

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6317 of 2021

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1. Dilip Kumar Deepak, Son of Late Munsu Lal Bishwas, Resident of Village-Durgapur, Post- Gardhbanaili, Police Station and Block- Kasba, District- Purnea.
 2. Prashant Kumar, Son of Late Gopal Prasad Mandal, Resident of Village-Sarah, Post- Gardhbanaili, Police Station- Kasba, District- Purnea.
 3. Mohammad Juman Ansari, Son of Mohammad Tahir, Resident of Village-Parktola Sarah, Post- Gardhbanaili, Police Station and Block- Kasba, District- Purnea.
 4. Jeetendra Kumar Bishwas, Son of Late Motilal Bishwas, Resident of Village- Parktola Sarah, Post- Gardhbanaili, Police Station and Block- Kasba, District- Purnea.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Urban Development Department, Patna.
2. The Additional Secretary-cum-Director, Urban Development and Housing Department, Patna.
3. The Joint Secretary, Urban Development and Housing Development Department, Patna.
4. The Divisional Commissioner, Purnea.
5. The District Magistrate, Purnea.
6. The Sub-Divisional Magistrate, Sadar, Purnea.
7. The District Panchayat Officer, Purnea.

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 19552 of 2021

1. Rajesh Kumar Mahto, Son of Late Bhagwan Prasad Mahto, Resident of Tinapaniya, Ward No. 5, P.S. - Kasba, District - Purnia.
2. Joy Kumar Lakra, Son of Late Jeevendra Kumar, Resident of Village - Jawanpur, Ward No. 17, P.S. Kasba, District - Purnia.
3. Nityanand Mandal, Son of Bhola Mandal, Resident of Village - Bareta, P.S. - Kasba, District - Purnia.

... .. Petitioner/s

Versus

1. The State of Bihar, through the Principal Secretary, Department of Urban Development and Housing, Govt. of Bihar.
2. The Principal Secretary, Department of Urban Development and Housing, Govt. of Bihar, Patna.
3. The Joint Secretary, Department of Urban Development and Housing, Govt. of Bihar, Patna.



4. The Divisional Commissioner, Purnea.
5. The District Magistrate, Purnea.
6. The Sub-Divisional Magistrate, Sadar, Purnea.
7. The District Panchayat Raj Officer, Purnea.
8. The Executive Officer, Nagar Parishad, Kasba, Purnea.
9. The Chief Electoral Officer, Bihar State Election Commission, Patna.

... .. Respondent/s

Appearance :

(In Civil Writ Jurisdiction Case No. 6317 of 2021)

For the Petitioner/s : Mr. Jitendra Singh, Sr. Advocate
Mr. Vikram Singh, Advocate

For the State : Mr. Subash Prasad Singh (GA-3)

For SEC : Mr. Sanjeev Nikesh, Advocate

(In Civil Writ Jurisdiction Case No. 19552 of 2021)

For the Petitioner/s : Mr. Nivedita Nirvikar, Sr. Advocate
Mr. Suryakant Kumar, Advocate

For the Respondent/s : Mr. Subash Prasad Singh (GA-3)

For SEC : Mr. Sanjeev Nikesh, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE MADHURESH PRASAD

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 11-03-2022

Since the same notification dated 03.03.2021, issued by the Department of Urban Development and Housing, Government of Bihar, whereby Nagar Panchayat, Kasba has been upgraded and constituted as Nagar Parishad, Kasba is under challenge in both the writ applications identical legal issues, they have been heard together with the consent of the parties and are being disposed of by present common judgment and order.

2. The petitioners in CWJC No. 6317 of 2021(“the first case’ for short) are residents of the villages falling under Gram



Panchayat Bareta. In its original form, a notification issued vide Memo No. 4372 dated 26.12.2020 was under challenge in this application whereby the State Government came out with its intention under Section 4 of the Bihar Municipal Act, 2007 ('The Act' for short) to declare, by way of upgradation, Nagar Panchayat Kasba to Nagar Parishad. It is noted that under Section 5 of the Act, any inhabitant of Nagar Panchayat in respect of which a notification is published under Section 4 of the Act is permitted to raise objection within one month from the date of its publication to anything contained in the notification and submit it in writing to the State Government. Section 5 of the Act further stipulates that if such objection is filed, the State Government shall take such objection into consideration.

3. It is the petitioner's case that an objection was filed by them on 29.12.2020 addressed to the District Magistrate, Purnea, a copy of which has been brought on record by way of Annexure-4 to the writ application. The State Government thereafter came out with final notification under Section 6 of the Act issued vide Memo No. 1020 dated 03.03.2021. The said final notification is sought to be challenged by seeking amendment in the writ petition through I.A. No. 1 of 2021.

4. I.A. No. 1 of 2021 stands allowed. The petitioners



have been permitted to question the legality of the said final notification dated 03.03.2021 in CWJC No. 6317 of 2021. The averments made in I.A. No. 1 of 2021 have been treated to be part of the pleadings in the main writ application.

5. One intervention application vide I.A. No. 2 of 2021 has been filed for impleadment as respondents to support the case of the petitioners. The said intervention application is misconceived in the Court's opinion, and is accordingly dismissed.

6. We will discuss later, the grounds taken by the petitioners of the first case i.e. CWJC No. 6317 of 2021 to question the validity of the impugned notification dated 03.03.2021.

7. The petitioners of CWJC No. 19552 of 2021(,the second case' for short) are also residents of the same Bareta Gram Panchayat who have filed this writ petition after issuance of the impugned notification dated 03.03.2021 under Section 6 of the Act. The aforesaid is the background in which both the cases have been heard together.

8. We have heard Mr. Jitendra Singh, learned Senior Counsel appearing on behalf of the petitioners in the first case and Mrs. Nivedita Nirvikar, learned Senior Counsel for the



petitioners in the second case. Mr. Subhash Prasad Singh, learned GA-3 has represented the State of Bihar and Mr. Sanjeev Nikesh, the State Election Commission, Bihar in both the cases.

9. Briefly narrated, the case of the petitioners of the first case is that according to the data based on 2011 census, more than 50% of the workers of Bareta Gram Panchayat are agricultural workers as would be evident from the Job Card List and 'PM Kishan Report'. The Panchayat consists of 75% irrigated land and 75% of the population lives in the hutments located on the road side. There are 20% Indira Awas beneficiaries; 30% of the workers work outside the village and rest of the population consists of cultivators (small and marginal). These facts, according to the petitioners, can be verified and seen through virtual mode with the help of Internet. No enquiry has been made by the respondents during COVID-19 pandemic for upgradation of Kasba Nagar Panchayat to Kasba Nagar Parishad. It has also been asserted that the whole exercise has been undertaken surreptitiously. In terms of the notification under Section 4 of the Act the petitioners had filed their objection as stipulated under Section 5 of the Act, which has not been considered, they assert.

10. In the second case, the petitioners have relied on



the same objection, which is at Annexure-4 of the first case, and it has been stated that the said objection was filed by the representatives and residents of Bareta Panchayat which has not been considered by the respondents in accordance with law. The petitioners of the second case admittedly did not raise any objection in their own capacity, and they are relying on the objections raised by some of the residents of the Bareta Gram Panchayat.

11. It is common case of the respondent-State of Bihar in both these matters that subsequent to amendment in second proviso to Section 3 of the Act, and with reference to departmental letters, the District Magistrate, Purnea had forwarded a proposal to the Secretary of the Department for upgradation of Kasba Nagar Panchayat to Kasba Nagar Parishad. It is stated in the counter affidavit that number of main cultivator and marginal cultivator workers in the proposed Nagar Parishad on upgradation was found to be 2502 which comes to 14% of the total number of workers. In the light of the said proposal, the notification dated 26.12.2020 was issued in exercise of power under Section 3(1)(a), 4, 5, 6 and 8 of the Act. It is further stated that the objections, which were received under Section 5 of the Act, were duly considered by a District Level Committee



constituted for the said purpose in its meeting held on 01.02.2021. The proceedings of the meeting dated 01.02.2021 of the District Level Committee has been brought on record by way of Annexure-R-1/F. It has been stated that five objections/suggestions had been received in relation to proposed upgradation of Kasba Nagar Parishad. On perusal of the said Annexure, we notice that objection filed by the petitioners of first case had been considered by the said Committee and was rejected after considering a report obtained from the Sub-Divisional Officer, Sadar, Purnea.

12. It would be apt here to note that on perusal of the said proceedings of the meeting of the District Level Committee it is manifest that only two objections were raised by the inhabitants of Bareta Gram Panchayat requesting its exclusion from the proposed creation and upgradation of Kasba Nagar Parishad.

13. Mr. Jitendra Singh, learned Senior Counsel appearing on behalf of the petitioners in the first case has contended that any policy decision of a State within the meaning of Article 12 of the Constitution of India should conform to the Directive Principles of State Policy as contained in Part IV of the Constitution. Relying on Article 40 of the Constitution he



submits that it is one of the directive principles that the State must take steps to organize village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-Government. He contends, relying on the said provision, that the State is under obligation to frame its policy in a manner that it is directed towards promotion of self-governance at Panchayat level by giving it powers requisite to enable them to function as units of self-governance. He has submitted that the impugned action of the State Government of including a Panchayat within Nagar Parishad defeats the solemn objective of Article 40 of the Constitution. He has further submitted that the petitioners, in their objection, had specifically mentioned that 90% of the population of Bareta Gram Panchayat was dependent on agriculture and labour, whereas 5% were engaged in business and rest 5% dependent on other works. He would contend that the objections raised by the inhabitants of the Gram Panchayat have been ignored by the respondent-State of Bihar and has issued the impugned notification in utter violation of the statutory provisions under the Act. He has further argued that no document discloses any due consideration of the objections raised by the petitioners as mandated under Section 5 of the Act. He has also submitted that



the State of Bihar, without making such enquiry as stipulated in Section 3 of the Act has included Bareta Gram Panchayat in Nagar Parishad, Kasba, by issuance of the impugned notification which is unsustainable for the said reason also.

14. Mrs. Nivedita Nirvikar, learned Senior Counsel appearing on behalf of the petitioners in the second case has contended that Article 243Q of the Constitution envisages three kinds of municipalities, viz. a Municipal Corporation for a larger urban area, a municipal council for a smaller urban area and a Nagar Panchayat (by whatever name called), for a transitional area i.e. a rural area in transition to an urban area. She has submitted that the State Government could not have converted a Panchayat into Nagar Parishad (smaller urban area) without allowing it to pass through the transition i.e. by converting it firstly into a transitional area. She contends that it is impermissible for the Government to declare a Gram Panchayat to become part of Nagar Parishad without the area having ever been constituted first as a Nagar Panchayat. She has relied on a decision of this Court in case of *Anand Kumar Jha vs. State of Bihar* reported in *2011(1) PLJR 401* (SB) with particular reference to paragraph 37 thereof. She has also contended that the objections filed by the representatives of the Panchayat have



not been duly considered by the State Government before issuance of the impugned notification. She further contends that there has been no consultation by the State Government with the Panchayat for its inclusion in Kasba Nagar Parishad and for the said reason also; the impugned notification deserves interference by this Court.

15. We deem it proper to notice at this stage itself that the said decision in case of **Anand Kumar Jha** (supra) has admittedly been overruled subsequently by a Division Bench decision rendered on 13.07.2011 in LPA No. 1797 of 2010 (*S.M. Ali Imam vs. State of Bihar*).

16. It has been argued on behalf of the State of Bihar, on the other hand, that the notification has been issued taking into account all relevant factors including the objections raised by the petitioners of the first case. It is the case of the State of Bihar that since the petitioners have not been able to demonstrate breach of any statutory requirement under the Act, no interference is needed by this Court in the matter of upgradation of Kasba Nagar Panchayat to Kasba Nagar Parishad.

17. We, at this juncture deem it relevant to refer to a recent Division Bench decision of this Court rendered on 17.01.2022, in CWJC No. 7446 of 2021 (*Usha Devi vs. The*



State of Bihar & Ors.) in which the Division Bench had the occasion to examine various aspects in relation to constitution of an urban local body, in the said case Nagar Parishad, with reference to various provisions under the Act. The consequence of failure on the part of an inhabitant of a Gram Panchayat *apropos* his *locus standi* to challenge the notification has been dealt in paragraphs 16 and 17, which read thus :-

“16 Before going into the controversy based on objections raised in the writ petition, it would be worthwhile to consider whether petitioner Nos. 1, 2 and 4 can be permitted to assail the draft notification or the final notification. Since these petitioners have chosen not to make any objection when they were afforded opportunity, there is no basis for them to maintain the instant writ proceedings. Having chosen not to avail the statutory opportunity, it does not lie in their mouth to contend that there is any infirmity in the statutory process, much less non consideration of their objections. They cannot be permitted to invoke writ jurisdiction of this Court under Article 226 of the Constitution of India.

*17 In this connection, this Court would consider it appropriate to refer to decision of Hon’ble Apex Court in the case of **Board of Directors, Himachal Pradesh Transport Corporation & Another -Versus- K C Rahi**, reported in (2008) 11 Supreme Court Cases*



502. Even in the context of a departmental proceeding wherein there is requirement of observing the principles of natural justice, the Apex Court, in the judgment, has held that when pursuant to notice sent to the delinquent by publication in the newspaper, he did not respond or participate, in such event “plea of principles of natural justice is deemed to have been waived and he is estopped from raising the question of noncompliance with principles of natural justice...”

18. It being an admitted fact that the petitioners of the second case had not raised any objection despite there being an opportunity available to them to do so under Section 5 of the Act. In our considered view, they cannot be permitted now to question the correctness of the impugned notification whereby Gram Panchayat, Bareta has been included within Kasba Nagar Parishad.

19. A copy of the objection raised by the petitioners of the first case is available as Annexure-4 to the said writ application. There are six points mentioned in the said objection stating why Bareta Gram Panchayat should not be included into Nagar Parishad, Kasba. One of the objections, which can be treated to be main objection, was, as has already been noticed above, that 90% of the inhabitants of Bareta Gram Panchayat are



dependent on agriculture and labour.

20. Learned Senior Counsel appearing on behalf of the petitioners have attempted to persuade this Court that by the said objection the objectors had pointed out violation of the first proviso to Section 3 of the Act. Section 3 of the Act, as amended by Bihar Municipal (Amendment) Act, 2020 reads as under :-

“3. Declaration of intention to constitute a municipal area.- (1) The State Government may, after making such inquiry as it may deem fit, and having regard to the population of any urban area, density of population there in, the revenue generated for the local administration of such area, the percentage of employment in non-agriculture activities in such area, the economic importance of such area, and such other factors as may be prescribed, by notification, declare its intention to specify such area to be a larger urban area, or a medium urban area, or a transitional area;

Provided that no such declaration shall be made unless the population

(a) in the case of a larger urban area, is two lacs or more,

(b) in the case of medium urban area, is forty thousand or more but is less than two lacs, and

(c) in the case of a transitional area, that is a small town, is twelve thousand and more but not more than forty thousand:

Provided further that the total population of main cultivator workers and marginal cultivator workers shall be below fifty percent of total population of workers



in such area in all cases.

Explanation.-“Revenue generated for the local administration” shall not include-

(a) taxes, if any, distributed to the Municipality by the State Government,

(b) loans and grants from the State Government, and

(c) loans and grants from the Central Government of institution or other source.

(2) The State Government shall, by notification, declare an area specified as-

(i) a larger urban area to be a city,

(ii) a medium urban area to be a town, and

(iii) a small town or transitional area to be a Nagar Panchayat or urban growth centre

(3) Notwithstanding anything contained in sub-section (1), the State Government may, by notification, determine separate conditions, to constitute any hill area, pilgrim centre, tourist centre or mandi as a municipal area.”

21. There was no plea taken to the effect that population of main cultivator workers and marginal cultivator workers is not below 50% of the total population of workers, in their objections filed by the petitioners on 29.12.2020.

22. The petitioners’ contention that their objections were not considered cannot be accepted for two reasons. Firstly, the respondents in their counter affidavit have relied on the proceedings of the District Level Meeting held on 01.02.2021 which disclose that the objections filed by the petitioners of the



first case were taken into consideration.

23. Further, the language used in Section 5 of the Act which allows filing of objection and consideration thereof reads thus :-

*“5. **Consideration of objection.**- Any inhabitant of the city, town or Nagar Panchayat in respect of which a notification has been published under Section 4 may, object to anything contained in the notification and submit his objection in writing to the State Government within one month from the date of its publication, the State Government shall take such objection into consideration.”*

24. The expressions ‘shall consider’ and ‘shall take into consideration’ have different connotations. The requirement of consideration means an objective consideration after due application of mind and which implies giving of reasons for its decision, taking into consideration the points raised by a person. The phrase ‘take into consideration’, on the other hand, in the context of the provision under Section 5 of the Act is more akin to the expression ‘shall have regard to’. Such expression is merely a guide for an authority for the purpose of arriving at a conclusion of fact. The expression ‘take into consideration’ cannot have the same meaning as that of ‘to consider’. The later expression is generally in the nature of a command to the



authority to adjudicate and determine an issue or right after consideration.

25. There is no mandate under Section 5 of the Act for the State to consider every objection and pass reasoned order before overruling an objection. The words chosen in Section 5 of the Act dealing with objections, depict the legislative intention in the context of and in the nature of power which the State Government exercises in constitution of an urban body, either by way of a fresh constitution or upgradation conferred under Article 243Q of the Constitution of India read with the provisions under the Act.

26. We reiterate, at this stage, the view taken in case of **Usha Devi** (supra) on the nature of function which is exercised while issuing notifications under Sections 4 and 6 of the Act, relying on the Supreme Court's decision in case of ***Sundarjas Kanyalal Bhatija & Others vs. Collector, Thane, Maharashtra & Others*** reported in **(1989) 3 SCC 396**. It has been held in case of **Usha Devi** (supra) in paragraphs 47 to 49 and 51 and 52 as under :-

“47. Having regard to the discretion given to the Governor under Article 243Q of the Constitution of India, the notifications issued under Chapter II of the Act of 2007 cannot be considered to be discharge of administrative functions, much less



adjudicatory in nature. Though the notifications under Sections 4 and 6 of the Act of 2007 are issued under Article 166 of the Constitution of India, but the same may be termed as legislative rather than administrative.

48. By no stretch of imagination, the exercise of declaration of intention or constitution of municipal area may be termed as adjudicatory function. Chapter II of the Act of 2007, therefore, consciously omits the requirement of disposing of the objections received in response to the notification issued under Section 4 of the Act of 2007. Chapter II of the Act of 2007 only provides an opportunity to the inhabitants of the city, town or Nagar Panchayat to submit their objection in writing to the State Government within one month from the date of publication of intention to constitute a municipal area. The Act of 2007, therefore, requires the State Government to take such objection into consideration; and consciously omits any prescription for disposal of the objections or passing of orders thereupon.

49 The notifications issued under Chapter II of the Act of 2007 are issued in exercise of functions which partakes legislative character though issued under Article 166 of the Constitution of India.

51. Likewise, in the instant case, the notifications issued by the Governor in exercise of powers under Chapter II of the Act, having its roots in Article 243Q (2) of the Constitution of India cannot be subjected to judicial review applying the principles of natural justice, requiring the passing of reasoned orders upon objections received in response to notification issued under Section 4 of the



Act of 2007.
52. Once the objections are invited, considered and notification issued, it is not for the constitutional Courts under Article 226 of the Constitution of India to sit in judgment over the decision leading to issuance of the notification upgrading or constituting a larger Municipal Area.”

27. In view of the discussions aforesaid and in the light of the Division Bench decision of this Court in case of **Usha Devi** (supra), we find no merit in these applications, which are accordingly dismissed.

28. There shall be no orders as to costs.

(Chakradhari Sharan Singh, J)

I agree.
Madhuresh Prasad, J

(Madhuresh Prasad, J)

Rajesh/-

AFR/NAFR	NAFR
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