IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11717 of 2021

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1. Dr. Ashish Kumar Sinha, S/o Shri Rajendra Prasad, R/o Gulab Bagh Market, Sampatchak, Bankipore, Patna, Bihar-800004
2. Indradeep Kumar, S/o Bhubneshwar Ram, House No. 14, Nand Nagar, Saidpur, Sampatchak, Patna, Bihar- 800016
3. Kiran Mehta, W/o Dhananjay Kumar Mehta, Gur Ki Mandi, Pitambara Mandir, Sampatchak, Patna, Bihar- 800007
4. Nilam Kumar W/o Sanjeev Kumar, Gwal Toli Diwan Mohalla, Sampatchak, Patna, Bihar- 800008
5. Kismati Devi W/o Late Chabilamahto, Choti Pahari (Rasida Chak) Raed No. 56, Bari Pahari, Sampatchak, Bihar- 800007
6. Manoj Kumar S/o Gopal Prasad Jaiswal, Kila Road, Patna City, Nagla, Patna, Bihar- 800008
7. Kailash Prasad Yadav S/o Duli Chandra Yadav, House No. 110, Amrudi Gali, Nala Road Arya Kumar Road, Patna, Bankipur, Bihar- 800004
8. Meera Kumari W/o Upendra Prabhakar, Near Pani Tanki, Chandpur Bela, Patna GPO, Patna, Bihar- 800001
9. Prabha Devi W/o Sunil Singh, Purani Sabajpura, Dinapur-cum-Khagaul, Patna, Bihar- 801105
10. Dhanraj Devi, House No. 1/12, Teksatbook Colony, Keshari Nagar, Phulwari, Keshari Nagar, Patna, Bihar- 800024
11. Suchitra Singh W/o Nilesh Prasad, Kurji, Magadh Colony, Sadaqat Asharam Patna, Bihar - 800010
12. Anita Devi W/o Rakesh Kumar, House No.95, Parnami Mandir Gali, Pamami Mandir Gali, Rajapur, Patna, Patna GPO, Bihar- 800001
13. Dinesh Kumar S/o Sharda Chaudhary, Gate No.- 90, Near Devi Mandir, Makhdumpur, Dinapur-cum-Khagaul, Patna, Bihar- 800011
14. Renu Singh @ Renu Devi W/o Shekhar Singh, Bundel Toli, Patna City, Simli Murarpur, Patna, Bihar - 800008
15. Binod Kumar S/o Kamta Prasad Sharma, Nagala Main Road, Malsalami, Patna City, Nagla, Patna, Bihar- 800008
16. Abda Kuraishi W/o Md. Mehmood Kurashi 00, Shah Fasamat Ka Maidan, Post Jhauganj, Near Madhya Bihar Gramin Bank, Patna City, Patna, Bihar- 800008
17. Vikash Kumar Mehta @ Vikash Kumar S/o Pradip Kumar Mehta, Nakhash Machhua Toli, Patna city, Begampur, patna, Bihar, 800009
18. Smita Rani W/o Rajkumar Near Devi Sthan, Dadar Mandi, Gulzarbagh, Patna, Bihar- 800007
19. Sunita Devi W/o Manoj Kumar Dhawalpura, Bandh Par, Patna City, Sampatchak, Patna, Bihar- 800009
20. Tara Devi W/o Umesh Kumar Godampar, Bahari Begampur Par Pokhara, Patna City, Begampur, Patna, Bihar- 800009

21. Anand Mohan Kumar, S/o Brahmadeo Lal, Mogalpura, Jamuni Rai Ka Kuan, Nath Cold Storage, PS.- Khajekala, Patna City , Bihar, - 800008
22. Kanti Devi W/o Manoj Kumar, Puagali, Jhauganj Chowk, Patna City, Patna, Bihar- 800008

... ... Petitioner/s

Versus

1. The Union of India through the Cabinet Secretary, Government of India
2. The Finance Secretary, Ministry of Finance, Government of India
3. The Law Secretary, Department of Legal Affairs, Government of India
4. The State of Bihar through the Chief Secretary, Government of Bihar, Patna
5. The Principal Secretary, the Urban Development and Housing Department, Government of Bihar, Patna
6. The Secretary cum Legal Remembrancer, Law Department, Government of Bihar, Patna
7. The Municipal Commissioner, Patna Municipal Corporation

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 5713 of 2020

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1. Bihar Local Bodies Employee Federation, a Trade Union registered under the provisions of Indian Trade Union Act, 1926 through its President Mr. Shiv Bachan Sharma (Male) aged about 68 years, S/o Late Bhagwan Singh Address Mohalla- 24/K I S Lane Gurunank School, P.S.- Muffasil, District- Gaya.
2. Dilip Mallick, S/o Late Sakhi Chandra Mallick R/o Village- Baghi, P.S.- Muffasil, District- Begusarai.
3. Ambika Paswan Son of Late Mukh Lal Paswan, Resident of Village- Manshahi, P.S.- Manshahi, District- Katihar.

... ... Petitioner/s

Versus

1. The State of Bihar through its Principal Secretary, Town Development and Rehabilitation Department, Government of Bihar, Patna.
2. The Special Secretary Town Development and Rehabilitation Department, Govt. of Bihar, Patna.
3. The Joint Secretary Town Development and Rehabilitation Department, Govt. of Bihar, Patna.
4. The Additional Secretary, Lokayukta, Bihar, Patna.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 9047 of 2020

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1. Ramesh Kumar son of Baiju Gop Resident of Bhanwar Pokhar, Gopal Tola, PS- Pirbhore, Dis- Patna.
2. Mukesh Kumar, son of Shiv Kumar Thakur, Resident of Bhanwar Pokhar, near by Khetan Market, PS- Pirbhore.
3. Durga Gor son of Bisajan resident of 21, Harding Road, MLA Flat, PS- Sachiwalaye, Dis- Patna.
4. Nawab Ahmed Ali, son of Md. Ali Resident of Phulwari Sharif, PS- Phulwari Sharif, Dis- Patna.
5. Abash Kumar son of Harinand Singh Resident of Gardanibagh, Road No. 1, PS- Gardanibhagh, Dis- Patna.
6. Niraj Kumar son of Nagendra Singh Resident of Vishnupuri Chitkohara, PS- Gardhanibagh, Dis- Patna.
7. Rahul Kumar son of Raju Rajak Resident of Chandpur Bela, Pani Tanki Gaya Line Road, Patna1.
8. Ranjeet Kumar son of Ramji Mahto Resident of Aadalatganj, PS- Kothwali, Dis- Patna.
9. Rakesh Kumar son of Ram Vilas Sharma resident of Kuthaul, Patna, PS- Kuthaul, Dis- Patna.
10. Vinod Kumar son of Ram Ashis Paswan resident of Kamla Nehru Nagar, Aadalatganj, PS- Kothwali, Dis- Patna.
11. Amit Kumar son of Jitendra Kumar Resident of Chitkohara, PS- Gardhanibagh, Dis- Patna.
12. Nitiesh Kumar son of Murli Prasad resident of New Punaichak Boaring Road, PS- Sashtri Nagar, Dis- Patna.
13. Shambhu Nath son of Lalchandra Ram resident of Raja Bazaar Samanpura, PS- Sashtrinagar, Dis- Patna.
14. Dipak Kumar son of late Chabila Prasad resident of South Mandiri, PS- Budhacolony, Dis- Patna.
15. Vinod Kumar son of Ramji Singh resident of Phulwari Sharif, PS- Phulwari Sharif, Dis- Patna.
16. Bimlesh Kumar son of Kashinath Singh resident of Phulwari Sharif, PS- Phulwari Sharif, Dis- Patna.
17. Dipak Kumar son of late Shivjatan Paswan resident of Bichli Mandiri, PS- Budhacolony, Dis- Patna.
18. Rahul Kumar son of Sambhu Prasad resident of Nagar Nigam Colony, Pulwari sharif, PS- Phulwari Sharif, Dis- Patna.
19. Ajay Kumar Paswan son of Ramakant Paswan resident of Saristabad Gardanibagh, PS- Gardanibagh, Dis- Patna.
20. Kanhaiya Kumar Misra son of late Pitambar Misra resident of Jagjivan Nagar, Chitkohara Pul Ke Niche, PS- Gardanibagh, Dis- Patna.
21. Chandan Kumar son of Dinesh Baitha resident of Anishabad, PS- Gardanibagh, Dis- Patna.

22. Panjak Kumar son of Kumar resident of Kedwaipuri, PS- Budhacolony, Dis- Patna.
23. Anand Bhagat son of Chattu Bhagat resident of Gardanibagh, PS- Gardanibagh, Dis- Patna.
24. Sanjay Paswan son of Ramakant Paswan resident of Done Khurd, PO- Done, PS- Daurauli, Dis- Shiwan.
25. Amitabh Trivedi son of Krishna Murari Shankar Trivedi resident of Thakurbari Nala Road, PS- Kadam Kuan, Patna.
26. Bhim Ravidas son of Shri Ngina Mocha resident of Gram Godna, PO- Paawo, PS- Masuadi, Dis- Patna.
27. Uday Prasad son of Surendra Prasad resident of Salimpur Aahara Kadam Kuwan, PS- Gandhimaidan, Dis- Patna.
28. Chandan Saini son of Vinay Bhagat resident of Gram Kansari, PO- Kansari, PS- Gaurichak, Patna.
29. Satyendra Kumar son of Shambhu Prasad Yadav resident of Village Raghunathpur, PS- Naubatpur, Patna.
30. Vijan Kumar Singh son of Anil Kumar Singh Resident of Mohala Sirpalpur, PS- Punpun, PO- Punpun.
31. Ranjeet Singh son of Gaya Singh Resident of Mohalla Akanta Apartment, Kali Mandir Marg Bekar Bagh, PS- Dhanbad Town, Jharkhand.
32. Amresh Rai son of Ram Prasad Rai Resident of Birhiya Moharnpur, Dis- Vaishali.
33. Sunil Kumar son of Shayam Kumar Resident of Quarter No. 1 Patna Nagar Nigam Camp, PS- Gardhanibagh, Dis- Patna.
34. Pankaj Kumar son of Suresh Ram Resident of Polo Road Kausal Nagar, PS- Airpot, Dis- Patna.
35. Pawan Kumar son of Ram Lakhan Singh Resident of R. Block, PS- Sachiwalaye, Dis- Patna.
36. Prem Kumar son of Arjun Prasad resident of A.N. College Pani Tanki Boaring Road, Water Board Quarter No. 4, Flat No. 1, PS- Krishna Puri, Dis- Patna.
37. Sudhir Paswan son of Banshi Paswan resident of Khajpura, PS- Vetnari College, Dis- Patna.
38. Alok Kumar son of Shayam Kumar resident of near Gardanibagh Hospital Quarter No. 1, PS- Gardanibagh, Dis- Patna.
39. Shambhu Kumar son of Ramanand Saw resident of Mohalla Sona Gopal Pur Sampatchak, PS- Sampatchak, Dis- Patna.

... ... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Urban Development and Housing Department, Government of Bihar, Patna.

3. The Deputy Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
4. The Patna Municipal Corporation, Maurya Lok Complex, Patna Through the Municipal Commissioner.
5. The Municipal Commissioner, The Patna Municipal Corporation, Maurya Lok Complex, Patna.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 12524 of 2021

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Bihar Local Bodies Employees Federation, Patna through its Pradesh Sangathan Mantri, Md. Asjad Alam, male age about 30 years, son of Late Muhammad Asraffudin, Ward no. 22, Ganimat Hussein Path, Nagar Parishad Supaul, Bihar.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Urban Development and Housing, Government of Bihar, Patna.
2. The Principal Secretary, Department of Urban Development and Housing, Government of Bihar, Patna.
3. The Director, Municipality Administration Directorate, Department of Urban Development and Housing, Government of Bihar, Patna.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 12619 of 2021

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Patna Nagar Nigam Staff Union through its General Secretary, Mr. Niraj Kumar Verma, Male Age about-58 Years, Resident of -24A, Ward No.-49, Mohammadpur, Sampathchak, Patna, Mahendru, Bihar-800006. Present Office at Water Board Colony, Boring Road, Patna-800013.

... ... Petitioner/s

Versus

1. The Union of India Through the Cabinet Secretary, Government of India
2. The Law Secretary, Department of Legal Affairs, Government of India
3. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
4. The Principal Secretary, Urban and Housing Development Department, Government of Bihar, Patna.
5. The Municipal Commissioner, Patna Municipal Corporation, Patna.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 12809 of 2021

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1. Binod Kumar Yadav S/o Shri Jai Prakash Yadav R/O Near Shiv Mandir, Godavari, P.O.- Chand Chaura, Gaya, Bihar- 823001.
2. Chunna Khan S/O Shri Habib Khan R/O Neemgali, Panchaitiya Akhara, Gaya, Bihar- 823001.

... ... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, The Urban Development and Housing Department, Government of Bihar, Patna.
3. The Municipal Commissioner, Gaya Municipal Corporation.

... ... Respondent/s

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Appearance :

(In Civil Writ Jurisdiction Case No. 11717 of 2021)

For the Petitioner/s	:	Ms. Mayuri, Advocate
		Mr. Kamleshwar Pandey, Advocate
For the Respondent/s	:	Dr. K.N. Singh (ASG)
		Mr. Alok Kumar Jha, CGC
		Mr. Sriram Krishna, JC to ASG
		Ms. Prakritita Sharma, JC to ASG
For the State	:	Mr. Lalit Kishore, Advocate General
		Mr. Subhash Prasad Singh, G.A. 3
		Mr. Pawan Kumar AC to AG
For the PMC	:	Mr. Prasoon Sinha, Advocate

(In Civil Writ Jurisdiction Case No. 5713 of 2020)

For the Petitioner/s	:	Mr. Y.C. Verma, Sr. Advocate
		Ms. Priyanka Singh, Advocate
		Mr. Anuj Kumar, Advocate
		Mr. Madhav Raj, Advocate
For the State	:	Mr. Lalit Kishore, Advocate General
		Mr. Pankaj Kumar, SC-12
		Mr. Pawan Kumar AC to AG

(In Civil Writ Jurisdiction Case No. 9047 of 2020)

For the Petitioner/s	:	Dr. Anjani Pd. Singh, Advocate
For the State	:	Mr. Abbas Haider, SC-6
		Mr. Pawan Kumar AC to AG
For the PMC	:	Mr. Prasoon Sinha, Advocate

(In Civil Writ Jurisdiction Case No. 12524 of 2021)

For the Petitioner/s	:	Mr. Siddharth Prasad, Advocate
		Mr. Sunit Kumar, Advocate
		Ms. Surya Nilambari, Advocate
		Mr. Om Prakash Kumar, Advocate
For the State	:	Mr. Subash Prasad Singh, GA-3

Mr. Pawan Kumar, AC to AG

(In Civil Writ Jurisdiction Case No. 12619 of 2021)

For the Petitioner/s	:	Mr. Rajeeva Roy, Sr. Advocate
		Mr. Akash Keshav, Advocate
		Ms. Akansha Malviya, Advocate
		Mr. Shashwat, Advocate
		Mr. Vishal Kumar Singh, Advocate
		Mr. Deepak Kumar Singh, Advocate
For the Union of India	:	Dr. K.N.Singh, A.S.G.
		Mr. R. K. Sharma, CGC
For the State	:	Mr. Lalit Kishore, Advocate General
		Mr. Pawan Kumar AC to AG
For the PMC	:	Mr. Prasoon Sinha, Advocate

(In Civil Writ Jurisdiction Case No. 12809 of 2021)

For the Petitioner/s	:	Ms. Mayuri, Advocate
		Mr. Kamleshwar Pandey, Advocate
For the Respondent/s	:	Mr. Lalit Kishore, Advocate General
		Mr. Pawan Kumar AC to AG
		Mr. Subhas Prasad Singh, G.A. 3
For the GMC	:	Mr. Rabindra Kumar Priyadarshi, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE S. KUMAR

CAV JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 21-10-2022

The following questions arise for consideration in the present set of writ petitions:

(i) Whether the impugned amendments brought in by virtue of Bihar Municipal (Amendment) Act, 2021 (Bihar Act 06, 2021) are repugnant to the Constitution (Seventy Fourth) Amendment Act, 1992?

(ii) Whether the impugned provisions of Bihar Municipal (Amendment) Act, 2021 are in contravention of their parent Act, i.e. Bihar

Municipal Act, 2007 (Bihar Act 11, 2007)?

(iii) Whether the Bihar Municipal (Amendment) Act, 2021, restricting the power of appointment, posting, transfer of the employees, results into truncating the cadre autonomy and functioning of Municipal Bodies as institutions of self-government?

(iv) Whether the expression "enable them to function as Institutions of self-government" under Article 243W of the Constitution of India would encompass the power of the Municipal Body to have complete freedom and right of selection, appointment, posting and transfer of its employee(s)?

Impugned Legislation

2. The present set of writ petitions lay challenge to Sections 36, 37, 38, 40A, 41 and 43 of Chapter V of the Bihar Municipal Act, 2007 (hereinafter referred to as the "Municipal Act") and subsequent amendment to Sections 36, 37, 38 and 41 of the said Act, introduced on 31.03.2021 vide the Bihar Municipal (Amendment) Act, 2021 (Bihar Act 06, 2021) (hereinafter referred to as the "Amendment Act").

3. By virtue of existing Chapter V (as amended on 31.03.2021), the power to select; appoint; post; and transfer an employee of a Municipality now vests with the State Government, even though for the purpose of salary; wages and

all pecuniary benefits, the responsibility is that of a former. Is this permissible in law? Is what we are called upon to answer.

4. Petitioners, Dr. Ashish Kumar Sinha & Ors., in CWJC No.11717 of 2021 lay challenge to Chapter V of the "Municipal Act" (Sections 37, 38, 40 40A, and 43) and subsequent amendment to Sections 36, 37, 38 and 41 of the said Act, introduced on 31.03.2021 vide the "Amendment Act".

5. Petitioners, Bihar Local Bodies Employee Federation & Ors., in CWJC No. 5713 of 2020 lay challenge to the amendment brought in Sections 36, 38 and 41 by virtue of the "Amendment Act."

6. Petitioners, Ramesh Kumar & Ors., in CWJC No.9047 of 2020 sought a declaration that in view of Section 37 (3) of the "Municipal Act", conferring powers upon the Empowered Standing Committee (ESC) to prepare and maintain a schedule of posts of officers and other employees constituting the establishment of Municipality and Rule 10(a) of the Bihar Municipal empowered standing Committee Conduct of Business Rules, 2010 (hereinafter referred to as "Conduct of Business Rules, 2010") and to take decision regarding appointments, promotions, benefits and other matters in connection with and incidental thereto about the establishment of Municipality, the

State Government does not have any jurisdiction to interfere in the functioning of Municipality.

7. Petitioner, Bihar Local Bodies Employees Federation, Patna, in CWJC No.12524 of 2021 lays challenge to the amendment brought in Sections 36 and 38 of the "Amendment Act".

8. Petitioner, Patna Nagar Nigam Staff Union, in CWJC No.12619 of 2021 apart from claiming identical relief in striking down the amendment to Sections 36, 37, 38 and 41, also questions the constitutionality of amendment to Section 67 of the Bihar Municipal Act vide Bihar Municipal (Amendment) Act, 2020. The petitioner also seeks quashing of three Notifications/Letters- Notification bearing No.1840 dated 12.05.2021, Annexure P/9 to this petition (**Page-85**)**;** Notification bearing No.1843 dated 12.05.2021 (**Page-90**)**;** letter bearing no 2197 dated 30.06.2021 (**Page-94**); letter bearing no 3453 dated 29.06.2018, Annexure P/2 to this petition (**Page-47**).

9. Petitioners, Binod Kumar Yadav & Anr, in CWJC No.12809 of 2021, seek similar reliefs.

10. Though some petitioners laid challenge also to certain provision of Chapter V, Sections 36, 37, 38, 40A, 41 and 43; Chapter VI, Section 45 and Chapter XV, Section 127 of the Bihar

Municipal Act, 2007 as being in violation of the Constitution of India, but the same is now, for the purposes of this adjudication, restricted only to the validity of the Bihar Municipal (Amendment) Act, 2021 (Bihar Act 06, 2021), with liberty to file separate writ petitions. Here only we clarify that on the objection of the State, technical in nature, we leave the validity of Section-43 and other provisions of the Municipal Act to be decided in appropriate proceeding.

11. Though the State has filed separate response in some of the petitions, however, a comprehensive response is by way of a counter affidavit, supplementary counter affidavit and 2nd supplementary counter affidavit filed in CWJC No.11717 of 2021, titled as Dr. Ashish Kumar Sinha v. The Union of India & Ors., which we refer for the purpose of adjudication of the *lis*.

12. The State, as is evident from the response, has tried to justify the "Amendment Act", i.e. the Bihar Municipal (Amendment) Act, 2021 (Bihar Act 06, 2021) by pleading *inter alia* as under:-

Counter affidavit dated 20.09.2021(Page 136)

> "9. That the Act, 2007 was enacted by the legislature of the State of Bihar to consolidate and amend the laws relating to Municipal Government in the State of Bihar in conformity with the provisions of the Constitution of India as amended by the Constitution (Seventy-fourth Amendment) Act, 1992 based on Principles of participation in, and decentralization,

autonomy and accountability of Urban Self Government at various levels to introduce reforms in financial management. The Act, 2007 has been enacted in the light of the provisions contained in part IX-A (The Municipalities) of the Constitution of India."

"10. That for quite sometime a need for amendments of the provisions contained in Sections-36,37,38,41,53,56 and 435 of the Act,2007 was being felt by the State Govt. on account of practical difficulties, implementation related problems and change of policy of the State Government relating to Group-D services."

"12. That it is worth mentioning here that the State Government took a conscious policy decision for filling up Group-D posts like Sanitation Workers etc. in the ULBs of Bihar through Outsourcing System and in this regard, UD & HD Letter No. 3453 dated 29.06.2018 was issued to all Municipal bodies by fixing norms for personnel to be engaged through outsourcing. Implementation status of outsourcing of group-D employees has also been under enquiry by the Ld. Lokayukta, Bihar, in which order dated 28.11.2019 was passed with a clear observation that State Government shall take necessary steps for getting the Policy of outsourcing of Group-D services be implemented by all Municipal Bodies in letter and spirit and the copy of the said order should be circulated to all Municipal Bodies for its compliance."

"13. That, recently, a lot of practical difficulties were being faced due to Municipal Level Cadre of Group-C posts of Municipal Establishment and therefore, it was thought proper to create State Level Cadre of Group-C Municipal Posts in order to remove procedural problems in the matter of appointment of Group-C Municipal Posts.

Yet another reason for making the Group-C Municipal posts State Cadre post is that due to absence of any specified institution for making selection of Group-C Municipal posts at the Municipal Level, a lot of procedural problems were being encountered in fair appointment of Group-C Municipal Posts."

"14. That in view of the aforementioned reasons, the necessary amendments in Sections-36,37 and 38 have been made by the impugned Amending Act, 2021 and now, the appointing authority of Group-C Municipal Post is Municipal Administration Directorate under UD & HD, the Group-C post will be State Level Cadre."

"15. That the provisions contained in section-41 of the Act, 2007 relating to appointment of officers of State Government for municipality was causing hurdles/obstacles to the State appointed officers in free and fair discharge of their duties due to provision that the officer of the government so appointed shall be the under administrative control of Empowered Standing Committee, has to be withdrawn by the State Government if, a resolution to that effect is passed by the Councilors in a meeting called for this purpose by a 2/3 majority of the total number of Councilors holding office for the time being. Considering the aforementioned problem the State Government has decided to amend the section-41 of the Act, 2007 and therefore, deleted the second proviso which gave control to the Empowered Standing Committee over State Government Officers."

(**Emphasis supplied**)

Supplementary affidavit dated 23.12.2021(Page 167)

"7. That by way of this supplementary counter affidavit aims and objectives of the amendments made vide Bihar Municipal (Amendment) Act, 2021 are being explained and summarized point wise as herein below:-

I. Sections 36, 37 and 38

A. That prior to amendment of Sections 36,37 & 38 of the Act, 2007, the procedure was not prescribed for appointment on class-C post in the municipalities. In absence of procedure for appointment, it was difficult to appoint group-C employees in the municipalities.

B. Prior to amendment, the municipalities were empowered to make appointments on Class-C post. There were large scale complaints of illegal appointments regarding huge number of posts, which were made without any proposal and without following the prescribed procedure in respect of the qualification and method of appointments and these appointments were made without following the rules of the appointment.

C. After the appointment, State Government has been empowered to make appointments on Class-C posts since the Class-C posts were declared as State cadre posts. Pursuant to such amendments the appointment on Class-C post have become fair and transparent as such appointment would be

made following the procedure prescribed by the Commission at State Level. Consequent to such appointments, efficient and qualified employees would be available to the municipalities.

D. Prior to the amendment, the employees on Class-C posts used to remain working in a particular municipal office in a long time or for the whole service period, which was proving counterproductive and was one of the main reasons for corruption and nexus with unscrupulous elements. It was felt necessary to bring amendments and after the amendments it became possible to make transfer of group-C employees from one municipality to the other in the State of Bihar which would result in proper administration and administrative managements.

F. There shall be uniformity in selection procedure because of the post being State cadre post and the municipalities would be having efficient and experienced employees.

H. Therefore, by the impugned Amending Act, 2021 now the appointing authority of Group-C Municipal Post is Municipal Administration Directorate under UD & HD and the Group-C post will be the State Level Cadre.

In view of the aforementioned difficulties/situations, the necessary amendments in Section 36, 37 and 38 have been made by the impugned Amending Act, 2021.

II. Section 41

A. Prior to the amendment, the officers of State Government posted in municipalities were to be removed by 2/3 majority votes of the total members of the municipality. It was observed that sometimes the officers who were strict in discharge of their official duty or none complying to some malpractices etc. were returned and removed unceremoniously by a proposal passed by municipality, which was not proper for administration of municipality. In this situation State Government Officers were facing difficulties in execution of their duties properly and officers were at times, compelled to perform their duties under undue pressures also.

B. The State Government Officers posted in municipalities are the officers of State cadre, who are under "control superintendence of State Government." In the light of administrative point of view, such officers should have been under direct control of State Government and they should be withdrawn/transferred by the State Government as and when

requires, so that they perform their duties in free and fair environment.

Hence, the State Government has decided to delete the second proviso of Section 41."

(Emphasis supplied)

2nd Supplementary affidavit dated 25.02.2022(Page 219)

"22. That prior to the amendment of section 41 of the Act, 2007, the officers of State Govt. posted in municipalities were to be removed by 2/3 majority votes of the total members of the municipality. It was observed that sometimes the officers who were strict in discharge of their official duty or none complying to some malpractices etc. were returned and removed unceremoniously by a proposal passed by municipality, which was not proper for administration of municipality, which was not proper for administration of municipality. In this situation state govt. officers were facing difficulties in execution of their duties properly and officers were at times, compelled to perform their duties under undue pressures also."

"42. That it is submitted that establishment of the municipalities is conducted and operated in state of Lassaiz faire. The State Govt. has not any control upon the administration of local bodies are supposed to act according to the will of the Empowered Standing Committee. The State Govt. has rather a Supervisory power over local Bodies lest they may not act in arbitrary and unfair manner."

(Emphasis supplied)

Submissions

13. In challenging the constitutional validity of these provisions, the Court heard all the learned counsel, including the *Amicus Curiae* at length. In fact, members of the Bar were openly requested to assist. Also perused the written submissions filed by them. The submissions made, succinctly are recorded as under:-

Submissions on behalf of petitioners:

13.1 Ms. Mayuri, learned counsel for the petitioner(s) challenges the constitutionality of the Municipal Act and Amendment Act on grounds that-

(i) It is in contravention of objects and reasons enshrined in the Seventy Fourth Amendment Act to the Constitution of India, and the Municipal Act. In furtherance, she lays stress on the four basic tenets informing, understanding and interpretation of the constitutional amendment as also the State Legislation - (a) devolution of powers; (b) decentralization; (c) autonomy; and (d) vibrant unit of self-government.

(ii) The Amending Act cannot be contrary to the Parent Act. Placing reliance on Section 22 and 27-B of the Act as representing cadre autonomy available to the Municipal Bodies, is taken away by the "Amending Act".

(iii) On Section 40A, she submits that the power of appointment and administrative control of employees which should rest with the Empowered Standing Committee (ESC) is being taken away by repeated amendments, resulting in concentration of power with the State Government which is against the spirit of devolution of powers. In support, she relies on Section 37 of the Bihar and Orissa Municipal Act, 1922,

which provided for the appointment of Municipal Officer on terms and conditions to be decided by the Municipal Corporation.

(iv) The amendments erase administrative control of municipal bodies over its employees. The lack of accountability and answerability would encourage indifference and insubordination which is not in consonance with the idea of good governance.

(v) The Amendment Act goes against the Constitution as the intention of the legislature cannot be said to be that of conferring such limited and truncated powers when they have created an office of Mayor/Chief Councillor (being an elected position) only to treat it unfairly.

(vi) The object and reasons of the Amending Act are unreasonable and arbitrary. Taking aid of the pleaded stand of the State Government, it is argued that intent contravenes the Parent Act wherein prior to the amendment, the Empowered Standing Committee was entitled to supervise and control the employees.

(vii) There is a conflict between the objective of the Amending Act and that of the Parent Act, i.e. the Municipal Act. The latter was made in furtherance of the provisions of the self-governance, devolution of powers etc. to bring the State in line

with the introduction of the third level of government while the former has been made with the objective of taking away the power of appointment as well as rendering moot any administrative control the municipality had over its officers.

(viii) Further, it was contended that, it is not the power of appointment which is intended to be taken away by the impugned legislation, instead it is what happens after appointment, that is drastically affected by this legislation. Section 38 and Section 40A have been cited to show that the Rules of appointment were already being made by the State and it is the consultation power of the Empowered Standing Committee that has been taken away. Thus, the control aspect stands fundamentally altered.

(ix) The supplementary counter affidavit of the State casts severe aspersions on the functioning of the Municipality without leading any evidence in support of the same.

(x) Group- C posts although are converted to State Cadre, the cost incurred in meeting expenses of salary and other emoluments will be borne out of the Municipal Funds. Sub-section (2) of Section 39 of the Municipal Act grants a power to the Municipality to provide pension, gratuity, bonus etc. and transfer from one autonomous body to another will lead to confusion in regard to such payment.

(xi) In support, she refers to and relies on the following decisions:-

(i) Kaushal Kaushik v. State of Bihar[1]; (ii) Santosh Kumar v. State of Bihar[2]; (iii) Afjal Imam v. The State of Bihar[3] ; (iv) T. Devender v. State of Andhra Pradesh[4] ; (v) Maharashtra State Board of Secondary & Higher Secondary Education v. Paritosh Bhupeshkumar Sheth [5] ;(vi) State of Gujarat v. Raman Lal Keshav Lal Soni[6]; (vii) B.N. Narajan v. State of Mysore[7]; (viii) Sajjan Singh v. State of Rajasthan[8]; (ix) In Re, Berubari Union[9]; and (x) Rajnarain Singh v. Chairman Patna Administration Committee Patna[10] .

13.2 Mr. Yogesh Chandra Verma, learned Senior Advocate, has made the following submissions:-

(i) The Amendment Act is in complete violation of the provisions contained in Article 243W of the Constitution of India. It empowers the State Legislature to make laws according

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12017 (3) PLJR 167
22017 (1) PLJR 46
3(2011) 5 SCC 729
4(1992) 3 ALT 1
5(1984) 4 SCC 27
6(1983) 2 SCC 33
7AIR 1966 SC 1942
8AIR 1965 SC 845
9AIR 1960 SC 845
10AIR 1954 SC 569

to and not in derogation of the Constitution.

(ii) The word 'endow' is not restrictive, in fact empowering the State Government for making laws to facilitate self-government under Article 243W of the Constitution.

(iii) The phrase 'devolution of powers' suggests devolving of functions i.e. transfer of authority to *quasi* autonomous local Government. In such a system, local Governments have clear and legally recognized geographical boundaries over which they exercise certain authority and perform public functions.

(iv) In a system of devolution, decentralization has numerous benefits- (a) Planning and implementation of services is done by those who are directly concerned with delivery thereof. (b) Decision making is participatory in nature when the elected officials and their electors, i.e. the public are in close contact and proximity, etc.

(v) The impugned Amendment Act is a colourable exercise of power. The legislature ought not to do indirectly what cannot be done directly- '*Quando aliquid prohibetur ex directo, prohibetur et per obliquum'*. Reliance is placed on **K.C.G. Narayan Deo v. State of Odisha, AIR 1953 SC 375.**

> **"9.** ... If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the

> legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect…"

(vi) The objective behind insertion of Part IX-A to the constitution of India was to enable local bodies who had become weak and ineffective to function as vibrant units of self-government. This part was introduced to keep the economic transformation of the country in line with the needs and realities of the grassroots.

(vii) The Bihar Municipal Act was brought in to bring the State in conformity with the Constitution of India as amended by the 74th Constitutional Amendment Act, 1992 on the principles of participation, decentralization autonomy, accountability etc.

(viii) Separation of powers is part of the basic structure of the Constitution and the exercise carried out by the State is in contravention of such separation.

(ix) The provisions of the Amendment Act are arbitrary/unreasonable. It vests State Government with complete power in respect of staff and personnel.

(x) While stating that the amendment usurps power of local bodies and vests controlling power in the State Government

defeating the purpose of formation of local bodies, the learned Senior Advocate also submits that the other submissions advanced by the learned counsel are adopted.

13.3 Mr. Rajeeva Roy, learned Senior Advocate, Mr. Akash Keshav and Ms. Akanksha Malviya, learned Advocates together made submissions to the effect that-

(i) The Seventy Fourth Amendment to the Constitution of India brought in the principles of decentralization, autonomy and accountability at the level of Urban Local Government.

(ii) It is submitted that Article 243W of the Constitution of India is an enabling provision which enables the State Government to make laws for Municipality, but enablement is to make laws in a manner which allows Municipality to function as institutions of self-government.

(iii) He has further submitted at length on the meaning and interpretation of following words- 'may', 'endow', 'self-government', 'democratic decentralization'.

(iv) Referring at length to the decision in **Raman Lal Keshav Lal Soni**[6], it is submitted that the distinction as to when an employee is an employee of a distinct body corporate is clear. Close monitoring of Municipal employees is directly in teeth of Part IX A of the Constitution of India. Employees of a

Municipality as a State cadre are but employees of the State and not that of a Municipality.

(v) The provisions of the Amendment Act read with amendment to Section 67 vide Bihar Municipal (Amendment) Act, 2020 (Bihar Act 13, 2020) lead to the only conclusion that the work of the Municipality shall be conducted by private companies. Article 243W of the Constitution of India does not permit the State Government to divert functions of the Municipality to private companies, nor to itself take up the work of municipality through creation of Directorate.

(vi) The effect of the amendment is that the Municipalities have been rendered a body corporate with no employees of its own which is entirely against the idea of self-Government.

(vii) In support, they referred to and relied on the following judgments:-

(i) Parmar Samantsinh Umedsinh v. State of Gujarat[11]; (ii) M J. Thulasiraman v. Commissioner, Hindu Religious and Charitable Endowment Administration[12]; (iii) Seema Sarkar v. Executive Officer[13]; (iv) Champa Lal v. State of Rajasthan[14]; (v)Lok Prahari through its General Secretary v. State of U.P.[15]; (vi) Rajendra

112021 SCC OnLine SC138
12(2019) 8 SCC 689
13(2019) 6 SCC 559
14(2018) 16 SCC 356

Shankar Shukla v. State of Chhattisgarh[16]; (vii) Afjal Imam[3]; (viii) Bhanumati v. State of Uttar Pradesh[17]; (ix) Bondu Ramaswamy v. Bangalore Development Authority[18]; (x) K Krishna Murthy (Dr) v. Union of India[19]; (xi) Velpur Gram Panchayat v. Assistant Director of Marketing, Guntur[20]; (xii) Housing Board of Haryana v. Haryana Housing Board Employees Union[21]; (xiii) Raman Lal Keshav Lal Soni[6]; (xiv) Union of India v. Shri R. C. Jain[22]; (xv) The Official Liquidator v. Dharti Dhan (P) Ltd.[23]; (xvi) Municipal Corporation of Delhi v. Birla Cotton, Spg. and Wvg. Mills Delhi[24]; (xvii) M.R. Goda Rao Sahib v. State of Madras[25].

13.4 Ms. Surya Nilambari, learned Advocate, argued that:-

(i) Whilst most of the constitutional schemes adopted by India reflect that of the United Kingdom, one fundamental difference between the two systems is that as opposed to

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15(2017)1SCC244
16(2015) 10 SCC 400
17(2010) 12 SCC 1
18(2010) 7 SCC 129
19(2010) 7 SCC 202
201998(1)ALD625
21(1996) 1 SCC 95
22(1981) 2 SCC 308
23(1977) 2 SCC 166
24(1968) 3 SCR 251
25AIR 1966 SC 653

legislative supremacy, India has adopted constitutional supremacy. The legislative competence of the State to amend the Municipal Act, it is also true that such amendment has to be in consonance with Part IX-A of the Constitution.

(ii) On interpretation of Constitution and legislative action, it is argued that the trend is to not restrict oneself in such an exercise only to the textual, but also take into account the contextual import and supply an interpretation which supports and enhances the object of the Act under question. Further, that the ultimate aim of interpreting Statute or the Constitution is to understand the intent of the Legislature, the true meaning and scope of the Act and the problem which it seeks to remedy.

(iii) She laid emphasis on the keywords of Part IX-A such as devolution of powers, institution of self-government etc. and elucidated on the concept of democratic governance, submitting that if the vires of the Amending Act are upheld, Part IX-A in its entirety would be compromised.

(iv) The amendment has taken away the direct involvement of the Empowered Standing Committee (ESC), no longer having any say in the appointment of officers resulting in a situation where these officers are no longer accountable to these bodies.

(v) On the reliance placed by Mr. Ashish Giri, learned *Amicus Curiae* on **Gujarat Pradesh Panchayat Parishad[47],** she has submitted that the ratio of that case is in a different factual and legal context thereby having no bearing on this case. It is contended, as opposed to the said decision, the present case does not revolve around, day to day discharge of administrative and executive functions, rather it entails an examination of status of Empowered Standing Committee as a body and whether the State Government by repeated amendments can be permitted to downgrade its position and instead keep the powers allocated to such committee, with itself.

(vi) In support, she refers to and relies upon the following decisions:

(i) Government of NCT of Delhi v. Union of India[26]; (ii) Kalpana Mehta v. Union of India[27]; (iii) Eera v. NCT[28]; (iv) Binoy Viswam v. Union of India[29], (Paras 76, 78, 79, 80, 83); (v) Namit Sharma v. Union of India[30] (Paras 8-12, 21); (vi) State of Madhya Pradesh v. Rakesh Kohli[31] ; (vii) Ravi Yashwant Bhoire v. The Collector, District Raigad[32](Para 22); (viii) Bondu

26(2018) 8 SCC 501
27(2018) 7 SCC 1
28(2017) 15 SCC 133
29(2017) 7 SCC 59
30 (2013)1 SCC 745
31(2012) 6 SCC 312

Ramaswamy[18] (Paras 40, 43, 45); (ix) Government of Andhra Pradesh v. Smt. P. Laxmi Devi[33] ; (x) Delhi Transport Corporation v. DTC Mazdoor Congress[34] (Paras 241-255) ; (xi) State of West Bengal v. Union of India[35] and (xii) M.P.V. Sundararamier and Co. v. State of Andhra Pradesh[36] .

Submissions on behalf of the Respondents

14. Mr. Lalit Kishore, learned Advocate General, submits that-

(i) The petitioners have failed to establish any constitutionally settled grounds for challenge and as such, the petitions are fit to be dismissed. The presumption of the constitutionality of the Statute(s) remains unrefuted. Also the provisions impugned are totally within the domain of legislative competence and are legally sustainable.

(ii) Justifying the provision of the "Municipal Act" and the "Amendment Act", it is argued that a practical issue faced in the free and fair appointment on the posts of Group 'C' and that these positions being used to "remain working in a particular municipal office for a long time", lead to corruption. Post amendment,

32(2012) 4 SCC 407
33(2008) 4 SCC 720
341991Supp(1)SCC600
35AIR 1963 SC 1241
36AIR 1958 SC 468

transfers of Group ‘C’ employee became possible, resulting into better management of the Municipalities with “efficient and experienced employees”.

(iii) In particular reference to Section 41, it is submitted that Officers of the State Government for Municipalities were not able to discharge their duties and in certain cases faced difficulties or were ‘unceremoniously removed by a proposal passed by the Municipality’ which was ‘not proper for the administration of the Municipality’, as the Act provided for them to be under the administrative control of the Empowered Standing Committee (ESC).

(iv) Officer(s) posted by Government had to be withdrawn with a resolution passed by two-thirds majority of total Councillors holding office.

(v) That for quite some time, the need for amendment was being felt “on account of practical difficulties, implementation related problem and change of policy of the State Government relating to Group-D services.” (Page-146 of the counter affidavit dated 20.04.202).

(vi) That the State Government took a conscious policy decision to fill up Group-D posts in Urban Local Bodies through outsourcing and so the Urban Development and Housing

Department, Government of Bihar sent letter dated 29.06.2018 bearing no. 3453 to Municipal Bodies in this regard. That the Hon'ble Lokayukta had also looked into this matter and observed that a policy of an outsourcing be implemented in letter and spirit.

(vii) A lot of "procedural problem were being encountered in fair appointment of Group-C Municipal Post." Now, post amendment the "appointing authority of Group-C Municipal Post is the Municipal Administration Directorate under the Urban Development and Housing Department, Government of Bihar and the Group-C post will be State Cadre".

(viii) There were large scale complaints of illegal appointments regarding huge number of posts, which were made without any proposal and without following the prescribed procedure.

(ix) The State Government Officers posted in municipalities are the officers of State Cadre, who are under "control superintendence of State Government" and can perform their duties in "free and fair environment".

(x) He reiterated the pleadings to the effect that the "State Government has not any control upon the administration of local bodies are supposed to act according to the will of the

Empowered Standing Committee. The State Govt. has rather a supervisory power over local bodies lest they may not act in arbitrary and unfair manner." (Para- 42 of 2nd supplementary counter affidavit, Page-219)

(xi) The learned Advocate General refers to and relies upon the following judgments:-

(i) P. Laxmi Devi[33]; (ii) Shanti G. Patel v. State of Maharashtra[37]; (iii) Commissioner, Bangalore v. State of Karnataka[38]; (iv)Ram Chandra Kasliwal v. State of Rajasthan[39]; and (v) Anil Kumar Gulati v. State of M.P[40].

15. Supporting the intra-vires stand of the State, Mr. Ashish Giri, learned Amicus Curiae, made the following submissions:-

(i) The Union Legislature has supremacy as provided under Article 246(1) & (2) of the Constitution of India. However, federalism cannot be bypassed. Interpretation of the Constitution has to be in a way that the power of the State is not compromised or reduced. Legislative competence of the State Legislature can be circumscribed only by constitutional provision themselves. Federalism recognized as a feature of the basic structure of the Constitution is so that the State can enjoy autonomy and sovereignty in governance.

37(2006) 2 SCC 505
382006 (1) Kar LJ 1
392004 SCC OnLine Raj 355
40AIR 2004 MP 182

(ii) The power of the State to legislate within its competency is plenary and cannot be curtailed in the absence of limitation placed by the Constitution itself.

(iii) On the grounds for challenge to the vires of an Act, it is submitted that lack of legislative competence, violation of fundamental rights and any other provisions of the Constitution are the only grounds. Schedule VII, List II, Entry 5 of the Constitution deals with local Government, i.e. it gives exclusive domain to State Legislature to make laws for the subject therein. This power is to be construed broadly so as to extend to all ancillary and subsidiary matters which can be reasonably encompassed by it.

(iv) On Part IX-A of the Constitution, it is submitted that a perusal of Article 243-R, 243-W and 243-ZA read with 243-ZF, it is apparent that there is no absolute curtailment of intervention by the State Government. Therefore, there is no prohibition or limitation on the State providing service condition for Group-C and D employees.

(v) Article 243-W as well does not provide any such limitation as it is only an enabling provision with the discretion to or not to make law resting with the State. Its interpretation, therefore, cannot circumscribe the power of the State Legislature

to make laws with respect to appointment and service conditions of Group-C and D employees.

(vi) From the provisions of the Municipal Act, it is apparent that the concept of local self government is based on collective responsibility and a local body is constituent of many parts, such as the Municipal Corporations/Councils/Nagar Panchayats, also providing for, under Section 20, an Empowered Standing Committee being collectively responsible and together constituting local self government. The scope of this concept is not only limited to power and control but is a collective responsibility between the Municipality, its authorities and its officers. From the perusal of Sections 3 to 10, 40, 40A, 45(3) and un-amended Section 38(a), it is clear that the Municipal Act never provided for absolute and unguided control and exercise of power by the local bodies.

(vii) The amendment does not take away or affect any of the core functions of the Municipality, nor does it interfere with the electoral process.

(viii) The scheme of Part-IX read with Section 22 of the Municipal Act makes it apparent that executive power is not a constitutional mandate and an act of legislation making it amenable to amendment or withdrawal. Learned counsel

contended that the challenge to the impugned legislation is based on an apprehension of misuse of the amendment, but the petitioners have not supplied any material on record to substantiate the same.

(ix) In support of his submissions, he refers to and relies upon the following decisions:-

(i) State of Rajasthan v. Ashok Khetoliya[41]; (ii) Parmar Samantsinh Umedsinh[11]; (iii) Jindal Stainless Ltd. v. State of Haryana[42] (Paras 83, 85, 86, 87, 88 and 91); (iv) Dharmendra Kirthal v. State of UP[43] (Paras 23-28); (v) State of Uttar Pradesh v. Zila Parishad, Ghaziabad[44]; (vi) Bhanumati[17]; (vii) Goa Glass Fiber Ltd. v. State of Goa[45]; (viii) Gujarat Pradesh Panchayat Parishad v. State of Gujarat[46]; (ix) Kishansing Tomar v. Municipal Corporation of the City of Ahmedabad[47]; (x) Kuldip Nayar v. Union of India[48]; (xi) Shanti G. Patel[37]; (xii) ITC Ltd. v. Agricultural Produce Market Committee[49] (Paras 59, 93, 94); (xiii) State of Andhra Pradesh v.

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41 2022 SCC Online SC 295
42(2017) 12 SCC 1
43(2013) 8 SCC 368
44(2013) 11 SCC 783
45(2010) 6 SCC 499
46(2007) 7 SCC 718
47(2006) 8 SCC 352
48(2006) 7 SCC 1
49 (2002) 9 SCC 232

Mcdowell and Company[50]; (xiv) Rai Sahib Ram Jawaya Kapoor v. State of Punjab[51], (Para 12).

Constitutional Amendment: Self Governance-A Facet of Law

16. The Constitution of India envisages a federal structure of Government wherein the Centre, the State, and the Municipalities/Panchayati Raj Institutions, each, carry out functions entrusted to them, with some overlap. The framers of the Constitution and later the Parliament in exercise of its power to amend the Constitution have earmarked areas of functions, at each level for the purposes of smooth functioning and efficient governance. It would be pertinent to delve into 73rd and 74th Constitutional Amendment Acts, 1992 to appreciate the background and reasons for which the third level of Government was given constitutional recognition. By virtue of such amendments, Part IX and Part IX-A were inserted into the Constitution dealing with Panchayats and Municipalities respectively.

17. The organization, election and administration of local bodies, prior to 1992, was governed by State Legislation. In **Municipal Corporation of Delhi v. Birla Cotton, Spg. And Wvg. Mills[52]**, local bodies were defined as "…subordinate

50(1996) 3 SCC 709
51AIR 1955 SC 549
52(1968) 3 SCR 251

branches of governmental activity. They are democratic institutions managed by the representatives of the people. They function for public purposes and take away a part of the government affairs in local areas. …As they are intended to carry on local self-government the power of taxation is a necessary adjunct to their other powers." Noticing the unsatisfactory functioning thereof, and with the intention of strengthening grass root democracy, the said amendments to the Constitution were brought in. Both these amendments seek to decentralize decision making power, thereby strengthening the rule of the people. The objective of the introduction of Part IX-A, in particular, was to ensure proper working of local bodies, conducting of timely elections and the regulation of nominated bodies. The idea was to place Local Self Government in urban areas on a sound and effective footing. The Hon'ble Supreme Court in **K. Krishna Murthy**[19] encapsulated the intent governing the enactment of 73rd and 74th Amendment as:-

> "2. The Constitution (Seventy-third Amendment) Act, 1992 (hereinafter "the 73rd Amendment") and the Constitution (Seventy-fourth Amendment) Act, 1992 (hereinafter "the 74th Amendment") had inserted Part IX and Part IX-A into the constitutional text thereby contemplating the powers, composition and functions of local self-government institutions i.e. the panchayats (for rural areas) and municipalities (for urban areas). In pursuance of objectives such as democratic decentralisation, greater accountability between citizens and the State apparatus as well as the empowerment of weaker sections,

> these constitutional amendments contemplated a hierarchical structure of elected local bodies."
>
> **(Emphasis supplied)**

18. In **Bondu Ramaswamy**[18], Hon'ble the Supreme Court observed that:-

> "45. Part IX-A seeks to strengthen the democratic political governance at grass root level in urban areas by providing constitutional status to municipalities, and by laying down minimum uniform norms and by ensuring regular and fair conduct of elections. When Part IX-A came into force, the provisions of the existing laws relating to municipalities which were inconsistent with or contrary to the provisions of Part IX-A would have ceased to apply. To provide continuity for some time and an opportunity to the State Governments concerned to bring the respective enactments relating to municipalities in consonance with the provisions of Part IX-A in the meanwhile, Article 243-ZF was inserted. …"
>
> **(Emphasis supplied)**

19. A Constitution Bench (Five Judges) of the Hon'ble Apex Court in **State (NCT of Delhi)**[26], while elaborately dealing with the concepts of democracy; democratic spirit; representative participation; constitutional morality and values; constitutional governance and executives; parliamentary democracy and collective responsibility of cabinet; democracy and federalism; constitutional objectivity; constitutional responsibility; collaborative federalism; pragmatic federalism; constitutional renaissance, *inter alia* observed that:

> ".....The main purpose of a representative Government is to represent the public will, perception and the popular sentiment

into policies. The representatives, thus, act on behalf of the people at large and remain accountable to the people for their activities as lawmakers. Therefore, representative form of governance comes out as a device to bring to fore the popular will. The Constitution of India has embraced the representative model of governance at all levels i.e. local, State and the Union. Thus perceived, the people are the sovereign since they exercise the power of adult franchise that ultimately builds the structure of representative democracy."

"Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of a people that import meaning to a Constitution which otherwise merely embodies political hopes and ideals."

"Fundamental human freedoms limit the authority of the State. Yet the role of institutions in achieving democracy is as significant. Nations fail when institutions of governance fail. The responsiveness of institutions is determined in a large measure by their ability to be receptive to differences and perceptive to the need for constant engagement and dialogue. Constitutional skirmishes are not unhealthy. They test the resilience of democracy. How good a system works in practice must depend upon the statesmanship of those who are in decision-making positions within them."

(Emphasis supplied)

20. In **Bhanumati**[17], Hon'ble the Supreme Court made the following observations with respect to the sister amendment, i.e. 73rd Constitutional Amendment Act, 1992:-

"21. In other representative democracies of the world committed to a written Constitution and rule of law, the principles of self-government are also part of the constitutional doctrine. It has been accepted in the American Constitution that the right to local self-government is treated as inherent in cities and towns. Such rights cannot be taken away even by the legislature. The following excerpts from *American Jurisprudence* are very instructive:

"Stated differently, it has been laid down as a binding principle of law in these jurisdictions that a statute which attempts to take away from a municipal corporation its power

of self-government, except as to matters which are of concern to the State as a whole, is in excess of the power of the legislature and is consequently void. Under this theory, the principle of home rule, or the right of self-government as to local affairs, is deemed to have existed before the Constitution."

(Vol. 56, *American Jurisprudence*, Article 125)

22. Under the Seventy-third Amendment of the Constitution, panchayat became an "institution of self-governance" which was previously a mere unit, under Article 40. The Seventy-third Amendment heralded a new era but it took nearly more than four decades for our Parliament to pass this epoch-making Seventy-third Constitution Amendment—a turning point in the history of local self-governance with sweeping consequences in view of decentralisation, grass-root democracy, people's participation, gender equality and social justice.

23. Decentralisation is perceived as a precondition for preservation of the basic values of a free society. Republicanism which is the "sine qua non" of this amendment is compatible both with democratic socialism and radical liberalism. Republicanism presupposes that laws should be made by active citizens working in concert. Price of freedom is not merely eternal vigilance but perpetual and creative citizen's activity.

(Emphasis supplied)

24. This Seventy-third Amendment is a very powerful "tool of social engineering" and has unleashed tremendous potential of social transformation to bring about a sea change in the age-old, oppressive, anti-human and status quoist traditions of Indian society. It may be true that this amendment will not see a quantum jump but it will certainly initiate a thaw and pioneer a major change, may be in a painfully slow process.

26. What was in a nebulous state as one of the directive principles under Article 40, through the Seventy-third Constitutional Amendment metamorphosed to a distinct part of constitutional dispensation with detailed provision for functioning of panchayat. The main purpose behind this is to ensure democratic decentralisation on the Gandhian principle of participatory democracy so that the panchayat may become viable and responsive people's bodies as an institution of governance and thus it may acquire the necessary status and function with dignity by inspiring respect of common man. In our judgment, this Seventy-third Amendment of the Constitution was introduced for strengthening the Preambular vision of democratic republicanism which is inherent in the

constitutional framework.

32. … When faced with a challenge to interpret such laws, courts have to discharge a duty. The Judge cannot act like a phonographic recorder but he must act as an interpreter of the social context articulated in the legal text. The Judge must be, in the words of Krishna Iyer, J. "animated by a goal-oriented approach" because the judiciary is not a "mere umpire, as some assume, but an active catalyst in the constitutional scheme". (See *Authorised Officer* v. *S. Naganatha Ayyar* [(1979) 3 SCC 466] .)

51. Many issues in our constitutional jurisprudence evolved out of this doctrine of silence. The basic structure doctrine vis-à-vis Article 368 of the Constitution emerged out of this concept of silence in the Constitution. A Constitution which professes to be democratic and republican in character and which brings about a revolutionary change by the Seventy-third Constitutional Amendment by making detailed provision for democratic decentralisation and self-government on the principle of grass-root democracy…"

(Emphasis supplied)

21. In **Rajeev Suri v. Delhi Development Authority[53],** Hon'ble the Supreme Court made pertinent observations:-

"177. …Furthermore, the Supreme Court in K. Krishna Murthy and Ors. v. Union of India (UOI) and Anr. 290, while observing on the participation through panchayats, had observed thus:

"56. The objectives of democratic decentralisation are not only to bring governance closer to the people, but also to make it more participatory, inclusive and accountable to the weaker sections of society. ..."

In yet another post-independence judgment, this Court in Mohinder Singh Gill and Anr. v. Chief Election Commissioner, New Delhi and Ors.291, while noting how the representative model serves as the minimum requirement of a participatory democracy, observed thus:

"24. Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of his proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and

532021 SCC Online 7

general elections as constitutional compulsions. 'The right of election is the very essence of the constitution' (Junius). It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more."

"181. The introduction of local self-governance in 1992 could be seen as an acceptance of the above proposition. In the Indian scenario, it would be wholly wrong to say that public participation is limited to exercise of universal suffrage once in five years. Today, Government invites public to participate in a series of administrative processes as per the mandate of enacted laws envisaging public participation in the form of inviting representations against Government proposals. Besides, every citizen is vested with a guaranteed right to approach the constitutional Courts for seeking review of administrative action. We must note that Part III of the Constitution is the pivot around which democracy revolves …"

184. The principle of participatory democracy has two integral elements – first, public participation in decision making and second, placing information regarding Government actions in public domain. As discussed above, the first element, no matter how desirable, is carefully circumscribed by the state of Rule of Law or procedure established by law, as present, and a fine balance has been struck between need for public participation and effective functioning of administration. The legislature has expressly provided for such public participation and the extent thereof in the governing enactments, referred to earlier.

185. The participation itself involves three features – the stage, the extent and the nature of participation. The extent and quality of permissible participation is dependent upon a multitude of factors including, but not limited to, the stage of procedure, nature of subject matter, number of affected persons, local conditions, geography, strategic importance of project, budgetary allocations for the project etc. The subject matter of a development project having no direct bearing on lives and livelihoods cannot be equated with a project which has a direct impact upon their lives and livelihoods."

(Emphasis supplied)

22. In **Ravi Yashwant Bhoir**[32], Hon'ble the Supreme Court observed that:-

"22. Amendment in the Constitution by adding Parts IX and IX-A confers upon the local self-government a complete

autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the institution.

23. The democratic set-up of the country has always been recognised as a basic feature of the Constitution, like other features e.g. supremacy of the Constitution, rule of law, principle of separation of powers, power of judicial review under Articles 32, 226 and 227 of the Constitution, etc. [Vide *Kesavananda Bharati* v. *State of Kerala* [(1973) 4 SCC 225 : AIR 1973 SC 1461] , *Minerva Mills Ltd.* v. *Union of India* [(1980) 3 SCC 625 : AIR 1980 SC 1789] , *Union of India* v. *Assn. for Democratic Reforms* [(2002) 5 SCC 294 : AIR 2002 SC 2112] , *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election Matter)* [(2002) 8 SCC 237 : AIR 2003 SC 87] and *Kuldip Nayar* v. *Union of India* [(2006) 7 SCC 1 : AIR 2006 SC 3127] .]

24. It is not permissible to destroy any of the basic features of the Constitution even by any form of amendment, and therefore, it is beyond imagination that it can be eroded by the executive on its whims without any reason. The Constitution accords full faith and credit to the act done by the executive in exercise of its statutory powers, but they have a primary responsibility to serve the nation and enlighten the citizens to further strengthen a democratic State.

25. ... However, wherever the executive fails, the Courts come forward to strike down an order passed by them passionately and to remove arbitrariness and unreasonableness, for the reason that the State by its illegal action becomes liable for forfeiting the full faith and credit trusted with it. (Vide *Scheduled Castes and Scheduled Tribes Officers' Welfare Council* v. *State of U.P.* [(1997) 1 SCC 701 : 1997 SCC (L&S) 194 : AIR 1997 SC 1451] and *State of Punjab* v. *G.S. Gill* [(1997) 6 SCC 129 : 1997 SCC (L&S) 1475 : AIR 1997 SC 2324])

26. “Basic” means the basis of a thing on which it stands, and on the failure of which it falls. In democracy all citizens have equal political rights. Democracy means actual, active and effective exercise of power by the people in this regard. It means political participation of the people in running the administration of the Government. It conveys the state of

> affairs in which each citizen is assured of the right of equal participation in the polity. (See *R.C. Poudyal* v. *Union of India* [1994 Supp (1) SCC 324 : AIR 1993 SC 1804] .)
>
> **(Emphasis Supplied)**

23. Reference of the above decisions is only to highlight the importance, significance, and relevance of self-governance being a facet of law.

24. Pursuant to the 73rd and 74th Amendment to the Constitution, the State of Bihar enacted the Bihar Municipal Act, 2007.

25. The Preamble to the Municipal Act reads:-

> "An Act to consolidate and amend the laws relating to the Municipal Governments in the State of Bihar in conformity with the provisions of the Constitution of India as amended by the Constitution (Seventy-fourth Amendment) Act, 1992, based on the principles of participation in, and decentralization, autonomy and accountability of, urban self-government at various levels, to introduce reforms in financial management and accounting systems, internal resource generation capacity and organizational design of Municipalities, to ensure professionalisation of the municipal personnel, and to provide for matters connected therewith or incidental thereto."

26. We may notice that Municipal Act stands amended time and again. In total, seven times, i.e., in 2011, 2012, 2013, 2016, 2020, 2021 and 2022 which have brought in several changes, and the discussion herein is limited to the provisions sought to be challenged.

Provisions of the Municipal Act

27. The relevant sections of the Municipal Act, unamended or amended, are reproduced for ease of reference.

> **"Section 36 - Officers of Municipality.-**(1) Subject to the provisions of Section 41 and need for ensuring maximum possible economy in municipal administration, the Municipality shall have the following posts of Officers namely-
>
> (a) in the case of Municipal Corporation,-
>
> (i) the Municipal Commissioner, an Officer of Indian Administrative Service or Bihar Administrative Service,
>
> (ii) the Controller of Municipal Finances and Accounts, a senior Audit Officer/Accounts Officer from Accountant General Office or senior member of Bihar Finance Service,
>
> (iii) the Municipal Internal Auditor,
>
> (iv) the Chief Municipal Engineer,
>
> (v) the Municipal Architect and Town Planner,
>
> (vi) the Chief Municipal Health Officer,
>
> (vii) the Municipal Law Officer,
>
> (viii) the Municipal Secretary,
>
> (ix) three Additional Municipal Commissioners, preferably in the rank of A.D.M. but not below the rank of S.D.M. of Bihar Administrative n Service, and
>
> (x) Such number of Joint Municipal Commissioners or Deputy Municipal Commissioners or Deputy Chief Municipal Engineers as the Empowered Standing Committee may, from time to time, determine, and
>
> (b) in the case of a Municipal Council or Nagar Panchayat,-
>
> (i) the Municipal Executive Officer,
>
> (ii) the Municipal Finance Officer,
>
> (iii) the Municipal Engineer,
>
> (iv) the Municipal Health Officer,
>
> (v) the Municipal Secretary, and
>
> (vi) such other officers as may be designated by the State Government in this behalf:
>
> Provided that the State Government may reduce the number of posts of the officers as aforesaid:
>
> Provided further that the State Government may re-designate any of the posts of the officers as aforesaid.
>
> *(2) Appointments of officers mentioned in sub-section (1) may be made either on a* ***regular basis or on a contract basis for such term as the Empowered Standing Committee may consider necessary****.*

*(3) **At the requests of the Empowered Standing Committees of more than one Municipality, the State Government may, by order, provide for sharing of services of officers referred to in sub-section** (1) by such Municipalities, and on such terms and conditions, as may be specified in the order.*

(4) Subject to the provisions of sub-section (2), appointments of officers referred to in sub-section (1) for different posts as may be specified by Regulations shall be made—

*(a) **by the State Government in consultation with the Empowered Standing Committee by notification from amongst the persons who are or have been in the service of that Government, or***

*(b) **by the Empowered Standing Committee with the prior approval of the State Government from amongst the officers who are or have been in the municipal service of any Municipality**, or*

*(c) **by the Empowered Standing Committee with the prior approval of the State Government and in consultation with the State Public Service Commission:***

Provided that the appointments to the posts as aforesaid shall be on such terms and conditions, and for such period not exceeding five years in the first instance, as the State Government may determine:

Provided further that the State Government may, in consultation with the Empowered Standing Committee, extend the period of appointment to the posts as aforesaid from time to time.

*(5) Until cadres of common municipal services for the State are constituted under sub-section (1) of Section 43, the **Empowered Standing Committee may determine which of the posts of officers referred to in clause (b) of sub-section (1) of this Section are necessary for Municipal Council or a Nagar Panchayat, and, with the prior approval of the State Government, create posts of, and appoint, such officers and fix the salaries and allowances to be paid to such officers.***

(6) The method of, and the qualifications required for, recruitment, and the terms and conditions of service including conduct, discipline and control, of officers appointed by the Empowered Standing Committee shall be such as may be prescribed.

(7) Notwithstanding anything contained in the foregoing provisions of this Section, the State Government may, at any time, in the case of any person appointed to any post referred to in sub-section (1), terminate his appointment:

Provided that if, in the case of any such officer, the empowered Standing Committee so decides, the State Government shall terminate the appointment of such officer.

(8) Notwithstanding anything contained in sub-section (2) or sub-section (3), ***prior approval of the State Government shall be necessary in the case of appointment of a person not recommended by the State Public Service Commission****.*

(9) No person above the age of sixty years shall be appointed to any post in a Municipality."

"Section 37 - Establishment of Municipality and schedule of posts-(1) The posts of officers and other employees of the Municipality, other than those referred to in sub-section (1) of Section 36, shall constitute the municipal establishment.

(2) The Municipality shall, by Regulation, classify the posts of officers and other employees constituting the establishment of the Municipality into four categories, namely, category 'A' post, category 'B' post, category 'C post, and category 'D' post, on the basis of the scales of pay of such posts.

(3) The Municipality shall prepare, and maintain, a schedule of posts of officers and other employees constituting the establishment of the Municipality, to be called Establishment Schedule, and such Establishment Schedule shall include the designation, and the number of posts under each designation, and shall be in three parts of which Part I shall include category, 'A' posts, Part II shall include category 'B' posts, and Part III shall include category 'C' posts and category 'D' posts.

(4) Every year the ***Chief Municipal Officer shall place before the Empowered Standing Committee for its consideration the Establishment Schedule along with the proposals for such changes*** *therein as he may consider necessary:*

Provided that no upward revision of the size of the establishment of the Municipality shall be made without the prior sanction of the State Government.

(5) ***The Empowered Standing Committee shall, after consideration of the Establishment Schedule along with the proposals****, if any,* ***for changes therein****, place the same along with its recommendations, if any,* ***before the Municipality*** *for approval prior to the presentation of the budget estimates to the municipality by the Chief Councillor,*

(6) The Chief Municipal Officer shall revise the Establishment Schedule as approved by the Municipality.

(7) ***The Empowered Standing Committee may sanction any category 'C post or category 'D' posts for a period not exceeding six months:***

Provided that no such post shall be sanctioned unless there is a provision in this behalf in the budget estimates of the Municipality.

(8) Subject to such norms regulating the size of a municipal

establishment as may be fixed by the State Government from time to time, no post of an officer or other employee of the municipality ***shall be created by the Municipality without the prior sanction of the State Government, if the number of posts to be so created*** *in a year for a Municipality is* ***more than one per cent*** *of the total number of sanctioned posts of officers and other employees in existence in the year immediately preceding:*

Provided that the number of posts as may be admissible for creation in a year without the prior sanction of the State Government after the commencement of this Act, if not created in that year, may be carried forward to the next year, subject to a maximum of ten.

(9) The recruitment to the posts of officers and other employees of the ***Municipality not required to be made through the Public Service Commission shall be made through the local Employment Exchange or through such other method as the State Government may determine from time to time.***

(10) Notwithstanding anything contained in the foregoing provisions of this Section or elsewhere in this Act, the Empowered Standing Committee may decide to engage on contract basis, officers and other employees of the Municipality against such posts of officers and other employees referred to in sub-section (1) of Section 37."

"Section 38 - Appointing Authorities.-Subject to the other provisions of this Act, the appointing authority in respect of the posts of officers and other employees constituting the establishment of the Municipality shall be,-

(a) in the case of category, ***A' posts, the Chief Municipal Officer,***

(b) in the case of category 'B' posts,-

(i) an ***Additional Municipal Commissioner or a Joint Municipal Commissioner, in the case of a Municipal Corporation, or***

(ii) ***the Municipal Executive Officer, in the case of a Municipal Council or a Nagar Panchayat,*** *and*

(c) ***in the case of category 'C posts and category 'D' posts, such officer or officers of the Municipality as the Chief Municipal Officer may, with the prior approval of the Empowered Standing Committee, designate*** *in this behalf."*

"40. Leave and other conditions of service.- All officers and other employees of the Municipality shall be subject to such conditions of service including leave and other benefits or obligations, not specifically provided for in this Act, as may be

prescribed."

"40A. The State Government may make provisions by framing Service Rules for different categories of officers and other employees of the Municipality for recruitment, service conditions, posting, transfer, promotion, disciplinary action and other related aspects of municipal service and municipal personnel management."

"41. Appointment of officers of the State Government for Municipalities.- Notwithstanding anything contained elsewhere in this Act, the State Government may appoint an officer of that Government possessing such qualifications as may be determined by it for a Municipal Corporation or class of Municipal Councils or Nagar Panchayat as Municipal Executive Officer, Municipal Finance Officer, Municipal Engineer or Municipal Health Officer referred to in sub-section (1) of section 36 or with such designation as the State Government may consider necessary, and in such manner, and on such terms and conditions of service, as may be determined by the State Government in this behalf. The expenditure on account of salaries and allowances of any such officer shall be borne by the State Government:

Provided that the officer so appointed shall be under the administrative control of the Empowered Standing Committee and may be withdrawn by the State Government suo motu or if a resolution to that effect is passed by the Councillors at a meeting called for this purpose by a two third majority of the total number of Councillors holding office for the time being.

Provided further that resolution regarding withdrawal of the officer shall not be taken within one year of the posting of the officer."

"43. Cadres of common municipal services, appointments etc.- (1) The State Government may constitute cadres of common municipal services of such officers of municipality referred to in sub-section (1) of section 36 and other employees as may be determined by that Government from time to time.

(2) The Director of Local Bodies shall be the appointing authority of all officers borne in the cadres of common municipal services and shall be the authority to transfer such officers and other employees of the municipality from one Municipality to another."

28. Vide 2011 Amendment, a proviso was added to Section 41 which restricted the passing of a resolution regarding

withdrawal of an officer to be at least after one year of such posting.

29. Vide 2012 Amendment, changes were made to Section 36 which is the Officers of Municipality under Chapter V Part A, but in the present *lis* challenge is laid to the changes under Chapter V Part B as also the Amendment Act which had changes in Chapter V Part A, not otherwise.

30. Vide 2013 Amendment, Section 40 was amended and Section 40A was added to it. The Services Rules with respect to categorization, recruitment, conditions, posting, promotion etc. were now to be made by the State Government.

31. Vide 2016 Amendment; change was made under Section 13, not of concerning the present *lis*.

32. Vide 2020 Amendment:- changes were made under Sections 3, 50, 67, 145, not concerning the present *lis*.

33. A subsequent amendment "The Bihar Municipal (Amendment) Act, 2021" (Amendment Act) was brought in on 31st March, 2021 vide a notification in the extra-ordinary gazette. The relevant provisions to which amendments have been made as under are subject of this *lis*.

> **"2. Amendment of Section-36 of Bihar Act 11, 2007:-**
> (i) Sub-section (2) of section 36 of the Bihar Municipal Act, 2007 shall be substituted by following:-
> "36 (2) Appointments of officers mentioned in sub-

section (1) may be made either on a regular basis or on a contract basis for such term as the State Government may be prescribe."

(ii) Sub-section (3) of section 36 of the Bihar Municipal Act, 2007 shall be substituted by following:-

"36 (3) Subject to the provisions of sub-section (2) officers mentioned in sub-section (1) and other employees of the Municipality, the method of appointment, required qualification, conduct and discipline, control and other conditions of service shall be such as may be prescribed."

(iii) Sub-section (4), (5), (6), (7), (8) and (9) of section 36 of the Bihar Municipal Act, 2007 shall be deleted.

(**Emphasis supplied**)

3. Amendment of Section-37 of Bihar Act 11, 2007:-

(i) Sub-section (4), (5), (6), (7), (8), (9) and 10 of Section 37 of the Bihar Municipal Act, 2007 shall be deleted.

(**Emphasis supplied**)

4. Amendment of Section 38 of Bihar Act 11, 2007:-

(i) Section 38 of the Bihar Municipal Act, 2007 shall be substituted by following;-

"38. Appointing Authorities.- Subject to the other provisions of this Act, the appointing authority in respect of the posts of officers and other employee constituting the establishment of the municipality shall be.-

(a) in the case of category, 'A' and category, 'B' posts, the Government and

(b) in the case of category 'C' posts,- Directorate of Municipal Administration under Urban Development and Housing Department and the cadre shall be state level."

(**Emphasis supplied**)

5. Amendment of Section -41 of Bihar Act 11, 2007:-

(i) First proviso of Section 41 of the Bihar Municipal Act, 2007 shall be substituted by following:-

"Provided that the officer so appointed may be withdrawn by the State Government suo motu."

(ii) Second proviso of Section 41 of the Bihar Municipal Act, 2007 shall be deleted."

Scope of Judicial Review

34. The grounds on which validity of a legislation can be challenged or not so, have been detailed in **D.D. Basu in Shorter Constitution of India (14th Edn., 2009)** with reference to various judgments of Hon'ble Supreme Court as under:-

> "Grounds of unconstitutionality.— A law may be unconstitutional on a number of grounds:
> (i) Contravention of any fundamental right, specified in Part III of the Constitution. (Ref. Under Article 143: Special Reference No. 1 of 1964, In re [AIR 1965 SC 745 : (1965) 1 SCR 413] .); Goa Glass Fiber Ltd. v. State of Goa, (2010) 6 SCC 499
> (ii) Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by the Seventh Schedule, read with the connected articles. (Ref. Special Reference No. 1 of 1964, In re [AIR 1965 SC 745 : (1965) 1 SCR 413] .); Goa Glass Fiber Ltd. v. State of Goa, (2010) 6 SCC 499; State of Andhra Pradesh v. Mcdowell and Company, (1996) 3 SCC 709; Kuldip Nayar v. Union of India, (2006) 7 SCC 1
> (iii) Contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a legislature e.g. Article 301. (Ref. Atiabari Tea Co. Ltd. v. State of Assam [AIR 1961 SC 232])
> (iv) In the case of a State law, it will be invalid insofar as it seeks to operate beyond the boundaries of the State. (State of Bombay v. R.M.D. Chamarbaugwala [AIR 1957 SC 699]
> (v) That the legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body. (Hamdard Dawakhana v. Union of India [AIR 1960 SC 554 : 1960 Cri LJ 735])" .

35. Hon'ble the Supreme Court in **Parisons Agrotech (P) Ltd. v. Union of India**[54]**,** noted that judicial review is a powerful weapon to restrain unconstitutional exercise power by the

54(2015) 9 SCC 657

Legislature and the Executive. Judicial interference is a check on such an exercise. However, a check on the Court's own power is self-imposed discipline and judicial restraint.

36. Hon'ble the Supreme Court has succinctly stated in **P. Laxmi Devi[33],** that the singular ground to declare an act of legislature or provision of the Act as invalid as that it violates some provisions of the Constitution in such a manner that there can be no doubt. When declaring such act of legislature to be unconstitutional, a Court must be "absolutely sure" that there can be no manner of doubt that it violates a provision of Constitution. Further, if two views are possible, one upholding the constitutionality then all effort must be made, including strained construction to uphold such validity. [Also **Dharmendra Kirthal[44]; Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar[55]; State of Bihar v. Bihar Distillery Limited[56]**.]

37. Further principles being:-

(i) A statute is construed so as to make it effective and operative on the principle expressed in the maxim "*ut res magis valeat quam pereat*". (It is better to validate a thing than to invalidate it.) **[Ranjit P. Gohil[57]]**

(ii) If a case of violation of a constitutional provision is made

55AIR 1958 SC 538
56(1997) 2 SCC 453
57(2003) 9 SCC 358

out then the State must justify that the law can still be protected under a saving provision. **[Ranjit P. Gohil[57]]**

(iii) The courts strongly lean against reducing a statute to a futility. As far as possible, the courts shall act to make a legislation effective and operative. **[Ranjit P. Gohil[57]]**

(iv) The process of judicial review is in three sequential stages- (a) substantive judicial review, i.e. examining compatibility with fundamental rights or the competence of the legislature; (b) whether impugned provision can be saved by reading it down; and (c) whether the offending portion of the statute is severable? If yes, then the remaining part is saved. **[Binoy Viswam[29]]**

(v) A presumption always exists in favour of constitutionality and the burden to prove otherwise is upon the person who attacks the same. [**Charanjit Lal Chowdhury v. Union of India AIR 1951 SC 41 : 1950 SCR 869**]

(vi) The principles like "reading into" and/or "reading down" are relevant in upholding the constitutionality of a provision, as opposed to declaring it unconstitutional. **[Namit Sharma[30]]**

38. Recently, in **Madras Bar Association v. Union of India[58]; ** Hon'ble the Supreme Court stated as follows:

582021 SCC OnLine SC 463

> "39. …Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment and a clear transgression of constitutional principles must be shown. In State of Madhya Pradesh v. Rakesh Kohli & Anr. (2012) 6 SCC 312, this Court held that sans flagrant violation of the constitutional provisions, the law made by Parliament or a State legislature is not declared bad and legislative enactment can be struck down only on two grounds: (i) that the appropriate legislature does not have the competence to make the law, and (ii) that it takes away or abridges any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional provisions. Subsequently, the Court has also recognised "manifest arbitrariness" as a ground under Article 14 on the basis of which a legislative enactment can be judicially reviewed."

39. We may also notice that a Constitution Bench of Hon'ble the Supreme Court in **Shri Ram Krishna Dalmia**[55] has held the following in reference to the presumption of constitutionality-

> "11. (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

40. It is an established proposition of law that the vires of a legislation or constitutional validity thereof can be challenged before a High Court under Article 226 of the Constitution of India. This position was recently reiterated in **Devendra Dwivedi v. Union of India**[59]**.** It has been held by Hon'ble Supreme Court

592021 SCC Online SC 221

that unless a decision is ex facie contrary to a statute or public policy, a constitutional court would be advised to exercise judicial restraint. **[Ramchandra Murarilal Bhattad and others v. State of Maharashtra and others[60]; 5 M & T Consultants, Secunderabad v. S.Y. Yawab and another[61], Para-16; Association of Registration Plates v. Union of India and others[62], para 35].** In other words, in judicial review, the court sits not to substitute the wisdom of the legislature, but to examine as to whether such balance has been achieved or not.

41. While dealing with the Constitutionality of a fiscal legislation, Hon'ble the High Court of Bombay, in **Mahalaxmi Cotton Ginning Pressing and Oil Industries v. State of Maharashtra and Others[63],** speaking via Dr. Justice D.Y Chandrachud (as his Lordship then was) held:-

> "38. There are several reasons for the doctrine of judicial deference which has emerged in the area. Firstly, the doctrine of deference is an emanation of the presumption of constitutionality which attaches to a law which is enacted by the competent legislature. A written Constitution such as ours, does confer judicial power on the Courts to expound the Constitution. Judicial review can extend to striking down legislation which infringes constitutional provisions. But, in exercising that power, when they are called upon to determine the validity of legislation, Courts must realize

60(2007) 2 SCC 588
61(2003) 8 SCC 100
62(2005) 1 SCC 679
632012 SCC OnLine Bom 733

> that the constitutional function of enacting legislation is conferred in a democratic polity on the legislature which consists of elected representatives. In a classical democratic system of checks and balances a fine balance is drawn by the constitution between the enacting power of legislature and the reviewing power of the judiciary. The reviewing power of the Court seeks to preserve the eternal values which form the basis of the constitutional document. The object of judicial review is not to second guess the legislature, but to ensure that the legislature has not transgressed constitutional boundaries."

42. In the considered opinion of this Court and in light of what has time and again been held by Hon'ble the Apex Court[64] that it is the legislature that understands the need of the people, the observation above has general application.

Self Government: Scope, Definition and Concept

43. Prior to the introduction of the Seventy Third and Seventy Fourth constitutional amendments, local government institutions were mere units. It is pertinent, however, to effectively understand the import of the said amendments that its history is appreciated.

44. Local Government in India has a long history. Traditional Self Government in villages has been recorded since long. Formal structures of local government, the establishment thereof was with a view to inculcate the ideals of democracy. It is noted that consequential steps were taken by Lord Mayo and

64M/s. B.R. Enterprises v. State of U.P. (1999)9 SCC 700; also Government of Andhra Pradesh and others v. P. Laxmi Devi, (2008) 4 SCC 720; Hamdard Dawakhana v. Union of India, AIR 1960 SC 554

Lord Rippon, Viceroys of India.

45. In the drafting of the Constitution attempts were made for the recognition of village Panchayats as financially empowered units of Government, forming the base of provincial governments. However, the same did not succeed. A provision to the effect of 'Gandhiji's notion of village republic' was incorporated in the Directive Principles Of State Policy under Article 40 of the Constitution of India which reads as under:-

> **"40. Organisation of village panchayats**.—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."

46. In India, some States enacted legislation creating a three tier system. Both Municipal and village units of local governments faced various problems in implementation of duties entrusted to them as a result of frequent changes in power. [65]

47. The first set of bills was for amendment to the Constitution introduced in 1989[66] and was finally passed in December, 1992. The provisions of the amendment contain detailed requirements on the structure, elections thereto and representation in these bodies.

65See Generally, Dr. Marina R Pinto 'City Governance in India' Sage Publications 2000. And, K. C. Sivaramakrishnan 'Local Government' in the Oxford Handbook Of The Indian Constitution (Choudhry, Khosla and Mehta, Eds.)

66K. C. Sivaramakrishnan 'Local Government' in the Oxford Handbook Of The Indian Constitution (Choudhry, Khosla and Mehta, Eds.) (page-565)

48. The object and reasons clause of the Seventy Fourth Constitution Amendment clearly set out (a) that local bodies suffered from ‘prolonged suppressions’; (b) inadequate devolution of powers and functions; and (c) the resultant inability to perform effectively as vibrant units of self government. It is with this background that Part IX-A consists of a number of Articles providing for a well rounded functioning of Municipal Bodies, ensuring that democracy indeed is taken to the grass-root level. This is further evidenced by the fact that even within the municipalities a further division into Nagar Panchayat for rural areas transitioning into urban areas, Municipal Council for small urban area and Municipal Corporation for larger urban areas was conceptualized.

49. Prior to any other discussion, it is essential to detail a concept which forms the bedrock of scrutiny into all legislative undertaking. A key differentiating factor with United Kingdom with respect to India is that the latter has adopted a system of constitutional supremacy as opposed to legislative.

50. In **Kalpana Mehta**[27], Hon’ble the Supreme Court observed “thus, the three wings of the State are bound by the doctrine of constitutional sovereignty and all are governed by the framework of the Constitution. The Constitution does not accept

transgression of constitutional supremacy that is how the boundary is set.

51. In **Indira Nehru Gandhi v. Raj Narain**[67]**,** Justice Beg in his concurring opinion quoted Mr. M.C. Setalvad, the first Attorney General for India as follows:-

> "572. … This will no doubt strike one accustomed to the established supremacy of Parliament in England as unusual. In the course of its historical development Parliament has performed and in a way still performs judicial functions. Indeed the expression 'Court of Parliament' is not unfamiliar to English lawyers. However, a differentiation of the functions of different departments is an invariable feature of all written Constitutions. The very purpose of a written Constitution is the demarcation of the powers of different departments of Government so that the exercise of their powers may be limited to their particular fields. In countries governed by a written Constitution, as India is, the supreme authority is not Parliament but the Constitution. Contrasting it with the supremacy of Parliament, Dicey has characterised it as the supremacy of the Constitution."

52. The adjudication of the present *lis* turns on the phrase self-government. It is essential to understand the meaning and import of this term in order to arrive at a most suitable decision with respect to the impugned amendments.

53. Part IX-A which is titled as "The Municipalities" begins with Article 243-P Definition; 243-R Composition of Municipalities; 243-S Constitution and Composition Wards Committees etc.; 243-T Reservation of Seats; 243-V Disqualification of Membership; 243-W Powers, Authority and

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671975 Supp SCC 1

Responsibilities of Municipalities; 243-X power to impose taxes by, and funds of, the Municipalities; 243-Y Finance Commission; 243-Z Audit of Accounts of Municipalities; 243-ZA Elections to the Municipalities; 243-ZB Application to Union territories; 243ZC Part not to apply to certain areas; 243-ZD Committee for district planning; 243-ZE Committee for Metropolitan planning; 243-ZF Continuance of existing laws and Municipalities; 243-ZG Bar to interference by Courts in electoral matters.

54. The above, detailed setting out of powers, within the text of the Constitution puts in clear context the intent of the legislature on various aspects with respect to governance of municipalities.

55. Any exercise of law-making power under Article 246 and thereby Entry 5 List II, is required to balance the impact which it may have over Part IX-A.

56. On institutions of self-government, Hon'ble High Court of Andhra Pradesh has held in **Velpur Gram Panchayat**[20], that-

> "16. The expression 'self government' from the latin gubernaculum means "The system of polity in a State; that form of fundamental rules and principles by which a nation or state is governed, or by which individual members of a body politic are to regulate their social actions. A constitution either written or unwritten, by which the rights and duties of citizens and public officers are prescribed and defined, as a monarchical government, a republican government, etc. The sovereign or supreme power in a state expresses its will and

exercises its functions; or the framework of political institutions, departments, and offices, by means of which the executive, legislature and administrative business of the State is carried on" (Under the word 'Government' at Page 695 of Black's Law Dictionary, sixth edition, 1990), The expression 'self-government' understood in that context is a sovereign government to rule by itself Self-Government as a noun means control of one's own (political) affairs, and self-government as an adjective means having control over oneself, specifically having self-government (Page 842, Penguins English Dictionary). 'Self-government' means "self-rule, self-determination, home rule, heteronomy, dominion rule, colonial government, colonialism, neo colonialism, provisional government, coalition government" (Item 612, Page 475 of the Original Roget's, Roget's International Thesaurus, fifth edition).

(Emphasis supplied)

57. Hon'ble the Andhra Pradesh High Court in **T. Devender**[4]**,** observed as under:

"Local government is understood in England in contra-distinction to Central Government functioning from the Westminister and the White hall in London; in that country to say that local government is local self government is a mere tautology. The legal framework within which local government functions and its relations vis-a-vis the Central Government according to Martin Loughlin, a British author may be noticed:

"Local government law is primarily concerned with powers rather than duties. Local government law essentially establishes legal framework within which local authorities are given discretionary powers to act. Many of these powers are subjectively formulated so that subject to judicial review, the local authority is effectively free to determine the limits of the power. Central Government possess a variety of powers enabling them to influence and restrain local authorities. However, what is most significant is that the law was never intended to establish norms governing relations between central departments and local authorities. …"Law, Legitimacy and the Constitution" Edited by Patrick Me Auslan and John F. Me Edowney, 1985 Edition, P. 100.

"Local self-government", in the Indian context lacks

precise meaning. Statutorily it is not defined. During the British Raj, the concept of local self-government was introduced for the purpose of associating natives living in a locality to attend to the immediate problems that arise from communal living-matters like sanitation, water supply, roads, health facilities etc. When we were allowed to administer our own local affairs it was felt by the British that they allowed self-government for the people and that led to the evolution of the expression "local self-government". Local self-government as understood in the modern sense dates back to 1687 in our country when a municipal corporation was set up in the city of Madras. How local self-government in India was understood by the British may be noticed as quoted in the Report of the Indian Statutory Commission:

"Local self-government in India, in the sense of a representative organisation, responsible to a body of electors, enjoying wide powers of administration and taxation, and functioning both as a school for training in responsibility and as a vital link in the chain of organisms that make up the government of the country, is a British creation. The ancient village communities were constituted on a narrow basis of hereditary privilege or caste, closely restricted in the scope of their duties - collection of revenue and protection of life and property were their main functions-and were neither conscious instruments of political education nor important parts of the administrative system.", Shriram Maheshwari, "Local Government in India", P. 13.

Some scholars have doubted the wisdom of retaining the expression "local self- government" after India became independent, Ibid Pp. 1 to 9. In what form a representative organisation with the label of local government should be created by law is a matter for legislative judgment and wisdom. Entry 5 of List II only gives a broad indication that a unit of local government when created by law should be a self- governing one in the sense that it should be autonomous, the degree and extent of autonomy depending upon legislative wisdom. Even so it is clear that in the name of creating a local government the Legislature cannot set up an administrative department with little or no trace of autonomy. It is impossible to lay down the parameters of a statutory body to pass muster as a local self- government unit. The extent of the autonomy or "self governance" must be discerned only from the provisions of the statute creating

> the body. At the same time pragmatic perceptions do not cease to have their impact. Although it is trite to say that claims in relation to a local body must be found in the statute and do not spring from the Fundamental Rights guaranteed by the Constitution, we cannot ignore the irrefragable truth that local bodies play a fundamental role in maintaining the democratic structure of our society."
>
> **(Emphasis supplied)**

Objects and Reasons Clause -A Tool of Interpretation

58. On the Usefulness of the Objects and Reasons Clause, Hon'ble the Apex Court stated recently in **Union of India v. Excide Industries Ltd.**[68] as under**:-**

> "29. The Objects and Reasons behind the enactment of a statute signify the intention of the legislature behind the enactment of a statutory provision. Indubitably, the purpose or underlying aim of a law can be discerned when interpreted in the light of stated Objects and Reasons. Inasmuch as, the settled canon of interpretation is to deduce the true intent of the legislature, as the will of the people is constitutionally bestowed in the legislature. It is true that an express Objects and Reasons would be useful in understanding the import of an enacted provision as and when the Court is called upon to interpret the same. This Court in State of T.N. v. K. Shyam Sunder [State of T.N. v. K. Shyam Sunder, (2011) 8 SCC 737 : 6 SCEC 65] , laid emphasis upon the usefulness of Objects and Reasons in the process of interpretation and observed thus : (SCC p. 771, paras 66-68)
>
> > "66. The Statement of Objects and Reasons appended to the Bill is not admissible as an aid to the construction of the Act to be passed, but it can be used for limited purpose of ascertaining the conditions which prevailed at that time which necessitated the making of the law, and the extent and urgency of the evil, which it sought to remedy. The Statement of Objects and Reasons may be relevant to find out what is the objective of any given statute passed by the

68(2020) 5 SCC 274

> legislature. It may provide for the reasons which induced the legislature to enact the statute. 'For the purpose of deciphering the object and purport of the Act, … the court can look to the Statement of Objects and Reasons thereof.' (emphasis supplied) (Vide Kavalappara Kottarathil Kochuni v. States of Madras & Kerala [Kavalappara Kottarathil Kochuni v. States of Madras & Kerala, AIR 1960 SC 1080] and Tata Power Co. Ltd. v. Reliance Energy Ltd. [Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659] , SCC p. 686, para 79.)
>
> 67. In A. Manjula Bhashini v. A.P. Women's Coop. Finance Corpn. Ltd. [A. Manjula Bhashini v. A.P. Women's Coop. Finance Corpn. Ltd., (2009) 8 SCC 431 : (2009) 2 SCC (L&S) 441] this Court held as under : (SCC p. 459, para 40)
>
> '40. The proposition which can be culled out from the aforementioned judgments is that although the Statement of Objects and Reasons contained in the Bill leading to enactment of the particular Act cannot be made the sole basis for construing the provisions contained therein, the same can be referred to for understanding the background, the antecedent state of affairs and the mischief sought to be remedied by the statute. The Statement of Objects and Reasons can also be looked into as an external aid for appreciating the true intent of the legislature and/or the object sought to be achieved by enactment of the particular Act or for judging reasonableness of the classification made by such Act.'
>
> 68. Thus, in view of the above, the Statement of Objects and Reasons of any enactment spells out the core reason for which the enactment is brought and it can be looked into for appreciating the true intent of the legislature or to find out the object sought to be achieved by enactment of the particular Act or even for judging the reasonableness of the classifications made by such Act."
>
> (**Emphasis in original**)

59. The objects and reasons clause of Seventy Fourth Amendment to the Constitution reads as "In many States local bodies have become weak on account of prolonged separations

and inadequate devolution of powers and functions. As a result, Urban Local Bodies are not able to perform effectively as vibrant democratic units of self-government."

60. In relation thereto, Hon'ble the Supreme Court in **Kishansing Tomar**[47] observed:-

> **"12.** It may be noted that Part IX-A was inserted in the Constitution by virtue of the Constitution (Seventy-fourth) Amendment Act, 1992. The object of introducing these provisions was that in many States the local bodies were not working properly and the timely elections were not being held and the nominated bodies were continuing for long periods. Elections had been irregular and many times unnecessarily delayed or postponed and the elected bodies had been superseded or suspended without adequate justification at the whims and fancies of the State authorities. These views were expressed by the then Minister of State for Urban Development while introducing the Constitution Amendment Bill before Parliament and thus the new provisions were added in the Constitution with a view to restore the rightful place in political governance for local bodies. …"
>
> (**Emphasis supplied**)

61. The intention of institution of the constitutional amendment is clear. It is the lack of devolution of power which resulted in the need for a top down change.

Understanding Article 243-W of the Constitution of India

62. Article 243-W reads as under:-

> "**243W. Powers, authority and responsibilities of Municipalities, etc-** Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow
>
> (a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to-

> (i) the preparation of plans for economic development and social justice;
>
> (ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;
>
> (b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule."
>
> **(Emphasis supplied)**

63. Various parts form this Article- subject to other provisions of this Constitution; the Municipality is to be endowed with powers which the State Legislature may find necessary to enable their functioning as institution of self-government. This devolution of powers may be with respect to plans of economic development and social justice, the performance of certain functions and implementation of schemes or with responsibility conferred upon them as per the Twelfth Schedule.

64. The main bone of contention is Article 243-W which deals with the powers and authority of municipal body. It says that subject to other provisions of the Constitution, the legislature of a State "may" "endow" these bodies with powers and authority, as may be necessary, for effectively being a unit of self-government. A breakdown of these components of this Article is essential to appreciate the scope and effect thereof.

65. Devolution has been defined as transference of rights, power, property and responsibility to another, especially: the

surrender of powers to local authorities by a central government.[69]

66. The word "endowment" is defined under the Black's Law Dictionary "to give money or property to, esp. as a source of continuing or permanent income. 2. Hist. To provide (a woman) with a dower (trust cannot be divested subsequently).

67. Hon'ble the Supreme Court in **State of Uttar Pradesh v. Hari Ram**[70] while explaining the word 'vest' observed-

> "vest" …… To place or give into the possession or discretion of some person or authority (the regulation of the waterways …. to give to a person a legally fixed immediate right of present or future enjoyment of (as an estate) (a deed that vests a title estate in the grantee and a remainder in his children), b. to grant endow, or clothe with a particular authority right or property ….. to put (a person) in possession of land by the feudal ceremony of investiture ….. to become legally vested (normally) title to real property vests in the holder of a property executed deed.)"
>
> (**Emphasis supplied)**

68. In **M.J. Thulasiraman**[5] Hon'ble the Supreme Court, speaking via N.V. Ramana, J. (as His Lordship then was) defined the word 'endow' as-

> **"18.** While the word "endow", and the connected word "endowment", have actually not been defined under the Act, from their usage in the Act and judgments on the subject, it is clear that they relate to the idea of giving, bequeathing or dedicating something, whether property or otherwise, for some purpose. In the context of the Act, the purpose is with respect to religion or charity. [See *P. Ramanatha Aiyar: The Law Lexicon*, 2nd Edn., p. 634, 635; *Pratapsinghji N. Desai* v. *Charity Commr.* [*Pratapsinghji N. Desai* v. *Charity*

69https://www.merriam-webster.com/dictionary/devolution
70(2013) 4 SCC 280

> *Commr.*, 1987 Supp SCC 714] , para 8]. In the present case, the rock inscription clearly provides for the utilisation of money from the "Bakers Choultry" for the purposes of performing the charitable activity of feeding Brahmins during the specified religious festivals. As such, it is clear that the rock inscription creates a "specific endowment" as specified under Section 6(19) of the Act, which falls within the ambit of the Act."

69. As is evident from the above extracts, the word "endow" does not signify a transaction of a fickle nature. It holds a sense of permanence. As noted by Hon'ble the Apex Court above, it is akin to being legally vested.

70. Having detailed the keywords informing the understanding of Article 243-W, we now proceed to examine the application thereof.

71. Article 243-W of the Constitution of India states that subject to other provisions of the Constitution, the Legislature of a State may give certain powers as necessary to municipalities. It is contended, therefore, on behalf of the respondents-State of Bihar that Article 243-W is not a super provision and cannot override entries 5 and 13 of List II of the Seventh Schedule. Reliance is placed upon **Ram Chandra Kasliwal**[39] (71).

72. It is, therefore, contended that the State was well within its jurisdiction to enact the impugned legislation. Further, it is submitted that the word used under Article 243-W is "may" by law "endow" and therefore, it is not necessitated by the

71Ram Chandra Kasliwal v. State of Rajasthan, 2004 SCC OnLine Raj 355

constitutional schemes to do so. Relying on a judgment of Hon'ble High Court of Rajasthan in **Ram Chandra Kasliwal**[39] and **Shanti G. Patel**[37] **(Para-9),** it is argued that Article 243-W is an enabling provision giving discretion to the State Legislature to confer powers upon the municipalities and the expression used therein is not "shall" but "may".

73. In our considered view, in the exercise of interpretation of statutes, a provision is not read in solitude, but in context. The language used is to be interpreted in such light. The question, therefore, is that if the word "may" is read in its literal sense, does the constitutional context, or for that matter spirit, allow the same?

74. Hon'ble the Apex Court in **Dharti Dhan (P). Ltd.**[23]**,** observed in para 7 that:-

> **"7.** … In other words, the word "may", used before "stay" in Section 442 of the Act really means "may" and not "must" or "shall" in such a context. In fact, it is not quite accurate to say that the word "may", by itself, acquires the meaning of "must" or "shall' sometimes. This word, however, always signifies a conferment of power. That power may, having regard to the context in which it occurs, and the requirements contemplated for its exercise, have annexed to it an obligation which compels its exercise in a certain way on facts and circumstances from which the obligation to exercise it in that way arises. In other words, it is the context which can attach the obligation to the power compelling its exercise in a certain way. The context, both legal and factual, may impart to the power that obligatoriness."
>
> (**Emphasis supplied**)

75. Therefore, as held in **Excide Industries Ltd.**[72] **and A.**

Manjula Bhashini v. A.P. Women's Coop. Finance Corpn. Ltd [73], the object of Article 243-W and the amendment by which it was introduced, has to be seen as an external aid to construction "for appreciating the true intent of the legislature or to find out the object sought to be achieved by enactment".

76. The true intent, which may also be discerned also by the application of pith and substance test [See **Sajjan Singh[8]**] in the considered view of this Court, is reflected in the conferment of constitutional status on this third level of government. Smaller units of Government were recognized, for the very reason that administration by the State Legislature and Executive in their respective functions was not able to truly reflect the needs of the people on the ground. Taking away of municipal autonomy, is therefore reverting to, in some form or another, the same system of governance where the State apparatus was entirely in control- leading to ineffective implementation of policy.

77. A Constitution Bench of Hon'ble the Supreme Court in **State of U.P. v. Manbodhan Lal Srivastava. AIR 1957 SC 912,** speaking via **B.P.Sinha, J.** [as His Lordship then was] while dealing with the interplay between the expression "shall" and "may" used in the Constitution itself, discussed as under**:-**

72(2020) 5 SCC 274
73(2009) 8 SCC 431

> "11. An examination of the terms of Article 320 shows that the word "shall" appears in almost every paragraph and every clause or sub-clause of that article. If it were held that the provisions of Article 320(3)(*c*) are mandatory in terms, the other clauses or sub-clauses of that article, will have to be equally held to be mandatory. If they are so held, any appointments made to the public services of the Union or a State, without observing strictly, the terms of these sub-clauses in clause (3) of Article 320, would adversely affect the person so appointed to a public service, without any fault on his part and without his having any say in the matter. This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. In that connection, the following quotation from *Crawford on Statutory Construction* — Article 261 at p. 516, is pertinent:
>
> "The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other…."
>
> (**Emphasis supplied**)

78. Hon'ble the Supreme Court in **Nisha Priya Bhatia v. Union of India**[74] observed with respect to "may" being read as "shall" in the following terms**:-**

> **"78.** The setting in which the expression "may" has been placed in this provision, it must be read as "shall…. We find it highly incongruous to permit the rule to operate in a manner so as to leave the scope for denial of pensionary benefits to an officer who has been retired without his/her

74(2020) 13 SCC 56

> volition for the sake of meeting organisational exigencies. Notably, the rule, being a special provision, does not prescribe for any minimum age or length of service of the officer concerned and the necessities of the situation may demand the invocation of this rule even within short period of service…"

79. In reading "may" as "shall" in the context of interpretation of rules, Hon'ble the Supreme Court in **Dinkar Anna Patil v. State of Maharashtra**[75]**,** held as under:-

> **"26.** Coming to the interpretation of Rule 4-A, it is no doubt true that the language used therein indicates that the said Rule is made applicable retrospectively from the date when the Rules were made applicable w.e.f. 10-10-1982 (*sic* 15-10-1982). Rule 4-A opens with a non obstante clause and provides that if in the opinion of the State Government, the exigencies of service so require, the Government *may in consultation with MPSC wherever necessary* make appointments to the post in relaxation of the percentage prescribed in Rule 4 of the Rules by promotion and nomination. The Tribunal held that the word "may" used in this Rule is directory but in our considered view, to give such a meaning would render the very object of consultation with MPSC wherever necessary nugatory. It would give unbridled power to the Government to dispense with the consultation with MPSC which may result into arbitrary exercise of powers by the authority. This could never be the object of Rule 4-A. In our considered view, the word "may" must mean "shall" and this is also obvious from the correspondence between the State Government and MPSC. The Government of Maharashtra wanted to relax the quota rule but MPSC was not agreeable and ultimately it relented to the request of the Government of Maharashtra and suggested amended Rule 4-A. This suggestion was accepted and accordingly the amendment was inserted in the Rules. We also find support to our view from the decision of this Court in *Keshav Chandra Joshi* v. *Union of India* [1992 Supp (1) SCC 272 : 1993 SCC (L&S) 694 : (1993) 24 ATC 545] . This Court was dealing with the interpretation of Rule 27 of the U.P. Forest Service Rules, 1952 and the said Rule is similar to Rule 4-A. While construing the word "may" used in Rule 27, this Court held

75(1999) 1 SCC 354

> that the word "may" has to be read as "shall" and, therefore, consultation is mandatory…."

80. In **D.K. Basu v. State of W.B.**[76]**,** Hon'ble the Supreme Court held that the context determines whether "may" is to be read as "shall"-

> **"11…**A plain reading of the above would show that Parliament has used the word "may" in sub-section (1) of Section 21 while providing for the setting up of a State Human Rights Commission. In contrast Parliament has used the word "shall" in Section 3(1) while providing for constitution of a National Commission. The argument on behalf of the defaulting States, therefore, was that the use of two different expressions which dealing with the subject of analogous nature is a clear indication that while a National Human Rights Commission is mandatory a State Commission is not. That argument is no doubt attractive, but does not stand close scrutiny. The use of the word "*may*" is not by itself determinative of the true nature of the power or the obligation conferred or created under a provision. The legal position on the subject is fairly well settled by a long line of decisions of this Court. The stated position is that the use of the word "*may*" does not always mean that the authority upon which the power is vested may or may not exercise that power. Whether or not the word "*may*" should be construed as mandatory and equivalent to the word "*shall*" would depend upon the object and the purpose of the enactment under which the said power is conferred as also related provisions made in the enactment. The word "*may*" has been often read as "*shall*" or "*must*" when there is something in the nature of the thing to be done which must compel such a reading. In other words, the conferment of the power upon the authority may having regard to the context in which such power has been conferred and the purpose of its conferment as also the circumstances in which it is meant to be exercised carry with such power an obligation which compels its exercise."
>
> **(Emphasis supplied)**

81. In the considered view of this Court if the word "may" is read in its literal sense, specifically in the context of transfer,

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76(2015) 8 SCC 744

posting etc., it not only defeats Part IX-A, but also other provisions concerning municipalities. The word “shall” imposes a positive obligation to be carried out. However, if there is lack of independence and ability to have people in accordance with the plans and vision set out to fulfill such positive obligation, the entire scheme of self-government, gets called into question.

82. Part IX-A of the Constitution of India consists 18 Articles, i.e. 243-P to 243-ZG. It is noticed that among these 18, two Articles do not use ‘may’ or ‘shall’ (Article 243-P; 243-ZG), 13 use the word ‘shall’ (Articles 243-Q; 243-R; 243-S; 243-T; 243-U; 243-V; 243-Y; 243-ZA; 243-ZB; 243-ZC; 243-ZD; 243-ZE; 243-ZF) and ‘may’ is used in 3 Articles (Articles 243-W; 243-X; 243-Z).

83. In 1992, when this amendment was brought into the Constitution, the goal and intent perhaps was to ensure political governance of municipal areas that were plagued by various issues. The Articles concerned political governance used the word ‘shall’ so as to supply a mandate to comply with, but the words of the constitutional amendment were not limited to only political governance. At the relevant time, administrative functions were entered into these Articles with “may”. More than three decades have passed since. For the true intent of

decentralization and self-governance to be realized, administrative governance must vest with the local units of government for one is not mutually exclusive of the other. Administrative governance forms as much a part of devolution of powers, accountability and self-governance as political governance and both aspects of governance harmoniously and seamlessly mixed with each other form holistic governance for the betterment of public at large. Therefore, Municipalities on the whole need to be furthered in a way to evolve into units of political and administrative governance. We are supported in this approach by the words of Ganguly J., in **Bhanumati**[17] wherein it was stated that "when faced with a challenge to interpret such laws, courts have to discharge a duty. The Judge cannot act like a phonographic recorder but he must act as an interpreter of the social context articulated in the legal text"; and also by words of Krishna Iyer J., who said that a Judge must be "animated by a gold oriented approached" and that "the judiciary is not mere umpire, as some assume, but an active catalyst in the constitutional scheme."

84. The discretion of the State Government in granting power to the municipality is not unbridled and is checked by the very basis of the 74th Amendment, i.e. self-government and

devolution of powers.

85. The phrase ‘devolution of powers’ means the transfer of authority to a *quasi* autonomous, distinct body having clear and legally recognized geographical boundaries over which they exercise certain authority and perform public functions.

86. The Constitution Bench has held that the phraseology as well as the intent and design of the enactment must govern the finding whether “may” is read as “shall”. As observed earlier, at the time of introduction of the constitutional amendment in 1992, perhaps the intent was to secure at first political governance and for that reason the Articles concerned political governance had the mandatory “shall” provision. But in order for the true intent of the constitutional recognition of the third level of governance to be realized, such institutions must evolve to take within their fold administrative governance as well. With increasing urbanization, burgeoning city populations, the demands on Municipal Units of governance grow and so in order for their continued and successful existence as institutions of self-government, it is incumbent upon the State Government to endow such bodies with the necessary wherewithal to meet such demands and carry out effectively and efficiently the responsibilities entrusted upon it by the Twelfth Schedule of the

Constitution of India. It is clear, therefore, that if "may" is read as is the evolution required of bodies of Municipal governance would be slow and delayed. The "may", therefore, in Article 243-W of the Constitution of India must be read as "shall".

87. It is pertinent to note here only, that Entry 5 List II itself mentions the term self-government. Therefore, any law made by the State Legislature has to be made, keeping in mind that it is being made for units of local government. The State's interpretation of the Entry as being an overriding provision, giving control to the State Legislature over these institutions of self-government does not find favour with this Court. Should that interpretation be acquiesced to, the very purpose of the third level of Government, as introduced by way of a special and specific part, shall stand defeated. So, although it is true that the State Legislature is competent to make laws for local government, but such exercise of law making cannot be done in a manner in which it loses sight of such aspect of relative independence, granted to municipalities by Constitution. While dealing with taxation powers to be delegated to a municipality in **Birla Cotton Spg. and Wvg. Mills[24],** the Hon'ble Supreme Court with respect to this entry in Seventh Schedule observed-

> "52. The entry in question is Entry 5 in the State List. It reads:
>
> "5. Local government, that is to say, the constitution and

> powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."
>
> Under this entry power is given to the legislature to create self-governing units. It has always been understood, as we shall show presently, that such self-governing units must have resources for their own administration and duties…"

88. In order for any organization to carry out effectively, in accordance with its policies, any work or obligation, it is important that those executing such work are accountable for the manner in which the work/obligation is carried out. This accountability can only be to those who have framed such policies. The words of Article 243-W of the Constitution of India themselves testify to this. The municipalities are to be devolved power and responsibilities with respect to "the performance of functions and the implementation of scheme as may be entrusted to them in relation to the matters listed in the Twelfth Schedule". In reference to the issue in hand, the "performance of functions" would include, in our considered opinion, the need to have those of the executive arm under its control. More so, that the removal of any say of the municipal authority in the decision making process as to which of the officers of the State would function within its area and on what terms is squarely in the teeth of "self-government".

89. The Hon'ble Supreme Court noted in **Rajendra**

Shankar Shukla[16] that Article 243-N and Article 243-ZF required any law or provision thereof be suitably amended to fall in line with the 73rd and 74th Constitutional Amendments and any disobedience of such mandate would lead to breakdown of federal polity.

90. Pursuant to the Seventy Third and Seventy Fourth Amendment 1992 coming into force, the State of Bihar enacted the Bihar Municipal Act, 2007 to amend the laws based on the principles of decentralization, autonomy and accountability of urban self government. It was done so to introduce reform in finance, accounting and internal resource generation. The aim thereof was to ensure professionalization of the municipal personnel.

91. The Bihar Municipal Act, 2007 is a complete code in itself providing for all matters concerning those enumerated above as also any other matters incidental thereto. It has been noted by Hon'ble the Apex Court that the same is "quite a comprehensive Act". [**Afjal Imam**[3]]

Effect of Amendments made in the Parent Municipal Act

92. It is contended on behalf of the petitioners that the provisions of the Amending Act caused violence upon the Parent

Act. The original Act, it is submitted envisaged the administrative control resting with the Empowered Standing Committee (ESC), however, the same has been eroded by subsequent amendments. To lay emphasis on this point, Section 37 of the Bihar and Orissa Municipal Act, 1922 is taken as an illustration, submitting that this section which was enacted well before the 74th Amendment, gave power of appointment, salary fixation and other terms entirely to the Municipal Corporation.

93. The Respondents-State of Bihar submitted that a number of practical issues were being faced in the free and fair appointment on the posts of Group 'C' and that these positions were being used to "remain working in a particular municipal office for a long time", was one of the reasons for corruption. Further it is stated that post such amendment transfers of Group 'C' became possible, which resulted in better management.

94. In particular reference to Section 41, it is submitted that Officers of the State Government for Municipalities were not able to discharge their duties because provisions of the Act provided for them being under the administrative control of the Empowered Standing Committee. Also that such officer had to be withdrawn if a resolution by two-thirds majority of total Councilors holding office at such time, was passed.

Amendment to Section 36

95. With respect to laws made for local self-government, the four key words that form the essence of the Seventy Fourth Constitutional Amendment, as also the Municipal Act, i.e decentralization, devolution of powers, autonomy and accountability must always be respected. In the considered view of this Court, the impugned amendments fall foul of the Constitution. Section 36 of the Municipal Act prescribes the schedule of officers that would, with the aim of maximum possible economy in Municipal Administration, be posted to a Municipal Corporation or to a Municipal Council or a Nagar Panchayat. The Section as it stands post amendment has reduced the Municipal Body to being a mere recipient of what the State Government decides. Pre-amendment such appointment was done by the State as it is now, but the necessity thereof was determined by the Empowered Standing Committee. This position was in line with the idea of self-government. People elected from within the municipal area governed. They determined the necessity upon which State Government took action. Governance cannot be divorced from such elementary aspects of control.

96. Under the amended section 36(2), the term of an appointment of officers under Section 36(1) who are the

executive authorities of the municipalities too will be decided by the State.

97. Sub-Section (4) of Section 36 of the Municipal Act pertained to the regulations to be made for appointment of officers under sub-section (1). Two alternates existed- The State Government appointed officers with consultation of the Empowered Standing Committee or the Committee appointed officers of the prior approval of the State. This provision stands deleted. As a consequence to this Section 36(6) which empowered the Committee to lay down conditions of service, discipline and control etc. are also deleted. Under the Amendment Act, the State Government shall prescribe the method of appointment, required qualification, conduct and discipline and other conditions of service under sub-section (3) of Section 36. Under Section 36(7), the State Government had power to terminate the appointment of any officer appointed under sub-section (1), but equally, the Empowered Standing Committee had the power to request to a removal of an officer should a resolution to that effect with 2/3rd majority be passed. This power stands taken away.

98. Section 36(8) and 36(9) required respectively that if a person to be appointed was not recommended by the Bihar

Public Service Commission, prior approval of the State Government would be needed and that no person above sixty years shall be appointed to any post. These provisions are deleted, enabling the State to unilaterally appoint any person to a Municipality.

99. The primary reason for which a need was felt to confer constitutional status upon units of local government was that there was an inadequate devolution of powers and far too much control of the State Government opposing their development as institutions of self government. The impugned amendment is an exercise of centralization of powers as opposed to devolution as required by the Constitution.

99.1 Hon'ble the Supreme Court in **Bhanumati[17],** while dealing with the sister amendment**,** has pertinently stated in para 38 that "under the constitutional scheme introduced by the 73rd Amendment, Government of the State is no longer a service provider but is a felicitator for the people to initiate development on the basis of equity and social justice and for the success of the system people have to be sensitized about their role and responsibility in the system." (**Emphasis supplied**)

99.2 The wide amendment to Section 36(3) reduces to zero all subsequent sections. The Empowered Standing

Committee being truly empowered is essential to achieve the object of the constitutional amendment as also the Municipal Act. The amended nature of the Committee does not stand scrutiny as a constitutionally recognized body of governance. The amendments made to Section 36 must be struck down.

Amendment to Section 37

100. Section 37 of the Municipal Act concerned the Municipal Establishment and Schedule of Posts to be maintained therein. Sub-Section (4) onwards were deleted by the impugned Amendment Act. The deleted sub-sections, all were with respect to powers of the Empowered Standing Committee (ESC) regarding employees within the Municipality, including revision of the Establishment Schedule, sanctions of category-C posts or engaging persons on contract basis.

101. Peculiarly, sub-section (2) and (3) remain on the books. Sub-Section (2) is classification of posts into four categories, ‘A’, ‘B’, ‘C’ and ‘D’ and sub-section (3) requires the Municipality to prepare and maintain a schedule of posts. As submitted on affidavit by respondent no.5, category ‘D’ stands outsourced, rendering meaningless a part of sub-section (2). Under Section 36(3) as amended, the State Government has complete power with respect to appointment and service

conditions of employees in Municipality, yet, Section 37(3) survives and so does Rule 10 of the Bihar Municipal Empowered Standing Committee Conduct of Business Rules, 2010 which provides that the executive power of the Municipality vests with the Empowered Standing Committee and that the control over staff of the Municipality shall vest with the Chief Executive Officer. In particular, sub-rule (a) which deals with transfer, posting, disciplinary action etc. is still on the statute book. Hence, the schedule, so prepared, is nothing but a piece of paper. Whether under the aegis of a law making power meant to further self-government (Entry 5, List II of the Constitution of India), an amendment which washes away any power of a body vested with executive power of a municipal body- can be termed valid? The answer is in the negative. The amendment made to Section 37 has the appearance and effect of centralization of power and reduction of the Empowered Standing Committee to an effectless body, so far as the employees working under it.

102. This can, in no manner, be said to be in consonance with the constitutional amendment.

Amendment to Section 38

103. Section 38 of the Municipal Act concerns the designation of appointing authorities. Prior to amendment,

category ‘A’ and ‘B’ were appointed by the State Government, while ‘C’ and ‘D’ were appointed by the Chief Municipal Officer or their designate with approval of the Empowered Standing Committee. The latter part was amended and now category ‘C’ would be appointed by the Directorate of Municipal Administration as part of State Cadre.

104. The State Government has issued letters asking for outsourcing to be implemented with respect to category ‘D’ employees as per a policy decision circulated vide letter dated 29.06.2018 (Page 146 of CWJC No.11717 of 2021) and an order dated 28.11.2019 passed by Hon’ble Lokayukta in Case No.1/Lok/ Urban Development)/31/210 titled as Md. Saifuddin v. Mayor, Municipal Corporation. The order of the Hon’ble Lokayukta was challenged in CWJC No.3599 of 2020 titled as Dharmendra Kumar v. State of Bihar and was set aside by this Court vide judgment dated 06.12.2021. The operative portion of the judgment reads as under:-

> “26. In light of the discussion above, we set aside the order dated 28.11.2019 passed by Hon’ble Member (Judicial) Lokayukta, Bihar (Annexure-1) and, further in light of the affidavit filed by the respondent Nos.1 and 2; namely, the State of Bihar through the Principal Secretary, Urban Development and Housing Department, Bihar, Patna and the Deputy Secretary, Urban Development an Housing Department, Bihar, Patna through Project Officer cum Deputy Director, Urban Development and Housing Department, Government of Bihar, this petition and any associated interlocutory applications stand disposed of with the following

directions:-

1) The order dated 28.11.2019 passed by the learned Member (Judicial), Lokayukta, Bihar, in Case No.1/Lok/(Urban Development)/31/2010 Md. Surfuddin v. Mayor Municipal Commissioner, is *non-est* in law.
2) The questions relating to continuation of employment of Group 'D' or any other service falls outside the jurisdiction of the Institution of Lokayukta, Bihar, Patna.
3) Any action taken, therefore, in furtherance of the impugned order is void."

105. The power of a body consisting elected members has been taken away and vested in a centralized executive authority, i.e. the Directorate of Municipal Administration. The consideration on which the constitutionality to amendment to Section 38 rests is whether such power of an elected body can be taken away when no clear reasons or evidence to back such an exercise of law making power can be found in record. This amendment is in continuation of a theme running across the impugned sections of the Amendment Act, concentrating power with the State Government. It would not be conducive to the principles of devolution of powers and self-government for each and every employee within a municipality to be recruited and controlled by a statewide authority. The essence of collective responsibility, for it to be adhered to would necessitate some freedom resting with the Municipality in such functions. Be that as it may, should the State upon due effort and investigation find pervasiveness of illegalities in such appointments, it shall be

entirely open to them to take action, in accordance with powers already vested with them in the Act.

106. The answer to vague statement such as "procedural problems" is not to denude a Municipality of its powers and damage the constitutional status granted to it, instead, it would be to find ways to streamline processes and put in place safeguards against such appointments.

Amendment to Section 40A

107. The challenge to Section 40A is not subject of the present *lis* as restricted vide order dated 17.11.2021 and as Section 40A was not a part of the original Act and was inserted vide an Bihar Act 2 of 2014 dated 08.01.2014.

Amendment to Section 41

108. The proviso to Section 41 which stood amended vide the impugned Amendment Act to the effect that the Empowered Standing Committee could no longer asked the State Government to withdrawn an officer should a resolution to that effect be passed by a two-third members holding office. Consequentially, the second proviso which stated that such resolution could not be passed till the completion of one year from the posting of this officer also stands deleted. In effect, the Empowered Standing Committee and a Municipality as a whole is option

less/remediless should they be of the opinion that the concerned officer needs to be withdrawn. This then means that the Municipality shall be forced to work with an officer whom the majority finds unfit.

109. Under Schedule XII of the Constitution, Municipalities are entrusted with a number of duties for which they as the legislative body would make policy and the executive, i.e. these officers, would execute accordingly. Would the requirement of self-government and devolution of powers be satisfied if despite the majority testifying so by way of their vote, such officer is still posted under such Municipality? The answer is nugatory. The provision of two-thirds majority is in itself a safety net preventing such a resolution from being passed arbitrarily.

110. The amendment made to Section 41 does not stand scrutiny of law.

111. The Parent Act, came into being, to bring the State in line with the changes made to the constitutional structure of governance. The primary aims therein were- a) devolution of powers; b) self-government; c) Decentralization and d) autonomy. The Objects and Reasons Clause, reproduced supra, of the Parent Act also reflected the same. Therefore, any action

under the statute should be to fulfill these aims.

112. Under the Parent Act, in the considered view of this Court, the legislature, in furtherance of the aims enshrined, had found a balance, where autonomy of the municipal authorities was maintained, while also ensuring that control of the State remains intact.

113. Under the Amendment Act, the equation has been made totally lopsided, and all power has been taken away. The State Government now has to feel the necessity to make appointments either on regular or contract basis of those mentioned in sub-section (1) and, now it has complete authority to prescribe method appointment, control, conduct etc. the appointing authority has been made the State Government as opposed to the various other officers of the municipality under the Parent Act (Municipal Act).

114. This Court has held in **Kaushal Kaushik**[1] that once a concerned officer is posted, may be by the State Government, to an Urban Local Body, he is under the administrative control of such local body for the period he is under deputation to such urban local body.

115. In **T. Devender**[4]**,** it was observed**-**

> " If the head of the local body is deprived of the power of administrative control over the chief executive officer,

except in matters relating to implementation of the resolutions of the local body, can the local body function in the manner ordained by the statute? Our answer is in the negative. The nature of the powers conferred on and functions entrusted to the local bodies are so vast and varied, as already noticed, it becomes imperative for the head of the body, as a necessary corollary, to have control over the chief executive to ensure effective functioning of the local body. The question is not why the elective head should exercise administrative control over the chief executive? The question is and must be whether without that power the elective body can function effectively in conformity with the statutory mandate?..."

116. Hon'ble the Apex Court in **Afjal Imam[3],** observed that:-

"46….The members of this Empowered Standing Committee are nominated by the Mayor. After a Mayor is removed, and another Mayor is elected in his place, if the new Mayor is not allowed to nominate his nominees on the Empowered Standing Committee, it is likely to result into a situation of conflict. This is apart from the fact that the new Mayor will be treated dissimilarly with the earlier Mayor, although both of them are elected by the same full House and there is no justifiable reason for making any distinction…

47. After a Mayor is removed under Section 25(4) of the Act, a new Mayor is to be elected under Section 23(3) of the Act. This section does not say that the newly elected Mayor will not have the powers of nominating the other members on the Empowered Standing Committee which is available to the Chief Councilor or Mayor under Section 21(3) of the Act. Thus, in fact, by stating that the nomination of the members on the Empowered Standing Committee is a one time act, the Respondents are adding words in Section 21(3) of the Act. Thus, in a way, they are supplying in Section 21(3) the words 'only by the first Chief Councilor and not by his successors in office' in place of 'the Chief Councilor' after the words 'shall be nominated' in Section 21(3) of the Act….

Such a reading and resultant situation will be contrary to the basic principle of parliamentary democracy, viz. that those in office ought to be representative of and responsible to the House. therefore, if the house has lost confidence in the earlier Mayor, it is all the more necessary that the members of the Empowered Standing Committee should be made to step down alongwith him and a newly elected Mayor be permitted to have his nominees on the Empowered Standing Committee."

(Emphasis supplied)

117. In **Afjal Imam**[3] noting the nature of powers and functions on an ESC and the importance of having suitable members as a part of it, Hon'ble the Supreme Court observed:-

> "60. Considering the powers which are available to the Empowered Standing Committee, if the newly elected Mayor is not read as having the power to nominate his nominees on the Empowered Standing Committee, he will be treated dissimilarly and such an interpretation will make Section 27 violative of Article 14 of the Constitution and contrary to the powers of the Mayor under Section 21(3) of the Act…Thus, the newly elected Mayor will also have the authority to nominate seven members of his choice to the Empowered Standing Committee.

118. Learned counsel for the petitioner has submitted that the objects and reasons behind enacting the Bihar Municipal Amendment Act, 2021 are unreasonable and arbitrary stating that the object of the amendment is in violation of the Parent Act.

119. Adjudicating a question on the scale of unreasonableness/arbitrariness is not one of formulaic application and is decided and determined on case to case basis with particular attention being paid to specific set of facts. The presence of either of the two ill qualities hits at Article 14 of the Constitution of India as no law possessing such ill qualities can be said to be in consonance with the founding document.

120. The Constitution Bench (Five-Judge) of Hon'ble

the Supreme Court in **Natural Resources Allocation, In re, Special Reference No. 1 of 2012**[77]**,** observed as under:-

> **"102.** Equality and arbitrariness were thus, declared "sworn enemies" and it was held that an arbitrary act would fall foul of the right to equality. Non-arbitrariness was equated with the rule of law about which Jeffrey Jowell in his seminal article "The Rule of Law Today" said:
>
> "Rule of law principle primarily applies to the power of implementation. It mainly represents a state of *procedural fairness*. When the rule of law is ignored by an official it may on occasion be enforced by courts."
>
> **"103.** As is evident from the above, the expressions "arbitrariness" and "unreasonableness" have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in *Sharma Transport* v. *Govt. of A.P.* [(2002) 2 SCC 188], this Court has observed thus: (SCC pp. 203-04, para 25)
>
> **(Emphasis supplied)**

121. In **Union of India v. International Trading Co.**[78]**,** Hon'ble the Supreme Court observed that:-

> "23. …Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict.
>
> **(Emphasis supplied)**

122. In **Pravinsinh Indrasinh Mahida v. State of Gujarat**[79]**,** Hon'ble the High Court of Gujarat speaking through

77(2012) 10 SCC 1
78(2003) 5 SCC 437

J.B.Pardiwala, J. (as His Lordship then was) observed:

> "67. In order to test the constitutional validity of the Act, where it is alleged that the statute violates the fundamental rights, it is necessary to ascertain its true nature and character and the impact of the Act. Thus, the Courts may examine with some strictness the substance of the legislation and for that purpose, the court has to look behind the form and appearance thereof to discover the true character and nature of the legislation. Its purport and intent have to be determined.
>
> > "8…. In order to do so it is permissible in law to take into consideration all factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy."
> >
> > (Vide : Dwarkadas Shrinivas v. The Sholapur Spinning & Weaving Co. Ltd., AIR 1954 SC 119; Mahant Moti Das v. S.P. Sahi, The Special Officer in charge of Hindu Religious Trust, AIR 1959 SC 942; and Hamdard Dawakhana v. Union of India, AIR 1960 SC 554, para 8).

123. In the present set of facts, the impugned amendment was purportedly brought on to remedy the vice of corruption prevailing in Municipal bodies, in particular, reference to appointment of Group- C and D employees, recording in the object and reason that, many employees had been serving at one Municipal unit for unduly long period, giving rise to and aiding propagation of corrupt practices. They also stated that due to the power of removal of officers vesting with the municipality, such officers are not able to carry out duties without fear or favour.

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124. From the documents adduced, neither of these fact so alleged, come to light. The record does not show any inquiry conducted into corruption in municipal bodies generally or with respect to appointment in Group-C or D, neither have any example been put forth to establish the misuse of the power to recall an officer by municipalities and the consequent problems in administration arising therefrom.

125. As observed by Hon'ble the Supreme Court in **International Trading Co.**[73]**,** reasonableness is to be judged from the stand point of general public interest. So whereas curbing corrupt practices is undoubtedly in public interest, the same should be demonstrated and it is as much in public interest that municipalities are allowed to govern as best possible in realization of being an institution of self government. While it is true that the municipality takes up a part of the State's responsibility and administration, it cannot be solely for the reason of Entry 5 List II, that it is open to State Government to reduce/truncate the functionality of a municipality. As indicated in the case, "the extent and urgency of the evil sought to be remedied" must be borne from the record; "The nature of right alleged to have been infringed" in this case is that of governance at the grass root level ensuring that the democratic machinery is

within the reach of the common person.

126. The history of the legislation as well as the constitutional amendment suggest that devolution of powers and autonomy form the rationale and looking behind the form and appearance of the amendment, as noted in **Pravinsinh Indrasinh Mahida[74],** it appears that without any sound basis, both these cornerstones of the 74th Amendment Act, 1992 are sought to be compromised with lending itself to the conclusion that there is dis-proportionality in the imposition with the same not being backed up by prevailing conditions.**[**See **International Trading Co.[73]]**

127. It has been held by Hon'ble the Apex Court in **Bhanumati[17]** that the 73rd Amendment is a very powerful tool of social engineering. In the considered view of this Court, the expression can be extended to the 74th Amendment as well. When localized institutions are in control of economic planning and social justice, the performance of functions and implementation of schemes is far easier. In pursuance thereof, decentralization and devolution as given in Article 243-W are essential.

128. In this context, therefore, once a power is given to unit of local government, it is not open to the State Legislature to under exercise of List II Clause 5 take away such power without

any solidly put forth basis, emasculating the municipalities.

129. In light of the above pronouncements of Hon'ble the Apex Court as also this Court, respondents' submission that the amendment has been made for the purposes of transparency cannot be held as sustainable in law, for it has overstepped its authority, defeating the well rounded and balanced objectives of the Parent Act, reflecting nothing but an element of manifest arbitrariness.

130. Further, learned counsel for the petitioner has submitted that the object and reasons behind the Amendment Act are unreasonable and arbitrary, stating that the object of the amendment is in violation of the Parent Act. What this means, is that the amendment carried out vide the impugned legislation hampers/restricts or causes hindrance to achieving the goal for which the Municipal Act was brought onto the book.

131. The situation effected by the amendment is that the State Government possesses singular control over the Executive Officers of the Municipality, but the execution of the responsibilities still vests with the Municipality itself. What is to be considered then is whether the control of Executive Officers and the execution of responsibilities are two separate units coming together to function as the third level of Government or

whether both these aspects together form a single comprehensive unit, albeit in the overall supervision of the State under Entry 5, List II of the Constitution of India in furtherance of tasks and duties laid down for it under Schedule 12 of the Constitution of India. The State and the learned Amicus would have us hold the former and conversely the petitioner vehemently argued in favour of the latter.

132. The Collins Dictionary[80] defines 'Executive' as the part of the Government, that is concerned with carrying out decisions or orders.

133. The Encyclopedia Britannica[81] notes 'political executives' are government officials who participate in the determination and direction of Government policy. They include heads of States and Government leaders- President, Prime Ministers…., Cabinet Members, Ministers, Councillors and Agency Head.

134. Section 45 of the Municipal Act which details the core functions of the Municipality and Section 47 which under six heads lists 'other functions' would form such determination and direction of Government policy.

135. Section 22 of the Municipal Act states that the

80https://www.collinsdictionary.com/dictionary/english/executive
81https://www.britannica.com/topic/political-system/The-executive

executive power, i.e. the power to carry out functions and other associated matters, as delineated under above two sections, would lie with the ESC. Section 22 (remains unamended) is reproduced hereinunder:-

> "**22. Executive power of Municipality to be exercised by Empowered Standing Committee**.—Subject to the provisions of this Act and the Rules and the Regulations made thereunder, the executive power of a Municipality shall be exercised by the Empowered Standing Committee."

136. Section 27-B of the Municipal Act, inserted vide Bihar Act 7 of 2011, states that the Chief Municipal Officer shall be the Principal Executive Officer of the Municipality and all officers and other employees of the Municipality shall be subordinate to him, with the power of transfers, posting and disciplinary actions also vesting within him. Any action taken by this Officer is subject to the supervision and control of the ESC. It is noteworthy this Section granting power to the Chief Municipal Officer and placing such person under the supervision of the Empowered Standing Committee was specifically inserted into the Act. Section 27-B **(**remains unamended**)** reads as under**:-**

> "**27-B Power and function of Chief Municipal Officer**-(1) The Chief Municipal Officer shall be the Principal Executive Officer of the Municipality and all officers and other employees of the Municipality shall be subordinate to him. Powers of transfers & posting & disciplinary action against all officers and staff appointed by him under Sec. 38 of this Act shall vest in the Chief Municipal Officer.
>
> (2) Subject to the supervision and control of the Empowered Standing Committee, and the provisions of this Act and of any Rules and Bye-laws made there under, executive

functions for carrying on the administration of the municipality shall vest in the Chief Municipal Officer.

(3) He shall be present at the meeting of the Board of Councillors, Empowered Standing Committee or of any committee except meetings convened for the purpose of considering the question of withdrawal of his service by the State Government and he shall have the right to make a statement or to explain facts, but he shall not vote for or against or make any proposition at such meeting.

(4) Power, functions and duties delegated by the Municipality, the Empowered Standing Committee and under the provisions of this Act to the Chief Municipal Officer shall be exercised, discharged and performed by the Chief Municipal Officer.

(5) Subject to provisions of this Act and Rules made under this Act, the Chief Municipal Officer may delegate any of his powers, duties and functions under this Act and any Rules and Bye-laws made there under to any officer subordinate to him.

(6) The Chief Municipal Officer shall carry into effect every resolution of the Empowered Standing Committee or the Board of Councillor or of any Committee of the Municipality which is in conformity with provisions of law unless such resolution is set aside or suspended under this Act by the appropriate authority.

(7) In the case of absence of the Chief Municipal Officer for any reason, the powers of the Chief Municipal officer as specified in the foregoing provisions of this section or elsewhere in this Act or the Rules made under this Act, shall be exercised by any officer of the Municipality as may be nominated by the Chief Councillor in this behalf till such time State Govt. makes a substitute arrangement."

(Emphasis supplied)

137. If we are to hold as the State would have us do, then the Chief Municipal Officer and all other officers would be subject to the exclusive control of the State Government as opposed to being under the supervision of the ESC. The ESC, being a body of elected members, in discharge of its executive functions would be responsible to the people for the myriad functions as listed, but would not, as argued by the petitioners,

have effective control over those responsible for carrying out the orders issued by them.

138. It is apparent from the examination of various provisions of the Municipal Act that the Empowered Standing Committee (ESC) and the Municipality as a whole is responsible for the overall well being of their respective areas and originally, in keeping with the spirit of grassroots democracy and the keywords informing the effect of Seventy Fourth Amendment to the Constitution of India- were granted considerable leeway in its functioning.

139. We also notice that, the State Government, in any case, has power within the Municipal Act to oversee the functioning of municipalities. Section 65 under Chapter VIII the State Government is empowered to call for any record, correspondence or document; requires the furnishing of any return, plan, estimate, statement etc.; obtain any report. Under Section 66 the State Government may depute any of its officers above a certain rank, to inspect and examine any department, office, service, work and property of the municipality. Section 67 gives the power to the State Government to require the Municipality to take action if after considering the record under previous two sections, it is of the opinion that any action by such

authority is unlawful or irregular or that any duty cast upon them has been performed in an imperfect, insufficient or unsuitable manner or, has not been performed at all. Under sub-section (b) of Section 67, the State Government has the power to annul an action/require the Municipality to regularize such unlawful or irregular action or perform such duty/ restrain such authority from taking such unlawful or irregular action if it is the opinion that adequate financial provision has not been made for the performance any duty under the Act. The State may then direct such authority to make such financial provision/arrangement to the satisfaction of the State Government as may be specified in the order.

140. A proviso to Section 67 states that unless the need of execution of such order is immediate, the State Government shall provide such Municipal authorities an opportunity of showing cause within a specified period, in writing, as to why such an order should not be made.

141. 2020 Amendment to the Municipal Act introduced a second proviso which stated that the State Government in larger public interest would have the authority to issue direction to such municipal authorities as may be fit and proper and that such authorities would be expected to comply therewith.

142. The text of Sections, 65, 66 and 67 are as under**:-**

"**65. Power of State government to call for the records etc**.- The State Government may, at any time, require any municipal authority –

(a) to produce any record, correspondence, or other documents,

(b) to furnish any return, plan, estimate, statement, accounts, or , statistics, and

(c) to furnish or obtain any report and thereupon such municipal authority shall comply with such requirement."

"**66. Power of State government to depute officers to make inspection or examination and report.-** The State Government may depute any of its officers to inspect or examine any department, office, service, work or property of the Municipality and to report thereon, and such officer may, for the purpose of such inspection or examination, exercise all the powers of the State Government under section 65:

Provided that such officer shall be not below the rank of –

(a) a Deputy Secretary to the State Government in the case of a Municipal Corporation, and municipal council of class "A" and "B",

(b) an Under Secretary to the State Government in the case of a Class 'C' Municipal Council or Nagar Panchayat, as the case may be."

"67. Power of State Government to require municipal authorities to take action.- If, after considering the records required under section 67, or the report under section 66, or any information received by Government the State Government is of opinion that –

(a) any action taken by a municipal authority is unlawful or irregular or any duty imposed on such authority by or under this Act has not been performed or has been performed in an imperfect, insufficient or unsuitable manner, or

(b) adequate financial provision has not been made for the performance of any duty under this Act, the State Government may, by order, annul such action, or require such municipal authority to regularize such unlawful or irregular action or perform such duty or restrain such authority from taking such unlawful or irregular action or direct such authority to make, to the satisfaction of the State Government or within such period as may be specified in the order, arrangement, or financial provision, as the case may be, for the proper performance of such duty:

Provided that the State Government shall, unless in its opinion the immediate execution of such order is necessary,

> before making an order under this section, give such municipal authority, in writing, an opportunity of showing cause, within such period as may be specified by the State Government, why such order should not be made.
>
> Provided that it shall be lawful for the State Government in the larger public interest to issue such direction to the Municipal Authorities as may be deemed fit and proper and the Municipal Authorities will be expected to follow such direction."

143. Section 68 gives the power to the State Government to provide for enforcement of an order passed under Section 67. If no action stands taken according to the order passed, the State Government may make arrangement for taking such action and charge all expenses connected therewith to the municipal fund. It may also appoint any person as deemed fit for a period, subject to its own directions to carry out all or any of the power and functions of the municipality, necessary to implement such order under Section 67. Section 68 reads as under**:-**

> **"68. Power of State Government to provide for enforcement of order under section 67**.- (1) If no action has been taken in accordance with the order under section 67 within the period specified therein or if no cause has been shown under the proviso to that section or if the cause shown is not to the satisfaction of the State Government, the State Government may make arrangement for the taking of such action and may direct that all expenses connected therewith shall be defrayed from the Municipal Fund.
>
> (2) For the purposes of sub-section (1), it shall be lawful for the State Government to appoint, for such period as the State Government may think fit, any person considered suitable by it, who shall exercise and perform, subject to such directions as the State Government may issue from time to time, all or any of the powers and functions of the municipal authorities necessary to implement the order under section 67."

144. As is apparent from the above discussion, the State

Government possesses considerable authority over the functioning of the municipal bodies and can test/examine/scrutinize almost any action of such bodies. It is well known and well settled that any act or provision thereof is not read or construed in isolation and the act and its impact is to be understood as one entity or, on the whole.

145. In the present case, an amendment was brought into the Municipal Act, seeking to remedy and issue which, as observed earlier, does not bear from record. The State, be that as it may, already stood empowered to take action against municipalities vide the parent Act. Section 67 of the Municipal Act empowers the State Government to require the municipal authorities to take action if after calling for records under Section 65 or receiving a report under Section 66 or any other information, it is of the opinion that any action so taken by the authority is unlawful or irregular.

146. The wide language of calling for records under Section 65 or receiving a report under Section 66 or any other information, empowers the State Government to compel such action in nearly any circumstance and further, under Section 68, if after the reply to the show cause by the municipal authority, the State Government is not satisfied, it can even enforce such an

order passed under Section 67, including appointing an officer to take over the functions of the municipal authorities necessary to implement such order.

147. No such action ever having been taken emanates from record or in the submissions advanced, both oral and written, on behalf of the State. Instead the State relies on vague phrases such as “practical difficulties”, “procedural problems”, implementation related problems, hurdles/obstacles to the State appointed officers in “free and fair discharge of duties”(counter affidavit on behalf of Respondent No. 5 dated 20.04.2021, Pages-145, 148, 149), “undue pressures” (supplementary counter affidavit on behalf of respondent no. 5 dated 23.12.2021 Page 175).

148. Amending a provision of law is entirely permissible so long as such amendment does not fundamentally alter the overall scheme of the Act. In the face of existing provisions giving wide and far ranging supervisory powers to the State, the path chosen is one that hampers/damages a hallmark of the third

level of Government i.e. devolution of powers. It would have been entirely within the purview of the State to have initiated an investigation into the purported corrupt practices prevailing in municipal bodies compelled the taking of rectifying action and in the absence of such action being taken, itself enforced the order and in exceptional cases, after due opportunity of being heard, even dissolved the municipality.

149. In light of these provisions, if this Court is to accept the contentions of the State and hold the Amendment Act, reducing or taking away the say of Empowered Standing Committee (ESC) in appointment of its officers and control thereof- it would be in contravention of the scheme of the parent Act. It is essential to strike a balance in the devolution/self-government of municipal bodies and the control exercised thereon by the State.

150. It is, therefore, considered opinion of this Court that should the Amendment Act, to the extent challenged herein, stand that coupled with the powers under Section 65, 66, 67, 68 as also

Section 69 which is the power of the State Government to dissolve a municipality, it would create a lopsided situation with the State Government exercising overarching and overbearing control over municipal bodies.

151. The form that takes shape is that not only does the State have considerable authority arising out of the above mentioned sections to look into as observed earlier, almost all aspects of functioning of municipal body, the Amendment Act heightens this power by taking unilateral control of Officers of the Municipality. So duties and responsibilities remain same, but the corresponding power to execute such responsibilities as the elected body deems fit is drastically reduced. Under the above sections, action of the Municipality can be scrutinized and orders passed should the State Government be of the opinion that an Act done by such body is improper etc. as also under the impugned amendments the level of control of the Municipal Body over its officers, the functioning of whom may cause such body to be issued show cause, proceeded and ordered against and in certain

cases even dissolved, be almost minimal.

152. The contention of the State that the amendments have been brought in so that the officers posted within the Municipality can perform their duties without being in fear of transfer (proviso to Section 41) is negated as even without the amendment, taking away the authority of the councillors to, by a meeting specifically called for this purpose have the State withdrawn an officer by resolution of two-third majority; the State in the above Sections has the power to withdraw the officers suo motu. This takes away any option on part of the Municipal Body to have an officer withdrawn- which then translates to being responsible for the actions of an officer with whose functioning the Municipal Body may not be satisfied, being answerable to the State which may call into question its very existence, but, have no power to have such officer removed from its municipal area. Such a situation is in direct contravention of observation of Hon'ble the Supreme Court in **Ravi Yashwant Bhoir**[32] that amendment to the constitution by

adding parts IX and IX-A confers upon the local self-government a complete autonomy on the basic democratic unit unshackled by official control.

153. The amendment to Section 37 which is titled as Establishment to Municipality and Schedule of Posts under Chapter V Part B brought in by the Amendment deletes sub-sections (4) to (10). The remainder of the Section reads as under:-

> **“Section 37 - Establishment of Municipality and schedule of posts-**(1) The posts of officers and other employees of the Municipality, other than those referred to in sub-section (1) of Section 36, shall constitute the municipal establishment.
> (2) The Municipality shall, by Regulation, classify the posts of officers and other employees constituting the establishment of the Municipality into four categories, namely, category 'A' post, category 'B' post, category 'C post, and category 'D' post, on the basis of the scales of pay of such posts.
> (3) The Municipality shall prepare, and maintain, a schedule of posts of officers and other employees constituting the establishment of the Municipality, to be called Establishment Schedule, and such Establishment Schedule shall include the designation, and the number of posts under each designation, and shall be in three parts of which Part I shall include category, ‘A' posts, Part II shall include category 'B' posts, and Part III shall include category ‘C’ posts and category 'D' posts.”

154. We notice from the above that Section 37(2) requires a municipality to, by regulation classify officers and employees into four categories, namely categories ‘A’ through ‘D’ on the

basis of scales of pay. Section 37(3) requires a municipality to maintain a schedule of posts, constituting such municipality. However, if the State, vide the impugned amendment Section 38, in case of category 'A' and 'B' the appointing authority would be the State Government and in case of category 'C' Directorate of Municipal Administration under the Urban Development and Housing Department through a State Level Cadre, then the impugned amendment goes against the responsibility cast upon the Municipality under Section 37. No classification or maintaining of schedule, which responsibilities still stand after amendment, remains possible if the cadre is at State Level. Therefore, the impugned amendment plainly contravenes the provisions the Parent Act.

155. A Constitution Bench in **Shayara Bano v. Union of India**[82] examined manifest arbitrariness as under-

> "87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision

82(2017) 9 SCC 1

in McDowell [State of A.P. v. McDowell and Co., (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

101. It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

(**Emphasis supplied**)

156. Mr. Yogesh Chandra Verma, learned Senior Advocate

has argued and submitted that the Amendment Act is arbitrary as it vests controlling power with the State Government. This court's analysis must be whether the impugned amendment is "disproportionate, excessive or otherwise being manifestly unreasonable."

157. The impugned amendment has been made by a competent legislature and, therefore, has the presumption of constitutionality. To examine whether the impugned amendment suffers from the vice of being manifestly arbitrary, apart from that being in conflict with Article 243-W of the Constitution as we have already discussed, each of these sections would have to individually be tested at this altar.

158. Excessive would mean that the law making power exercised and the result accrued therefrom transgresses the authority vested in such law making power. Manifestly unreasonable would then mean that the exercise being sans reason is plainly visible.

159. Amended Section 36 as observed earlier reduces the role of the Empowered Standing Committee to nearly zero

regarding employees of the Municipality. Such a situation would be saved from being manifestly unreasonable, should it be established that the reason for which Municipal bodies were constituted and duly empowered could allow for this to sustain. This section would not be declared excessive if such an alteration in the powers could still be in line with the Constitution.

160. On both those counts, in the considered opinion of this Court, Section 36 as amended fails.

161. The intention of the 74th Amendment, as discussed in detail in the earlier part of our opinion, was to create bodies at the local level to implement grassroots level governance with decentralization and devolution of powers. A necessary corollary of being vested with executive function is to have the means to execute. Employees are such means. At the minimum those answerable to general public in this case should be able to determine rules of conduct, control and discipline to ensure that their policies and objectives would be sufficiently implemented. Taking such authority away would be manifestly unreasonable as neither the Constitution of India nor the scope of the Act would

permit the executive authority of the third level Government to be entirely handicapped to the State Government.

162. The constitutional scheme clearly lays down a horizontal separation of powers. It cannot be and is not denied that the State has law making powers for Municipality. However, this law making power cannot dilute this horizontal separation beyond a point. [**See K.C.G. Narayan Deo (supra)**]. Within the Act, the amendment would concentrate far too much authority with the State rendering local bodies, empty vessels. This cannot be termed as reasonable or not in excess.

163. Amended Section 37, similar to amended Section 36, takes away all involvement and control of the Empowered Standing Committee over the employees working in their area. The Municipality is still to maintain a record of employees under the various categories. However, this record is essentially valueless since all appointment/transfer/posting/conduct shall now be regulated by the State Government.

164. Amended Section 38 gives the powers to the State Government through the Directorate of Municipal Administration

under Urban Development and Housing Department to appoint Category ‘C’ posts. This means that every time when the Municipal Authority, an elected body feels the need they would need to request an executive body to do the needful. Whether functioning as an institution of self-government could be in line with a centralized authority having unilateral power of appointment. The answer is no because the result thereof would be disproportionate. An elected body is stated to be the best to judge the need of its people and so keeping in mind the work required to be executed, the Municipal Body itself would be suited to take action.

165. Section 41 as amended makes helpless a Municipal Body should they be dissatisfied with the working of an officer. The State has *suo motu* powers to withdraw an officer but the body has no means to have such officer withdrawn. A resolution passed by two-third majority is an expression of will of the people which now has been superseded by the singular decision of the State Government. Substituting an expressed will of the people in a democracy with that of the executive is undoubtedly

excessive and manifestly arbitrary.

166. Accountability is arguably one of the hallmarks of governance. That is to say, in a tiered system of governance accountability of a junior to a superior and all policy as well as executive decision following a ladder structure, accountability is the assurance of a task being seen to its logical end. Without the same, such a structure looses shape leading to mis-governance and ultimately suffering of the public at large. Democratic institutions by nature, exists to serve the need of the people and if the absence of one particular aspect leads to the suffering of those very people, it is incumbent upon those in decision making positions to ensure that such an aspect is found as well as implemented.

167. As noted earlier, it was strenuously argued by learned counsel for the petitioner that lack of control of the officers serving under the Municipality at the hands of the Empowered Standing Committee would lead to loss of accountability reducing such committee to only an existence on paper without any powers corresponding to its position.

168. The learned Advocate General, on the other hand,

justified the amendment citing the beleaguered functioning of Municipalities and the prevalent corrupt practices so far as transfer and posting are concerned.

169. Governance has been defined to refer to "structures and processes that are designed to ensure accountability, transparency, responsiveness, rule of law, stability, equity and inclusiveness, empowerment, and broad-based participation. Governance also represents the norms, values and rules of the game through which public affairs are managed in a manner that is transparent, participatory, inclusive and responsive. Governance, therefore, can be subtle and may not be easily observable. In a broad sense, governance is about the culture and institutional environment in which citizens and stakeholders interact among themselves and participate in public affairs."[83]

170. The freedom to appoint/transfer officers albeit in consultation with the State Government would form an essential aspect of responsiveness and broad based participation. The local government is the doorstep of governmental interaction for the general public and, therefore, it should not only reflect the

83Concept of Governance, International Bureau of Education, UNESCO
http://www.ibe.unesco.org/en/geqaf/technical-notes/concept-governance

democratic spirit but also be in tune with the people. Self Government is characterized by autonomy and devolution of powers. There is no question as to this autonomy not being in absolute terms, however, the limitations to such autonomy should not fundamentally alter the characteristics of municipal bodies.

171. Mr. Ashish Giri, learned *Amicus Curiae*, places reliance on a judgment of the Hon'ble the Supreme Court in **Parmar Samanthsinh Umedsinh[11],** where it was held that State's power to legislate within its competence cannot be curtailed in the absence of an express limitation placed by the Constitution itself.

172. He further relies on **Jindal Stainless Ltd.[43] (Para 83, 85, 86, 86, 88 and 91)** to state that the Constitution of India must be read/interpreted in a way that it does not "whittle down the powers of the State Legislature". [**ITC Ltd.[50] (Para 59**) Y. K. Sabharwal, J.]

173. In our considered opinion, Entry 5, List II of the Seventh Schedule of the Constitution of India empowers the State Government to make laws with respect to local government for the purposes of self government. In the considered view of

this Court, such law making by the State Legislature, as indicated by the Entry itself, has to be in furtherance of achieving local self government and the contention made on behalf of the State that the powers mentioned under List II are plenary and must be read broadly while may be true, the nature of the power is itself circumscribed by the latter half, i.e. the phrase “for the purpose of local self-government.”

174. The Empowered Standing Committee vide the impugned amendment stands emasculated having lost powers of appointment either on regular or contract basis of officers mentioned under Section 36(1) of the Act. The objective as stated in the Amending Act was to give control to the State Government. However, as is apparent, from the unamended Act, the State Government was the appointing authority even prior to such amendment. It was only that such appointment was to be made in consultation with the Empowered Standing Committee. As it stands now, the Municipality has no control over any of its officers. Therefore, we are in agreement with the submissions of learned counsel for the petitioner that it is not the process of appointment which has changed instead it is control post

appointment which is hampered.

175. It is pertinent to note that the Hon'ble Supreme Court in **Lok Prahari through its General Secretary**[15]**,** citing **Bhim Singh v. Union of India**[84] stated that Panchayati Raj Institutions are the preferred implementing agencies in the rural areas and in urban areas it would be the local bodies to implement work conduct MPLADS. The safeguards of the scheme should be considered so as to ensure that the role ascribed to institutions of self governance would not be denuded.

176. By extension then, if the Mayor is to be allowed to have members of their choosing in the Empowered Standing Committee to enable proper functioning, then the Committee, forming executive power of the local body should also have a say in the officers working under it as also control over them.

177. Mr. Giri, learned *Amicus Curiae*, supporting the claim of the State, submitted that there exists distinction between the Municipality and the Empowered Standing Committee terming the same to be a constituent of "other authorities" as mentioned in Entry 5, List II of the Constitution of India and for the same to be a creation of Statute and not possessing constitutional

84(2010) 5 SCC 538

recognition.

178. This submission requires to be negated for the reason that a municipal body is a body responsible for governance and if a distinction is drawn between the body and its organ constituting executive power, both are rendered ineffective in absence of the other. Section 22 of the Act states, that executive power of the municipality is to be exercised by the Empowered Standing Committee. Hon'ble the Apex Court in **Afjal Imam**[3] underscoring the importance of the Empowered Standing Committee noted-

> "…63. The idea is that the Mayor should have the confidence of the Executive Council or the Empowered Standing Committee, as the case may be, apart from that of the House. The members of the Empowered Standing Committee are authorised to answer the questions on behalf of the Empowered Standing Committee under the Bihar Municipal Act. Thus, there is an element of collective responsibility. The Empowered Standing Committee is supposed to function on the basis of the principle of democratic governance in the sense that the decisions are to be taken by the majority. If the new Mayor is not permitted to have his nominees on the Empowered Standing Committee, the collective functioning will be under jeopardy. Thus, there is a clear omission in the Bihar Municipal Act, 2007 in this behalf."
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> **(Emphasis supplied)**

179. In other words, the Empowered Standing Committee is intrinsic to the municipal body and is the vehicle through which the executive power vested with the municipality is to be exercised. Sans executive power the existence of municipality

becomes moot and an Empowered Standing Committee without such empowerment is akin to a tiger without its claws.

180. Hon'ble the Supreme Court in **B. N. Nagarajan v. State of Mysore**[85]**,** has held that making appointments is part of general executive power. The same can be made, even if there are no statutory rules or regulations (**V. Balasubramaniam v. T.N Housing Board**[86])

181. This Court has in **Kaushal Kaushik**[1] as well as in **Santosh Kumar**[2] held that the Municipal Commissioner is there to carry out the directions of the Corporations. In the present fact situation, if there is no control of the Empowered Standing Committee, i.e such officer can only be withdrawn by the State *suo moto*, the elements of governance as noted above cannot be fulfilled. We may restate, at the cost of repetition what the Hon'ble High Court of Andhra Pradesh held in **T. Devender**[4] :

> "The nature of the powers conferred on and functions entrusted to the local bodies are so vast and varied, as already noticed, it becomes imperative for the head of the body, as a necessary corollary, to have control over the chief executive to ensure effective functioning of the local body."

182. In this backdrop of self rule, the power to appoint, post or transfer is an essential aspect so as to enable those who

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85AIR 1966 SC 1942
86(1987) 4 SCC 738

are duly elected to such positions to carry out their vision. We are in agreement with submission on behalf of the petitioners that lack of such control may lead to insubordination or indifference, which will ultimately affect the public at large when there is disharmony in the executive.

183. Lack of control therefore, both in appointment and supervision strike at the heart of governance and the very basis for introducing the third level of government. The object of granting constitutional status to municipal bodies as separate and distinct from the State Government exemplifies the measure of considerable independence bestowed by the Constitution on such bodies over and above the law making power of the State under List II.

Absence of State's Accountability in the process of appointment.

184. The situation presented by the impugned amendment is anomalous on one further count- that an elected official has arguably become secondary to that of an official of the executive. It is the Director, Municipal Administration under the Department of Urban Development and Housing, Government of Bihar, who now is the sole authority to decide which officer is posted where and when and also how such recruitment is made.

The elected official, being a representative of the public, is entrusted with numerous functions but cannot decide under any circumstance as to who will execute the policies enacted. In other words, the responsibility of the elected officer of the municipality remains unchanged; however, powers and control are severely truncated.

185. Accountability of Empowered Standing Committee is to the local people, those who have elected them. Any short fall or dissatisfaction within the people of Municipality, the members of the Empowered Standing Committee shall be answerable to. It is not the executive of the State who is in direct contact with the people nor is it the State Legislature who make laws for the functioning the Municipality.

186. As stated above, there is no doubt that the State Legislature possesses the ability, under the Constitution, to legislate on matters concerning municipal bodies. What is under question is the degree of involvement of the State Government in functioning of such municipal bodies.

187. It was noted by Hon'ble Supreme Court in **State of West Bengal[35] (para-99),** that the Constitution of India accepts of a federal structure and distributes powers between the coordinate constitutional entities, i.e. the Centre and the State. It

was held that by implication, one could not encroach upon the Governmental functions or instrumentalities of the other unless the Constitution expressly provides for such interference. In **Gujarat Pradesh Panchayat Parishad[47],** the Hon'ble Supreme Court observed that:

> "24. …Part IX of the Constitution confers certain powers on local self-government. It promises duration of five years, free and fair election, representation of Scheduled Castes and Scheduled Tribes in the administration of institutions of local self-government, "no interference" by other organs of the State, including judiciary, etc. … What was sought to be done by the Seventy-third Amendment was that constitutional status to the local self-government was conferred to District Panchayats, Taluka Panchayats and Village Panchayats. A State Legislature, in the light of constitutional provisions in Part IX, cannot do away with these democratic bodies at the local level nor their normal tenure be curtailed otherwise than in accordance with law nor can the State Government delay elections of these bodies."
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> (**Emphasis supplied**)

188. By extension, with the introduction of the third level of government, a certain degree of surety against non-encroachment of functions rests also with the institution of local government. The fact that the State is competent to legislate in matters concerned therewith, the same does not dilute the fact that local Government is a constitutionally recognized facet of the federal structure of India.

189. The unamended Act made clear the situation and nearly all appointments were to be made by the State Government in consultation with the Empowered Standing

Committee. In certain cases, as is befitting a constitutionally recognized tier of government, the Committee upon passing a resolution of more than two-third of votes could force the hand of the State Government in recalling certain officers etc. giving it a balanced measure of control. This makes it amply clear that there is no question about complete independence of a municipality vis-à-vis the State Government.

190. It was contended in support of the State's claim of the amendment being intra vires that Article 243W of the Constitution of India was merely an enabling provision and posited no restriction upon the power of the State to legislate and take away the power of appointment as has been done under the impugned legislation.

191. An enabling provision is defined as which gives Government Officials the authority to put the law into effect and enforce it. Putting the law into effect necessitates a purposive interpretation, i.e. supplying an interpretation with the purpose of enactment being the guide to construing the provisions therein.

192. In **State of Himachal Pradesh v. Kailash Chand Mahajan[87] (Para 81),** Hon'ble the Supreme Court observed with regards to the distinction between the purpose or object of an enactment and the legislative intention governing it, as being that

871992 Supp. (2) SCC 351

the former relates to the mischief which is to be remedied by the enactment and the latter refers to the legal meaning of such an enactment.

193. In **S. Gopal Reddy v. State of Andhra Pradesh**[88]**,** (para-12) Hon'ble the Supreme Court observed that:-

> "12. It is a well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary…"

194. The purpose, therefore, of the 74th Amendment of the Constitution of India under which falls Article 243W of the Constitution of India and as a result of which the Bihar Municipal Act, 2007 was enacted was to bring to the local political institutions already existing, autonomy, the power to self govern through devolution of power and independence in regards to certain functions.

195. Article 243W of the Constitution of India being an enabling provision, enables the legislature of a State to endow the municipalities with such powers and authority as may be necessary to function as institutions of self government. Therefore, any law making undertaken by the State with respect to municipalities has to be as noted elsewhere for the purposes of

88(1996) 4 SCC 596

fostering self government. It is also to be noted that it was inadequate devolution of powers which led to the need for the 74th amendment to the Constitution.

196. So whereas there is no envisaging of complete autonomy for municipal bodies, there certainly is a considerable measure of independence enshrined within the Constitution. The impugned legislation, per contra, in the view of this Court does not foster self government, nor does it attempt to find solutions to problems highlighted in the aims and objectives to the Amendment Act, instead furthers the antithesis of devolution giving the State more power in the everyday functioning of a municipality.

197. Mr. Giri, learned counsel, in his arguments to the Court emphasized collective responsibility and also submitted that the amendment does not, in any way, hinder the core functions of the Municipality under Section 45 of the Act, nor have the elections to these local bodies been altered in any way. In support, he relies on a decision in **Gujarat Pradesh Panchayat Parishad[47],** where it was observed that the powers of the District Panchayat President on one hand and the District Development Officer on the other, had no where affected directly or indirectly, the functioning of Part IX of the Constitution. He

submitted that in the present case, merely because the appointment and service conditions of group-C and D employees were controlled by the State Government, it will not affect functioning of the municipality.

198. In our considered view, the impugned amendment while not altering the responsibilities of the municipal bodies hampers or constrains the use of an essential tool for the fulfillment of such responsibilities. The golden thread of independence runs across the key words of the 74th Amendment which must be adhered to. Collective responsibility as argued, would be to explore mechanisms in consultation with local government institutions by the State to cure municipal administration of corruption and other ill practices. The withdrawal of control of the Empowered Standing Committee over officers of the State Government does not further and instead sets back the commendable goal of collective responsibility.

199. Also, in **Gujarat Pradesh Panchayat Parishad**[47], the fact situation presented was, conflict between the powers of District Development Officer (hereinafter referred to 'DDO') and the President of the District Panchayat under the Gujarat Panchayat Act, 1993. A resolution was passed that the DDO

would consult the President in matters of recruitment, appointment, transfer etc. however, the DDO was adamant to the opposite position stating that the President had no voice in the executive functions of the DDO.

200. The Dispute at hand is one of different nature. The conflict pertains not to a conflict between the executive and the legislature instead it is one legislative power dominating the other. Unlike in the case relied on where the resolution mandated each and every transfer/posting being approved by the President, in the present case, the process of a simple consultation with the Empowered Standing Committee (ESC) with the State Government still being the appointing authority has been taken away. So far as the appointment of Group-C and D Employees is concerned and the irregularity/illegality plaguing this exercise, the constitutionally permissible answer would be to exercise powers already existing under the Statute, supervisory in nature and not to bring in an amendment which goes against the very spirit of joint/collective responsibility and the core reasons for which this amendment was brought to the Constitution. To clarify, the issue is not the functioning of the Chief Municipal Officer or any other Officer of the Municipality, it is the manner in which such Officers are appointed and under whose control

such Officers shall perform day to day function as entrusted to them under the Act.

201. The Urban Development and Housing Department, Government of Bihar notified Rules in respect of the formation of the "Bihar Municipal Revenue and Accounts Cadre" and "Bihar Municipal Clerical Cadre" [Page-85 and Page-90 of CWJC No.12619 of 2021 titled as Patna Nagar Nigam Staff Union v. The Union of India] promulgated by Hon'ble Governor, State of Bihar under Article 309 of the Constitution of India pertaining to the process of recruitment and regulation in this cadre. Such Rules were notified vide Memo Nos.1840 and 1843 respectively on 12.05.2021. Article 309 of the Constitution of India, proviso thereto under which the impugned Rules have been made reads-

> " Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

202. On such rule making power of the Governor, a Constitution Bench of Hon'ble the Supreme Court in **Chebrolu Leela Prasad Rao v. State of A.P.**[89] held as under:-

> **"58.** The rules framed under the proviso to Article 309 of the Constitution cannot be said to be the Act of Parliament or State Legislature. Though the rules have the statutory force, they cannot be said to have been framed under any Act of Parliament or State Legislature…. The rules made under the proviso to Article 309 of the Constitution cannot be said to be an enactment by the State Legislature."

203. The appointing authority in both the impugned rules is as according the Amendment Act, i.e. Director, Directorate of Municipal Administration, Urban Development and Housing Department, Bihar. [Rule 2, sub-rule (iii) (page 85 & 90). It is, therefore, evident that these rules are a consequence of the amendment carried out to Municipal Act, vide Bihar Act 6, 2021. In the foregoing discussion, the amendment to Section 38 by which the Director, Directorate of Municipal Administration, Urban Development and Housing Department, Bihar has been made the appointing authority for category 'C' has been held to be ultra vires the Constitution and in contravention of the Parent Act. Therefore, the impugned rules to the extent that they are inconsistent with the Municipal Act as restored shall stand modified.

204. Post hearing and the judgment being reserved, the State has objected to allowing I.A. No.02 of 2022 filed by the petitioner in CWJC No.11717 of 2021. In terms of the said I.A.,

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89(2021) 11 SCC 401

an additional challenge was laid to the constitutionality of Section 43 of the Municipal Act.

205. In view of the said objection, we have chosen not to delve into the validity of the provisions of the Municipal Act, leaving it open to be adjudicated in an appropriate proceeding.

206. In our considered view, the principles of law enunciated in following decisions referred to by the learned counsel already stand noticed, hence, we need not dilate any further thereupon:-

B.N. Narajan v. State of Mysore[7]; In Re, Berubari Union[9]; Rajnarain Singh v. Chairman Patna Administration Committee Patna[10] ; Champa Lal v. State of Rajasthan[14]; Housing Board of Haryana v. Haryana Housing Board Employees Union[21]; Union of India v. Shri R. C. Jain[22]; M.R. Goda Rao Sahid v. State of Madras[25] ; Eera v. NCT[28] ; Delhi Transport Corporation v. DTC Mazdoor Congress[34]; Commissioner, Bangalore[39], State of Uttar Pradesh v. Zila Parishad, Ghaziabad[45]; Rai Sahib Ram Jawaya Kapoor v. State of Punjab[52]

207. Based on our aforesaid discussion, the questions raised in the examination of the constitutional validity of the

Bihar Municipal (Amendment) Act, 2021 are answered hereinunder:-

(i) Whether the impugned amendments brought in by virtue of Bihar Municipal (Amendment) Act, 2021 (Bihar Act 06, 2021) are repugnant to the Constitution (Seventy Fourth) Amendment Act, 1992?

207.1 This Court in line with the holding of **Smt. P. Laxmi Devi**[33] is certain that the impugned amendments (Sections 2, 3, 4 and 5 of the Amendment Act) violate the provisions of Part IX-A of the Constitution of India.

207.2 The Seventy Fourth Amendment to the Constitution of India was brought in to secure the position of Municipal units and grant such units where they did not exist in order to further participatory democracy wherein the common person is in direct connect with those elected to serve. However, vide the impugned amendment, the scope of such an elected body of having effective administrative governance stands severely restricted.

207.3 The principles of decentralization self-governance, autonomy and accountability form the basis of both the constitutional amendment as also the Municipal Act. In the Municipal Act, these principles, prior amendment, to some extent, were reflected. Now, with the amendment, largely, the

power stands centralized and the Empowered Standing Committee, an elected body, in many ways reduced to be a mere receptacle, defeating the objective of democratic decentralization which is not only to bring governance closure to the people but also make it more participatory, inclusive and accountable to the weaker sections of society [**Rajeev Suri**[53] and **K. Krishna Murthy**[19]]. For the reasons discussed in our opinion, more so law enunciated amongst others in **Manbodhan Lal Srivastava (supra); Dharti Dhan (P). Ltd.**[23]**; Excide Industries Ltd.**[72]**; Sajjan Singh**[8], the impugned amendments to the extent of Section 2, amending Section 36; Section 3, amending Section 37; Section 4, amending Section 38; Section 5, amending Section 41 of the Municipal Act, by virtue of Bihar Municipal (Amendment) Act, 2021 (Bihar Act 06, 2021), are contrary to the Seventy Fourth Constitutional Amendment as both the major effects, i.e. the recentralization of power and institution of self-government being weakened as being dependent on the State Government for regulation of its employees, are incompatible with the idea, intent and design of the constitutional amendment and are manifestly arbitrary.

207.4 As a result, the impugned amendments are struck down and the Bihar Municipal Act, 2007 as prior to such

amendment is restored in its entirety. The issue of some of provisions of the Bihar Municipal Act, 2007 being intra or ultra vires is left open to be adjudicated in an appropriate case with liberty to the petitioners or any other public spirited person to do so.

(ii) Whether the impugned provisions of Bihar Municipal (Amendment) Act, 2021 are in contravention of its parent Act, i.e. Bihar Municipal Act, 2007 (Bihar Act 11, 2007)?

208. The Municipal Act was enacted to bring the State in line with the provisions of the constitutional amendment and the State under its power vested in Entry 5 List II was to devolve such powers on the Municipalities as required to function as institution of self-government. The impugned Amendment Act runs contrary to this. There is no question as to the supervisory power of the State and to the law making authority it possesses. However, in pursuance of the same, it is essential to strike a balance, maintaining the autonomy of the third level of Government. The amendments strike at the heart of the search for this balance. Sections 27-B, 37 (1) to (3) and the wide range of functions and responsibilities under Section 45 and 47 of the Municipal Act clearly suggest that Municipalities have their own sphere of authority and function but, disproportionate power and

authority now vests with the State Government, creating a situation that tilts completely in favour of the unilateral exercise of power by the latter. The impugned amendments place hurdles in achievement of self-governance and therefore are liable to be removed, in view of our detailed discussion in the earlier part of our opinion noticing several principles enunciated, including in **Madras Bar Association**[58]. In other words, Sections 2, 3, 4 and 5 of the Bihar Municipal (Amendment) Act, 2021 are in contravention of the Bihar Municipal Act, 2007.

(iii) Whether the Bihar Municipal (Amendment) Act, 2021, restricting the power of appointment, posting, transfer of the employees, results into truncating the cadre autonomy and functioning of Municipal Bodies as institutions of self-government?

209. Originally, in respect of category ‘A’ and ‘B’, appointments were to be made by the State Government in consultation with the Empowered Standing Committee and with respect to the latter two, i.e. category ‘C’ and ‘D’, the Chief Municipal Officer with the prior approval of the Empowered Standing Committee would make such appointment. Now, it is an executive of the State Government which undertakes this task. With the amended Sections 36(3) and 37, it is not the appointing

authority, at least in respect of Category ‘A’ and ‘B’ that has changed, but the control of such officers that has been shifted away. In regard to Category ‘C’ as amended, and also ‘A’ and ‘B’, the Municipal authorities are entirely dependent on the State for appointment, posting and transfer of employees working within their respective territorial jurisdiction. The Empowered Standing Committee, in other words, the executive of the Municipal Authority, being expected, only to be answerable to the public for functions enumerated in the Act, but not have control over the executing officers and staff, is excessive and manifestly arbitrary, for, a Municipal Authority is envisaged as an institution of self-government representing decentralization of authority. Principles enunciated in **Shayara Bano**[82] and **Shri Ram Krishna Dalmia**[55] are fully applicable here. We have discussed their application in the earlier part of our opinion. For convenience and ready reference, the same is extracted as under:-

> “83. In 1992, when this amendment was brought into the Constitution, the goal and intent perhaps was to ensure political governance of municipal areas that were plagued by various issues. The Articles concerned political governance used the word ‘shall’ so as to supply a mandate to comply with, but the words of the constitutional amendment were not limited to only political governance. At the relevant time, administrative functions were entered into these Articles with “may”. More than three decades have passed since. For the true intent of decentralization and self-governance to be realized, administrative governance must vest with the local units of government for one is not mutually exclusive of the

other. Administrative governance forms as much a part of devolution of powers, accountability and self-governance as political governance and both aspects of governance harmoniously and seamlessly mixed with each other form holistic governance for the betterment of public at large. Therefore, Municipalities on the whole need to be furthered in a way to evolve into units of political and administrative governance. We are supported in this approach by the words of Ganguly J., in **Bhanumati**[17] wherein it was stated that "when faced with a challenge to interpret such laws, courts have to discharge a duty. The Judge cannot act like a phonographic recorder but he must act as an interpreter of the social context articulated in the legal text"; and also by words of Krishna Iyer J., who said that a Judge must be "animated by a gold oriented approached" and that "the judiciary is not mere umpire, as some assume, but an active catalyst in the constitutional scheme."

86. The Constitution Bench has held that the phraseology as well as the intent and design of the enactment must govern the finding whether "may" is read as "shall". As observed earlier, at the time of introduction of the constitutional amendment in 1992, perhaps the intent was to secure at first political governance and for that reason the Articles concerned political governance had the mandatory "shall" provision. But in order for the true intent of the constitutional recognition of the third level of governance to be realized, such institutions must evolve to take within their fold administrative governance as well. With increasing urbanization, burgeoning city populations, the demands on Municipal Units of governance grow and so in order for their continued and successful existence as institutions of self-government, it is incumbent upon the State Government to endow such bodies with the necessary wherewithal to meet such demands and carry out effectively and efficiently the responsibilities entrusted upon it by the Twelfth Schedule of the Constitution of India. It is clear, therefore, that if "may" is read as is the evolution required of bodies of Municipal governance would be slow and delayed. The "may", therefore, in Article 243-W of the Constitution of India must be read as "shall".

207.3 The principles of decentralization self-governance, autonomy and accountability form the basis of both the constitutional amendment as also the Municipal Act. In the

> Municipal Act, these principles, prior amendment, to some extent, were reflected. Now, with the amendment, largely, the power stands centralized and the Empowered Standing Committee, an elected body, in many ways reduced to be a mere receptacle, defeating the objective of democratic decentralization which is not only to bring governance closure to the people but also make it more participatory, inclusive and accountable to the weaker sections of society [**Rajeev Suri**[53] and **K. Krishna Murthy**[19]**]**."

(iv) **Whether the expression "enable them to function as Institutions of self-government" under Article 243-W of the Constitution of India would encompass the power of the Municipal Body to have complete freedom and right of selection, appointment, posting and transfer of its employee(s)?**

210. The effect of removal of any and all such powers relating to regulation of Municipalities' employees- having no say whatsoever and being entirely dependent on a part of the executive of the State Government is that, the Empowered Standing Committee, an elected body, answerable to the people is now at the mercy of the Directorate of Municipal Administration in whom vests all control with respect to employees. Such a situation is constitutionally impermissible. The State's law making power gives them the authority to make law governing the general processes with respect to employment, however, such exercise cannot be done in a manner that it leaves no room for Municipalities to function as per their own need and

requirement.

211. The control exercised by the Municipal authority in matters concerning its employees is not complete/unbridled or entirely autonomous, however, there is considerable freedom guaranteed by virtue of such authority being a quasi-autonomous body which must be respected in line with horizontal separation of powers under the constitution.

Directions

212. In the light of the submissions advanced, various judgments referred to by learned advocates and the foregoing discussion, following directions are issued:-

(i) Bihar Municipal (Amendment) Act [Bihar Act 06, 2021] published in Bihar Gazette (Ex. Ord.) No.231, dated 31.03.2021 is declared unconstitutional to the effect of amendments carried out in Sections 36, 37, 38, 41 of Bihar Municipal Act, 2007, by virtue of amending Sections 2, 3, 4 and 5.

(ii) As a consequence of our discussion, Rules termed as "Bihar Municipal Revenue and Accounts Cadre Rules, 2021" notified on 12th May, 2021 (Annexure-P/9, Page-85); "Bihar Municipal Clerical Cadre Rules, 2021" dated 12th May, 2021 (Page-90) of CWJC No.12619 of 2021 are modified to the extent

that they are inconsistent with Section 38 of the Municipal Act as prior to coming into force of the Amendment Act and the directions issued herein.

(iii) The order dated 30th June, 2021 passed by the Urban Development Department, Government of Bihar effecting transfer of 170 employees across Municipal Bodies (Page 94 of CWJC No.12619 of 2021 Patna Nagar Nigam Staff Union v. The Union of India and Annexure-A to the counter affidavit filed by respondent no.3 namely Deputy Municipal Commissioner, Gaya in CWJC No.12809 of 2021 titled as Binod Kumar Yadav v. The State of Bihar) stands stayed by the Government itself vide Memo No.2270 dated 05.07.2021(Annexure-C to the above counter affidavit) for the reason that there is incongruity in the pay structure/retiral benefits across these bodies within the State of Bihar, therefore, no further direction in respect of this prayer of the petitioners in CWJC No.12619 of 2021 and CWJC No.12809 of 2021 is required.

(iv) All other issues including the issue of outsourcing of work are left to be agitated and adjudicated in an appropriate case, clarifying further that we have only dealt with the constitutionality of the provisions of the Amendment Act to be *ultra vires*.

213. We appreciate the assistance rendered to the Court by all the learned Senior Advocates/Advocates appearing for the parties and in particular, Ms. Mayuri, Ms. Surya Nilambari, advocates for petitioners, and Mr. Ashish Giri, who appeared as *Amicus Curiae*.

214. No other points urged.

215. All the writ petitions stand disposed of in the above terms.

216. Interlocutory application(s), if any, shall stand disposed of.

217. Let a copy judgment be communicated to the Chief Secretary, Government of Bihar, forthwith.

(Sanjay Karol, CJ)

S. Kumar, J. I agree.

(S. Kumar, J)

Sunil/Sujit/-

AFR/NAFR	AFR
CAV DATE	13.10.2022
Uploading Date	21.10.2022
Transmission Date	