

(2017) 03 OHC CK 0063

In the Orissa High Court

Case No : 4398 of 2017(In the matter of an application under Articles 226 and 227 of the Constitution of India)

Sukhalal Munda

APPELLANT

Vs

State of Odisha and others

RESPONDENT

Date of Decision : 30-03-2017

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs

General Clauses Act, 1897, Section 23 -
Provisions applicable to making of rules or bye-

Citation : (2017) 03 OHC CK 0063

Hon'ble Judges : Vineet Saran, B.R. Sarangi

Bench : DIVISION BENCH

Final Decision : Allowed

Judgement

1. Part-IX has been added to the Constitution consisting of Articles 243 to 243-O and a new Schedule, viz., Eleventh Schedule has also been added by the Constitution (Seventy-third Amendment) Act, 1992 with effect from 24.04.1993. The amendment is intended to give effect to Article 40 of the Directive Principles of State Policy. Article 40 directs the State to take steps to organize Village Panchayats and vest them with such powers and authority and may be necessary to enable them to function as units to self-Government. The object of Part IX was to introduce the panchayat system at grass root level. As panchayat systems were based on State Legislation, and their functioning was unsatisfactory, the amendment to the Constitution sought to strengthen the panchayat system by giving a uniform Constitutional base, so that the panchayats became vibrant unit of administration in rural area by establishing strong, effective and democratic local administration, so that there can be rapid implementation of rural development programmes. A uniform three-tier system of Panchayats, i.e., at village, intermediate and district level, has been created throughout the country. Their term is fixed for five years and new elections are to be held before the

period expires. There is reservation for scheduled castes/scheduled tribes and women for the post of members, as well as chairperson. It is also provided that all the reserved seats are to be allotted by rotation of different constituents in a Panchayat. The aim of rotation may be to draw into political process, members of vulnerable groups in all areas. The State Government is empowered to confer upon Panchayat institution the right to implement schemes relating to twenty-six subjects inserted in the Eleventh Schedule. 2. To achieve those avowed objectives, after completion of five years tenure, the Government of Odisha in Panchayati Raj Department vide notification issued under sub-rule (2) of Rule 3 of the Odisha Zilla Parishad Election Rules, 1994 published in Official Gazette on 23.12.2016, called upon all the Parishad Constituencies in the State to elect their Members for the purpose of constituting the Zilla Parishads. Consequentially, in exercise of power conferred under Article 243-K of the Constitution of India and sub-rule (1) of Rule 4 read with Rules 20, 36 and 47 of the aforesaid Rules, the State Election Commission, by the notification dated 27.12.2016, appointed the date and time with respect to conduct of election. From the date of notification, i.e. 27.12.2016, the election process was to continue till the date of publication of names of duly elected Vice-President by the Commission i.e., 27.03.2017. As such, the model code of conduct issued by the Commission would remain in force from the date of issuance of notification till the final publication of the results. During continuation of the election process, a notification was issued on 08.03.2017 by the State Government, in exercise of power conferred by Section-51 of the Odisha Zilla Parishad Act, 1991 (Odisha Act 17 of 1991) amending the Odisha Zilla Parishad Election Rules, 1994 by inserting Rule 51A after the Rule 51 of the existing Rules, which is the subject-matter of challenge in this application. Rule 51A of Odisha Zilla Parishad Election (Amendment) Rules, 2017 is extracted hereunder: "51A. (1) Every political party, whose member as an elector casts a vote for the purpose of election to the office of the President, or as the case may be, the Vice-President, may appoint one authorised agent and the President or the General Secretary of the State Level Political Party/State unit of the National Political Party shall, in writing, inform the same to the Election Officer with full details of the authorised agent proposed to be so engaged for the said election prior to the scheduled date of election. (2) Notwithstanding anything contained in Rules 50 and 51, the Election Officer shall, between the period, when an elector being a member of a political party records his vote on a ballot paper and before such elector inserts that ballot paper into the ballot box, allow the authorised agent of that political party to verify as to whom such elector has cast his vote." 3. The petitioner is a Social activist and is an active member of Bharatiya Janata Party (BJP). He has been elected as Zilla Parishad Member of Sundargarh District as a candidate of BJP. The petitioner is affected and prejudiced by the Odisha Zilla Parishad Election (Amendment) Rules, 2017 notified on 08.03.2017, when the Zilla Parishad Election for the posts of President and Vice-President was fixed to 12.03.2017 and 24.03.2017 respectively. takeover 4. Dr. A.K. Mohapatra, learned Senior Counsel appearing along with Mr. S.P. Mangaraj, learned counsel for the petitioner strenuously urged

before this Court that such notification dated 08.03.2017 (Annexure-1) issued by the State Government inserting Rule 51A after Rule 51 of Odisha Zilla Parishad Election Rules, 1994, by way of amendment, is without jurisdiction, meaning thereby the State Government lacked jurisdiction to add Rule 51A as it was violative of Article 243K(4) read with Section 51 of the Odisha Zilla Parishad Act, 1991. Further, the notification dated 08.03.2017 suffers from the procedure as envisaged under Section 51(1) of the Odisha Zilla Parishad Act, 1991, where the previous publication is a pre-requisite to make Rules consistent with the provisions of the Act. The same having not been complied with, the amendment made by inserting Rule 51A is ultra vires the provisions contained in Section 51(1) of the Odisha Zilla Parishad Act, 1991. It is contended that a bare look at the provisions contained in amending Rule 51A(2), wherein it has been stated that when an elector being a member of a political party records his vote on a ballot paper and before such elector inserts that ballot paper into the ballot box, allow the authorised agent of that political party to verify as to whom such elector has cast his vote, would show that the very sanctity of "secrecy of ballots", which is the paramount consideration under the provisions of the Odisha Zilla Parishad Act, 1991 vis-a-vis the Representation of the People Act, 1950, has been infringed. Therefore, such provision is ultra vires the statute and the mandate of free and fair election is grossly affected by such amendment, which is not permissible under law. To substantiate his contention, he has relied upon the judgments of the apex Court in Smt. Rekha Rana v. Jaipal Sharma, AIR 2009 SC 2946; Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari, AIR 2014 SC 1290; Krishnamoorthy v. Sivakumar, AIR 2015 SC 1921; State of Kerala v. P.J. Joseph, AIR 1958 SC 296; Govind Lal Chagga Lal Patel v. The Agriculture Produce Market Committee, AIR 1976 SC 263; State of Madhya Pradesh v. Ram Ragubir Prasad Agarwal, AIR 1979 SC 888; State of Uttar Pradesh v. Jogendra Singh, AIR 1963 SC 1618; The Official Liquidator v. Dharti Dhan (P) Ltd. AIR 1977 SC 740 and K. Manjusree v. State of Andhra Pradesh, (2008) 3 SCC 512. 5. Mr. S.P. Mishra, learned Advocate General appearing along with Mr. P.K. Rath, learned counsel for the State opposite parties contended that Rule 51A, which has been inserted by way of amendment to the Rules, 1994, is well within the competence of the authority concerned. In order to give effect to the provisions contained in Section 33B of the Odisha Zilla Parishad (Amendment) Act, 2015, which came into effect from 10.12.2015, the Rule-51A has been inserted by issuing impugned notification to implement and give effect to the said provision of the Act. The Odisha Zilla Parishad Election Rules, 1994, which is in existence, having been framed by following due procedure envisaged under Section 51 of the Odisha Zilla Parishad Act, by issuing previous publication, the amending Rules which have been notified inserting Rule 51A does not require to follow the principles of previous publication, as it is in addition to the Rules already in existence and provisions contained in section 33B of the Act. It is further contended that Section 51(1) is directory in nature and not mandatory, because of use of the word "may" in the said provision and the said word "may" cannot be construed as "shall". Therefore, it gives discretion to the authority in making

Rules to implement and to give effect to the provisions contained in Section 33B, as nothing new has been added in the Rule. Further, it is contended that Section 23 of the General Clauses Act is to be followed only when it is mandatory. As such, when a specific procedure has been prescribed under Odisha Zilla Parishad Act in Section 51(1), the principle of General Clauses Act may not apply in the present context. By incorporating such amending Rule 51A, it does not affect the secrecy of ballots by disclosing the same to the agent. As such, this has been done keeping in view the similar notification issued for conducting election for Rajya Sabha. Thereby, no illegality or irregularity has been committed by the State authority by issuing such notification. In support of his contention, he placed reliance on the judgment of the apex Court in *State of Tamilnadu v. K. Sabanayagam*, (1998) 1 SCC 318. 6. Mr. P. Acharya, learned Senior Counsel appearing along with Mr. A. Satpathy, learned counsel for the State Election Commission contended that the notification for conducting Zilla Parishad Election was issued under Rule 3 of the Odisha Zilla Parishad Rules, 1994. The date of election has been fixed as per Rule 4, which is *pari materia* to the provisions contained in Article 243E of the Constitution. As such, the notification having been issued by the Election Commissioner on 27.12.2016, the election process started from that date till the results are published, i.e., 27.03.2017. When the election process is continuing, State Election Commission is the only competent authority, and not the State, to issue instructions or guidelines for free and fair election, as contemplated under the Constitution, read with respective Acts and Rules governing the field. It is emphatically contended that during the poll process, even the legislature cannot make any change in Election Laws, and more so once the election process has been started, the Supreme Court under Article 32 and the High Court under Article 226 of the Constitution of India, though have got jurisdiction, will not interfere during such election process, even if law is changed during continuation of such poll process. It has been further urged with vehemence that the notification dated 08.03.2017 so issued by the State Government, which is under challenge, should not have been issued during continuation of election process. More particularly, the law cannot also be changed, what to speak of Rules governing the field. Once the election process starts, the State Government lacks jurisdiction to issue such notification by inserting Rule 51A to the Odisha Zilla Parishad Election Rules, 1994. More so, the provisions contained in the Representation of the People Act, 1950 being *mutatis mutandis* applicable to the election to the Zilla Parishads, the secrecy of vote is not to be infringed as per Section 94 of the Representation of the People Act, 1950. Though the expression has been used as open ballot in the said provision, that *ipso facto* cannot be incorporated by way of inserting Rule 51A, when the election process is in continuation. To substantiate his contention, he has relied upon the judgment of the apex Court in *Mohinder Singh Gill v. The Chief Election Commissioner*, New Delhi, (1978) 1 SCC 405: AIR 1978 SC 815 (CB); *Kishansing Tomar v. Municipal Corporation of the City of Ahmedabad*, (2006) 8 SCC 353; Special Reference No.1 of 2002 (Gujarat Assembly Election matter), In Re: (2002) 8 SCC 237; and *A.C. Jose v. Sivan Pillai*, (1984) 2 SCC 656. 7. We have

heard learned counsel for the parties. Pleadings having been exchanged between the parties and on perusal of records, as well as with consent of learned counsel for the parties, the matter is disposed of at the stage of admission. 8. On the basis of the contention raised by learned counsel for the parties three questions are to be considered:- (1) Whether the State Government lacks jurisdiction to amend the Odisha Zilla Parishad Election Rules, 1994, when the election process has already been started? (2) For amendment of the Rules, whether previous publication inviting suggestions and objections is required under Section 51(1) of the Act or not? (3) Whether such amending Rule 51A affects the secrecy of ballots or not? 9. For framing of Rules including amendment, whether the previous publication inviting objections and suggestions is required under law, is the prime consideration for the case in hand. Therefore, we are considering the question no.(2) first. To achieve the avowed objective of the Twenty-seventh amendment of the Constitution, the State legislature enacted law called, the Odisha Zilla Parishad Act, 1991 to establish Zilla Parishads in the State of Odisha. Section 2(1) defines "Zilla Parishad" means the body constituted under Sub-Section (1) of Section (3). The Government may, by notification constitute a Parishad for every district. It is profitable to refer Section 6 (1) and (2) of Odisha Zilla Parishad Act, 1991, which reads as under : "6. Members of Parishad- (1) The Parishad shall consist of the following members namely : (a) one member elected directly on the basis of adult suffrage from every constituency within the Parishad area. (b) Chairman of each Samiti situated within the district. (c) every member of the House of the People and of the State Legislative Assembly representing constituencies which comprise wholly or partly the area of the Parishad; (d) members of the Council of States who are registered as electors within the area of the Parishad. xx xx xx (4)(a) The election of members specified in clause (a) of sub-section (1) shall be held in the prescribed manner. Provided that where such election is contested on political party basis, the candidate contesting such election shall use their respective party symbols. (b) In the absence of any provision in this Act or the rules, the provisions of the Representation of the People Act, 1950 and Representation of the People Act, 1951 shall mutatis mutandis apply for the purposes of election to Parishads in the following matters, namely :- (i) preparation, revision and updating of electoral rolls; (ii) appointment of Electoral Registration Officers, Presiding Officers and Polling Officers; (iii) qualifications and disqualifications for registration as voter; (iv) such other matters which have to be, or may be required to be, dealt with for the purpose of conducting free and fair election. (c) Unless the Election Commission, by order published in the Gazette directs otherwise, so much of the electoral roll of the Assembly Constituency for the time being in force as relates to a Parishad Constituency shall, subject to such revision or updating as may be necessary, be the electoral roll of the Parishad Constituency for the purpose of election to the Parishad. Section 6-A states that superintendence, direction and control of elections shall be vested in State Election Commission. Section 8 deals with election of President and Vice-President. Sub-section (1)(a) of Section 8 is reproduced below: "Section 8: (1)

(a) at its first meeting which shall be convened within twenty-two days, but not before the expiry of seven days, from the date of publication of the names under sub-section (2) of Section 6, elect in the prescribed manner a President from among them." Section 51 deals with power to make Rules, which is reproduced herein below: "51. Power to make rules - (1) The Government may, after previous publication, make rules consistent with the provisions of this Act to carry out all or any of the purposes of this Act and prescribe forms for any matter which they consider that a form should be provided. (2) In particular and without prejudice to the generality of the foregoing powers such rules may provide for- (i) the conditions subject to which property may be acquire or transferred by sale, mortgage, lease, exchange or otherwise by a Parishad; (ii) regulating the duties, functions and powers of a Parishad; (iii) generally determining the relations between Grama Panchayat Samitis and the Parishad for the guidance of Parishads in all matter connected with the carrying out of the Provisions of this Act; (iv) regulation of all elections under this Act, including deposits to be made by candidates at an election to the office of the President, the conditions for forfeiture of refund of such deposit and the qualifications of a proposer or seconder; (v) specifying the responsibility of the District Level Officers of the Government to the Parishads; (vi) any other matter which has to be, or may be, prescribed under this Act." (Emphasis supplied) 10. On perusal of the provision contained under sub-section(1) of Section 51 the Government may, after previous publication, make Rules consistent with the provisions of this Act, to carry out all or any of the purposes of the Act with regard to regulation of all elections under this Act. Following the aforesaid provisions of sub-section(1) of Section 51, different Rules have been framed, namely, the Orissa Zilla Parishad Election Rules, 1994, the Orissa Zilla Parishad (Conduct of Business) Rules, 1996, the Orissa Zilla Parishad (Division and Reservation of Constituencies) Rules, 1995 and the Orissa Zilla Parishad (Constitution of Standing Committees) Rules, 2000. For better appreciation, the preambles of these rules are reproduced below: "The Orissa Zilla Parishad Election Rules, 1994 The 31st August, 1994 S.R.O. No. 796/94- Whereas the draft of certain rules was published as required under Subsection (1) of Section 51 of the Orissa Zilla Parishad Act, 1991 (Orissa Act 17 of 1991) in the extraordinary issue No. 630, dated the 31st May 1994 of the Orissa Gazette under the notification of the Government of Orissa in the Panchayati Raj (Grama Panchayat) Department No. 8581- G.P. dated the 25th May 1994, bearing S.R.O. No. 523/94, inviting objections and suggestions from all persons likely to be affected thereby till the expiry of a period of fifteen days from the date of Publication of the said notification in the Orissa Gazette. And whereas no objection or suggestion has been received by the State Government; (Emphasis supplied) The Orissa Zilla Parishad (Conduct of Business) Rules, 1996 The 19th July, 1996 S.R.O. No.459/96- Whereas the draft of certain rules was published as required under Subsection (1) of Section 51 of the Orissa Zilla Parishad Act, 1991 (Orissa Act 17 of 1991) in the extraordinary issue No. 1429 of the Orissa Gazette, dated the 19th December, 1955, under the notification of the Government of Orissa in the

Panchayati Raj (Grama Panchayat) Department No.26266/G.P. dated the 18th December 1995, as S.R.O. No.1446/95, inviting objections and suggestions from all persons likely to be affected thereby till the expiry of a period of fifteen days from the date of Publication of the said notification in the Orissa Gazette. And whereas no objection or suggestion has been received by the State Government; (Emphasis supplied) The Orissa Zilla Parishad (Division and Reservation of Constituencies) Rules, 1995 The 30th October, 1995 S.R.O. No.1166/95- Whereas the draft of certain rules was published as required under Subsection (1) of Section 51 of the Orissa Zilla Parishad Act, 1991 (Orissa Act 17 of 1991) in the extraordinary issue No. 1110, dated the 29th September 1994 of the Orissa Gazette, under the notification of the Government of Orissa in the Panchayati Raj (Grama Panchayat) Department No. 19263 G.P., dated the 29th September 1995, bearing S.R.O. No. 1059/95, inviting objections and suggestions from all persons likely to be affected thereby till the expiry of a period of fifteen days from the date of Publication of the said notification in the Orissa Gazette. And whereas no objection or suggestion has been received by the State Government; (Emphasis supplied) The Orissa Zilla Parishad (Constitution of Standing Committees) Rules, 2000 The 25th September, 2000 S.R.O. No. 641/2000- Whereas the draft of the Orissa Zilla Parishad (Constitution of Standing Committees) Rules, 1999 was published as required under Sub-Section (1) of Section 51 of the Orissa Zilla Parishad Act, 1991 (Orissa Act 17 of 1991), in the extraordinary issue No. 887 of the Orissa Gazette, dated the 20th June 2000 under the notification of the Government of Orissa in the Panchayati Raj (Grama Panchayat) Department No. 9082-G.P., dated the 19th June 2000 as S.R.O. No. 422/2000, inviting objections and suggestions from all persons likely to be affected thereby till the expiry of a period of thirty days from the date of Publication of the said notification in the Orissa Gazette. And Whereas no objection or suggestion has been received by the State Government;" (Emphasis supplied) All the above Rules clearly indicate that the same have been framed under Sub-Section(1) of Section 51 of the Orissa Zilla Parishad Act, 1991 published in official gazette by inviting objections and suggestions from all persons likely to be affected thereby within a period of fifteen days/thirty days, as the case may be, from the date of publication of the said notification in the Orissa Gazette. Therefore, all these Rules have followed the mandate put in Sub-Section(1) of Section 51 of making previous publication by giving time for inviting objection and suggestions from all likely to be affected. The amending Rules, which are notified on 8th March, 2017, the preamble is as follows: "S.R.O. No. 95/2017- In exercise of the powers conferred by section -51 of the Odisha Zilla Parishad Act, 1991 (Odisha Act 17 of 1991), the State Government do hereby make the following rules further to amend the Odisha Zilla Parishad Election Rules, 1994 namely:-" On perusal of the aforesaid provision, it clearly indicates that no previous publication has been given as required under Sub-Section(1) of Section 51 of the Orissa Zilla Parishad Act, 1991 by inviting objections and suggestions from the persons likely to be affected by the said notification published in the official gazette. 11. Section 23 of the General

Clauses Act, 1897 states as follows: "23. Provisions applicable to making of rules or bye-laws after previous publication- Where, by any Central Act or Regulation, a power to make rules or bye-laws is expressed to be given subject to the condition of the rules or bye-laws being made after previous publication, then the following provisions shall apply, namely,- (1) the authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby; (2) the publication shall be made in such manner as that authority deems to be sufficient or if the condition with respect to previous publication so requires, in such manner as the government concerned prescribes; (3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration; (4) the authority having power to make the rules or bye-laws, and, where the rules, or bye-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye-laws from any person with respect to the draft before the date so specified; (5) the publication in the Official Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye-laws after previous publication shall be conclusive proof that the rule or bye-law has been duly made." The aforementioned provision clearly puts a mandate that whereby any Central Act or Regulation, a power to make Rules or bye-laws is expressed to be given subject to the condition of the Rules or bye-laws being made after previous publication, then it has to follow the provisions as envisaged under sub-section(1) to sub-section(5). Similarly, Orissa General Clauses Act, 1937, Section 24 also provides such previous publication, which quoted below: 24. Provisions applicable to making of rules or bye-laws after previous publication.- Where, by any Orissa Act, a power to make rules or by-laws is expressed to be given, subject to the condition of the rules or by-laws being made after previous publication, then the following provisions shall apply:- (1) the authority having power to make the rules or by-laws shall, before making them, publish a draft of the proposed rules or by-laws for the information of persons likely to be affected thereby; (2) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires in such manner as the Central Government or as the case may be, the State Government prescribes; (3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration; (4) the authority having power to make the rules or by-laws, and, where the rules or by-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the roles or bylaws from any person with respect to the draft before the date so specified; (5) the publication in the Gazette of a rule or by-law purporting to have been made in exercise of a power to make rules or by-laws after previous publication shall be conclusive proof that the rule or by-law has been duly made. Both, under the Central Act as well as State Act, as mentioned

above, Sections 23 and 24 respectively envisaged that the power to make Rules or bye-laws is expressed to be given, subject to the condition of the Rules or bye-laws being made after previous publication. 12. The meaning of "previous publication" had come up for consideration by Calcutta High Court in *Brojendra Kumar Saha v. Union of India*, AIR 1961 Cal. 217 it was held as follows :
 "Previous Publication" -Meaning of.- Previous publication means- (i) the authority concerned must public a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby; (ii) the manner of publication is left to the authority concerned unless it has been otherwise prescribed by the Government; (iii) along with the draft rules, a notice must also be published specifying a date on or after which the draft is to come up for consideration; (iv) the said authority must then consider any objections or suggestions which may have been received before the specified date; and (v) then after all these requirements have been fulfilled, the rule or the bye-laws, as the case may be, as finalized, must be published in the Official Gazette and a certain presumption then arises under Section 23(5) that the rule of byelaws have been duly made." Similar view has also been taken in *Munna Lal Tewari v. H.R. Scott*, AIR 1995 Cal. 451 and in *Automobile Transport, Rajasthan (P) Ltd. v. State of Rajasthan*, AIR 1962 Raj. 24 13. The word "ultra" means "beyond" and "vires" means "powers". A simple meaning of the term is "beyond powers"; in a strict sense, therefore, the expression is used to mean any act performed in excess of powers of the authority or the person who performs the act. 14. Prof. H.W.R. Wade in his book "Administrative Law" observed: "The ultra vires doctrine is, therefore, not confined to cases to plain excess or power; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by the wrong procedure. In law the consequences are exactly the same; an improper motive or a false step in procedure makes an administrative act just an illegal as does a flagrant excess of authority. Unless the Courts are able to develop doctrines of this kind, and to apply them energetically, they cannot impose limits on the administrative powers which Parliament confers so freely, often in almost unrestricted language." The term "ultra vires," therefore, not only means "beyond powers" but also "wholly unauthorized by law" and, thus void. 15. Basically ultra vires character of an Act may be two-fold, (i) simple ultra vires, and (ii) procedural ultra vires. (i) Simple ultra vires-An act may be said to acquire the character of simple ultra vires when the person does the act in excess of the power conferred on him. (ii) Procedural ultra vires-Procedural ultra vires may happen when there is a failure to comply with mandatory procedural requirements. All procedural requirements as laid down by statute should be complied with. The doctrine now refers to not only the lack of power to do any act but also to any situation like improper or unauthorized procedure, purpose or violation of the law of natural justice in exercising the power that is lawfully conferred on the authority concerned. In *Shri Sitaram Sugar Company Ltd. v. Union of India*, (1990) 3 SCC 223 : AIR 1990 SC 1277, the apex Court held: "A repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or by acting in bad faith or for an inadmissible purpose or for

irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. Any act of the repository of power, whether legislative, administrative or quasi-judicial, is open to challenge if it violates the provisions of the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it." The doctrine of ultra vires can cover virtually all situations where statutory power is exercised contrary some legal principles. 16. Considering the language "employed" in section 51(1) of the Orissa Zilla Parishad Act, 1994 read with Section 23 of General Clauses Act, 1897 and Section 24 of the Orissa General Clauses Act, 1937, it puts a mandate to have a previous publication before the rule is enacted, which come under the procedural ultra vires. If the procedure envisaged therein has not been followed, then the notification issued on 08.03.2017 is to be construed ultra vires the provisions of the Act itself. 17. In view of provisions contained in Section 51(1) of Odisha Zilla Parishad Act, 1991 by using of word "may" should be read as "shall" is to be considered as mandatory for requiring the previous publication for enacting the amending the Rules. 18. In *State of Kerala v. P.J. Joseph*, AIR 1958 SC 296, the Constitution Bench of the apex Court held: "All the licenses issued to the respondent were in Form F.L. 1 and he paid Rs. 2,000 for each of them. The imposition of a further duty under Section 17 read with Section 18 by way of fees on licenses for sale would obviously, therefore, amount to an amendment of the provisions of R. 7 of the Cochin Abkari Rules under which the licenses had been issued. Section 69 of the Act requires that all rules made or notifications issued under this Act shall be made and issued by publication in the Cochin Sarkar Gazette. The section further provides that all such rules and notifications so published shall thereupon have the force of law and be read as part of this Act and might in like manner be varied, suspended and annulled. The rules, which included R. 7 under which the licenses in question had been issued, have been published in Cochin Sarkar Gazette and those rules have the force of law and have to be read as part of the Act and can only be varied, suspended or annulled in like manner, i.e., by a rule or notification similarly published. It is conceded that the endorsement at the foot of the Exb. (1), which is said to be a statutory order made under Section 17 and which obviously varied the provisions of R. 7 by enhancing the fee on licences by adding a 20% commission to the fee already paid was not published in the Cochin Sarkar Gazette. It follows, therefore, that even if the endorsement could be regarded as a rule or notification prescribing the levy of duty, not having been published in the manner aforesaid, the same cannot be regarded as a valid order having the force of law and, therefore, the impost cannot be said to be supported by authority of any law. Learned counsel faintly suggested that the endorsement in question was neither a rule nor a notification but was an order and was, therefore, not governed by Section 69. Section 18 being the machinery section for working out Section 17, and the alleged order not being in terms or form an imposition of a fee on license for sale, under Section 18 Clause (d) learned counsel could not refer us to any other section in the Act under which an order of the kind appearing at the foot of Exb. (1) could be made or show us

under what provision of law could such an order have legal effect without its publication in the official Gazette. Assuming the endorsement at the foot of Exb. (1) was an order, not having been published in the official Gazette, it cannot, by reason of Section 69, in any way vary R. 7 which fixes the fee on licenses in Form F.L. 1 at Rs. 2,000 per annum. The fact of the matter is that the impost was nothing but an executive order, if an order it was, which had no authority of law to support it and was, therefore, an illegal imposition." 19. In *Govind Lal Chagga Lal Patel v. The Agriculture Produce Market Committee*, AIR 1976 SC 263 the apex Court in paragraphs 16 and 18 held as follows: "16. The object of these requirements is quite clear. The fresh notification can be issued only after considering the objections and suggestions which the Director receives within the specified time. In fact, the initial notification has to state expressly that the Director shall consider the objections and suggestions received by him within the stated period. Publication of the notification in the Official Gazette was evidently thought by the legislature not an adequate means of communicating the Director's intention to those who would be vitally affected by the proposed declaration and who would therefore be interested in offering their objections and suggestions. It is a matter of common knowledge that publication in a newspaper attracts greater public attention than publication in the Official Gazette. That is why the legislature has taken care to direct that the notification shall also be published in Gujarati in a newspaper. A violation of this requirement is likely to affect valuable rights of traders and agriculturists because in the absence of proper and adequate publicity, their right of trade and business shall have been hampered without affording to them an opportunity to offer objections and suggestions, an opportunity which the statute clearly deems so desirable. By Section 6(2), once an area is declared to be a market area, no place in the said area can be used for the purchase or sale of any agricultural produce specified in the notification except in accordance with the provisions of the Act. By Section 8 no person can operate in the market area or any part thereof except under and in accordance with the conditions of a licence granted under the Act. A violation of these provisions attracts penal consequences under Section 36 of the Act. It is therefore vital from the point of view of the citizens' right to carry on trade or business, no less than for the consideration that violation of the Act leads to penal consequences, that the notification must receive due publicity. As the statute itself has devised an adequate means of such publicity, there is no reason to permit a departure from that mode...." xx xx xx "18. We are therefore of the opinion that the notification issued under Section 6(5) of the Act like that under Section 6 (1), must also be published in Gujarati in a newspaper having circulation in the particular area. This requirement is mandatory and must be fulfilled. Admittedly, the notification (Ex. 10) issued under Section 6(5) on February 16, 1968 was not published in a newspaper at all, much less in Gujarati. Accordingly, the inclusion of new varieties of agricultural produce in that notification lacks legal validity and no prosecution can be founded upon its breach." 20. In *State of U.P. v. Jogendra Singh*, AIR 1963 SC 1618 the apex Court in paragraph-8 held as follows: "The word "'may" generally does not mean

"must" or "shall". But it is well-settled that the word "may" is capable of meaning "must" or "shall" in the light of the context. Where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command. Sometimes, the legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed." 21. In *State of U.P. v. Manbodhan Lal Shrivastava*, AIR 1957 SC 912, the apex Court held as follows: "The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other." Similar view has also been taken by the apex Court in *State of M.P. v. Pradeep Kumar*, (2000) 7 SCC 372 and *Sarka Goel v. Krishanchand*, (2009) 7 SCC 658. 22. In *State of U.P. v. Babu Ram Upadhya*, AIR 1961 SC 751, at page 765 the apex Court held as follows: "the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provision in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered." Similar view has also been taken by the apex Court in *Rubber House v. Excellsior Needle Industries Pvt. Ltd.*, AIR 1989 SC 1160. 23. In *Bhikraj Jaipuria v. Union of India*, AIR 1962 SC 113 the apex Court held that if object of the enactment will be defeated by holding the same directory, it will be construed as mandatory. The same view has also been followed in *Raja Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur*, AIR 1965 SC 895. 24. Even though the word "may" used in Section 51(1) of the Odisha Zilla Parishad Act, 1991 under the Rule making power of the Government, but the irresistible conclusion can be drawn on the basis of the Rules, which have been framed under the said provisions, preambles of which have been mentioned above, the word "may" has been used as "shall" by making it mandatory to have the previous publication inviting objections and suggestions from the affected parties. In such view of the matter, the contention raised by the learned Advocate General, that the provision is directory one, is not tenable in the eye of law. Rather, by conduct, if the provisions have been given effect to by inviting objections and suggestions from the affected parties by making previous publication, as required under the Act and the provisions contained in General Clauses Act, the same has to be followed scrupulously. Nonobservance of the provisions contained in Section 51(1) of the Odisha Zilla Parishad Act, 1991 read with Section 23 of the General Clauses Act (Central Act) and Section 24 of Orissa General Clauses Act, 1937, the amendment made to the Odisha Zilla Parishad Rules by inserting Rule 51A in the impugned notification dated 08.03.2017

during the election process cannot sustain in the eye of law. Thereby, the question no.2 is answered in affirmative. 25. As regards question no.1, by virtue of the notification issued by the Election Commission dated 27.12.2016, the election process started from that date and it will continue till 27.03.2017 by publication of names of the duly elected Vice-president by the Commission. When the election process is continuing, the State Government in exercise of power under Section 51 of the Act issued the notification dated 08.03.2017 in Annexure-1 by amending Odisha Zilla Parishad Election Rules, 1994 inserting Rule 51A after Rule 51. The contention of learned Advocate General is that such notification has been issued only to implement and give effect to the provisions contained in Section 33B of the Act and nothing new has been added in the Rules itself. Since Section 51(1) is directory one but not mandatory, by using the word "may" no illegality has been committed by issuance of such notification. 26. No doubt Section 33B has been inserted by way of amendment in December, 2015, pursuant to which the notification was issued on 04.01.2016. Section 33B deals with disqualification on the ground of defection, which is reproduced below: "33-B. Subject to the provisions of Section 33-C,- (i) if an elected member of the Parishad belonging to any political party voluntarily gives up his membership of such political party, or if such member, contrary to any direction issued by the political party to which he belongs or by a person or authority authorised by it in this behalf, votes or abstains from voting, without obtaining prior permission of such political party, person or authority, in a meeting of the Parishad, in an election of its President, Vice-President, a member of a Standing Committee, or the Chairman of a Standing Committee, or in a voting on a no confidence motion against any one of them; and (ii) if an independent member joins any political party after becoming a member of the Parishad; he shall be disqualified for being a member of that Parishad. Explanation.- For the purpose of this section an elected member or an independent member of the Parishad shall be deemed to be the member referred to in Clause (a) of sub-section (1) of Section 6." The amending Rules dated 08.03.2017 have been issued to implement and to give effect to the said provisions of the Act. As such, nothing new has been added. 27. May it be that nothing new has been added under the Amending Rules, the question remains whether the State Government can issue such notification once the election process starts? 28. It is profitable to quote Articles 324 and 243K of the Constitution: "324. Superintendence, direction and control of elections to be vested in an Election Commission.-(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission). (2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President. (3) When any other Election

Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission. (4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1). (5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine: Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner. (6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1)." "243K. Elections to the Panchayats.-(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor. (2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine: Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment. (3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1). (4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats." 29. The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Panchayats shall be vested in the Election Commission consisting of Chief Election Commissioner to be appointed by the Governor. Since all the elections to Panchayats shall be vest in the State Election Commission, once the notification has been issued on 27.12.2016 declaring the election process which is to continue till 27.03.2017, all the powers had been vested with the State Election Commissioner. Once the election process starts, the State Government is denuded with power of issuing any instruction, direction for conduct of election,

unless the process is over. There is a bar under Article 243O to interference by Court in electoral matter. 30. In *Mohinder Singh Gill* (supra), the Constitution Bench of the apex Court in paragraphs 36 to 40 and 92 held as follows: 36. Having held against the maintainability of the writ petition, we should have parted with the case finally. But counsel for both the candidates and, more particularly, the learned Additional Solicitor General, appearing for the Election Commission, submitted that the breadth, amplitude and implications, the direction and depth of Article 324 and, equally important, the question of natural justice raised under Article 324 are of such public importance and largely fallow field going by prior pronouncements, and so strategic for our democracy and its power process that this Court must decide the issue here and now. Article 141 empowers and obligates this Court to declare the law for the country when the occasion asks for it. Counsel, otherwise opposing one another, insistently concurred in their request that, for the working of the electoral machinery and understanding of the powers and duties vested in the functionaries constituting the infrastructure, it is essential to sketch the ambit and import of Article 324. This point undoubtedly arises before us even in considering the prohibition under Article 329 and has been argued fully. In any view, the Election Tribunal will be faced with this issue and the law must be laid down so that there may be no future error while disposing of the election petition or when the Commission is called upon to act on later occasion. This is the particular reason for our proceeding to decide what the content and parameters of Article 324 are, contextually limited to situations analogous to the present. 37. We decide two questions under the relevant article, not argued, but as substantive pronouncements on the subject. They are : "(a) What, in its comprehensive connotation, does the "conduct" of elections mean or, for that matter, the "superintendence, direction and control" of elections ? (b) Since the text of the provision is silent about hearing before acting, is it permissible to import into Article 324(1) an obligation to act in accord with natural justice ?" 38. Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function. It is true that Article 324 has to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualized in Article 327 the Commission cannot shake itself free from the enacted prescriptions. After all, as Mathew, J. has observed in *Indira Gandhi* : (supra) "In the opinion of some of the judges constituting the majority in *Bharati*'s case (supra), Rule of Law is a basic structure of the Constitution apart from democracy. The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere." And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system. 39. Even so,

situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words "superintendence, direction and control" as well as "conduct of all elections" are the broadest terms. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism--instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in *Virendra and Harishankar* discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J. "But the electorate lives in the hope that a sacred power will not so flagrantly be abused-and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power." 40. The learned Additional Solicitor General brought to our notice rulings of this Court and of the High Courts which have held that Article 324 was a plenary power which enabled the Commission to act even in the absence of specific legislation though not contrary to valid legislation. Ordering a re-poll for a whole constituency under compulsion of circumstances may be directed for the conduct of elections and can be saved by Article 324-provided it is bona fide necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll was because it failed to achieve that goal. While we repel Sri Rao's broadside attack on Article 324 as confined to what the Act has conferred, we concede that even Article 324 does not exalt the Commission into a law unto itself. Broad authority does not bar scrutiny into specific validity of the particular order. xx xx xx 92. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsise the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings : (1) (a) Article 329(b) is a

blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result. (b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.. (2) (a) The Constitution, contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances. (b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law, relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fair play-inaction in a most important area of the constitutional order, viz., elections. Fairness does import an obligation to see that no wrongdoer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of order for total repoll, although not in full penoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication. (3). The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage and procedure as predicated in Article 329(b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidates if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law." 31. After considering the law laid down by the Constitution Bench of the apex Court mentioned supra, in the midst of election process the impugned notification was issued, which should not be introduced during the continuance of the poll process, when the State Election Commission is in complete control over the entire election process. Needless to say that even during poll process legislature cannot make any change in the election law, as discussed by the Constitution Bench of the apex Court mentioned supra. More so, the Court will not interfere during the election process even if the law is changed during the continuance of the poll process. Consequentially, the impugned notification issued, could not, and should not have been issued, when the election process was continuing, and more so, when the legislature have been denuded of the power not to frame any law, then what to talk of inserting

the Amending Rules under the Rules. Mr. S.P. Mishra learned Advocate General relied upon the similar notification in order to conduct election to Rajya Sabha. But on query made by the Court it is candidly stated that such notification has not been issued during the poll process. So far as previous publication is concerned, nothing has been elucidated before us to satisfy with regard non-observance of the provision of law. Thereby, this Court is not inclined to accept the contention of the learned Advocate General. Therefore, we are of the view that the State authority has lacked jurisdiction to issue such notification dated 08.03.2017 in Annexure-1, when the election process is continuing. May it be, to implement or to give effect to the provisions of the Act itself, but that notification could not have been issued during the poll process. In such view of the matter, question no.1 is also answered in affirmative. 32. So far as question no.3 is concerned, we are of the considered opinion that we are not making any observation and discussion in the present context and the same can be done in a suitable case, if any occasion arises in future. 33. All other judgments referred to by the learned counsel for the parties, being not germane to be considered for just and proper adjudication of the case, have not been dealt in this case. 34. In view of the aforesaid fact and circumstances, as well as the settled position of law discussed above, we hold that the notification issued by the State authority in Annexure-1 dated 08.03.2017 during continuance of the process of election suffers from lack of jurisdiction by the authority concerned, more particularly when the provisions contained in Section 51(1) of the Odisha Zilla Parishad Act have not been followed, and as such notification being ultra vires to the said provision, is liable to be quashed and is hereby quashed. 35. The writ application is allowed. No order to cost.