Uttaranchal High Court

Gram Sabha Mawkot And Others vs State Of Uttarakhand And Others on 14 May, 2018

Judgment Reserved on : 08.05.2018

Delivered on : 14.05.2018

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (M/S) No. 1047 of 2018

Gram Sabha Mawakot & others

.....Petitioners

Versus

State of Uttarakhand & others .....Respondents

With

Writ Petition (M/S) No. 1101 of 2018

Purushottam Puri and another

.....Petitioners

Versus

State of Uttarakhand & others

.....Respondents

With

Writ Petition (M/S) No. 1107 of 2018

Smt. Guddi Devi & others

.....Petitioners

Versus

State of Uttarakhand & others

.....Respondents

With

Writ Petition (M/S) No. 1276 of 2018

Gram Panchayat Daula & another

.....Petitioners

Versus

State of Uttarakhand & others

.....Respondents

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With
Writ Petition (M/S) No. 1286 of 2018

Hari Om Sethi
.....Petitioner

Versus

State of Uttarakhand & others
.....Respondents

With
Writ Petition (M/S) No. 1292 of 2018

Govind Singh Bisht .....Petitioner

Versus

State of Uttarakhand & others
.....Respondents

With
Writ Petition (M/S) No. 1287 of 2018

Pitambar Dutt Tiwari & another
.....Petitioners

Versus
State of Uttarakhand & others
.....Respondents
With
Writ Petition (M/S) No. 1266 of 2018

Ankit Panwar .....Petitioner

Versus
State of Uttarakhand
.....Respondent
With
Writ Petition (M/S) No. 1183 of 2018

Gram Panchayat Hempur Ismile & others

.....Petitioners
Versus

State of Uttarakhand & others
.....Respondents
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With

Writ Petition (M/S) No. 1184 of 2018

Gram Sabha Jhankaiya & another

.....Petitioners

Versus

State of Uttarakhand & others

.....Respondents

With

Writ Petition (M/S) No. 1214 of 2018

Sanjay Joshi & another

.....Petitioners

Versus

State of Uttarakhand & others

.....Respondents

With

Writ Petition (M/S) No. 1223 of 2018

Smt. Dalveer Kaur

.....Petitioner

Versus

State of Uttarakhand & others

.....Respondents

With

Writ Petition (M/S) No. 1224 of 2018

Yogendra Singh Chauhan & others

.....Petitioners

Versus

State of Uttarakhand & others

.....Respondents

With

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Writ Petition (M/S) No. 1258 of 2018

Deewan Ram & others
.....Petitioners

Versus

State of Uttarakhand & others
.....Respondents

With

Writ Petition (M/S) No. 1260 of 2018

Smt. Anju Rani .....Petitioner

Versus

State of Uttarakhand & others
.....Respondents

With

Writ Petition (M/S) No. 1179 of 2018

Karam Chand & others
.....Petitioners

Versus

State of Uttarakhand & others
.....Respondents

With

Writ Petition (M/S) No. 1144 of 2018

Suman Singh .....Petitioner

Versus

State of Uttarakhand & others
.....Respondents

Present:- Mr. V.B.S. Negi, Senior Advocate assisted by Mr. A.K. Joshi, Advocate, Mr. Yogesh Pacholia, Mr. Subhash Upadhyaya, Mr. Vivek Shukla, Mr. Siddhartha Singh, Mr. B.D. Pandey, Mr. Lalit Samant, Mr. D.S. Bohra, Mr. D.S. Mehta, Mr. Rakesh Kumar Joshi, Mr. D.P. Bhatt, Mr. M.S. Bisht, Mr. M.C. Bhatt, Advocates for the petitioners.

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Mr. S.N. Babulkar, Advocate General assisted by Mr.

Paresh Tripathi, Chief Standing Counsel for the State.

Mr. Sanjay Bhatt, Advocate for the State Election Commission.

Mr. S.C. Bhatt, Advocate for Nagar Palika Parishad, Khatima, District Udham Singh Nagar.

Mr. Navnish Negi, Advocate for Nagar Palika Parishad, Bhowal, District Nainital.

Dr. Kartikey Hari Gupta, Advocate for Nagar Nigam, Haridwar.

Mr. B.S. Negi, Advocate for Nagar Panchayat, Nandprayag, District Chamoli.

Mr. M.K. Chand, Advocate for Nagar Palika Parishad, Tanakpur, District Champawat.

Hon'ble Sudhanshu Dhulia, J.

73rd and 74th constitutional amendments have brought the Panchayats in Part IX and Municipalities in Part IXA of the Constitution of India. Both these institutions establish local self governments at the rural and urban areas, respectively. Local self governments which function in rural areas are known as "Panchayats", which have a three-tier system, at Village, Block and District level, known as Gram Panchayats, Kshetriya Panchayats and Zila Parishad respectively. Similarly for urban areas again there is again a three-tier system, each for a "transitional area", "smaller urban area", and "a larger urban area". Their nomenclature in Uttarakhand is "Nagar Panchayat", "Nagar Palika" and "Nagar Nigam", respectively.

2. In its usual course, over a period of time, a rural area may turn into a transitional urban area, which again over a period of time may become a smaller urban area and ultimately a larger urban area. This is the normal trajectory, a development or growth achieved over a period of time. At times though, "urbanity", like greatness, is also thrust upon.

3. It is this thrusting of urbanization, or more precisely the thrusting of urban institutions over an unwilling and overwhelmingly rural population, that has become the cause for filing of the above writ petitions, before this Court. In these cases what is under challenge is a declaration of rural self governing institutions like "gram panchayat" to an urban local body, by converting it into a "Nagar Panchayat". In some cases, conversion of Nagar Palika to Nagar Nigam i.e. in smaller urban area institution to large urban area body is done by inclusion of adjoining rural areas. All this is being challenged at the hands of the petitioners.

4. The conversion of these institutions, from smaller to bigger ones is not without its effects. First and foremost, it brings to a premature end the term of many local self governing bodies, which will now merge in one big local body, such as gram panchayat into a municipality. It also exposes the

population of rural areas to fresh taxes and duties. The change also results in a change in the land use of the place. There are other collateral effects as well. For this reason, the law mandates that a "hearing" to the affected persons is necessary before bringing this change. But more importantly, who will ultimately take the decision in bringing this changeover, is also an extremely important aspect.

5. In all these connected writ petitions before this Court, the issue which has been raised is common, hence all these petitions are being heard and decided together. In most of the petitions, barring Writ Petition (M/S) No. 1047 of 2018 and Writ Petition (M/S) No. 1101 of 2018, even counter affidavits have not been called for as the learned Advocate General principally adopts the stand in all these petitions, as taken by the State in above two petitions. Moreover, what is being examined in any case is purely a legal issue. Hence with the consent of all the parties, the matter is being decided together. Having said this, for the records, since counter affidavit has been received in two of the petitions, i.e. Writ Petition (M/S) No. 1047 of 2018 and Writ Petition (M/S) No. 1101 of 2018, therefore while facts are being referred it shall be with reference to these two writ petitions.

6. In many of the writ petitions, either members of "Gram Sabha" or erstwhile "Gram Pradhan" of such "Gram Sabha" are before this Court. The challenge is based on the grounds that this exercise undertaken by the State executive is in violation of the Constitutional provisions, as well as in violation of the State statute.

7. This is the second round of litigation. In the first round of litigation, the petitioners and similarly situated persons had challenged the earlier notification, whereby a rural area was to be converted into an urban area*. The only point canvassed before this Court in the first round of litigation was that the State Government has not given any "opportunity of hearing" to the petitioners before the conversion from a rural area local * A reference to a rural area in this order also refers to "Gram Sabha" and an urban area, in all its forms, also refers to urban local bodies i.e. Municipalities.

body to an urban area local body. This Court had then come to a conclusion that an opportunity of hearing was indeed not given and to that extent the writ petitions were allowed with the following directions:

> "4. It was also a prima facie opinion of this Court earlier that the only issue which has to be seen by this Court is as to whether a proper hearing has been given to the petitioners by the State/State Authorities in these matters or not, as when a "Gram Sabha" or any local body is upgraded, though no opportunity of hearing is required, but when as a consequence of it, a "Gram Sabha" or "Nagar Panchayat" or "Nagar Palika Parishad", as the case might be, is to be dissolved, in order to facilitate its inclusion in the upgraded body, then rights of the persons who are elected representatives, as well as rights of ordinary members of "Gram Sabha" are involved, and therefore an opportunity of hearing is mandatory. This has also been laid down by a Division Bench of this Court in its judgment dated 23.06.2011 in the case of State of Uttarakhand & another v. Dinesh Randhawa & others (Special Appeal No. 103 of 2011) along with connected special appeal."

8. Thereafter, this Court gave the following orders:

> "7. In view of the above, all the writ petitions stand disposed with the directions to the petitioners to raise their objections, if any, before the Committee or the Authority, which is authorized under the law to hear such objections. The State Government shall also give an advertisement in two daily newspapers which have wide circulation in the State of Uttarakhand so that every other affected person may also file objections. Let a proper advertisement be given within forty- eight hours from today. Let all the affected persons be heard, who shall be given at least one week's time to file their objections from the date of advertisement and within one week thereafter, the State Government shall decide their objections in accordance with law."

9. Now after the said orders, the admitted position as it stands now in all the writ petitions is that committees were constituted under the Chairmanship of the concerned District Magistrates of the area and that committee heard objections of all the concerned persons, and thereafter a report was prepared and sent by the concerned committee to the State Government. Based on the report of the committee, the Government has ultimately passed a notification whereby the earlier stand of the conversion has been upheld and new urban bodies have been notified.

Facts of Writ Petition (M/S) No. 1101 of 2018

10. Mr. Yogesh Pacholia has submitted arguments for the petitioners in this case. After the order of this Court dated 09.03.2018 in Writ Petition (M/S) No. 3094 of 2017 and other connected petitions, the Government issued a preliminary notification on 10.03.2018 under Section 4 of the U.P. Municipalities Act. The preliminary notification dated 10.03.2018 states that for a notification to be issued under Section 3(2) of the Uttar Pradesh Municipalities Act, 1916 (as applicable in the State of Uttarakhand) where transitional or rural urban area is to be decided, read with Article 243Q of the Constitution of India, where it has been decided that the four revenue villages, namely, "Bhid Bhuter", "Rampur", "Tilwara" and "Maithana" having population of 1143, 297, 456 and 497 respectively, are to be formed into a "Nagar Panchayat" or a transitional urban area called "Nagar Panchayat Tilwara", objections are being invited from the members of the four "Gram Sabhas".

11. According to the petitioners, objections were filed by the members of the Gram Sabhas on 12.03.2018. On 23.03.2018 and thereafter a meeting was called in the office of the District Magistrate, Rudraprayag where objections were heard and report was sent to the State Government and thereafter, on 5.4.2018 final notification was issued.

12. The orders passed on these objections were never conveyed to the petitioners, it is alleged, however, these objections and decision taken therein were subsequently made available to them under the Right to Information Act and annexed as Annexure No. 7 to the writ petition.

Facts of Writ Petition (M/S) No. 1047 of 2018

13. Sri V.B.S. Negi, Senior Advocate assisted by Sri A.K. Joshi, Advocate were heard at length. Subsequent to the orders of this Court dated 09.03.2018 in Writ Petition (M/S) No. 3094 of 2017 and connected petitions, a tentative notification was issued under Section 4 of the U.P. Municipalities Act calling for objections by which 73 villages of adjoining "Nagar Palika, Kotdwar". These villages were proposed to be included in the "Nagar Palika, Kotdwar" and after their inclusion in the "Nagar Palika", the "Nagar Palika" was to become "Nagar Nigam", i.e. from a small urban area to a large urban area. For this, a committee was constituted under the Chairmanship of District Pauri Garhwal. On 16.03.2018, the District Magistrate constituted a sub- committee consisting of Additional District Magistrate, Garhwal, Sub Divisional Magistrate, Kotdwar, District Panchayat Raj Officer and Sahayak Nagar Ayukta, Municipal Corporation, Kotdwar. The objections were heard on 20.03.2018 and 21.03.2018 by this Sub- Committee and finally notification was issued on 05.04.2018 by which 73 villages were to be included in "Nagar Palika". Considering that the size of "Nagar Palika" had increased, it was then decided that "Palika" be converted into "Nagar Nigam", vide notification dated 05.04.2018.

14. In all the cases, the State was represented by Sri. S.N. Babulkar, the learned Advocate General and Sri Paresh Tripathi, the learned Chief Standing Counsel.

Preliminary Objections :

15. There are two objections raised by the learned Advocate General for the State, which must be addressed first before this Court proceeds with the merits of the case.

16. The first objection is that this is admittedly a second round of litigation. In the first round, the notification under Section 3 of the U.P. Municipalities Act, which was under challenge was quashed and the State was directed to give a proper hearing to the affected persons before changing rural areas into urban areas.

Now since the orders have been complied with, the petitioners do not have any ground to further agitate the matter as their grievance that they have not been heard has now been complied by the Government, and the Government authorities.

17. The second objection raised by the learned Advocate General is that all the arguments raised in the present writ petitions have already been dealt with by a Division Bench of this Court in a Public Interest Litigation where formation of a "Nagar Panchayat" to Municipal Council, Badahat, District Uttarakashi was under challenge. The reference is of bunch of writ petitions where leading petition was Writ Petition (PIL) No. 14 of 2018, Mr. Abhishek Chandra Jaguri and others v. State of Uttarakhand and others, decided on 12.04.2018. The learned Advocate General would argue that in that writ petition all the points which have presently been raised have been considered by the Division Bench and the arguments of the petitioners have been rejected.

18. In the said writ petition, one of the main grounds was that about 90% of the persons who were to be included in the municipality are engaged in agricultural activities. This was considered by the Division Bench to be a factual aspect, not liable to be considered in a writ petition. Moreover, the

Division Bench was of the opinion that in terms of Article 243Q (2) of the Constitution of India read with Sections 3 & 4 of the U.P. Municipalities Act, compliance has been made. The Hon'ble Division Bench came to the conclusion as follows:

> "As far as deriving of income from non- agricultural activities is concerned, also there appears to be a finding that more than 75 % derive income from the non- agricultural activities. These are findings of fact. Unless they are called in question as being perverse or not being supported by any material, we would not be empowered to interfere. In this regard, we may notice that no rejoinder affidavit was so sought to be filed and the petitioners were ready to go on with the case today."

19. Another ground that by including rural areas into municipalities, many of the forest area would be included was also rejected. The argument that the culture of the village will be affected adversely by inclusion of this area into urban area was also heard and rejected.

20. The third argument was that many of the persons staying in the rural areas under "Panchayats" would be adversely affected, as they would be deprived for the benefits under the MNREGA Act. This argument was also rejected as follows:

> "If the interest of the majority of the people requires that it be notified as an urban area, the fact that some persons may lose the benefits, vouchsafed for them under the MNREGA scheme, may not be sufficient to deprive the power with State to notify an area. We have noticed the stand of the State that with the inclusion in the urban area, the State would be forthcoming with various benefits for the development of the urban areas, with reference to various schemes."

21. Therefore, the learned Advocate General would argue that the matter already stands covered by the decision of the Division Bench and all these writ petitions are liable to be dismissed, in the light of the orders of the Division Bench in the above PIL.

22. It is true that this is the second round of litigation. It is also true that many of the grounds raised by the different petitioners in the present bunch of writ petition stand covered in view of the Division Bench Judgment in the above case (i.e. Writ Petition (PIL) No. 14 of 2018). All the same, presently a pure constitutional question has been raised by the petitioners, which must be answered by this Court.

23. On the surface, it looks like an open and shut case for the State, considering the earlier decisions of this Court. But the petitioners do have a point! The point is whether under clause (2) of Article 243Q of the Constitution of India read with Sections 3 & 4 of the U.P. Municipalities Act, the power to decide as to what would constitute a "transitional" or a "smaller" or "larger" urban area is to be exercised by the Governor in its discretionary powers, or by the Government under its Rules of Business? The question is extremely important and goes to the root of the matter. It is also an admitted position that this question was never raised before this Court, either in the earlier round of litigation, or before the Division Bench of this Court in the PIL. In fact, even earlier to this, i.e. in the

year 2011 when similar matters had come up before this Court where the validity of the inclusion of rural area into urban area was questioned, the present question was not raised. This Court therefore never had the occasion to examine this issue.

24. Now since it has been raised, this Court must examine this question and give its findings. In a recent decision of the Apex Court also relating to Article 243Q of the Constitution of India, the Hon'ble Apex Court has observed - "It is a settled principle of law that courts are bound to take note of the constitution and the laws"*.

* Champa Lal v. State of Rajasthan and Ors (Civil Appeal No. 4554 of 2018)

25. At the same time, this Court will not look into any other aspect, as they have already been dealt with and a finding has been reached so far as these grounds are concerned, to which a reference has been made above. The only aspect, which this Court has been called upon to examine is whether notifications under Article 243Q (2) read with Sections 3 & 4 of the U.P. Municipalities Act are notifications to be issued by the Governor, under his discretionary powers, or by the Government.

26. The argument raised by the petitioners is that when an area is to become a transitional area or smaller urban area or larger urban area that decision is the decision of the Governor, under clause (2) of Article 243Q read with Sections 3 & 4 of the U.P. Municipalities Act. It is a decision where he has to use his "discretion" and not to act merely on the aid and advice of his council of ministers.

Discretionary Powers of the Governor:

27. Article 154 of the Constitution of India states that the executive power of the State shall vest in the Governor and shall be exercised by him either directly or through officers subordinates to him. Article 154 of the Constitution of India reads as under:

> "Article 154. Executive power of State.- (1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.
>
> (2) Nothing in this article shall-
>
> (a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or
>
> (b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor."

28. Clause (1) to Article 163 of the Constitution of India, states that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion." Article 163 of the Constitution of India reads as under:

"Article 163. Council of Ministers to aid and advise Governor.- (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

(emphasis provided)

29. How the Government business is to be conducted is given in Article 166, which is as follows:-

"Article 166.- Conduct of business of the Government of a State.- (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

30. Like the President of India, a Governor too acts on the aid and advice of his Council of Ministers. All the same, unlike the President, in the case of Governor, some exceptions have been carved out. Here the Governor has to act on his "discretion".

31. Clause (1) of Article 163 of the Constitution of India states that Governor has to exercise his discretion, where the discretion is provided by the Constitution or under the Constitution - "by or under this Constitution", is the precise expression. This expression at times, has to be seen from the tenor and the context, where these powers have to be exercised and the language used for the purpose.

32. The Constitution expressly mentions areas where Governor has to exercise his "discretion". Such as under Article 239 of the Constitution of India, where when a Governor is appointed as an Administrator to an adjoining Union Territory, then in the administration of that Union Territory, the Governor does not act under the aid and advice of his council of ministers of the State. It is expressly provided that here the Governor "shall exercise his functions as such administrator independently of his Council of Ministers". Article 239 of the Constitution of India reads as under:

> "Article239. Administration of Union territories.- (1) Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.
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> (2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers."

33. Similarly, under Article 371* of the Constitution of India, the President may by an order _____ *"Article 371. Special provision with respect to the States of Maharashtra and Gujarat.- [* * *] (2) Notwithstanding anything in this Constitution, the President may by order made with respect to the State of Maharashtra or Gujarat, provide for any special responsibility of the Governor for-

> (a) the establishment of separate development boards for Vidarbha, Marathwada, and the rest of Maharashtra or, as the case may be, Saurashtra, Kutch and the rest of Gujarat with the provision that a report on the working of each of these boards will be placed each year before the State Legislative Assembly;
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> (b) the equitable allocation of funds for developmental expenditure over the said areas, subject to the requirements of the State as a whole; and
>
> (c) an equitable arrangement providing adequate facilities for technical education and vocational training, and adequate opportunities for employment in services under the control of the State Government, in respect of all the said areas, subject to the requirement of the State as a whole."

provide for special responsibilities for Governor of State of Maharashtra and Gujarat in respect of Vidarbha, Marathwada and the rest of Maharashtra, Saurashtra, Kutch and the rest of Gujarat. There are special powers given to the Governor under Article 371A as well. The provisions have expressly provided that the Governor has to exercise his discretion while exercising these powers.

34. But there are yet some areas where a discretion has still to be exercised by the Governor, though this has not been stated by the word "discretion", or even as clearly as in Article 239. This has to be discerned and inferred by the tenor and the context where it has been used. Article 243Q of the

Constitution of India for which we are presently concerned reads as under:

> "243Q. Constitution of Municipalities. - (1) There shall be constituted in every State,
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> -
>
> (a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area;
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> (b) a Municipal Council for a smaller urban area; and
>
> (c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part:
>
> Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.
>
> (2) In this article, "a transitional area", "a smaller area" or "a larger urban area" means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non- agricultural activities, the economic importance or such other facts as he may deem fit, specify by public notification for the purposes of this Part."
>
> (emphasis provided)
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> 35. In clause (2) of Article 243Q, the Governor has to specify as to what will constitute a "transitional area"

or a "smaller urban area" or a "larger urban area", in his State. While doing this the Governor has to take into account factors such as population, density of population, revenue generated for the local administration, percentage of employment of persons in non-agricultural activities, economic importance of the area "or such other facts" as the Governor may deem fit. The exact words are "as he may deem fit".

36. Article 243Q is a part of Part IX-A of the Constitution of India which was inserted by 74th Amendment. Subsequently amendments were made in Sections 3 & 4 of the U.P. Municipalities Act as well in the year 1994. Previously both in Sections 3 & 4 of the U.P. Municipalities Act, which pertain to bringing rural areas into urban areas or municipalities, the word was "Government". After the 74th Constitutional amendment and the incorporation of Article 243Q, amendment was brought in the State laws as well in the U.P. Municipalities Act in Sections 3 & 4 and the word "Government"

was replaced by the word "Governor".

37. Sections 3 & 4 of the U.P. Municipalities Act now read as under:

> "3. Declaration etc. of transitional area and smaller urban area. - (1) Any area specified by the Governor in a notification under clause (2) of Article 243-Q of the Constitution with such limits as are specified therein to be a transitional area or a smaller urban area, as the case may be.
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> (2) The Governor may, by a subsequent notification under clause (2) of Article 243-Q of the Constitution, include or exclude any area in or from a transitional area or a smaller urban area referred to in sub-section (1), as the case may be.
>
> (3) The notifications referred to in sub- sections (1) and (2) shall be subject to the condition of the notification being issued after the previous publication required by Section 4 and notwithstanding anything in this section, no area which is, or is part of, a cantonment shall be declared to be a transitional area or a smaller urban area or be included therein under this section.
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> * * *
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> 4. Preliminary procedure to issue
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> notification. - (1) Before the issue of a notification referred to in Section 3, the Governor shall publish in the Official Gazette and in a paper approved by it for purposes of publication of public notices, published in the district or, if there is no such paper in the district, in the division in which the local area covered by the notification is situate and cause to be affixed at the office of the District Magistrate and at one or more conspicuous places within or adjacent to the local area concerned a draft in Hindi or the proposed notification along with a notice stating that the draft will be taken into consideration on the expiry of the period as may be stated in the notice.
>
> (2) The Governor shall, before issuing the notification consider any objection or suggestion in writing which it receives from any person, in respect of the draft within the period stated."

38. The learned Counsel for the petitioners would submit that although the word "discretion" has not been used in clause (2) of Article 243Q and this decision which has to be taken, keeping in mind the "facts" which have been specified in clause (2) of Article 243Q of the Constitution of India, yet it has to be the decision of the Governor. It may not be his total discretion, but it is definitely a decision which has to be taken by the Governor himself, on consideration of facts which have been stated (in clause (2) of Article 243Q) or "such other facts" as he may deem fit.

39. In the above provision it is the Governor who has to specify as to what would constitute the above three categories of "urban areas". This he has to do keeping certain factors in mind, such as

the population, density of population, their dependence on agriculture, or "such other facts", "as he may deem fit". Meaning that apart from what has been specifically mentioned in clause (2) of Article 243Q, the Governor can take into considerations other relevant factors in order to determine as to what should constitute an urban area. This is so because of the diversity of India. Each State has its unique features and therefore it is possible that a factor may be relevant for a particular State alone, which ought to be a consideration while making this determination, when its rural area is to be converted into an urban area. It is for the Governor to think what these facts are. It is the Governor's discretion. It is he who ultimately decides what facts to consider, apart from what has been stated in the provision, while making this determination.

40. It is evident that the words "as he may deem fit", indicate a discretion. This expression has been variously put to use in different statutes such as, "as he may deem necessary", "as he may deem proper", etc.

41. Generally when such words are put, powers are given to a judicial authority or a quasi judicial authority, to use his discretion, in a particular given situation. One can immediately think of Section 438 of Criminal Procedure Code, where a High Court or a Court of Sessions while granting an anticipatory bail to a person can put such conditions "as it may think fit". It has been held that these powers are discretionary powers, though it is not an absolute power. Reference is here of K.K. Velusamy v. N. Palanisamy reported in (2011) 11 SCCC 275.

42. Similarly, in Section 27(b) of the Competition Act, 2002, the Commission in a given situation can impose a penalty "as it may deem fit". Again in the case of Excel Crop Care Limited v. Competition Commission of India and another reported in (2017) 8 SCC 47, these powers have been said to be discretionary, though the discretion has to be balanced and judicial. Such references pertaining to discretionary powers are given in other statutes as well and it is a settled principle of law that this is indicative of "discretion".

43. The authorities on the Discretionary Powers of the Governor are the two leading judgments of the Apex Court. The first is Samsher Singh v. State of Punjab and another reported in (1974) 2 SCC 831 and the other is a recent decision in the case of Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly and others reported in (2016) 8 SCC 1. In both these cases, the Constitutional position has been explained which is that in our Cabinet system the Governor acts on the aid and advice of his Council of Ministers except when he has to exercise his discretion. Therefore, working on the aid and advice of Council of Ministers is the Rule and discretion is an exception, to be exercised on well known situations.

44. In Nabam Rebia (supra), the Constitution Bench of the Apex Court has thoroughly dealt with the discretionary powers of the Governor, and where that can be exercised. It reiterates the settled position of law, that the "satisfaction of the Governor", wherever such satisfaction is mentioned, such as under Articles 213 or 311(2) of the Constitution of India, that would mean not a "personal satisfaction" of the Governor, but it means a satisfaction in the constitutional sense of his Council of Ministers. The above judgment then goes on to explain that the source of discretionary power which the Governor has, are in clause (1) of Article 163 and not in clause (2) of Article 163. Since the source

of discretionary powers of the Governor lies in clause (1) of Article 163, it comes with severe limitations. In other words, these powers can only be exercised where it has been expressly given by or under the Constitution. The Hon'ble Apex Court defined three areas where a Governor might function and these are:

> "(1) Areas in which he can act only on the aid and advice of the Council of Ministers. This is in all areas of the executive functions of the State Government [Article 166].
>
> (2) Areas in which he can act in his discretion by or under the Constitution and in which he does not need to take the advice of the Council of Ministers [Article 163] - "except insofar as he is by or under this Constitution required to exercise his functions or any of them in his discretion".] or, areas in which he might take the advice of the Council of Ministers but is not bound by it enabling him to act in his individual judgment by or under the Constitution.
>
> (3) Areas that have no concern with the Constitution. For example, where he is acting eo nominee. We are not concerned with this area at all."

45. Closer to our case, and dealing with the same provisions as we are presently dealing with, is a recent judgment of the Hon'ble Apex Court (Champa Lal v. State of Rajasthan and others (Civil Appeal No. 4554 of 2018), decided on 26.04.2018. In this case, the validity of the two notifications made by the State of Rajasthan in the year 2009 under Article 243Q of the Constitution of India were examined, where the Apex Court was of the view that such a decision has to be taken by the Governor keeping in mind the factors which have been laid down in clause (2) of the Article 243Q of the Constitution of India. It held as under:

> "It, therefore, appears from the scheme of Article 243Q (2) that the Governor is not free to notify "AREAS' in his absolute discretion but is required to fix the parameters necessary to determine whether a particular AREA is a transitional area or a smaller urban area or a larger urban area with due regard to the facts mentioned above. It is implicit that such parameters must be uniform for the entire State. It is only after the determination of the parameters, various municipal bodies contemplated under Article 243Q (1) could be constituted."

46. In the above case, the State notifications which were under challenge, took into account only the population of the area, and not other factors as given in clause (2) of Article 243Q. This was held to be violative of Article 243Q. While making that determination, the Hon'ble Apex Court held that it is not an absolute discretion of the Governor while making this determination (i.e. a determination as to what areas are to become urban areas), because while doing so the Governor has to take into consideration various factors stipulated in clause (2) of Article 243Q of the Constitution of India. All the same, what is necessary for our purposes, is that even in the above case, what has been noticed by the Hon'ble Apex Court is the "discretionary powers" of the Governor in these matters. It may not be a total discretion, but still it is not a situation where a notification can be made in the name of Governor under the "Rules of Business", without the file even being placed before the Governor!

This is being said for the reason that in the case at hand, it is an admitted position before this Court, as stated by the learned Advocate General that the file was never placed before the Governor of the State. Their argument is simple: as the "Rules of Business", state that what is being done by the Government, is being done in the name of Governor, therefore though it is the Government which has done it, but it will still be deemed to be in the name of the Governor! Rules of Business:

47. At this stage, it must also be said that the Rules of Business made by the Government under Clause (3) of Article 166 has its purpose. The purpose is that though all the executive action of the State are in law, to be done in the name of Governor, but it is practically not possible for the Governor to give his signature on each and every matter, or on each and every file. The day to day functions, which are though deemed to be done in the name of Governor, are never placed before the Governor. The learned Advocate General submits that the Rules of Business which are applicable in the State of Uttarakhand and which have been framed under clauses (2) & (3) of Article 166 of the Constitution of India, do not visualize a condition where a file (as the one dealing with Article 243Q of the Constitution of India) has to be taken before His Excellency the Governor. It is a work done by the "Government", yet it will still be deemed to be done in the name of the "Governor". The two words are interchangeable, the learned Advocate General would argue.

48. This argument, however, goes contrary to the stand of the Government, for the reasons that in the Rules of Business only such matters have to be stated, which though taken in the name of the Governor are never placed before the Governor. Since the matter relating to Article 243Q or matter relating to Sections 3 and 4 of the U.P. Municipalities Act is not specifically mentioned in the Rules of Business, it shows that these are discretionary powers of the Governor and therefore it is not a part of the Rules of Business.

49. To further elaborate this point, the Rules of Business are framed under clause (3) of Article 166, which says that "the Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion"*. In other words, Rules of Business are for the convenient transaction of business, except such business, where the Governor "is by or under this Constitution required to act in his discretion". The fact that the "business" relating to declaration of area from a rural to urban area is not mentioned in the Rules of Business, is for a reason, and the reason is that this is a discretion of the Governor. It is not meant to be in the Rules of Business.

50. There are two decisions of two different High Courts, relied upon by the learned Senior Counsel for the petitioners. One is of Madhya Pradesh High Court and another is of Jharkhand High Court. The case of Madhya Pradesh High Court being relied upon by the *Emphasis provided.

learned Senior Counsel for the petitioners is Anil Trivedi and Another v. State of M.P. and others (Writ Petition No. 3538/2014), which is a Division Bench judgment passed on 11.11.2014. The petitioners in the above case had challenged the notification by which the municipal limits of the city of Indore were sought to be altered. The case of the petitioner was that the notification has been made without the Governor having considered their objections for including the areas within the

municipal limits of Indore, as he was required under Section 405 of the M.P. Municipal Corporation Act, 1956. The Division Bench came to the conclusion that under clause (2) of Article 243Q of the Constitution of India, the expression is that the Governor has to decide the case "as he may deem fit" and the expression "as he may deem fit" shows that it is the discretion to be exercised by the Governor and no one else and therefore the final decision of inclusion of areas in the municipalities have to be taken by the Governor himself and by nobody else, and since this was not done, the impugned notifications were quashed.

51. In the case of Jawaharlal Sharma & etc. v. State of Jharkhand & Ors., reported in AIR 2006 Jharkhand, 135*, the issue was relating to constitution of Municipal Corporation at Jamshedpur. The Division Bench of Jharkhand High Court in the said decision held the notification published for the constitution of Municipal Corporation Jamshedpur was illegal as it was without jurisdiction, for the reasons that the powers are with the Governor.

* decided on 23.06.2006.

52. Having considered the rival submissions of both the sides at length, I have no doubt in my mind that the powers which have to be exercised under clause (2) of Article 243Q though are the powers which have to be exercised keeping certain factors in mind, factors as given in clause (2) of Article 243Q itself, and therefore to that extent the discretion is not a complete discretion, but yet these powers have to be exercised by none other than by the Governor himself. It is not a matter covered under the "Rules of Business". The exact words in clause (2) of Article 243Q are that the Governor has to declare a transitional area, a smaller urban area or a larger urban area keeping in mind certain factors, such as, density of population, dependence on agriculture, etc and other factors "as he may deem fit". The precise phrase "as he may deem fit" clearly indicates that this is the discretion of the Governor.

53. Having made the aforesaid determination, we have to now see whether any such order or notification exists under clause (2) of Article 243Q of the Constitution of India.

54. There is an order dated 26.09.2012, which is on record. The learned Advocate General submits that this is the order which has been passed under clause (2) of Article 243Q of the Constitution of India read with Section 3 of the U.P. Municipalities Act. On the other hand, in Writ Petition (M/S) No.1101 of 2018, the petitioner's case is that there is no order or notification as yet in Uttarakhand under Section 3 of the U.P.

Municipalities Act read with clause (2) of Article 243Q of the Constitution of India. The petitioners in Writ Petition (M/S) No. 1047 of 2018, though rely upon this notification and have argued that the present impugned order dated 05.04.2018 is not as per this notification, have nevertheless put up a case stating that the orders or notifications dated 05.04.2018 presently under challenge are not notifications by the Governor as contemplated under Section 3 of the U.P. Municipalities Act and clause (2) of Article 243Q of the Constitution of India.

55. The order dated 26.09.2012, which the learned Advocate General calls as an order passed under Clause (2) of Article 243Q is annexed as Annexure no. 10 to Writ Petition (M/S) No. 1101 of 2018, is a letter by the Secretary, Government of Uttarakhand to the two Divisional Commissioners of Uttarakhand i.e. Garhwal Division and Kumaon Division*.

56. The letter dated 26.09.2012 is from the Secretary, Urban Development Department with the subject as follows:

> "Sub: To call for extension of limits of the urban local bodies in their forthcoming elections and the suggestions to that effect."

* There are only two Divisions in Uttarakhand - (a) Garhwal Division and (b) Kumaon Division.

57. It calls the Divisional Commissioners that in the forthcoming elections* there is a proposal for extension of the limits of the urban local bodies and the District Magistrate was directed to send proposals for the extension keeping in mind the following parameters :

> (1) The area which is to be included in an urban area must have a population of which atleast 75% is engaged in non- agriculture activities (2) The area which is to be included in a urban area in the plains must have a density of 250 persons per sq. kms. And this density for the hill area should be 150 persons per sq. kms. (3) The area to be included must be in a position to generate revenue for local administration.
>
> (4) The area to be included must have an economic importance.
>
> (5) The area to be included must have the qualities** of an urban area".

58. Apart from that, certain statistics were requisitioned, such as, the population of the area which is to be included in an urban area; the total area to be included; the details of last three years expenditure of the area to be included; the total percentage of agricultural area of the area to be included; the site map of the area to be included be made available, etc.

59. A perusal of the said order undoubtedly shows that the factors mentioned therein are indeed the factors which are contemplated in Clause (2) of Article 243Q. These are the factors which have to be considered by the * The elections in the year 2012-13 **"Shahari gun", it states Governor. But that is precisely the question: Has this been done by the Governor. Evidently it does not appear to be so. On the contrary, this exercise has been done by the Secretary to the Government. In fact it is not even an "order", passed by the Governor. It is simply a letter written by the Secretary to the two Divisional Commissioners asking for certain details and that too for a particular period i.e. for the elections of local bodies for the year 2012-13. It is not an order which sets down definite parameters which have to be looked into while including a rural area or an urban area in terms of Clause (2) of Article 243Q. But most importantly it is an order which has been passed by a Government Official, not by the Governor. Therefore, it cannot be called a notification under Clause (2) of Article 243Q of the Constitution of India.

60. Similarly, the two notifications i.e. No. 920/IV(3)/2018-I (6Na.Ni)/2017 dated 05.04.2018 and No. 939/IV(3)/2018-I (6Na.Ni)/2017 dated 05.04.2018, annexed as Annexure Nos. 1 & 2, respectively to Writ Petition (M/S) No. 1047 of 2018, are the notifications which have been passed by the Secretary, Urban Development Department, Government of Uttarakhand. These notifications are ostensibly under Clause (2) of Article 243Q of the Constitution of India read with Section 3(1) of the U.P. Municipalities Act. The learned Advocate General has very fairly submitted that this has been done under the "Rules of Business" and therefore it may be deemed to be an order passed by the Governor.

61. A bare perusal of the order dated 05.04.2018 shows that it is not an order which has been passed by the Governor under his discretionary powers. It is admitted by the State that in the present case the file was never put up before the Governor.

62. The learned Advocate General has been very candid while making his submissions before this Court. His submissions are that a notification under clause (2) of Article 243Q of the Constitution of India can be made under the "Rules of Business", by a Secretary of the Government. It is not a discretionary power of the Governor. The notification has been made by the Government, but it has to be read as an act done by the Governor himself for the simple reason that under clause (1) of Article 154 all executive power of the State vests in the Governor, and under Article 166 (1) all executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

63. The learned Advocate General has very heavily relied upon the judgment of Hon'ble Apex Court in the case of State of U.P. and others v. Pradhan Sangh Kshettra Samiti and others reported in 1995 Supp (2) SCC 305, wherein it has been held that the words "Governor" and "Government" are the same. Since the decision of Hon'ble Apex Court in Pradhan Sangh Kshettra Samiti (supra) also arises out of a notification of the erstwhile State of U.P. passed in case of local bodies i.e. Panchayats, where the decision of Allahabad High Court was set aside the facts of the said case need to be stated first in order to fully appreciate the arguments of the learned Advocate General.

64. A Division Bench of Allahabad High Court in the case of Pradhan Sangh Kshettra Samiti v. State of U.P. and others reported in AIR 1995 Allahabad 162 was called upon to examine the validity of certain notifications of the Government of U.P. by which certain villages in U.P., were notified under the powers vested with the Government under Section 2 (t) of the U.P. Panchayat Raj Act read with Article 243(g) of the Constitution of India. After 73rd Amendment in the Constitution of India, most of the States including the State of U.P. brought about certain amendments in this existing U.P. Panchayat Raj Act, 1947. These amendments were brought primarily in the year 1994. Since the Division Bench of Allahabad High Court was dealing with a variety of issues, it is not necessary to touch upon all the issues, only such issues which are relevant for our purposes are being considered. Inter alia, therefore, before the Division Bench of Allahabad High Court the argument was that the "village" has been defined under Section 2(t) of the U.P. Panchayat Raj Act vide amendment as follows:

"2. Definition. - In this Act, unless there is anything repugnant in the subject or context :-

(t) "Village" means any local area, recorded as a village in the revenue records of the district in which it is situate, and includes any area which the State Government may, by general or special order, declare to be a village for the purposes of this Act;"

65. Whereas in the Constitution of India, the village is defined under Article 243 (g) as follows:

"243. Definitions. - In this Part, unless the context otherwise requires, -

(a)....

(b)....

(c)....

(d)....

(e)....

(f)....

(g) "village" means a village specified by the Governor by public notification to be a village for the purposes of this Part and includes a group of villages so specified."

66. The Division Bench of Allahabad High Court held that the village is one which is specified by the Governor by a public notification for the purposes of this part and therefore the definition of "village" given in U.P. Panchayat Raj Act is not in terms of the definition of "village" given in the Constitution of India and therefore, inter alia, held that the definition of "village" given in Section 2(t) of the U.P. Panchayat Raj Act is ultra vires of the Constitution of India.

67. The said judgment of the Division Bench was challenged before the Hon'ble Apex Court and the decision therein given by the Hon'ble Apex Court is reported in 1995 Supp (2) SCC 305. It had set aside the order of the Division Bench of Allahabad High Court. The reasoning given by the Hon'ble Apex Court is contained in Para 38, 39 and 40, which are reproduced below:

"38. We are also unable to appreciate the reasoning of the High Court that under the Act the State Government cannot declare the village by special or general order as required by Section 2 [t] because Article 243 [g] of the Constitution requires the Governor "to specify the village by a public notification". Admittedly, the general or special order issued by the State Government is always published in the official gazette. In any case, the order declaring the villages for the purposes of Section 2 [t] in the present case was gazetted. There is a hierarchy of legal instruments such as

> law, ordinance, order, bye-law, rule, regulation and notification. It is recognised even by Article 13 [3] [a] of the Constitution and Section 3 [29] of the General Clauses Act, 1897. All the orders, rules, regulations and notifications when made or issued by the State Government are made or issued in the name of the Governor by the functionary of the Ministry concerned named in the rules of business as per the provisions of Article 166 of the Constitution. We have already pointed out that in view of the provisions of Article 154 and of Article 163 read with Article 166 of the Constitution, 'Governor' means the Government of the State and all executive functions which are exercised by the Governor except where he is required under the Constitution to exercise the functions in his discretion, are exercised by him on the aid and advice of the Council of Ministers. Hence, whether it is a notification issued by the Government or a general or special order issued by the State Government, constitutionally both are the acts, of the Governor.

39. In the present case, by the notification dated 9-5-1994 issued under Section 96-A of the Act by the Governor, the powers of the State Government under Section 3 and Section 11-F of the Act were delegated to the Director, Panchayat Raj, U.P., Lucknow [hereinafter referred to as the `Director']. Pursuant to this delegation, on 4-8-1994 the Director issued notification establishing gram sabhas under Section 3 and declaring panchayat areas under Section 11-F of the Act. This was a composite notification both for establishing gram sabhas and declaring panchayat areas. It is true that neither in the notification dated 9-5-1994 delegating powers under Sections 3 and 11-F to the Director nor in the notification dated 4-8- 1994 establishing grain sabhas and declaring the panchayat areas, there is a mention either of Section 2 [t] of the Act or of the power delegated to declare the village under the said provision, However, keeping in mind the scheme of the Act and the provisions of Sections 2 [t], 3 and 11-F, it is clear that Section 2 [t] merely defines 'village' and by itself does not give power to the State Government to declare the village. It states that village means "any local area recorded as a village in the revenue records of the district in which it is situate and includes any area which the State Government may by general or special order declare to be a village for the purposes of the Act". The said section is, therefore, in two parts. By the first part, it adopts the villages recorded in the revenue records of the districts as villages for the purposes of the Act. By the second part, it accepts as village any area which the State Government may for the purposes of the Act declare as such village. There is no separate provision giving power to the State Government to declare any area as village for the purposes of the Act. The legislature, probably rightly thought that since the power given to the State Government by Section 3 to establish a gram sabha and by Section 11-F to declare the panchayat area comprise in them the power to declare the village within the meaning of Section 2 [t] and particularly of the second part of it, it was not necessary to make an independent provision to enable the State Government to declare the village for the purposes of the Act. It cannot be said that this view of the State Government is wrong for it is not possible to establish a gram sabha or declare the panchayat area unless the village for which such gram sabha is to be established and its area is first determined. The notification which was issued on 4-8-1994 further shows that the gram sabhas which are inappropriately tided as gram panchayats are established for villages within the meaning of Section 2 [t] and they comprise the area either of one revenue village or of more revenue villages than one. Although, therefore, the criticism by the High Court with regard to both the notifications dated 9-5-1994 and 4-8-

1994 delegating the power, and establishing gram sabhas and declaring panchayat areas may be justified in that they do not refer to Section 2 [t] and the latter notification has given inappropriate titles in columns 2 and 3 thereof, according to us, for the reasons stated above, the said defects do not in any way affect the legality of the said notifications. All that can be said in that connection is that they could have been correctly and adequately worded. However, in construing legal documents, it is not their form but their substance which has to be taken into consideration. Thus construed we are more than satisfied, that the two notifications are in substantial compliance with the provisions of the Act and have to be construed as such.

40.We also find no merit in the contention that the first part of Section 2 [t] which defines village to mean any local area recorded as a village in the revenue records of the district in which it is situate, goes counter to the provisions of Article 243 [g] in that it forecloses the authority of the Governor to specify the village for the purposes of establishing a gram panchayat as envisaged by Part IX of the Constitution. The argument ignores that whereas the Constitution permits the Governor to specify village by a notification, it does not prevent the State from enacting a law for the purpose. As pointed out earlier, the notification issued by the Governor is in fact a notification issued by the State Government. An enactment of the legislature is certainly a higher form of legal instrument than a notification. What is further, the Act has received the assent of the Governor on 22-4-1994. Hence, there is not only no conflict between the provisions of Sections 2 [t] of the Act and those of Article 243 [S] but there is an over-

compliance with the provisions of the Constitution."

68. As we can appreciate, the Hon'ble Apex Court in Pradhan Sangh Case was not dealing with the discretionary powers of the Governor under clause (2) of Article 243Q of the Constitution of India. Unlike in clause (2) of Article 243Q of the Constitution of India where specifically the words "as he may deem fit" have been given, there are no such words in Article 243. It is, inter alia, in that context therefore that the Hon'ble Apex Court was of the opinion that the definition of "village" which is given under 243(g) of the Constitution of India can be the same as given under 2(t) of the U.P. Panchayat Raj Act and there is no discrepancy between the same. Moreover, unlike in our present case there the statute itself gave power to the State Government. In our case under Sections 3 and 4 of the U.P. Municipalities Act, the power to give a notification is not given to Government. The words are not "Government" but "Governor". What is more important is that even here prior to 1994, the words were "State Government" which were replaced by "Governor" in the year 1994 by way of an amendment. This amendment is significant. Therefore, in my humble opinion, the judgment being relied upon by the learned Advocate General in support of his contention is of no help to him, as it is on a different aspect.

69. Lastly, in Writ Petition (M/S) No. 1047 of 2018, the learned Senior Advocate Sri Vijay Bahadur Singh Negi has also submitted that there is a specific ban on delegation of these powers in the U.P. Municipalities Act. Section 327 of the U.P. Municipalities Act, 1916 reads as under:

> "327. Delegation of powers by the State Government. - The State Government may, by notification, delegate to the Prescribed Authority in respect of any specified

> municipality or municipalities within his or its jurisdiction any one or more of the powers vested in it by this Act, with the exception of the powers detailed in Schedule VII."

70. The powers which are detailed in Schedule VII of the U.P. Municipalities Act cannot be delegated at all. Under Schedule VII, item no. 1 & 2 are the powers given under Section 3(1) and 3(2), respectively, and given as under:

"SCHEDULE VII POWERS OF THE STATE GOVERNMENT THAT MAY NOT BE DELEGATED [See Section 327] Section Powers of duties [3(1) To specify with limits any area to be a transitional area or a smaller urban area, as the case may be.

3(2) To include or exclude any area in or from a transitional area or a smaller urban area, as the case may be."

71. Admittedly, in all these cases, the authority which has heard the objections, which has made the recommendations, etc. is not even the State Government but the District Magistrate and this Committee and in some cases, the District Magistrate has sub-delegated these powers to the Sub-Divisional Magistrate and another committee. Therefore, this delegation in any case being bad in the eyes of law, the recommendations and the orders passed subsequently are liable to be quashed, the learned Senior Counsel for the petitioner would argue.

72. All the same, when once this Court has reached the conclusion that the power to define an urban area, in its various forms, is a discretionary power of the Governor, we need not deal with the delegation aspect at all, for it is settled that normally a "discretionary" power can never be delegated. Survey work, detailing of areas, etc. can be given to the subordinate officers, but the ultimate power to take a decision here, remains with the Governor.

73. Having considered the arguments of both the sides at length, in my considered opinion, the notifications dated 05.04.2018 have not been issued by the authority empowered under the law. The notifications under Article 243Q of the Constitution of India read with Sections 3 & 4 of the U.P. Municipalities Act are the notifications, which have to be issued by none other than the Governor, in his discretionary powers. Since this has not been done, the notifications do not have the validity of law. Consequently, all the writ petitions succeed and are hereby allowed and the impugned notifications dated 05.04.2018 (in Writ Petition (M/S) No. 1047 of 2018) and in other connected writ petitions are hereby quashed and set aside.

(Sudhanshu Dhulia, J.) 14.05.2018 Avneet/