

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.10184 OF 2019
WITH
CIVIL APPLICATION NO.10244 OF 2019
IN
WRIT PETITION NO.10184 OF 2019
WITH
CIVIL APPLICATION NO.10871 OF 2019
IN
WRIT PETITION NO.10184 OF 2019
WITH
CIVIL APPLICATION NO.10872 OF 2019
IN
WRIT PETITION NO.10184 OF 2019

Dattatray Yedu Thombre

..PETITIONER

VERSUS

The State of Maharashtra & Others

..RESPONDENTS

...

Ms. P. S. Talekar h/f M/s. Talekar and Associates,
Advocate for the Petitioner.

Mr. P. M. Shah, Senior Advocate i/b Mr. V. M.
Kagne, AGP for Respondent Nos.1 to 3.

Mr. V. R. Dhorde, Advocate for Applicant in
CA/10244/2019.

Mr. V. D. Salunke, Advocate for Applicant in
CA/10872/2019.

Mr. Ajeet B. Kale h/f Mr. Pratik Bhosle, Advocates
for Applicant in CA/10871/2019.

WITH

WRIT PETITION NO.10285 OF 2019

Sahebrao s/o Shrirang Dhange

..PETITIONER

VERSUS

The State of Maharashtra & Others

..RESPONDENTS

...

Mr. Sachin Deshmukh, Advocate for the Petitioner.

Mr. P. M. Shah, Senior Advocate i/b Mr. V. M.
Kagne, AGP for Respondent Nos.1 to 3.

WITH

WRIT PETITION NO.10481 OF 2019

Narmada Sunil Mundhe

..PETITIONER

VERSUS

The State of Maharashtra & Others

..RESPONDENTS

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Mr. P. D. Bachate, Advocate for the Petitioner.

Mr. P. M. Shah, Senior Advocate i/b Mr. V. M. Kagne, AGP for Respondent Nos.1 to 3.

WITH

WRIT PETITION NO.10538 OF 2019

Prakash s/o Vishwanath Ashte

..PETITIONER

VERSUS

The State of Maharashtra & Others

..RESPONDENTS

...

Mr. N. D. Patil Jamalpurkar, Advocates for the Petitioner.

Mr. P. M. Shah, Senior Advocate i/b Mr. V. M. Kagne, AGP for Respondent Nos.1 to 3.

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CORAM : S. V. GANGAPURWALA &
ANIL S. KILOR, JJ.

Closed for Orders on : 16.09.2019.

Order Pronounced on : 17.10.2019.

FINAL ORDER (Per S. V. Gangapurwala, J.) :-

1. The petitioners in these petitions assail the Ordinance No.XXII of 2019 dated 23.08.2019 promulgated by the State of Maharashtra for extending the election of President, Vice President and Chairman of subject Committees of some Zilla Parishads and Chairman and Vice Chairman of Panchayat Samitis on account of the ensuing General Election of the State Legislative Assembly.

2. The petitions are based on similar set of facts and involve common question of law. To avoid rigmarole are decided by common judgment.

3. Ms. Talekar, learned counsel eruditely made submissions. The other learned counsels viz. Mr. N. P. Patil Jamalpurkar, Mr. S. S. Deshmukh and Mr. Bachate echoed the arguments of Ms. Talekar and also put forth their stand. The contentions of the learned counsel for petitioners are as under:

(A) The impugned ordinance is fraud on constitution. The Legislative Assembly was in session till 02.07.2019. After the end of Legislative Assembly Session no new facts or circumstances have emerged so as to evidence an emergent situation deserving intervention of the Hon'ble Governor by exercising Ordinance making power. Irreversible position would have already been created prior to the Legislature being called in session. The approval by the Legislature would be mere eyewash.

The Ordinance is politically motivated. It is based on political convenience. The Court shall go beyond the appearance to identify the real intention of the Ordinance and the same can be considered by this Court. The petitioners rely on the judgment of the Apex Court in a case of **Dwarkadas Shrinivas of Bombay Vs. The Sholapur Spinning and Weaving Co. Ltd. and Others** reported in 1954 AIR 119.

(B) The Ordinance cannot be used to create enduring right or irreversible position. The Ordinance cannot be in the nature of temporary enactment. The impugned Ordinance is not only contrary to the parent Act, but is in the nature of temporary enactment creating irreversible and enduring rights. Such an Ordinance is not permissible to be promulgated under Article 213 of the Constitution of India. The Hon'ble Governor is required to form satisfaction of the existence of circumstances which makes it necessary to take immediate action. In such cases, the Court can exercise the powers of judicial review. The learned counsel relies on the judgment of the Apex Court in case of **Krishna Kumar Singh Vs. State of Bihar and Others** reported in (2017) 3 SCC 1.

(C) The Ordinance does not amend the Act of 1961. The Statute lays down mandate that the term of Chairman and Vice Chairman of Zilla Parishad and/or the Panchayat Samitis shall be 2.5 years. Section 44 and 66 permitting extension of the term of Chairman and Vice Chairman till successor fills in the office is deleted by Amendment Act of 1994. The conscious deletion of the provision permitting extension of the tenure of Chairman and Vice Chairman conveys that the Legislature desired a fix term of the Chairman and Vice Chairman extension would not be permissible. Mere non-obstantive clause in the Ordinance without amending the Statute would not hold good.

(D) This Court in case of **Kashinath Laxman Bhide and Ors. Vs. The State of Bombay** reported in (1953) 55 Bom LR 290 has held that in case, election is conducted for a period lesser than period prescribed for a term of office in the Statute, it would be illegal.

The Statute will have precedence over executive action in case of conflict; since the Ordinance does not amend the Statute, it comes in conflict with the Statute and mere fiction will not have precedence over the Statute. The reliance is placed on the judgment of the Apex Court in a case of **Babaji Kondaji Garad Vs. The Nasik Merchants Co-Operative Banks Ltd., Nasik & Ors.** reported in (1984) 2 SCC 50.

(E) The Ordinance falls foul to the test of Article 14 of the Constitution of India. The Ordinance is subject to all the Constitutional test that would be required to be satisfied by the Statute passed by the State Legislature including test of Article 14. There are various other Statutes prescribing postponement of election such as Maharashtra Co-operative Housing Societies Act, Maharashtra Provincial Municipal Corporations Act and so on. However, provision entitling postponement of the period of office in the Zilla Parishad Act has been deleted.

(F) It is a case of selective discrimination. In the earlier years, when similar situation arose in the year 2014, 2009 and 2005, Ordinance was not

promulgated to postpone elections.

(G) No nexus exists in the postponement of election and extension of term of office bearers to the object mentioned with the statement annexed to the Ordinance, stating grounds of possible overlapping of elections, possible undue pressure on civil and police administration, law and order situation and inconvenience to the citizens, candidates and electors. The elections to posts of office bearers are conducted in a single day with the only formality being of issuance of notices to members of Zilla Parishad and Panchayat Samiti without any requirement of deployment of police personnel and other staff. The Panchayat Samiti elections are scheduled on 14.09.2019, whereas the Zilla Parishad elections are scheduled on 21.09.2019, thus there is no question of overlapping of election.

4. The Ordinance is in violation of Chapter IX of the Constitution. The local bodies are bedrock of democracy. Non-existence of Chairman and Vice Chairman would lead to non-functional local body. The learned counsel relies on the judgment of this Court in a case of **Bhagwan Sampatrao Ghodmare and Anr. Vs. The State of Maharashtra and Anr.** reported in 2017 (4) Mh.L.J 394, **Kishansing Tomar Vs. Municipal Corporation of the City of Ahmedabad and Ors.** reported in (2006) 8 Supreme Court Cases 352, **Rohan Shirodkar Vs. The State of Goa and Ors.** reported in (2017) 4 Bom CR

406 and State Election Commission Vs. State of Andhra Pradesh and Another reported in 2000 SCC OnLine AP 234.

Article 243D of the Constitution of India mandates rotation of reservation for the post of Chairman and Vice Chairman of Panchayats. By extending the term of one of the category office bearers and reducing the term of another category office bearer amounts to violation of equality of term for each category office bearer as prescribed under Article 243D of the Constitution.

5. The Zilla Parishad Act, 1961 has received the assent of the Hon'ble President on 05.03.1962. Since the Statute is passed with the assent of the Hon'ble President of India, propriety would demand that any amendment thereto is carried out only with the assent of the Hon'ble President. The same rule would apply to the Ordinance making power of the Hon'ble Governor.

Proviso (b) to Article 213(1) states that the Ordinance making power would not apply in a situation where Hon'ble Governor deems it necessary to reserve the matter for Presidential assent. In the present case, there is no material on record to prove that there was any application of mind by the Hon'ble Governor with regard to the earlier assent of the Hon'ble President to the Act, that would necessitate him to seek instructions prior to promulgating any ordinance that would have an

effect of amending the Act.

6. Mr. Shah, learned senior counsel for respondent-State in his usual lucid manner put forth following propositions:

(a) This Ordinance is promulgated during the recess of Legislature.

(b) The preamble shows that there is prior satisfaction of the Governor as to circumstances existing rendering it necessary for him to take immediate action to provide for the temporary postponement of the elections of the President etc. of Zilla Parishad and Panchayat Samitis.

(c) The reasons for issuance of the Ordinance are that on account of the ensuing general elections to the Legislative Assembly, all the Collectors, the administrative staff of the district as well as the police personnel are busy with preparation for general elections to Legislative Assembly and would be totally occupied with pre and post election duties and to rule out any possible overlapping of the said general elections and any possible undue pressure on civil and police administration and any law and order problem or inconvenience to the citizens, the candidates and electors concerned it is considered expedient to temporarily postpone the elections.

(d) The general elections to the State Legislative Assembly are likely to be held some time in the month of October 2019 and the term of

offices of President of Zilla Parishad and Chairman etc of Panchayat Samiti are due to expire in August / September 2019.

(e) The elections are postponed for a period of 120 days from 23.08.2019 (i.e. 23.12.2019) or "till such earlier date" as may be specified by the State Government.

(f) Section 3 of the Ordinance opens with the words "notwithstanding anything contained in Z.P. Act." The same would have precedence.

(g) The term of the office bearers of Z.P. and Panchayat Samiti elected after the said period shall be co-terminus with the term of elected councilors. With a view that during the interregnum there should not be any vacuum or hiatus, the term of present office bearers is continued till the new office bearers are elected and it provides for the validation of certain Acts during the extended period. The office bearers deemed to have been and be competent to exercise all powers and perform all the duties and discharge all functions as such President etc and no act done by them during the said period shall be invalid or called in question in any Court merely on the ground that during such extended period the office bearers could not exercise all the powers etc. and the arrangements to hold the elections before or as soon as possible after the expiration of the extended term. (Vide Sections 2, 4 and 5 of the Ordinance).

(h) The power of this Court of judicial review is limited. The grounds for postponing the elections as spelled out in the Ordinance would not be a subject matter of judicial scrutiny. The extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of right affected. The subject matter of Ordinance relates to the postponement of elections of the President and Vice President of Zilla Parishad and Panchayat Samiti and not the postponement of general elections of Zilla Parishad. The postponement is for a period of 120 days or till such earlier date. There is no right in favour of the petitioners. Resultantly, there is no infringement of any right. No prejudice is caused to petitioners. The prejudice assumed by petitioners is notional and not real. The right to elect is not fundamental right and not a common law right, it is purely a Statutory right. The adequacy or sufficiency of material would not be justiciable. Reliance is placed on the judgment of the Apex Court in case of **S. R. Bommai Vs. Union of India** reported in (1994) 3 SCC 1. Reliance is also placed on the judgment of the Apex Court in a case of **Krishna Kumar Singh Vs. State of Bihar and Others** (supra).

(i) There is presumption as to validity of law. Political bias / political malafides cannot be presumed. Reliance is placed on the judgment of the Apex Court in a case of **Laxman Limbraj Rankhamb Vs. State of Maharashtra** reported in 1981 Mh.L.J.

566 to contend that the election to Zilla Parishads were postponed by six weeks under an Ordinance due to monsoon season and other administrative difficulties. The challenge failed. Reliance is also placed on the judgment of this Court in a case of **Sahebrao Patil Vs. The State of Maharashtra** reported in 1994 (1) Mh.L.J. 899 and another judgment of this Court in a case of **Ambedkarite Party Vs. State of Maharashtra** reported in 2017 (2) Mh.L.J. 575, wherein Ordinance relating to the Municipal elections introducing multi member multi ward system was called in question. Validity of Ordinance is upheld.

(j) The Hon'ble Governor while promulgating an Ordinance acts on the aid and advice of the Council of Ministers. Thus the Constitutional control of the State Legislature over the Ordinance making power of the Hon'ble Governor. The Ordinance has force and effect of law enacted by Legislature.

(k) The issue relating to irreversible situation is only academic. The issue of irreversible situation would crop up only if the Ordinance would cease to operate in future. The issue of enduring right has to be decided on the consideration of elements of public interest or the constitutional necessity. The issuance of Ordinance is necessitated by the public interest set out in preamble of the Ordinance. No prejudice is likely to be caused to the public at large by postponing the elections of the President and Vice President of Z.P. for short duration.

(1) The amending act does not require assent of the President merely because the parent Act has received present assent.

7. We have also heard Mr. Kale, learned counsel for intervenor. The intervenor relied on the following judgments:

1. **Bhanumati and Others Vs. State of Uttar Pradesh** reported in (2010) 12 SCC 1.

2. **Sahebrao narayanrao Patil and another Vs. State of Maharashtra and others** reported in 1994 (1) Mh.L.J. 899.

3. **Laxman Limbraj Rankhamb Vs. State of Maharashtra** reported in 1981 Mh.L.J. 566.

8. Promulgating an Ordinance is an exercise of Legislative powers by an Executive. The Governor under Article 213 of the Constitution of India is empowered to promulgate an Ordinance except when the Legislative Assembly of the State is in session and he is satisfied that the circumstances exist which render it necessary for him to take immediate action. Subject to the limitation as to the duration of the Ordinance as laid down in Clause 2(A) of Article 213 there is no other limitation upon the Ordinance making power of the Governor save those that are imposed upon the State Legislature under the Constitution. Proviso to Article 213 (1) of the Constitution prescribes a limitation that the Governor shall not without instructions from the President promulgate any 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.

9. Subject matter of the Ordinance is not covered by the concurrent list but is the subject matter of the State list. The amending act does not require the assent of the President, though parent Act has received such an assent. Every amendment is not required to be submitted for assent of the President. According to the petitioners, there is no application of mind on the part of the Governor nor the language of the Ordinance suggests that the Governor had applied his mind as to whether it would have been necessary to reserve a bill containing the same provision for consideration of the President. The said argument does not require a debate and need not detain us. An amendment to the State Act in respect of the subject matter covered under the State list would not require assent of the President, the objection of the petitioners on that count cannot be sustained.

10. Section 44 and Section 66 enabling extending the term of the President and Vice President of Zilla Parishads and Chairman and Vice Chairman of the Panchayat Samitis is deleted by Maharashtra Act 21 of 1994.

11. Preface to an Ordinance gives the reasons for promulgating the Ordinance. On account of ensuing general elections to the Maharashtra Legislative Assembly all the Collectors and staff of the Collectorate of the District as well as police personnel in the Districts are busy with the preparation for general election to the Maharashtra Legislative Assembly and would be totally occupied with the pre and post election duties, with the view to rule out any possible overlapping of the said elections and any possible undue pressure on civil and police administration and any law and order problem or any inconvenience to the citizen as well as to the candidates and electors concerned, it is considered expedient to temporarily postpone the election of the President and Vice Presidents of subject committees of certain Zilla Parishads and the Chairman and Deputy Chairman of certain Panchayat Samitis for a period of four months. Once the Code of Conduct is declared, as per Section 28-A of the Representation of Peoples Act staff would be on election duty and deemed to be on deputation of election commission. Both the houses of the State Legislature are prorogued on 02.07.2019. The Ordinance is issued by the Hon'ble Governor on 23.08.2019.

12. The Governor of the State of Maharashtra promulgated an Ordinance on 23.08.2019 namely the Maharashtra Zilla Parishad and Panchayat Samitis temporary postponement of election (of the President, Vice President and the Chairman of subject committees certain Zilla Parishads and Chairman and Deputy Chairman of certain Panchayat Samitis due to ensuing general elections to the State Legislative Assembly) Ordinance, 2019. The elections to these offices under the impugned Ordinance were postponed for a period of 120 days from the date of the Ordinance or till such earlier date as the State Government by Notification in the Official Gazette specify.

13. The Maharashtra Zilla Parishad and Panchayat Samiti Act, 1961 prescribes the term of the office of the President and the Vice President of the Zilla Parishads so also the term of the office of the Chairman and Vice Chairman of the Panchayat Samitis.

14. Article 243E of the Constitution provides for the duration of the Panchayat. The duration fixed by the Constitution under Article 243E of the Panchayat is five years from the date appointed for its first meeting unless sooner dissolved under any law for the time being in force. The Ordinance impugned does not tamper or interfere with the term of the Panchayat. Article 243 does not prescribe the term of the President and Vice President of the Zilla Parishads and Chairman and Vice Chairman of

the Panchyat Samitis. The term is provided of these persons under the State Legislation viz Section 43 and 65 of the Act, 1961 respectively. To hold the office of the President and Vice President of the Zilla Parishads or Chairman and Vice Chairman of the Panchayat Samitis is governed by the State Legislation. The same is a statutory right. Section 44 and 66 of the Act 1961 providing for the extended period of the term of the President and Vice President, so also the Chairman and Vice Chairman is deleted in 1994. The intention of the Legislature in deleting the said provision appears to be to give stability to the term of such President and Vice President. The term of the President and the Vice President of two and a half years as provided under the Statute can be resilient to the contingencies provided under the Act, namely, if such persons holding the office are disqualified under Section 16 of the Act or they lose the confidence of the members of the Zilla Parishads or the Panchayat Samitis or they are removed for misconduct as provided under Section 39 or they resign. The persons holding the office of the President, Vice President can be removed before the completion of term of two and a half years in respect of aforesaid contingencies. Procedure is also prescribed for filling in vacancies. The right to hold the office for a period of two and a half years of the President/Vice President, Chairman/Vice Chairman is circumscribed by provisions governing no confidence

motion, disqualification, removal on account of misconduct and so on.

15. In the instant case because of the promulgation of the impugned Ordinance, the term of the office of incumbent President and the Vice President of the Zilla Parishads and Chairman and Vice Chairman of the Panchayat Samitis is enlarged for a maximum of 120 days or such earlier date as the State Government may by notification in the official gazette specify. Consequently, next incumbent who would hold the office, his tenure will undergo abatement to that much of extent.

16. Today no vested right is created in any person of holding the office for two and a half years, as the new incumbent is yet to be elected. It is not necessary that the petitioners would contest for the post of President and the Vice President of the Zilla Parishads or they would get elected. No such right as on date exists in them to claim that their vested right would be infringed. It may happen that if a person is elected to the office of the President of Zilla Parishad, the Panchayat may get dissolved on account of one or the other exigency. Indefeasible right does not exist in the petitioners as on date, inter alia, even to complain of infringement of their rights.

17. The petitioners as well as respondents heavily rely upon the Constitution Bench judgment of the Apex Court in a case of **Krishna Kumar Singh**

Vs. State of Bihar and Others reported in (2017) 3 SCC 1.

18. It is held by the Constitution Bench that it is mandatory for the Ordinance to be laid before the Legislature otherwise it would amount to fraud on the Constitution. Matter has not reached such a stage and now the elections of the State Legislative Assembly are in the month of October. Within six months the Ordinance will have to be placed before the State Legislature. It would be premature to hold that the Ordinance would not be laid before the State Legislature. The Ordinance certainly is not creating any enduring rights. The Legislative Assembly Session came to an end on 02.07.2019. The Ordinance is issued almost one and half month thereafter. It also cannot be said that the Ordinance is promulgated with a view to create any right in a person holding the office, but it was promulgated considering the facts and situation as found fit by the Hon'ble Governor on the aid and advice of the Council of Ministers.

19. The local bodies are certainly the bedrock of democracy. The provision for representation of the Chairman of Panchayat is to be provided by the Legislature of the State. Article 243E consciously has not provided for term of chairperson of Panchayat and is left to the Legislature of the State to provide for the representation of the Chairman of the Panchayat in the Panchayat. It is not a case that because of the Ordinance the post

of Chairman and Vice Chairman becomes nonexistent. On the contrary, the terms of the existing Chairman and Vice Chairman are extended for a period of 120 days or for such earlier date as the State Government may by notification in the Official Gazette specify. The post of Chairman and Vice Chairman would not remain vacant and it would not lead to non functional local body.

20. In normal parlance, the right to contest election, the right to vote, right to get elected are statutory rights and not constitutional ones. Even if it is accepted as contended that the right to vote and right to contest an election of panchayat are constitutional right subsequent to the introduction of Part IX of the Constitution of India but said rights can be regulated/curtailed by the appropriate Legislature. Article 243 of the Constitution of India gives powers to the State to make provisions with respect to the composition of panchayat, the representation of the Chairman of the panchayat, the reservation of the office of Chairperson in the Panchayat at the village or any other level for SC/ST/Women in such a manner as Legislature of the State may by law provide.

21. Zilla Parishad and Panchayat being the State subject, Article 243 of the Constitution of India has consciously left it to the State to provide for composition of the Panchayat, representation of the Chairperson to the Panchayat. Article 243 prescribes the term of the Panchayat to

be five years. The State is bound by the same. As far as the term of Chairman to the Panchayat, the Constitution does not prescribe for the said term. The State Legislature has provided the term to be of two and half year. The State Legislature can amend the provisions qua the term of the Chairman of the Panchayat Samitis and/or Zilla Parishads. In present case, because of the circumstantial exigencies, the Governor has promulgated the Ordinance, postponing the election by 120 days or such earlier date as the State Government may notify.

22. Article 243D of the Constitution mandates rotation of reservation for the post of Chairman and Vice Chairman of the Panchayat. The arguments of the petitioners that, by extending the term of one of the category office bearers and reducing the term of another category office bearers amounts to violation of equality of term for each category office bearers, would be hypothetical. The reservation of seats would have to be provided in future. In a way, prior to the elections the reservations will have to be rotated. Just for the term reduced by four months or less would not mean that rotation under reservation policy is violated. The term of panchayat is not interfered with under the Ordinance. Rights claimed by the petitioners are inchoate. The State Legislature has been empowered under Article 243D to make provision for reservation. In fact Article 243D is meant to ensure fair representation of social diversity in

composition of elected local bodies to contribute to empowerment of traditionally weaker sections in the society viz; SC/ST, Women and Backward Class category. The principle of rotation is on the principle of reservation to obviate the possibility of the office of Chairman and Vice Chairman being not reserved in perpetuity despite there being sizable population of general category or despite there being sizable percentage of SC, ST persons in the village.

23. It is not a case of the re-promulgation of Ordinance. The Ordinance has been issued only after the Session was prorogued on 02.07.2019. Considering the ensuing elections to be held in October 2019 for the Legislative Assembly, the Hon'ble Governor on the advice of the Council of Ministers thought it fit to postpone the elections of the Chairman and Vice Chairman of the Panchayat, President and Vice President of the Zilla Parishads and of the subject committees. The reasons for promulgating the Ordinance and postponing the elections of President and the Vice President of the Zilla Parishads and Chairman and Vice Chairman of the Panchyat Samitis are self explanatory. The Apex Court in a case of **Krishna Kumar Singh Vs. State of Bihar and Others** (Supra) has observed as under:

"57. Applying the principles which emerge from the judgment of Justice Jeevan Reddy in Bommai, there is reason to hold that the satisfaction of the President under

Article 123(1) or of the Governor under Article 213(1) is not immune from judicial review. The power of promulgating ordinances is not an absolute entrustment but conditional upon a satisfaction that circumstances exist rendering it necessary to take immediate action. Undoubtedly, as this Court held in *Indra Sawhney v. Union of India*[42] the extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions involved and such factors. Since the duty to arrive at the satisfaction rests in the President and the Governors (though it is exercisable on the aid and advice of the Council of Ministers), the Court must act with circumspection when the satisfaction under Article 123 or Article 213 is challenged. The court will not enquire into the adequacy, or sufficiency of the material before the President or the Governor. The court will not interfere if there is some material which is relevant to his satisfaction. The interference of the court can arise in a case involving a fraud on power or an abuse of power. This essentially involves a situation where the power has been exercised to secure an oblique purpose. In exercising the power of judicial review, the court must be mindful both of its inherent limitations as well as of the entrustment of the power to the head of the executive who acts on the aid and advice of the Council of Ministers owing collective responsibility to the elected legislature. In other words, it is only where the court finds that the exercise of power is based on extraneous grounds and amounts to no satisfaction at all that the interference of the court may be warranted in a rare case. However, absolute immunity from judicial review cannot be supported as a matter of first principle or on the basis

- of constitutional history.
94. The judgment of Justice Sujata Manohar does indicate (as one commentator on the subject states), that the learned judge "is willing to engage in some form of heightened scrutiny"[60]. Yet, the three-fold test of irreversibility, impracticality or public interest may, if broadly applied, cover almost every situation where an ordinance has ceased to operate. A demolition may have been effected. An order of conviction may have been passed upon a trial. An acquisition of an industrial undertaking may be made. Large-scale regularisation of contractual or casual employees may be effected. Legislation of unauthorised structures may be made. A myriad different situation can be contemplated. Must every action under an ordinance produce binding rights, obligations and liabilities which will survive its demise? In our view, in determining the issue the over-arching consideration must be the element of public interest or constitutional necessity. Ultimately, it is this element of public interest which would have guided the court in Bhupendra Kumar Bose in holding that the validation of an election by an ordinance should not be set at naught (though the logic adopted by the court was flawed). Bhupendra Kumar Bose also raises troubling aspects independently on its facts because in that case a Bill which was moved before the state legislature to incorporate provisions similar to those of the ordinance was defeated. Be that as it may, in deciding to mould the relief the effort of the court would be to determine whether undoing what has been done under the ordinance would manifestly be contrary to public interest. Impracticality and irreversibility in that sense are aspects which are subsumed in the considerations which weigh in the balance while deciding

where public interest lies. Impracticality cannot by itself be raised to an independent status because it would then be simple enough for the executive to assert the supposed complexities in undoing the effects of an ordinance. Since the basic constitutional value which is at issue is of parliamentary supremacy and control, the moulding of relief can be justified in cases involving grave elements of public interest or constitutional necessity demonstrated by clear and cogent material.

- 105.3 The constitutional fiction, attributing to an Ordinance the same force and effect as a law enacted by the legislature comes into being if the Ordinance has been validly promulgated and complies with the requirements of Articles 123 and 213;
- 105.4 The Ordinance making power does not constitute the President or the Governor into a parallel source of law making or an independent legislative authority;
- 105.5 Consistent with the principle of legislative supremacy, the power to promulgate ordinances is subject to legislative control. The President or, as the case may be, the Governor acts on the aid and advice of the Council of Ministers which owes collective responsibility to the legislature.
- 105.9 Article 213(2)(a) provides that an ordinance promulgated under that article shall "cease to operate" six weeks after the reassembling of the legislature or even earlier, if a resolution disapproving it is passed in the legislature. The Constitution has used different expressions such as "repeal" (Articles 252, 254, 357, 372 and 395); "void" (Articles 13, 245, 255 and 276); "cease to have effect" (Articles 358 and 372); and "cease to operate" (Articles 123, 213 and 352). Each of these expressions has a distinct connotation. The expression "cease to operate" in Articles 123 and 213

does not mean that upon the expiry of a period of six weeks of the reassembling of the legislature or upon a resolution of disapproval being passed, the ordinance is rendered void ab initio. Both Articles 123 and 213 contain a distinct provision setting out the circumstances in which an ordinance shall be void. An ordinance is void in a situation where it makes a provision which Parliament would not be competent to enact (Article 123(3)) or which makes a provision which would not be a valid if enacted in an act of the legislature of the state assented to by the Governor (Article 213(3)). The framers having used the expressions "cease to operate" and "void" separately in the same provision, they cannot convey the same meaning;

105.10 The theory of enduring rights which has been laid down in the judgment in Bhupendra Kumar Bose and followed in T Venkata Reddy by the Constitution Bench is based on the analogy of a temporary enactment. There is a basic difference between an ordinance and a temporary enactment. These decisions of the Constitution Bench which have accepted the notion of enduring rights which will survive an ordinance which has ceased to operate do not lay down the correct position. The judgments are also no longer good law in view of the decision in S R Bommai.

105.13 The satisfaction of the President under Article 123 and of the Governor under Article 213 is not immune from judicial review particularly after the amendment brought about by the forty-fourth amendment to the Constitution by the deletion of clause 4 in both the articles. The test is whether the satisfaction is based on some relevant material. The court in the exercise of its power of judicial review will not determine the sufficiency or adequacy of the material. The court

will scrutinise whether the satisfaction in a particular case constitutes a fraud on power or was actuated by an oblique motive. Judicial review in other words would enquire into whether there was no satisfaction at all."

24. As is held by the Apex Court, the extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions involved and such factors.

25. The Courts would ordinarily prefer to be within confines of contours of its jurisdiction, authority and power. May be satisfaction of the Governor under Article 213 would not be absolutely immune to judicial review. The test is as to whether satisfaction is based on some relevant materials. Under a judicial review, it will not be open for the Court to determine the sufficiency or adequacy of the material. It may be tested as to whether there was no satisfaction at all.

26. It may not be out of place to refer to that in the year 2005 also the Ordinance was issued for postponing the elections of the Chairman and Vice Chairman of the Panchayat Samitis so also the President and the Vice President of the Zilla Parishads, though in 2014 and 2009, no such Ordinance was issued.

27. It is also well settled that the appropriate test to be applied is the test of

public interest and constitutional necessity. We may not infer legislative malice, as it would be beyond the pale of jurisdiction of law Courts. The ordinance does not tantamount to fraud on Constitution nor is an abuse of the power by the Governor. The reasons underlying promulgation of the Ordinance appear to meet with and resolve the peculiar situation.

28. It light of the aforesaid discussion, the challenge to the impugned Ordinance fails. The writ petitions are dismissed, however, with no order as to costs.

29. In view of dismissal of the writ petitions, present civil applications stand disposed of.

(ANIL S. KILOR)
JUDGE

(S. V. GANGAPURWALA)
JUDGE