

(1984) 12 KL CK 0010

In the High Court Of Kerala

Case No : O.P. No's. 8517, 8630, 8953 and 8954 of 1984

V.E. Vasudevan and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 14-12-1984

Acts Referred:

Constitution of India, 1950 — Article 213, 213(1)
Kerala Panchayat (Amendment) Ordinance, 1984 — Section 3, 4
Kerala Panchayat Act, 1960 — Section 1(2), 11(1)

Citation : AIR 1985 Ker 69

Hon'ble Judges : K. Bhaskaran, Acting C.J.; P.C. Balakrishna Menon, J; M.P. Menon, J

Bench : Full Bench

Advocate : Easwara Iyer and P. Radhakrishnan, for the Appellant; A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

Bhaskaran, Ag. C.J.

1. The backdrop of the case and the basic questions of law in all the four Original Petitions being the same, they were heard together and are being disposed of by this common judgment.

2. The challenge in O.P. No. 8517 of 1984 is directed against the Kerala Panchayats (Amendment) Ordinance, 1984 (hereinafter referred to as Ordinance No. 69 of 1984), with particular reference to Section 3 thereof. A true copy of Ordinance No. 69 of 1984 published in the Kerala Gazette Extraordinary dated 30th September, 1984 has been produced and marked as Ext. P4. The challenge in O.P. No. 8953 of 1984 and 8630 of 1984 is directed against the Kerala Municipalities (Second Amendment) Ordinance 1984 (hereinafter referred to as Ordinance No. 68 of 1984); a true copy of this has been marked as Ext. P2 in O.P. No. 8630 of 1984. The challenge in O.P. No. 8953 of 1984 is directed against the Kerala Municipal Corporations (Amendment) Ordinance of 1984 (hereinafter

referred to as Ordinance No. 67 of 1984). For the sake of convenience we would take up for consideration O.P. No. 8517 of 1984 in the first instance.

3. The facts are not much in dispute. Petitioners 1 and 2 respectively were the Vice-President of Cheriyanad Panchayat and the President of Aryod Panchayat for the period from 1-10-1979 to 30-9-1984. The 2nd petitioner also claims to be the General Secretary of the Kerala Panchayats" Association, Trivendrum. The first petitioner had filed O.P. No. 7163 of 1984 on 16-8-1984 against the respondents and others. In that writ petition, Civil Miscellaneous Petition No. 22303 of 1984 filed by the petitioner therein (first petitioner herein) was disposed of by this Court on 26-10-1984; and a true copy thereof has been produced and marked as Ext. PI in the present O.P. The operative portion of that order reads as follows:

"In the result, the C.M.P. is disposed of as follows :

1. Respondents are restrained from appointing any administrative committees or a special officer for any of the elected Panchayats in the State for a period of four months commencing from today.
2. Respondents will naturally take necessary steps for issue of appropriate notification under the proviso to Sub-section (1) of Section 11 of the Act."

It is further averred in the writ petition that a Division Bench of this Court declined to stay-the operation of Ext. PI interim order though an appeal was filed and interim stay was sought by the 1st respondent. It is the admitted case that that writ petition was ultimately dismissed as not pressed and the writ appeal against Ext. PI order has also been dismissed.

4. The counsel for the petitioners submitted that the respondents with political motives had omitted to take the steps necessary for holding the election of members to the Panchayats. Section 11(2) of the Kerala Panchayats Act, 1960 (Act 32 of 1960) (hereinafter referred to as the Act), provides as follows :

"Ordinary vacancies in the office of a member of a Panchayat shall be filled at ordinary elections which shall be fixed by the election authority to take place on such day or days within three months before the occurrence of the vacancies as he thinks fit.

Provided that the Government may for sufficient cause direct or permit the holding of any ordinary elections after the occurrence of the vacancy."

In terms of Section 2(19) of the Act, "ordinary vacancy" is a vacancy occurring by efflux of time and "ordinary election" means an election (to) fill an ordinary vacancy. The submission made by the counsel for the petitioners is that the respondents knowingly and deliberately omitted to make the necessary preparations and take steps for election of the Members to the Panchayat, which is a body constituted for the local administration of the Panchayat area under the Act, and this inaction on the part of the respondents was calculated to make an

unjustifiable and unfair gain to the ruling parties as their chance to succeed in the election, if held within the time specified u/s 11(2) of the Act in a majority of cases was remote. 80% of the Panchayats having been dominated by the opposition parties. It was in that background O.P. No. 7163 of 1984 was filed by the first petitioner herein seeking inter alia the issuance of a writ of prohibition restraining the respondent-State from appointing administrative committees or Special officers for the Panchayats in Kerala, and a writ of mandamus directing the respondent-State to extend the term of office of the petitioner and other members of the Panchayat Committees in Kerala. This Court had restrained by Ext. PI interim order the respondents from appointing any administrative committees or special officer in the place of elected representatives of the Panchayats for a period of four months from the date of that order and had directed the issue of appropriate notifications under" the proviso to Sub-section (1) of Section II of the Act.

5. Before proceeding further, it would be advantageous to notice the provisions contained in Sections 11 and 13 of the Act and the salient features of Ordinance No. 69 of 1984. Sections 11 and 13 of the Act read as follows

"11. Term of office of elected members.--

(1) The term of office of the members of every Panchayat who are elected at ordinary elections shall be five years beginning at noon on the day on which the vacancies occur :

Provided that the Government may, by notification in the Gazette, extend or reduce the said term by such period as may be specified in the notification.

(2) Ordinary vacancies in the office of a member of a Panchayat shall be filled at ordinary elections which shall be fixed by the election authority to take place on such day or days within three months before the occurrence of the vacancies as he thinks fit:

Provided that the Government may for sufficient cause direct or permit the holding of any ordinary elections after the occurrence of the vacancy.

(3) (a) Every casual vacancy in the office of member of a Panchayat shall be reported by the executive authority to the election authority within such time as may be prescribed.

(b) A member elected in casual vacancy shall enter upon office forthwith, but shall hold office only so long as the member in whose place he is elected would have been entitled to hold office if the vacancy had not occurred.

(c) Unless the Government otherwise directs, no casual election shall be held to a Panchayat within three months before the date of retirement of its members by efflux of time.

(4) Where the number of members of a Panchayat is increased, the members elected for the additional seats or the members elected in their places in casual

vacancies shall hold office until the date on which the members elected to the original seats at the ordinary elections immediately preceding will vacate office.

(5) If any person is elected as a member to more than one ward, he shall, by notice in writing delivered to the election authority within seven days from the date of the declaration of the last of such election, choose which one of those wards he shall serve and the choice shall be conclusive.

(6) When any such choice had been made, the election authority shall call upon the ward or wards, which such person has not chosen to serve, to elect another person.

(7) If the candidate does not make the choice referred to in Sub-section (5), the election of such person shall be void, and the election authority shall call upon the wards for which he has been elected to elect other persons."

x x x x x

13. Appointment of an Administrative Committee or a Special Officer when a Panchayat cannot be constituted :--

(1) If the Government are satisfied that a Panchayat cannot be constituted by reason of difficulty in holding an election of the members of a Panchayat or failure to elect such members of a Panchayat, the Government shall by notification either-

(a) appoint an Administrative Committee and a President thereof, or

(b) appoint a Special Officer.

(2) The President and members of an Administrative Committee or the Special Officer shall hold office for such period as the Government may specify in the notification under Sub-section (1).

(3) The Government may, at any time by notification in the Gazette, curtail or extend the period of appointment made under Clause (a) or Clause (b) of Sub-section (1).

(4) On the appointment of an Administrative Committee or the Special Officer under Subsection (1), all powers, functions and duties of the Panchayat and of the President shall be exercised and performed by such Administrative Committee and its President respectively or by the Special Officer, as the case may be.

(5) The Administrative Committee or the Special Officer shall be deemed to be a duly constituted Panchayat for the purpose of this Act.

(6) Notwithstanding anything contained in Section 11, the Government may at any time during which an appointment of an Administrative Committee or a Special Officer is in force direct an election to the Panchayat to be held. Upon the issue of such direction, the election authority shall hold election to that

Panchayat as if it were an ordinary election."

Section 3 of Ordinance No. 69 of 1984, reads as follows :

"3. Amendment of Section 11 -- In section 11 of the principal Act, in Sub-section (1). the proviso shall be omitted"

It has to be noticed that the direction in Ext. PI to issue notification under the proviso to Section 11(1) of the Act was at a time when that provision was on the statute book and on the assumption that it would continue to be in operation so as to enable the respondents to implement it. Now that, that proviso is no longer in existence, the State could not be compelled to do a thing, with respect to which the statute has not conferred any power on it.

6. We are not sure whether, when the proviso to Sub-section (1) of Section 11 gives a discretion to the Government, this Court could have compelled the repository of that power to exercise it in a particular way. S. A. De Smith in his book, *Judicial Review of Administrative Action*, Fourth Edition, at page 278 makes the following observation with regard to review of discretionary powers :

"The legal concept of discretion implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem. There may, however, be a number of answers that are wrong in law. In this chapter we shall consider the limits set by the Courts to the exercise of statutory discretionary powers....."

Parliament may, by apt ords, indicate that the exercise of the discretion itself shall be subject to judicial review. It may confer a restricted or unrestricted right of appeal to the Courts against the exercise of a discretion. It may specify exhaustively the ways in which a discretion may be exercised, as by enumerating the types of conditions which an authority may, if it thinks fit, attach to the grant of a licence; the attachment of any other type of condition will then be ultra vires. Again, it may lay down standards to which the exercise of a power must conform. Thus, an area electricity Board has a free discretion in fixing tariffs except insofar as it must not discriminate unduly in favour of or against any consumer. In an action brought by an aggrieved consumer, the Courts will determine independently whether the Board has been guilty of undue discrimination.

The crucial question, however, is : In what circumstances and to what extent will the Courts review the merits of the exercise of a statutory discretion which is neither made subject to appeal nor limited by the express provision of the Act? The Courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confided. And insofar as they have asserted a power of review, they have tended to express themselves in cautious language."

The learned Author has also quoted the following observations of Lord Sumner in Roberts v. Hopwood(1925)AC578

"There are many matters, which the Courts are indisposed to question. Though they are the ultimate Judges of what is lawful and what is unlawful to borough councils, they often accept the decisions of the local authority simply because they are themselves ill-equipped to weigh the merits of one solution of a practical question as against another."

The learned Author further states at page 286:

"How far are the principles outlined above applicable to the alleged abuse of the wide discretionary powers vested in executive bodies? We have already noted that the Courts sometimes call a discretionary power executive or administrative when they are unwilling to review the mode of its exercise by reference to "judicial" standards. Does this mean that such discretionary powers are legally absolute, totally immune from judicial review? To this question there is no short answer.....

..... No

discretionary power is reviewable unless somebody has locus standi to impugn the validity of its exercise. A decision by a public Corporation to raise the minimum qualifications for staff recruited for a particular grade might well be treated as unreviewable by Court; but the question will generally be academic, for, nobody, save an unsuccessful applicant who could establish that the qualifications were discriminatory, would have a sufficient legal interest to challenge that decision."

Again at page 292, it is thus observed :

"All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the Legislature and to see that those powers are exercised in good faith. Apart from that, the Courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction."

From the averments found in paragraphs 3 and 4 of the counter-affidavit filed on behalf of the State, it would appear that the delay in holding the elections was occasioned partially at least, if not wholly, on account of the practical difficulties arising out of the fact that the Census Report had intervened in the meantime. Assuming that, with due diligence and sincere approach, preparations for the conduct of the elections could have been completed within the time stated by Sub-section (2) of Section 11 of the Act, that by itself would not be a ground for holding the Ordinance promulgated on a subject falling under Entry 5 of List II of Schedule VII of the Constitution, unconstitutional. The State Legislature, in terms of Entry 5, is competent to make laws with respect to :

"Local government, that is to say, the constitution and powers of the municipal

corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."

In promulgating the Ordinance by virtue of the provisions contained in Article 213 of the Constitution, the power exercised by the Governor is the same as that of the State Legislature to make the laws. The Ordinance could not, therefore, be assailed as though it is an executive or administrative order of the Government. Secondly, the constitutional validity of an Ordinance could not be successfully challenged unless the promulgation thereof is without conforming to the requirements of Article 213 or is opposed to any other Article of the Constitution. We are, therefore, of the opinion that the attack mounted against the constitutional validity of the Ordinance on the ground that the Government did not take sufficient care and interest to complete the steps for conducting the elections within the time specified in Sub-section (2) of Section 11 of the Act, is not sustainable.

7. The next point urged by the counsel for the petitioners is that the promulgation of the Ordinance was actuated by the reluctance on the part of the Government to obey the prohibitory and mandatory directions contained in Ext. PI order passed by this Court, and for that reason, the Ordinance has to be declared unconstitutional. This Court cannot probe into the motive behind the exercise of the legislative power by the Governor so long as there is no lack of legislative competency, and the provisions are not opposed to the provisions of the Constitution. If the Government finds it necessary to have a legislation, which it is competent to make, to do away with the effect of a direction given by this Court, which, in its opinion, amounts to an encroachment on its statutory direction, it cannot be prevented from doing that, on the ground that the attempt virtually is to nullify the effect of the directions of the Court. What we are concerned with is the question of power of the Governor to promulgate the Ordinance, not the question of moral justification or the soundness of the policy behind it.

8. In terms of Sub-section (1) of Section 11 of the Act, the term of office of the members of the Panchayat, who are elected at ordinary elections," is five years, and in this case, the term of office of the members (including that of the Presidents) was to end on September 30, 1984.

9. We have now to consider the further contention of the petitioners that it was without satisfying himself that there existed circumstances which rendered it necessary for him to take immediate action that the Governor promulgated Ext. P4 Ordinance No. 69. We have already noticed that by efflux of time in terms of Sub-section (1) of Section 11 of the Act, the term of office of the members of the Panchayats concerned was to expire on September 30, 1984. The Government, however, had the discretion in the matter; to extend, by the issue of a notification in the official gazette, the term of office of the members by such period as may be specified therein, by invoking the power vested in it under the

proviso to Sub-section (I) of Section 11 of the Act. Where the Government opts not to exercise the discretion in favour of extending the term of office of the members on the expiry of the term, the Government would be under an obligation to appoint (a) an administrative committee and a President thereof or (b) a Special Officer by notification in accordance with the provisions of Sub-section (I) of Section 13 of the Act: and on the appointment of the Administrative Committee, or the Special Officer, as aforesaid, in terms of Sub-section (4) of Section 13 of the Act, all powers, functions and duties of the Panchayat and of the President shall be vested and performed by such administrative committee and its President respectively or by the Special Officer, as the case may be. May be, what led to the promulgation of the Ordinance was the policy decision of the Government not to allow the members of the Panchayats to overstay in office when their term, by efflux of time, in terms of Sub-section (I) of Section 11 of the Act, expired: or the disinclination of the Government to abide by the directions of the Court in and by Ext. P1 interim order, which, according to it, interfered with the statutory power of discretion vested in it.

10. It is submitted by the counsel for the petitioners that it was without satisfying himself about the existence of the circumstances which rendered it necessary for him to take immediate action that the Ordinance was promulgated, and therefore, it did not amount to proper exercise of the power under Article 213 of the Constitution it was also submitted that, as already stated, the action was actuated by *ma la fides*, was influenced by political considerations, was arbitrary and was opposed to the democratic values on which emphasis is laid by the Constitution, in particular, in the Directive Principles enshrined in Article 40 of the Constitution, which lays down :

"The State shall take steps to organise Village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government,"

11. Though in paragraphs 3 and 4 of the counter-affidavit filed on behalf of the State, the respondents have sought to controvert the allegation that there was deliberate inaction on the part of the State to take action for the conduct of the elections within the time specified in Section 11(2) of the Act, the counsel for the petitioners persisted in saying that there was lack of bona fides on the part of the respondents in that direction. According to the petitioners, the attempt of the respondents was to oust the Presidents and the members of the Panchayats, who were in office till 30-9-1984, from their office with an eye on the Lok Sabha elections, which were to take place shortly, as the respondents apprehended that the influence that was being wielded by the Presidents and Members of the Panchayats in the case of majority of the Panchayats, would have an adverse effect on the prospects of the ruling parties.

12. In our considered view, it is not open to the petitioners to challenge the exercise of power by the Governor under Article 213 of the Constitution on any of

the grounds urged by them in the writ petition. The promulgation of the Ordinance, when the Legislative Assembly was not in session, has to be on the satisfaction of the Governor that circumstances existed which rendered it necessary for him to take immediate action. It is a matter of; subjective satisfaction of the Governor, not justiciable in a Court of law. In promulgating the Ordinance the Governor as the constitutional head of the State, must have presumably, acted on the advice of the Council of Ministers as required under Article 163 of the Constitution; and in terms of Clause (3) of that Article, the question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court. The prohibitory and mandatory directions in Ext. PI order were issued by this Court on 26-9-1984; and the term of office of the members of the Panchayats was to expire on 30-9-1984. Thus, the Government was driven to a situation where either it had to implement the directions or decline to do so at the peril of it being hauled up for contempt. Placed between the horns of this dilemma, the Council of Ministers appears to have advised the Governor to promulgate the Ordinance which was intended to take away the proviso to Sub-section (1) of Section 11 of the Act, thereby rendering the Government powerless to extend the term of members of the Panchayat, with retrospective effect from the first day of September 1984. This statutory amendment effected by the Ordinance, for all practical purpose, amounted to the deprivation of the power of the Government to exercise the discretion; and it would have had to act without power in that behalf, if the directions contained in Ext.

PI order were to be given effect to after the amendment of the section by the Ordinance. The Ordinance had to be issued latest by September 30, 1984 in case the Government did not want to implement the directions in Ext. PI; and it was on that day Ext. P4 Ordinance No. 69 of 1984 was promulgated. In this background, when the Assembly was not, in session, the Governor should not be found fault with for having promulgated the Ordinance to achieve the policy behind the decision of the Government.

13. That the promulgation of an Ordinance has to be on the subjective satisfaction of the Governor; and that is not justiciable in any Court of law is well settled by a Constitution Bench of the Supreme Court in the decision reported in *S.K.G. Sugar Ltd. Vs. State of Bihar and Others*, . The exposition of the legal position by Sarkaria J., who spoke for the Bench in that case, appearing at page 1536 makes the position beyond doubt :

"There is no dispute with regard to the satisfaction of the first condition. Existence of condition (b) only is questioned. It is however well settled that the necessity of immediate action and of promulgating an Ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole Judge as to the existence of the circumstances necessitating the making of an Ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on ground of error of judgment or otherwise in Court....."

14. Counsel for the petitioners, however, sought to rely on a later decision of the Supreme Court reported in *State of Rajasthan and Others Vs. Union of India and Others*, . What is relied on by the petitioners is the passage occurring in paragraph 144 (at page 1414) :

".....But one thing is certain that if the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it, because in that case, there would be (sic-no?) satisfaction of the President in regard to the matter in which he is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power under Article 356 Clause (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid. Of course, by reason of Clause (5) of Article 356, the satisfaction of the President is final and conclusive and cannot be assailed on any ground, but this immunity from attack cannot apply where the challenge is not that the satisfaction is improper or unjustified, but that there is no satisfaction at all. On such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself. Take, for example, a case where the President gives the reason for faking action under Article 356, Clause (1) and says that he is doing so, because the Chief Minister of the State is below five feet in height, and, therefore, in his opinion a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Can the so-called satisfaction of the President in such a case not be challenged on the ground that it is absurd or perverse or mala fide or based on a wholly extraneous and irrelevant ground and is, therefore, no satisfaction at all. It must of course be conceded that in most cases it would be difficult, if not impossible, to challenge the exercise of power under Article 356. Clause (1) even on this limited ground, because the facts and circumstances on which the satisfaction is based would not be known, " but where it is possible, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds. This proposition derives support from the decision of the Judicial Committee of the Privy Council in AIR 1945 48 (Privy Council) , where Viscount Simon, L. C. agreed that the Governor-General in declaring that emergency exists must act bona fide and in accordance with his statutory powers. This is the narrow minimal area in which the exercise of power under Article 356. Clause (1) is subject to judicial review, and apart from it, it cannot rest with the Court to challenge the satisfaction of the President that the situation contemplated in that clause exists."

We do not understand the above passage relied on by the petitioners as one laying down a proposition that either the satisfaction of the President while promulgating an Ordinance under Article 123 or the satisfaction of the Governor under Article 213 of the Constitution is open to scrutiny by the Court as is sought to be made out by the petitioners. If the passage sought to be relied on is read in isolation of the main trend of the discussion and the principles enunciated therein, it might lead to confusion regarding the true nature and extent of the

power that the Court could exercise. On the other hand, this passage which might have practical applicability very rarely only, as experience would have it, has to be read and understood with what has been stated earlier in the same paragraph, which is quite in consonance with the principle laid down by the Supreme Court unequivocally in the earlier decision, viz. *S.K.G. Sugar Ltd. Vs. State of Bihar and Others*, Bhagwati J., has stated at the beginning of the above paragraph (para 144) thus : --

"But when we say this, we must make it clear that the constitutional jurisdiction of this Court is confined only to saying whether the limits on the power conferred by the Constitution have been observed or there is transgression of such limits. Here the only limit on the power of the President under Article 356. Clause (1) is that the President should be satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the executive branch of Government. There may be wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether the situation is such that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is not a decision which can be based on what the Supreme Court of United States has described as "judicially discoverable and manageable standards". It would largely be a political judgment based on assessment of diverse and varied factors, fast changing situations, potential consequences, public reaction, motivations and response of different classes of people and their anticipated future behaviour and a host of other considerations, in the light of experience of public affairs and pragmatic management of complex and often curious adjustments that go to make up the highly sophisticated mechanism of a modern democratic government. It cannot, therefore, by its very nature be a fit subject-matter for judicial determination and hence it is left to the subjective satisfaction of the Central Government which is best in a position to decide it. The Court cannot in the circumstances go into the question of correctness of adequacy of the facts and circumstances on which the satisfaction of the Central Government is based. That would be dangerous exercise for the Court, both because it is not a fit instrument for determining a question of this kind and also because the Court would thereby usurp the function of the Central Government and in doing so, enter the "Political thicket", which it must avoid if it is to retain its legitimacy with the people. In fact it would not be possible for the Court to undertake this exercise, apart from total lack of jurisdiction to do so since by reason of Article 74, Clause (2) the question whether any and if so what advice was tendered by the Ministers to the President cannot be enquired into by the Court, and moreover, "the steps taken by the responsible Government may be founded, on information and apprehensions which are not known to and cannot always be

made known to, those who seek to impugn what has been done."

15. One other decision cited by the counsel for the petitioners is the one reported in A.K. Roy and Others Vs. Union of India (UOI) and Others, and the relevant passage relied on by the petitioners' counsel is in paragraph 27, which reads :

"The State of Rajasthan and Others Vs. Union of India and Others, is often cited as an authority for the proposition that the Courts ought not to enter the "political thicket". It has to be borne in mind that at the time when that case was decided, Article 356 contained Clause (5) which was inserted by the 38th Amendment, by which the satisfaction of the President, mentioned in Clause (1) was made final and conclusive and that satisfaction was not open to be questioned in any Court on any ground. Clause (5) has been deleted by the 44th Amendment and, therefore, any observations made in the Rajasthan case on the basis of that clause cannot any longer hold good. It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction."

In this context, it has to be borne in mind that the Supreme Court in A.K. Roy and Others Vs. Union of India (UOI) and Others, has not in any way disturbed the exposition of law by that Court on the point in S.K.G. Sugar Ltd. Vs. State of Bihar and Others, already referred to. That decision categorically laid down that the necessity of immediate action and of promulgating an Ordinance is a matter purely of the subjective satisfaction of the Governor. He is the sole judge as to the existence of the circumstances necessitating the issuance of an Ordinance; his satisfaction is not a justiciable one and cannot be called in question by Courts. It has also to be noticed that whereas the decision reported in State of Rajasthan and Others Vs. Union of India and Others, was rendered after the relevant provisions of Arts. 123, 213 and 356 were amended by the Constitution (Thirty-eighth Amendment) Act, 1975, and the decision reported in A.K. Roy and Others Vs. Union of India (UOI) and Others, was rendered after the deletion of the- said provisions by the Constitution (Forty-fourth Amendment) Act, 1978, the decision in S.K.G. Sugar Ltd. Vs. State of Bihar and Others, was at a time when the decision was not in any way influenced either by the amendment introduced or the deletions thereof. In fact, the Supreme Court did not lay down any legal principle on the justiciability of the satisfaction of the President; but has only said :

"It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction."

16. Evidently, the Supreme Court did not intend to pronounce the last word on the justiciability of the satisfaction of the President while exercising powers under Clause (1) of Article 356 of the Constitution in that case. What appears to have been intended is to highlight the change that had come about by the amendment of the provisions by the Constitution (Forty-fourth Amendment) Act, 1978 in

comparison with the provision when the amendment introduced by the Constitution (Thirty-eighth Amendment) Act, 1975 was in force. It is also significant to note that that decision made no reference to the dictum laid down by the earlier decision by five Judges of the Supreme Court in *Section S.K.G. Sugar Ltd. Vs. State of Bihar and Others*, . Bhagwati J. in the case reported in *State of Rajasthan and Others Vs. Union of India and Others*, , while speaking with respect to the bar against the challenge in Court of the satisfaction of the President (contained in clause (5) of Article 356 of the Constitution as it then stood by virtue of Constitution (Thirty-eighth Amendment) Act, 1975), has only observed that the immunity from attack would not apply where the challenge was not that the satisfaction was improper or unjustified but there was no satisfaction at all. In that case, it was not the satisfaction arrived at by the President, but the very existence of the satisfaction that was under challenge. The illustration that followed the observations referred to in that judgment that such a situation would arise only where the President gave the reason for taking action under Article 356(1), and said that he was doing so because the Chief Minister of the State was below five feet in height; and, therefore, in his opinion, a situation had arisen where the Government of the State would not be carried on in accordance with the provisions of the Constitution, clearly shows that such contingency providing ground for assailing the Presidential action for the reason that the circumstances for taking action did not exist would hardly occur.

17. The Supreme Court has stated in the decision reported in *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, , in paragraph 27, thus :

"In *Corpus Juris* Vol. 16 (1956) it is said that the judiciary cannot exercise powers which are to be found in the other two departments of Government which are normally legislative or powers which are generally executive in their nature. All matters relating to or affecting elections are political questions and, as such, are not questions for the judiciary. All matters relating to or affecting elections are, in the absence of controlling constitutional or statutory provisions to the contrary, political questions and, as such, are not questions for the judiciary. So, subject to express constitutional restrictions, all matters relating to the holding of elections and determining their results, including contests are political questions."

It is, therefore, evident that it is not open to the petitioners to question the policy behind the Ordinance. Moreover, it is well settled that though discretionary power is reviewable, unless somebody having locus standi questions the validity of the exercise of that power, it cannot be reviewed. In these cases, the petitioners whose term of office as Panchayat Members (or Vice-President or President of the Panchayats had already expired, have no locus standi to claim that the terms of the defunct office should be extended as there is no office, the term of which could be extended.

18. The legal concept of discretion implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty.

To say that somebody has a discretion pre-supposes that there is no right to answer to his problem. All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the Legislature and to see that those powers are exercised in good faith. Apart from that, the Courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction. This position is clear from the passage already extracted from Section A. De Smith's Judicial Review of Administrative Action. Fourth Edition.

19. Now coming to the contention of the petitioners that the respondents' inaction was motivated by political considerations, we do not think the contention has any force. Beg C. 1, in *State of Rajasthan and Others Vs. Union of India and Others*, at p. 1377 has thus observed :

"Under our system, quest of political power, through formation of several political parties, with different socio-economic policies and programmes and ideologies, is legal, Hence, it cannot be said that a mere attempt to get more political power for a party, as a means of pursuing the programme of that party, as opposed to that of other parties, is constitutionally prohibited or per se illegal....."

Therefore, the contention raised by the petitioners regarding the political motives of the respondents also cannot be sustained.

20. The Additional Advocate-General appearing for the respondents submitted that in view of the power conferred by Article 213 of the Constitution on the Governor, as understood in the light of the interpretation given to it by the Supreme Court in the decision reported in *Section S.K.G. Sugar Ltd. Vs. State of Bihar and Others*, , it is not open to the petitioners to contend for the position that the satisfaction reached by the Governor could be subjected to scrutiny either in regard to the immediate need for issuing the Ordinance or in regard to the purpose of the Ordinance. He also submitted that as early as in 1931, the Privy Council while construing Section 72 of the Government of India Act, 1919, which for our purpose is analogous to Article 356 of the Constitution, had made it clear that the satisfaction of the Governor-General was not justiciable. Section 72 of the Government of India Act, 1919. reads as follows :

"The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature but the power of making Ordinances under this section is subject to the like restrictions as the power of the Indian Legislature to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature and may be controlled or superseded by any such Act."

" In AIR 1931 111 (Privy Council) , the Privy Council has observed :

"The Governor-General is the Judge of what conduces to the peace and good government of British India. Power given by Section 72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian Legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it."

It was also observed that :

"A state of emergency is something that does not permit of any exact definition. It connotes a suite of matters calling for drastic action which is to be judged as such by some one. It is more than obvious that someone must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance."

In AIR 1945 48 (Privy Council) also, the Privy Council took the same view. That was a case in which Section 72 in Schedule IX of the Government of India Act, 1935 was considered in a case where the Special Criminal Courts Ordinance No. 2 of 1942 was under challenge. One of the contentions advanced in that case was that the Ordinance was invalid because the language of Section 1(3) of the said Ordinance showed that the Governor-General, notwithstanding the Preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or else because Section 1(3) amounted to what was called delegated legislation. Negating the said contention, the Privy Council held :

"An emergency might well exist "which makes it necessary to provide for the setting up of Special Criminal Courts" without requiring such Courts to be actually set up forthwith all over India. Any other view would deny the Governor-General, when faced with an emergency, the exercise of any foresight in the protection of the State. The Governor-General may well have considered that in view of the existing emergency it was necessary to have a scheme for Special Courts drawn up and all ready for application if the existing emergency was further aggravated. It was perfectly possible, and indeed quite obvious, that the Governor-General regarded the situation on 2nd January, 1942 as constituting an emergency -- in view of what was happening it would be remarkable if he did not -- and this justified and authorised the Ordinance providing in advance for Special Courts. It did not in the least follow that the bringing of Special Courts into actual existence and operation all over India must take place at the same time."

21. The approach made by the Federal Court in the decision reported in *Lakhi Narayan Das v. Province of Bihar* AIR 1950 FC 59 while construing the provisions of an Ordinance issued u/s 88(1) of the Government of India Act, 1935. showed clearly that it was the Governor, and the Governor alone, who had to satisfy

himself as to the existence of the circumstances necessitating the promulgation of the Ordinance. The existence of such necessity was not a justiciable matter which the Court could be called upon to determine by applying an objective test.

22. It was then argued by the counsel for the petitioners that even assuming that the Ordinance is valid, the respondents were under a legal obligation to carry out the directions contained in Fxt. PI order. For one thing, it admits of no doubt that with the dismissal of the writ petition, O. P. No. 7163 of 1984, the interim order Ext. PI has ceased to be in force. Secondly, Ext. PI order was passed at a time when the proviso to Section 11(1) of the Act was on the statute book and on the assumption that it would continue to be in force. When the very basis of that order is taken away by the Ordinance by deleting the proviso, which enabled the State to carry out the directions, the direction itself will no longer exist. Thirdly, the petitioners, who have already ceased to be Vice-President and President of the respective Panchayats and also Members of the respective Panchayats, would not be entitled to ask for the issue of a notification for extending the term of their office, as that pre-supposes that they continued in office, whereas by the operation of the Ordinance deleting the proviso to Section 11(1) of the Act, they have ceased to be in office, and no question of extending the term of office would arise. The counsel for the petitioners went to the extent of saying that the respondents are bound to issue notifications restoring to the petitioners their respective offices. We do not, however, think, in the light of what has already been said, that this contention need be taken very seriously. We also find that in the strict sense the petitioners have no locus standi to question the discretion exercised by the first respondent or the promulgation of the Ordinance by the Governor for the simple reason that they have ceased to be President/Vice-President and or Members of the respective Panchayats.

23. It was also submitted that except for omitting the proviso to Section 11(1) of the Act, no other provision of the Act had been amended by the Ordinance; Section 4 of the Ordinance had introduced a new provision; and therefore, the amendment rendered the scheme of the Act not workable, and for that reason the Ordinance was liable to be struck down as unconstitutional. We do not find any merit in this contention. The deletion of the proviso to Sub-section (1) of Section 11 would not render the working of the scheme of the Act impracticable. Even when, as a result of a policy or political decision, this proviso is taken away, the operation of the other provisions of the Act would not come to a standstill as apprehended by the counsel for the petitioners inasmuch as sample safeguards for carrying on the day to day administration of the Panchayats, as a temporary measure, are provided in Section 4 of the Ordinance, which says ;

"notwithstanding anything to the contrary contained in the principal Act, or in any rule or bye-law made thereunder, or in any judgment, decree or order of any Court, in the case of every Panchayat, the term of office of the members of which expires on the 30th day of September, 1984 the powers, functions and duties of the Panchayat and of its President shall, by virtue of this section, be vested in

the Government for a period of not exceeding six months from the date immediately preceding the said date and the powers, functions and duties so vested shall be exercised and discharged by the Government in accordance with the rules as may be prescribed by them in that behalf."

24. The counsel for the petitioners stressed the need for holding the elections to the Panchayats expeditiously and also made a request to us to issue appropriate directions fixing the deadline for completing the process. The apprehension in the minds of the petitioners is understandable in the light of the past experience with respect to the conduct of elections to the Panchayats in the State of Kerala. From the pleadings, we find, in this State there are 1001 Panchayats; and they were constituted in the year 1964. No election to the Panchayats, however, was held thereafter till 1979, though Governments with different political alignments had come and gone in the meanwhile. It is our hope that bearing in mind the true spirit of the provisions of Article 40 of the Constitution, it would be the earnest endeavour of the Government to conduct the elections without any avoidable delay, crossing the hurdles that prevented it from holding the elections within the time stipulated in Section 11(2) of the Act, as stated in paragraphs 3 and 4 of the counter-affidavit.

25. On a careful consideration of the relevant provision of the Act and the impugned provisions of the Ordinance, we do not find any substance in the contentions raised by the petitioners in O. P. No. 8517 of 1984.

26. We would now consider O. P. Nos. 8630 of 1984 and 8954 of 1984. In these two writ petitions as already stated, the challenge is directed against Ordinance No. 68 of 1984, which by Section 3 of the Ordinance has omitted the proviso to Section 8 (1) of the Kerala Municipalities Act, 1960. Section 3 of the Ordinance reads :

"In Section 8 of the principal Act, in Sub-section (1), the proviso shall be omitted."

A copy of the Ordinance has been produced and marked as Ext. P2 in O. P. No. 8630 of 1984. Section 4 of this Ordinance also is in almost identical terms as Section 4 of Ordinance No. 69 of 1984. Section 4 of the Ordinance reads as follows :

"Special provision for vesting of the functions of Council, Chairman. Standing Committee and other Committees of certain municipalities in the Government for temporary period-- Notwithstanding anything to the contrary contained in the principal Act or in any rule or bye-law made thereunder or in any judgment, decree or order of any Court, in the case of every municipality the term of office of the Councillors of which expires on the 30th day of September, 1984, the functions of the Council and of its Chairman and of the Standing Committee and other Committees shall, by virtue of this section, be vested in the Government for a period not exceeding six months from the date immediately succeeding the said date, and the functions so vested shall be exercised by the Government in accordance with such rules as may be prescribed by them in that behalf."

27. In O. P. No. 8953 of 1984, the challenge is directed against Ordinance No. 67 of 1984. By Section 3 of the said Ordinance, the proviso to Section 67 (1) of the Kerala Municipal Corporations Act, 1961 has been omitted. By so doing, power vested in the first respondent to extend the term of office of the Councillors, Mayor, Dy. Mayor, Standing Committees, and other Committees of the Municipal Corporations of Trivandrum, Calicut and Cochin has been taken away. As in the case of the other two Ordinances, Section 4 of the Ordinance laysdown :

"notwithstanding anything to the contrary contained in the principal Act or in any rule, bye-law or regulation made thereunder or in any judgment, decree of order of any Court, the functions of the Council and of the Mayor, the Deputy Mayor and of the Standing Committees and other Committees of the Municipal Corporations of the cities of Trivandrum, Cochin and Calicut, the term of office of the Councillors of which expires on the 30th day of September, 1984, shall, by virtue of this section, be vested in the Government for a period not exceeding six months from the date immediately succeeding the said date, and the functions so vested shall be exercised by the Government in accordance with such rules as may be prescribed by them in that behalf."

Whatever has been said by us with respect to arguments advanced by the counsel for the petitioners in O. P. No, 8517 of 1984 on the question of constitutional validity of the Ordinance would hold good in these cases also.

28. The counsel for the petitioners in O. P. Nos. 8953 and 8954 of 1984 raised a further contention that the Ordinances were bad for want of instructions from the President The proviso to Clause (1) of Article 213 reads as follows:

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

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

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

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

29. We have not been told how this proviso is applicable to the Ordinances challenged in these writ petitions. We have already noticed that Entry 5 in List II of Schedule VII to the Constitution empowers the State Legislature to legislate with respect to the local government including Municipal Corporations and village administration. The petitioners have no case that the Acts, as they stood before being amended by the Ordinances, were bad for want of legislative competence. The counsel for the petitioners in the said two writ petitions, referred to the Division Bench ruling of this Court in E. Balanandan and Another Vs. State of

Kerala and Another, That was a case in which the constitutionality of the Public Property (Prevention of Destruction and Loss) Ordinance 1978 (Ordinance .No. 15 of 1978) promulgated by the Governor of Kerala, was assailed. The petitioners therein contended that the Ordinance was part of the repressive measures taken against those who participated in a general strike called by the Kerala State Electricity Board Workers' Association, and also for the reason that it was bad for non-compliance with Cl. (c) of the proviso to Article 213(1) of the Constitution. Allowing the writ petition, a Division Bench of this Court declared the Ordinance void. This decision, however, in our view, has absolutely no application to the present case. Section 2 of Ordinance 15 of 1978 which was under challenge in that case reads as follows :

"2. Punishment for committing mischief in respect of public property.-- Whoever attempts to commit or commits or instigates, incites or otherwise abets the commission of mischief within the meaning of Section 425 of the Indian Penal Code (Central Act 45 of 1860), in respect of public property shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine which may extend to two thousand rupees."

"Explanation.-- For the purposes of this section, "public property" means any property owned or controlled by the Government or by the Kerala State Electricity Board or by the Kerala State Road Transport Corporation or by any other Corporation owned or controlled by the Government."

After having elaborately discussed the constitutional provisions pertaining to the legislative competency, Gopalan Nambiyar, C. J., who spoke for the Bench, in paragraph 8 of the judgment at page 599 (of Ker LT) : (at Pp. 192-193 of Cri LJ) of the report, stated as follows:

"We are unable to hold that there has been any incorporation of the provisions of the Penal Code regarding mischief into the provisions of the Ordinance. What the Ordinance plainly and simply purports to do is to deal with the offence of mischief as defined by the Penal Code, and to erect mischief in respect of public property into a special category punishable with an enhanced term of imprisonment and a larger amount of fine. These clearly appear to us to be trespassing into forbidden field having regard to Articles 245, 246 and 254 of the Constitution which we have referred to earlier, and to Lists I and III of the VIIth Schedule, that the State's legislative power under the Entries in the Concurrent List is only subject to the power of Parliament to legislate over the same, and, in the absence of Presidential assent, must yield to any existing law with respect to the said matter. There was an existing law -- the Indian Penal Code -- on the subject. Legislative action taken by the State should be regarded as repugnant to the provisions of the "existing law", viz., the Penal Code under Article 254 of the Constitution, in the light of the principle of the decisions noticed, viz., *Zaverbhai Amaldas Vs. The State of Bombay*, and *State of Jammu and Kashmir Vs. M.S. Farooqi and Others*, Ss. 2 and 40 of Penal Code only reinforce that conclusion.

Having regard to Article 254(1) of the Constitution, a law made by the Legislature of a State in regard to the subject-matter of the Ordinance would be void, unless it has received Presidential assent. The same infirmity would affect the Ordinance, as the Ordinance making power of the Governor is conterminous with the State's legislative power. If so, the previous instruction of the President would have been necessary under the proviso to Article 213(1) read with Clause (c) of the said proviso. The same not having been obtained, the Ordinance should fail."

What was sought to be done by the issue of the Ordinance was to bring in a legislation which was inconsistent with the provisions of Sections 425 - 430 of the Penal Code. Criminal law being a subject falling within Entry I in List III Concurrent List in Schedule VII to the Constitution, the State are not entitled either by an Act or by an Ordinance to encroach upon the area already occupied by the Central legislation unless the Bill was reserved for the assent of the President as required under Clause (2) of Article 254 of the Constitution or was in pursuance of the instructions from the President as required under the proviso to Clause (3) of Article 213 of the Constitution. In that case, *E. Balanandan and Another Vs. State of Kerala and Another*, the Ordinance not having been issued pursuant to the instructions from the Presidents, the Court declared the Ordinance void. In the present case, the petitioners have not succeeded in showing that the Ordinance pertained to a subject included in the Concurrent List or in the Union List or that the legislative intent was to encroach upon the field occupied by any Central legislation. The relevant Entry, to repeat, is Entry 5 in List II of Schedule VII to the Constitution, with respect to which the State is free to legislate.

30. We, therefore, reject the contention based on the erroneous assumption that there was repugnancy between the provisions of the Ordinance vis-a-vis any Central Act and that the Ordinance was void for the reason that it was not promulgated pursuant to instructions from the President.

For the foregoing reasons, we find no merit in these writ petitions. Accordingly, they are dismissed; however, in the circumstances of the case, without any order as to costs.

Immediately after the judgment was pronounced, the counsel for the petitioners in O. P. Nos. 8517 and 8630 of 1984 made an oral request for leave to appeal to the Supreme Court. We do not find any substantial question of law of general importance, which requires to be decided by the Supreme Court involved in this case. Hence, leave declined.