 of 1986

Shivji Prasad and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 04-05-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 31

Citation : (1991) 1 BLJR 70 : (1991) 1 PLJR 363

Hon'ble Judges : S.B. Sinha, J;P.S. Mishra, J

Bench : Division Bench

Judgement

S.B. Sinha, J.—In this writ application the petitioners have sought for issuance of a writ or in the nature of mandamus directing the respondents to forebear from interfering with the rights of the petitioners as members of the Kataiya Notified Area Committee as also for issuance of a writ of certiorari directing the respondents to show cause as to why the notification dated 7.10.1986, as contained in Annexure-6 to the writ application, whereby and shereunder, inter alia, the added respondent Nos. 6 to 44 were nominated as the members of the said Notified Area Committee shall not be quashed.

2 The facts of this case lie in a very narrow compass.

3. The State of Bihar in exercise of its power conferred upon it u/s 388(1) of the Bihar and Orissa Municipal Act (hereinafter referred "Act") constituted a notified area known as Kataiya Notified Area by a notification dated 6.11.1985, as contained in Annexure-2 to the writ application.

4. By reason of a notification dated 3rd June, 1986, the State of Bihar in exercise of its power conferred upon it u/s 389(1) of the Act appointed/nominated the members of the said Committee including the petitioners.

5. The said Committee consisted of 40 persons including the Sub-Divisional Officer, Gopalganj as its ex-officio President and the B.D.O. as member thereof.

6 The Petitioner have alleged that as in terms of the aforementioned notification dated 6.11.1985, (Annexure-2) the several provisions of the said Act as mentioned in the schedule thereof including the provisions contained in Sections 29 to 33, 34, 35, to 50, 50-A, 51 53 to 57 of the said Act were applied in relation to the aforesaid Notified Area Committee, the petitioners could not have been removed in violation of the provisions thereof.

The petitioners have alleged, that some interested persons have been making representations to the concerned respondents which are contained in Annexures-4 and 5 to the writ application for their own personal gains and accordingly the concerned respondents in connivance and conspiracy with each other in order to help the local M.L.A. and the local M.P. passed the impugned order replacing the members of the Notified Area Committee by such persons who belonged to the camp of the local M.L.A. and local M.P. by reason of the said impugned notification dated 7.10.1986, as contained in Annexure-6 to the writ application.

8. The petitioners have contended that appointment of new members in respect of the aforementioned Kataiya Notified Area Committee, as a result whereof the petitioners, who were earlier appointed in the said posts, had been removed, is mala fide in law and also does not satisfy the mandatory requirements of said Act.

9. At the time of hearing of the application the petitioners have further challenged the vires of Section 389(C) of the said Act, inter alia, on the ground that the said provision is arbitrary inasmuch as thereby unguided powers have been conferred upon the State of Bihar.

10. In this case, a counter-affidavit has been filed on behalf of the respondent Nos. 1 to 4 wherein it has been alleged that the petitioners were appointed members of the aforementioned Notified Area Committee without any recommendation from the local officers and, as such, the said fact was brought to the notice of the State of Bihar by the local M.L.A. by his letter dated 19.6.1986 which is contained in Annexure-A to the counter affidavit. According to the said respondents, the then Chief Minister directed the Minister of State of the Urban Development Department to make an enquiry.

11. From a perusal of the aforesaid complaint, as contained in Annexure-A to the counter-affidavit, it appears that one of the objections raised therein was that some of the members of the said Committee were facing criminal trials. It was further mentioned therein that there are several persons who could not have been validly appointed as members of the said Notified Area Committee being ineligible for such appointment.

12. It has further been averred that thereafter the District Magistrate sent fresh recommendations after making enquiry in this regard, wherein, inter alia, it was contended that Shri Banka Tewari and Rabindra Mishra were residents of places beyond the territorial jurisdiction of the aforementioned notified area committee

and some other persons have been involved in some criminal cases. In that view of the matter, the District Magistrate made recommendation of the names of persons, who according to him, should be appointed as members of the aforesaid Notified Area Committee. According to the respondents the impugned notification has been issued by the State of Bihar in exercise of its discretionary power conferred upon it u/s 389 of the said Act keeping in view the other provisions thereof.

13. In this case an application was filed on behalf of respondent Nos. 6 to 44 for impleading them as parties in this application, which was allowed by an order dated 19.11.1986.

14. The petitioners in their rejoinder to the counter-affidavit filed on behalf of respondents, inter alia, alleged that the names of the petitioners were also recommended by the District Magistrate. It was further mentioned that even the persons who were appointed as members by reasons of the impugned notification have also been facing criminal charges. The petitioners have further denied that any criminal case is pending against them. They have also annexed character certificates issued in their favour by the Block Development Officer.

15. Mr. Ram Janam Ojha, learned Counsel appearing on behalf of the petitioners firstly submitted that Section 389(c) of the Act is ultra vires the Constitution inasmuch as thereby an unguided, arbitrary and naked power has been conferred upon the State of Bihar. Learned Counsel further submitted that no guideline has been provided for with regard to the constitution by a notified area committee and appointment of the members thereof and as such the State of Bihar could not have revoked the notification as contained in Annexure-1 to the writ application without framing any rule in this regard.

16. Learned Counsel further submitted that in any event the impugned notification had been issued by the State of Bihar taking into consideration the baseless allegations levelled against them by the local M.L.A. and M.P. which are contained in Annexures 4 and 5 to the writ application.

17. Learned Counsel further submitted that in any event as in terms of the notification dated 6.11.1985 some of the provisions of Chapter II of the said Act including those of Sections 29 and 35 thereof having been made applicable in relation to the Kataiya Notified Area Committee, the said mandatory provisions being applicable in the matter of removal of the members and as the said mandatory provisions have not been complied with before removing the petitions from the aforementioned notified area committee, the same must be held to be wholly illegal and without jurisdiction.

18. Learned Counsel further submitted that as prior to issuance of the impugned notification, as contained in Annexure-6 to the writ application, the mandatory provision in Section 35 of the said Act as also the principles of natural justice had not been complied with, the impugned notification as contained in Annexure-6 to the writ application must be quashed.

19. The learned Government Advocate appearing on behalf of the respondent Nos. 1 to 4, on the other hand, submitted that the said Act itself contains guidelines. Learned Counsel submitted that for the purpose of appointment of the members of a Notified Area Committee, the same provisions which are required to be taken into consideration for the purpose of nomination of the members of a municipality should be adopted. Learned Counsel further submitted that before a person can be validly appointed, he must be qualified to hold the said post in terms of Section 17 of the said Act read with Rule 6 of the Bihar Municipal Elections and Election Petitions Rules, 1953.

20. Learned Government Advocate further submitted that the purported allegations as against the Government Officials are not correct and it must be presumed that high ranking officers would act reasonably and in good faith.

21. Mr. Thakur Prasad, the learned Counsel appearing on behalf of the respondent Nos. 6 to 44 submitted that as in the instant case the appointment of the petitioners was wholly illegal and did not conform to the provisions of the Bihar and Orissa Municipal Act, the petitioners are not entitled to maintain this writ application.

22. Learned Counsel has relied upon *Ram Bachan Lal Vs. The State of Bihar*, , *Ramji Prasad Singh Vs. Ram Bilas Jha and Others*, , *Rohtas Industries Ltd. v. State of Bihar* reported in 1965 BLJR 886 *Shivadhar Prasad v. The State of Bihar*, reported in 1976 BBCJ 581 and *Shree Krishna v. State of Bihar*, reported in 1978 BBCJ 359.

23. The said Act was enacted to consolidate and amend the law relating to municipality in the State of Bihar and Orissa.

24. Section 4 of the said Act provides for declaration of intention to constitute or alter the limits of municipality. Section 5 provides for consideration of objections by the State of Bihar before an area can be declared to be a municipality.

25. Section 13 of the said Act provides for number of municipal commissioners and elected and co-opted by Commissioners, which reads as follows:

13. Number of Municipal Commissioners and elected and co-opted by Commissioners.--(1) The State Government shall, by notification in the official Gazette, fix the number of manner of commissioners who shall be elected in the prescribed manner which shall not be less than ten or more than thirty-seven.

(2) One-fifth of the number of Commissioners fixed under Sub-section (1), subject to a maximum of five, shall be co-opted by the elected members from the following categories of persons, but not more than one from each category, if such persons are not otherwise elected as Commissioners:

(i) Women,

(ii) Scheduled Castes,

(iii) Scheduled Tribes,

In Municipalities where the population of Scheduled Tribes exceeds three per cent according to the latest published Census Report.

(iv) Backward Classes, Annexure-1,

(v) Minority,

(vi) Local Legislators,

(3) The co-opted Commissioners shall have all the rights and privileges and be subject to all the liabilities and disabilities of the elected Commissioners.

26. Section 15 provides for election of Commissioners in the following terms-

15. Qualifications of voters at elections of Municipal Commissioners.-

(1) The (State) Government shall, by rules, prescribe the qualification and disqualifications, and the manner of the registration of voters at elections of Municipal Commissioners:

Provided that a person shall not be entitled to be registered as a voter who-

(a) has not attained the age of 21 years;

(b) is not a citizen of India; or

(c) is of unsound mind and stands so declared by a competent court.

(2) Every person who is registered as a voter in accordance with rules made under Sub-section (1) shall be entitled to vote at an election of Municipal Commissioners, and no person who is not so registered shall be entitled to vote at any such election.

27. Section 17 of the said Act provides for qualifications for election as Commissioners.

28. The State of Bihar in exercise of its power conferred upon it under Sections 15 and 19 of the said Act had framed a rule known as Bihar Municipal Elections and Election Petitions Rules, 1953. Rule 6 of the said Rules provides for qualifications and disqualifications of candidates, which is in the following terms:

Qualifications and disqualifications of candidates.--(a) Every person who is entitled to vote at an election under Rule 5 shall be eligible to be elected as a Commissioner.

(b) A person shall be disqualified for being a candidate for election as a Commissioner, if-

(i) he holds an office of profit under the Commissioners of the municipality; or

(ii) he has been adjudged by a competent court to be of unsound mind; or

- (iii) he is an undischarged insolvent; or
- (iv) he has a share or interest in a contract with the Commissioner; or
- (v) he is dismissed servant of the Government or a dismissed employee of a local body; or
- (iv) he has been convicted of an offence involving moral turpitude and sentenced to imprisonment for a term exceeding six months or to transportation, unless a period of five years has elapsed since his release; or
- (vii) he has not paid all taxes due by him to the Commissioners at the end of the financial year immediately preceding that in which the election is held.

29. Chapter XIV of the said Act deals with a matter relating to the notified areas. A notified area can be constituted by the State Government in terms of Section 388 of the said Act, which reads as follows:

Constitution of notified area.--(1) The (State) Government may by notification declare that it is necessary to make administrative provisions for all or any of the purposes of this Act in any area specified in the notification, other than a municipality or a cantonment.

(2) An area in respect of which such a notification has issued is hereinafter called a notified area.

30. Section 389 of the said Act provides for power to impose taxation in, apply enactments to, and constitute committees in notified area. Section 389 of the said Act reads as follows:

Power to impose taxation in, apply enactments to, and constitute committees in notified area-The (State) Government may by notification-

- (a) apply or adapt to a notified area to any part of a notified area any provision of this Act which may be applied to a municipality or any rule or bye-law in force or which can be made in any municipality under this or any other Act;
- (b) impose in a notified area or in any of a notified area any tax which could be imposed by the Commissioners if the notified area were a municipality; and
- (c) appoint or make rules for the appointment or election of a committee to carry out the purpose of this Act in the notified area.

30. The vires of the provisions contained in Sections 388 and 389 of the said Act had been challenged before this Court in *Rohtas Industries v. State of Bihar*, reported in 1965 BUR 886 wherein this Court held that the aforementioned provisions are not ultra vires the Constitution.

In *R. Prasad v. State of Bihar*, reported in 1976 BLJR 491, it has been held by a Division Bench of this Court that legislature while enacting the law did not intend that consultation or the wishes of people as an essential condition where a

notified area was to be constituted.

32. In *Ram Bachan Lal Vs. The State of Bihar*, , the Supreme Court held that in view of the provisions of Section 4 of the Act, Section 388 thereof give sufficient guidelines to the State Government and no arbitrary power has been conferred on the Government. The Supreme Court in the aforementioned case held as follows:

Number of points had been raised in the petition but Mr. B. Sen, the learned Counsel who appeared for the petitioner, has raised only two before us. He urged (1) that Sections 388 and 389 of the Act violate Article 14 of the Constitution, and (2) that Section 82(1)(ff), Sections 150-A to 150E, and the fourth Schedule offend Articles 14, 19(g) and 31 of the Constitution.

Regarding the first point, the ground of attack was that Sections 388 and 389 give arbitrary power to the Government either to constitute a municipality u/s 4 of the Act or to constitute a Notified Area Committee u/s 388, it would be noticed that the notified area committee was constituted as long ago as 1942. Without deciding the point, we assume that Mr. B. Sen is entitled to challenge the validity of Sections 388 and 389. It seems to us that there is no substance in this point.

However, the matter relating to constitution of a notified area committee again came up for consideration before the Supreme Court in *Baldev Singh and Others Vs. State of Himachal Pradesh and Others*, , wherein the Supreme Court stated the law thus:

Appellants' counsel has raised a more serious issue, namely, denial of an opportunity of being heard before the notified area has been constituted. Since Section 256 of the Act requires certain aspects to be satisfied before a notified area can be constituted, factual determination had to be made as to whether those statutory conditions were satisfied. Ours is a democratic polity. At every level, from the villages up to the national level, democratic institutions have been introduced. The villages are under Gram Panchayats, urban areas under Municipalities and Corporations, districts are under Parishads; for the State there is Legislature and for the entire country, we have the Parliament. People residing within Gram Panchayats have their electoral rights to exercise and in exercise of such rights, they have elected their representatives. Citizens of India have a right to decide, what should be the nature of their society in which they live--agrarian, semi-urban or urban. Admittedly, the way of life varies, depending upon where one lives. Inclusion of an area covered by a Gram Panchayat within a notified area would certainly involve civil consequences. In such circumstances it is necessary that people who will be affected by the change should be given an opportunity of being heard, otherwise they would be visited with serious consequences like loss of office in Gram Panchayats, an imposition of a way of life, higher incidences of tax and the like.

33. Following the aforementioned decisions of a Division Bench of this Court, of which one of us (P.S. Mishra, J.) was a party in *Sheonath Rai and Anr. v. The*

State of Bihar and Anr. reported in 1989 BBCJ 1 held that constitution of a Notified Area Committee without taking into consideration the will of the people and without inviting any objections from the residents of the locality violates democratic polity as also the principles of natural justice.

However, it may be mentioned that the State while exercising of its power under the aforementioned provision exercises a legislative function and not an executive power and as such the question of invoking principles of natural justice does not arise and the only requirements in such a matter is to consider the objection filed by the inhabitants of the area which is sought to be declared as a notified area committee in terms of Sections 4 and 5 of the said Act.

34. The question which arises for consideration is as to whether Section 389(c) is ultra vires the Constitution of India as the same confers upon the State a wholly unguided, uncanalised and unbridled power to make appointments of any person whatsoever.

35. In *Ramji Prasad Singh Vs. Ram Bilas Jha and Others*, , the Supreme Court held that the power to make appointment must be exercised for carrying out the purpose of the Act and not for defeating them. In that decision the Supreme Court held as follows:

It is a sad reflection that the sitting members of the Dumra Committee should have been dismembered on the eve of the elections, apparently without rhyme or reason. The State Government undoubtedly possesses the power u/s 389(c) of the Bihar and Orissa Municipal Act, 1922 to make appointments to the Notified Area Committee but that power, it ought to be remembered, must be exercised for carrying out the purposes of the Act, not for defeating them. The issuance of two notifications on the penultimate day, the feverish activity following in their wake and the unseemly haste and hurry with which the enrolment of new members was attempted to be rushed through on the eventful evening of the 5th April lend great weight to the contention of respondent 1's counsel that the cancellation of the old members and their replacement by the new ones was motivated by considerations foreign to the good governance of the Area Committee. We feel greatly uneasy that local machinations should have eventually led in this case to a denial of the valuable right of franchise to the whole body of 40 members who constituted the Area Committee. Such occurrences, we hope, will not happen once too often. If they do, the power of the State Governments to make appointments to Area Committees will itself become suspect, sapping thereby the faith of the people in the working of what are believed to be the nurseries of democracies.

36. In *Krishna Prasad Singh and Others Vs. The State of Bihar and Others*, , a Bench of this Court had again occasion to consider the aforementioned aspect.

37. It is now a trite law that the Court leans in favour of upholding constitutional validity of a provision. In other words, an Act legislated by a competent legislature is presumed to be intra vires and for upholding its validity, if

necessary, the provisions can be read down.

38. Section 389 of the said Act consists of two parts. By reason of the first part it conferred upon the State to exercise certain legislative functions whereas by latter part an executive function has been assigned in its favour.

39. In terms of the provisions of Section 389(c) of the Act three alternatives have been provided for constituting a committee in order to be carried out the purpose of the Act in the Notified Area Committee, namely, is: (a) appointment (b) make rules of the appointment (c) or election of a committee.

40. The aforementioned three powers are mutually exclusive and as such the State in its description is entitled to make appointment by taking recourse to one of the modes.

But the question which falls for consideration is as to whether the said power of appointment is wholly unguided or a guideline therefore has to be found out from the provision of the said Act.

41. In view of the decision of this Court and the Supreme Court as referred to hereinbefore in relation to constitution of a Notified Area Committee, there cannot be any doubt that a Legislative Act shall not be construed to be unconstitutional, if guidelines therefore can be found out in the said statute itself.

42. Where a power is conferred upon the State for making appointment and/or nomination for the purpose of running the affairs of local authority which has statutory functions to perform, an arbitrary power in favour of the State, cannot be conceded.

43. It is true that as in the case of other executive function, a play in joint is permissible in order to make the system a workable one.

44. However, as noticed hereinbefore, in the matter of constitution of Notified Area Committee, the Supreme Court in Baldev Singh and Others Vs. State of Himachal Pradesh and Others, , held that democratic polity should be upheld and normally it should be left to the will of the people for the purpose of taking into consideration as to whether the people of the locality would lie to be governed by a Gram Panchayat or a Notified Area Committee or a Municipality.

45. However, in the said decision also the Supreme Court pointed out that sufficient guideline in the matter is to be found out in the Act itself.

46. As indicated hereinbefore, the provisions of Sections 4 and 5 are to be invoked in the matter of constitution of a municipality.

47. Section 4 of the Bihar and Orissa Municipal Act provides the necessary guidelines to the State before a Municipality can be constituted.

48. From the plain reading of Section 388 of the Act it would be evident that the question as to whether a Notified Committee is to be constituted or not depends upon the satisfaction of the State Government to the effect that it is necessary to

make administrative provision for all or any of the purposes of the said Act.

49. In *Ram Bachan v. State of Bihar*, (supra), the Supreme Court while upholding the validity of the power of the State Government to constitute a Notified Area Committee observed:

Regarding the first point, the ground of attack was that Sections 388 and 389 give arbitrary power to the Government either to constitute a municipality u/s 4 of the Act or to constitute a Notified Area Committee u/s 388, it would be notified that the Notified Area Committee was constituted as long ago as 1942, Without deciding the point, we assume that Mr. B. Sen is entitled to challenge the validity of Sections 388 and 389. It seems to us that there is no substance in this point. Section 4(1)(a) and (b) provide as under.... It would be notified that Section 4(1) contemplates a town containing not less than five thousand inhabitants and a town of a particular density of population, and further that three-fourths of the adult male population should be engaged in pursuits other than agriculture. Now these requirements show that the area has reached such a stage of development that the Government should constitute a municipality in the area. Section 388 would come into the picture only if the requirements of Section 4 are not satisfied but yet the Government considers it necessary to make administrative provisions for all or any of the purposes of this Act. In our opinion, this gives sufficient guidance to the Government and thus no arbitrary power has been conferred on the Government.

However, the Supreme Court in *Baldeo Singh's case* (supra) held that obtaining of the opinion of the local resident is mandatory.

50. The Supreme Court, however, recently in *Sub-Divisional Officer and others Vs. Dr. Mehar Singh and others*, held as follows:

Section 244 contains sufficient guidelines to act thereunder. It is true that Section 244 by itself, does not in express words spell out the circumstances in which a notification issued u/s 241 or an order u/s 242 may be cancelled or modified. But Section 244 should not be read or construed in isolation from the rest of the chapter dealing with this subject matter. The provisions that a notified area will exercise only such powers as are entrusted to it by the State Government u/s 242 and that only such provisions of the Act as the State Government considers fit can be applicable to a notified area show that the principal consideration is the economic and administrative viability of the particular unit to look after its own local affairs. If the area develops further and further and proves viable and self-sufficient economically and efficient administratively, it may be eventually converted into a municipal area. If on the other hand, the area does not come up to expectations is not financially solvent or is administratively weak, the status quo ante may have to be restored. If Section 244 is read in this context and background, it will be very clear that it is intended as a power enabling the Government to go forward or backward in the process of this evolution depending upon the circumstances of each case.

51. In the aforementioned decisions, the Supreme Court held that Sections 241 to 244 of Punjab Municipal Act, 1911 were to be read together and same spell out and evolution in process.

52. Yet, recently the Supreme Court in *Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others*, while applying the principles of *Baldev Singh* held that although it is not necessary to comply with the principles of natural justice while declaring area to be a notified area committee the requirement of affording of an opportunity of being heard to the people of the locality as contemplated by the said Act should be complied with. The Supreme Court in the said decision held as follows:

In *Baldev Singh v. State of Himachal Pradesh* a similar question arose for consideration. An attempt was made to constitute a notified area as provided u/s 256 of the Himachal Pradesh Municipal Act, 1968, by including portions of the four villages for such purposes. The residents of the village who were mostly agriculturists challenged the validity of the notification before the High Court on the ground that they had no opportunity to have their say against that notification. The High Court summarily dismissed the writ petition. In the appeal before this Court, it was argued that the extension of notified area over the Gram Panchayat limits would involve civil consequences and therefore, it was necessary that persons who would be affected thereby ought to be given an opportunity of being heard. Rangnath Mishra, J. did not accept the contention, but clarified: (SCC p. 515, para 5).

We accept the submission on behalf of the appellants that before the notified area was constituted in terms of Section 256 of the Act, the people of the locality should have been afforded an opportunity of being heard and the administrative decision by the State Government should have been taken after considering the views of the residents. Denial of such opportunity is not is society. We must clarify that the hearing contemplated is not required to be oral and can be by inviting objections and disposing them of in a fair way.

In that case, it was further held:

Reverting to the case, we find that the conclusion of the High Court as to the need to reconsider the proposal to form the Corporation has neither the attraction of logic nor the support of law. It must be noted that the functions of the government in establishing a corporation under the Act is neither executive nor administrative. Counsel for the appellants was right in his submission that it is legislative process indeed. No judicial duty is laid on the government in discharging of the statutory duties. The only question to be examined is whether the statutory provisions have been complied with. If they are complied with, then the court could say no more. In the present case the government did publish the proposal by a draft notification and also considered the representations received. It was only thereafter, a decision was taken to enclude Ullasnagar for the time being. That decision became final when it was notified u/s 3(2). The Court cannot

sit in judgment over such decision. It cannot lay down norms for the exercise of that power. It cannot substitute even "its juster will for theirs.

Equally, the rule issued by the High Court to hear the parties is untenable. The Government in the exercise of its powers u/s 3 is not subject to the rules of natural justice any more than is legislature itself. The rules of natural justice are not applicable to legislative action plenary or subordinate. The procedural requirement of hearing is not implied in the exercise of legislative power unless hearing was expressly prescribed. The High Court, therefore, was in error in directing the government to hear the parties who are not entitled to be heard under law.

53. However, the Supreme Court itself in that decision held that before formation of a municipal corporation under the aforementioned Act, the State is bound to consider the objection receipt by it from the local inhabitants before forming its opinion.

54. In Sheonath Roy's case (supra, this Court however, held that before constitution of a notified area committee, the principles of natural justice are required to be complied with but as in that case it was not argued that Section 388 provides for a legislative function, the aforementioned observations were made but the decision in that judgment is correct as therein notification constituting a notified area committee was struck down as having been issued without calling for any objection from the local resident and thus, the statutory requirements were not complied with.

55. The aforementioned decisions have been referred to only for the purpose of considering as to whether if in the matter of constitution of a Notified Area Committee, the provisions which are required to be complied with before formation of a municipality, are necessary to be complied with so as to save the provisions from the Act from being rendered unconstitutional, whether the same reasonings should be applied in the matter of construction of Section 389(c) of the Act or not.

56. Statute may be declared ultra vires the Constitution, if thereby a vague power is conferred upon the authority exercising an executive function.

57. However, if there are inbuilt safeguards provided for in the Act itself which provides for requisite guidelines, such a provision cannot be held to be ultra vires Article 14 of the Constitution.

58. In this case, as notice hereinbefore, there are sufficient guidelines provided for in the matter of nomination of Municipal Commissioner in Sections 13 and 15 of the said Act.

59. If by reason of judicial pronouncement if the provisions of Sections 4 and 5 thereof can be read alongwith Section 388 so as to uphold its constitutional validity, there is absolutely no reason as to why the guideline provided for formation of a Municipal Committee in terms of the provisions of the said Act,

cannot be said to provide for the guidelines in the matter of nomination of the members of a Notified Area Committee.

60. The requirement of representation of all sections of people in a Notified Area Committee as in the case of nomination of Municipal Commissioner appears to be just and reasonable.

61. As noticed hereinbefore, the Supreme Court in *Sundarjas Kanyalal Bhatija's* case (supra), held that the constitution of a Notified Area Committee as also the provisions for conversion of the same into municipality and/or rendering the decision of status quo ante namely, by bringing it under the control of the village Panchayat are merely transactional process.

62. In the *Governing Body of Somri Hari Nath Mahila College and Ors. v. The Magadh University and Ors.* reported in 1989 PLJR 1125 Brother P.S. Mishra, J. while following an earlier decision of this Court in *Dr. Narendra Narain Sinha v. The University of Bihar and Ors.* reported in 1988 PLJR 546 held that an ad hoc committee constituted u/s 60(4) of the Bihar State Universities Act, 1976 read with Article 2(1) of Chapter XIII of the Magadh University Statutes, held that Syndicate's power to constitute an ad hoc governing body of a college is not unbridled and it has to adhere to the guidelines provided in the Act and the Statutes in constituting an ad hoc committee.

63. In my opinion, the same principles would apply in the matter of constitution of the committee in terms of Section 389(c) of the said Act also.

64. In this view of the matter, in my opinion, the provisions of Section 389(c) of the said Act cannot be said to be ultra vires the Constitution of India.

65. However, it goes without saying that the State of Bihar should frame specific rules in this regard so that in future, the provisions thereof may strictly be complied with before nominating the members of a notified area committee.

66. It does not stand to reason as to why no rules have yet been framed in terms of Section 389(c) of the Act inasmuch as, had the rules been framed and the provisions thereof were adhere to the State Government could have avoid so many litigation in this regard.

67. Section 389(c), so far as it confers power upon the State Government to nominate the members of a Notified Area Committee, is an executive function and not a legislative function. It was, therefore, incumbent upon the State of Bihar to directly follow the principles as laid down under Sections 13 and 15 of the said Act.

68. It is true, as has been contended by Mr. Ram Janam Ojha that in terms of the notification dated 6.11.1985 (Annexure-2), the State Government has made the provisions of Sections 29 and 35 thereof applicable in relation to Kataiya Notified Area Committee. If, therefore, a particular member was required to be removed, the principles embodied u/s 36 of the said Act, were required to be complied

with. It is true that before passing the impugned notification as contained in Annexure 6 to the writ application, the requirements of Section 35 of the said Act were not complied with.

69. However, in this case, as is evident from the statements made in the counter affidavit filed on behalf of the respondents that before appointing the petitioners as members of the notified area committee, the opinion of the local officials was not obtained.

70. Further, it has not been pointed out that in appointing the petitioners along with others as members of the notified area committee, the State complied with the provisions of Sections 13 and 15 of the said Act.

71. Further, as mentioned hereinbefore, the parties have made allegations and counter-allegations with regard to the eligibility of some of the petitioners and some of the respondents to be appointed as members of the notified area committee, as allegedly they have been facing criminal charges.

72. In exercise of power of writ jurisdiction, it is not possible for us to enter into the thickest of the disputed questions of fact.

73. Further, as noticed hereinbefore, even if the impugned order is quashed by this Court, in our opinion, the same would give rise to another illegality, namely, revival of the old committee which also do not comply with the requirements of law as laid down hereinbefore.

74. It is now well-settled by various decisions of this Court as also the Supreme Court of India the issuance of a writ of certiorari is a discretionary remedy. The writ jurisdiction of the High Court only provide for a discretionary remedy in favour of a party and it should not be exercised for quashing an order which might give rise to another illegal order and if it is not in public interest.

Reference in this connection may be made to Pramod Kumar and Others Vs. State of Bihar and Others, in which it has been held as follows:

In this connection reference may be made to the case of Godde Venkateswara Rao v. Government of Andhra Pradesh and Ors. AIR 1966 SC 823 Abdul Majid and Others Vs. The State Transport Appellate Authority and Others, , Debendra Prasad Gupta v. The State of Bihar and Ors. 1977 BBCJ 543; Hari Prasad Mandal v. Additional Collector 1978 BBCJ 575; Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another, The aforementioned decisions are authorities for the proposition that writ jurisdiction of a High Court only provides for discretionary remedy and it should not be exercised for quashing an order which might give rise to another illegal order as if substantial justice has been done to the parties.

In this connection, reference may be made to a recent decision of mine in the case of Jai Bharat Transport Co. v. Central Coal Field Ltd. reported in 1988 BLT (Rep) 192 wherein it was held that a High Court would be justified in a given

case to refuse to interfere with an illegal order if it is inequitable so to do or if the same would be against public interest.

75. It appears that by an order dated 10.11.1986, the election to the post of Vice-Chairman of the newly constituted Notified Area Committee was stayed.

76. In this situation, it may be presumed that except the election of the Vice-Chairman other functionaries of the Kataiya Notified Area Committee had all along been performed by the newly constituted committee.

77. In this view of the matter, it is not possible for this Court to interfere with the impugned notification.

78. We, however, hope and trust that in view of the fact that even the second committee may not conform to the provisions of Sections 13 and 15 of the said Act, the State shall without any unreasonable delay and preferably within a period of three months from today constitute a new committee.

79. In the result, this writ application is dismissed with the above observations. However, in the facts and circumstances of this case, there will be no order as to costs.

P.S. Mishra,

Since main judgment has been delivered by Brother Sinha and I have agreed with the conclusion I would have concluded by affixing my agreement to his judgment had he not stated-

However it may be mentioned that the State while exercising its power under the aforementioned provision exercises a legislative function and not an executive power and as such the question of invoking principles of natural justice does not arise and the only requirement in such a matter is to consider the objection filed by the inhabitants of the area which is sought to be declared as a notified area committee in terms of Sections 4 and 5 of the said Act.

The above observation has been made in the context of statement of the law in the case of Sheonath Rai v. State of Bihar 1989 BBCJ 1. The Supreme Court in Baldev Singh and Others Vs. State of Himachal Pradesh and Others, has said:

Appellants' counsel has raised a more serious issue, namely, denial of an opportunity of being heard before the notified area has been constituted. Since Section 256 of the Act requires certain aspects to be satisfied before a notified area can be constituted, factual determination had to be made as to whether those statutory conditions were satisfied. Ours is a democratic polity. At every level from the villages up to the national level, democratic institutions have been introduced. The villages are under Gram Panchayats, urban areas under Municipalities and Corporations, districts are under Parishads or the State there is Legislature and for the entire country, we have the Parliament. People residing within Gram Panchayats have their electoral rights to exercise and in exercise of such rights, they have elected their representatives. Citizens of India have a

right to decide, what should be the nature of their society in which they live agrarian, semi urban or urban. Admittedly, the way of life varies, depending upon where one lives. Inclusion of an area covered by a Gram Panchayat within a notified area would certainly involve civil consequences. In such circumstances it is necessary that people who will be affected by the change should be given an opportunity of being heard, otherwise they would be visited with serious consequences like loss of office in Gram Panchayats, an imposition of a way of life, higher incidences of tax and the like.

In *Sheonath Rai v. State of Bihar* 1989 BBCJ 1 this Court has said:

An examination of these provisions reveals that while for constituting a notified area by a notification u/s 388(1) of the Act conditions as enumerated in Section 4 of the Act need not be asked for like creating a municipality the State Government must be satisfied that all the three conditions enumerated in Section 4(1) of the Act which are conditions precedent to constitute a town municipality, have been fulfilled. In coming to the said conclusion the State Government must, if objections are raised as provided in Section 5 of the Act, take into account the objections of the inhabitants of the area concerned....

And then stated after considering various judgments of the Supreme Court and the aforementioned case of *Baldeo Singh*:

We accordingly, find no conflict in the two judgments of the Supreme Court and hold that as a rule of natural justice as enumerated in Section 4(1) of the Act be considered relevant for decision whether a notified area should be constituted or municipality should be constituted. The State Government's discretion shall thus be guided satisfying as held in *Baldeo Singh*'s case, the rule that the views of the residents are obtained before a decision is taken to constitute a notified area. Denial of such opportunity will not be in consonance with the scheme of the rule of law governing our society.

Though we read in Section 388 such requirements, in our view, it shall not be necessary while inviting objections to give oral hearing to the objections or to give elaborate judgment discussing each objections and deciding whether to accept or not. Natural Justice is a variable concept. It has been varied for the reasons of exigency from case to case, situation to situation and circumstance to circumstance. For the same reason, method of obtaining the views may not be as elaborate as one may desire before a decision is taken to constitute a municipality. In case of a decision to constitute a notified area it would be enough if due publicity of the intention to constitute a Notified Area is made and those who desire to object are allowed to file their objections to the District Magistrate who may, after obtaining such objections, forward to the Government of the State. The Government may in a given case be persuaded on account of the objections to abstain from notifying the area concerned and not to extend the application of the provision of the Act to such area. Notwithstanding the objections it may still hold that the area concerned should be put under a

committee which should govern in accordance with the provisions of the Act. The Government may have information by way of such objections which may influence its administrative decision and thus it may come to a definite conclusion.

The Bihar and Orissa Municipal Act is the law which plays the pivotal role to constitute a town municipality. Section 4 of the Act has given to the State Government a discretion but circumscribed it by the rule stated therein that the State Government must satisfy itself that three fourth of the adult male population of any town are engaged on pursuits other than agricultural and that such town contains not less than five thousand inhabitants and an average number of not less than one thousand inhabitants to the square mile of the area of such town before making the declaration of its intention to constitute such town together with or exclusive of any railway station, village land or building in the vicinity of such town, municipality and to extend to it all or any of the provisions of this Act. Section 5 of the Act has categorically said:

The State Government shall take into consideration any objection submitted through the District Magistrate within six weeks from the date of the publication of a declaration u/s 4 by any inhabitant of the town or area, or any rate-payer of the municipality concerned, and in the case of a declaration under Clause (a) of Sub-section (1) of the said section by the District Board of the District in which the town is situated.

These provisions together no doubt give to the State Government a statutory mandate to notify the declaration of its intention to constitute the municipality and to act on such satisfaction about the pursuits of the male population etc. and extending consideration to the objections of the rate payers and other concerned persons. Brother Sinha has stated that the State while exercising the power under the aforesaid provisions exercises its legislative function and not an executive power. I record my disagreement to this observation and add--(i) the creation of municipalities under the State Government's orders is an act which combines its executive function of ascertaining the views of the residents, judicial act of its satisfaction that the area concerned deserves a municipality including consideration of objections submitted through the District Magistrate and the legislative act of Constitution and incorporation of Municipal Commissioners as stated in Section 12 of the Act which runs:

There shall be established for each municipality a body of Commissioners, who shall be a body corporate by the name of the Municipal Commissioners of the place by reference to which the municipality is known having perpetual succession and a common seal, and may by that name sue and be sued.

Natural justice is an adjunct of every judicial act. It is not possible to visualise all situations in which one or the kind of natural justice rule shall be applied. It will, however, be necessary to bear in mind that even legislatures do have their role as administrators of justice as executive do have some times delegation to

legislate and Judicial officers are given executive powers as well as powers to legislate I do not intend to go into details of this discussion. Brother Sinha has taken notice of the a forementioned judgments. They stand by their merit. It will be futile for this Bench to record its disagreement with either the judgment of the Supreme Court in the case of Baldeo Singh (supra) or this Court in the case of Sheonath Rai (supra) as I am a party to the judgment of this Court in the case of Sheonath Rai (supra) and I reiterate my views. A few words on the scheme of Section 389 of the Act it states, "The State Government may by notification (a) apply or adopt to a notified area or to any part of a notified area any provision of this Act which may be applied to a municipality or any rule or bye-law in force or which can be made in any municipality under this or any other Act; (b) impose in a notified area or in any part of a notified area any tax which could be imposed by the Commissioners if the notified area were a municipality; and (c) appoint or make rules for the appointment or election of a committee to carry out the purpose of this Act in the notified area. Brother Sinha has stated the relevant facts and recorded his opinion upon the relevant part of Section 383. Since we are concerned with Clause (c) aforementioned I may at once advert to it. How to read Clause (c) of Section 389:

389(c) Appoint or make rules for the appointment or election of a committee to carry out the purpose of this Act in the Notified Area.

Reading "appoint or make rules" separately this can be divided into two: (i) the State Government may by notification a committee to carry out the purpose of this Act in the notified area and (ii) the State Government may by notification make rules for the appointment or election of a committee to carry out the purpose of this Act in the notified area. Act of appointing by the notification and act of making rules for the appointment or election by notification have been put in one equation and at part while in the latter case it is a delegated legislative power in the former case it is a discretion to select personnel to function as the notified area committee, an executive act although coloured as a legislative act. What is the intention of the legislature? On the one hand to leave all discretion with the State Government and on the other hand to empower it to make rules so that its discretion is put to constraints. The former has got a look of arbitrariness. The latter provides the safeguard. It is, therefore, possible to read the disjunctive or word between appoint or make rules as "and" and read Clause (c), "the State Government may appoint and make rules for the appointment or election of a committee to carry out the purpose of this Act in the notified area. It has been often said that language is an imperfect vehicle of thought. Legislatures exercise their wisdom and waste no words, still they leave such imperfections or ambiguities which are required to be resolved by the courts. As in the case of auxiliaries so in the case of words like "or" and "and" mistakes occur. They are entered changed and read in the context and in the light of the scheme of the law. Brother Sinha has agreed that the State Government cannot make arbitrary appointment of a notified area committee. He has expressed that the State Government has to control its discretion by the guidelines available in

the Act. I, however, think that controversies that may erupt at every constitution of a Notified Area Committee can be avoided by giving to Section 389(c) a clear and unambiguous meaning that the State Government may by notification make rules for the appointment or election of a committee to carry out the purpose of the Act in the notified area and appoint such committee in accordance with the rules so framed. Until rules are framed there shall always be a likelihood of the power to appoint the committee being abused.

My observations, however, do not mean that I intend to differ with the conclusions recorded by Brother Sinha. Even by the method of reasoning of my own I am sure no other conclusion is possible but I must add that the State Government shall be well advised to make rules for appointment or election of the Notified Area Committee and make appointments accordingly. By not doing so the State Government shall keep its intentions suspect.