HIGH COURT OF MADHYA PRADESH : JABALPUR

W.P. No.17245/2016 (PIL)

Gyan Prakash Patel
-Versus-
State of M.P. & Others

W.P. No.18794/2016

Anupiya Bai Baiga
-Versus-
State of M.P. & Others

Shri P.N. Pathak, Advocate for the petitioners.

Shri Bramha Datt Singh, Government Advocate for the State.

W.P. No.17933/2016

Vinod Kumar Tripathi
-Versus-
State of M.P. & Others

W.P. No.18782/2016

Kamlesh Manjhi
-Versus-
State of M.P. & Others

W.P. No.13547/2017

Sharda Prasad Goutam
-Versus-
State of M.P. & Others

None for the petitioners.

Shri Bramha Datt Singh, Government Advocate for the State.

Whether approved for reporting ?	Yes.
Law laid down	Constitution of a Gram Panchayat, Nagar Parishad and Municipal Council is a legislative function and the principles of natural justice would not be applicable. The maxim *audi alteram partem* does not become applicable to the case by necessary implication. The courts cannot interfere on the said ground in exercise of power of judicial review.
Significant paragraph Nos.	21.

CORAM :

Hon'ble Shri Justice Hemant Gupta, Chief Justice.
Hon'ble Shri Justice Vijay Kumar Shukla, Judge.

O R D E R
(Jabalpur dt.11.12.2017)

Per : Vijay Kumar Shukla, J.-

The Writ Petition No.17245/2016 filed by the petitioner, Gyan Prakash Patel is in the form of a public interest litigation whereas other writ petitions have been preferred either by the ex office bearers of the Gram Panchayats or by the residents of the Gram Panchayats.

2. For the sake of clarity and convenience the facts adumbrated in the W.P. No.17245/2016 are taken up for adjudication of the lis in question. The challenge in the present petition is to the Notification, dated 26th September, 2016, issued by the State Government, in exercise of powers conferred under Section 5(1)(b)

of the M.P. Municipalities Act, 1961 [hereinafter referred to as `the Act']. By the impugned Notification, Nagar Parishad Manpur (Municipal Council, Manpur) has been notified to be constituted, by including the area of Gram Panchayats, Manpur, Sigudi, Semra and Govarde. The villages of these Gram Panchayats have been notified in the impugned Notification. Villages - Manpur, Kathar and Barbaspur of the Gram Panchayat Manpur and Village, Sigudi of Gram Panchayat Sigudi; and villages of Semra and Goverde have been notified to be merged in the area of newly constituted Nagar Parishad Manpur.

3. The petitioners have challenged the constitution of the Nagar Parishad on the ground that the Notification is contrary to the provisions of the Act and also as there is no urban activity therein, therefore, the Gram Pancahayat cannot be made to loose its existence; that the residents of the villages do not pay any taxes viz. octroi (entry tax) or house tax whereas the inhabitants of a Nagar Parishad will have to pay the same to the Nagar Parishad. It is further contended that the Notification is not in the interest of residents of the villages. Further, challenge has been made on the ground that the Notification is bad in law, because the procedure prescribed under Section 5 of the Act and the principles of natural justice have not been followed, hence the impugned Notification is

contrary to the observations made in para 29 of the judgment rendered by the Apex Court in the case of ***State of Maharashtra and another vs. Jalgaon Municipality, AIR 2003 SC SC 1659***.

4. In this bunch of writ petitions it is also contended that the Notification is also contrary to the provisions enshrined under Article 243U of the Constitution of India, as the term of the existing Panchayat had not expired and the same would be prejudicial to the interest of the existing elected body of the Gram Panchayat.

5. Controverting the aforesaid submission, counsel for the respondents/State assiduously urged that the Notification has been issued in accordance with the statutory provisions of Section 5 of the Act. He also raised an objection regarding maintainability of the public interest litigation in this bunch of writ petitions. It is contended by him that in view of Section 5 of the Act, it is only population of the area which plays an important role for deciding as to whether a Municipality Council or Nagar Parishad or transitional area is to be constituted. It is canvassed that the State Government has issued the Notification dated 27-12-2011, wherein the scale of population has been provided to decide the Constitution of a Nagar Parishad/Municipal Council/Municipal Corporation. It is also provided in the said Notification that where population exceeds

20000 but less than 50000 then a Municipal Council can be constituted. A copy of the Gazette Notification, dated 27-12-2011 has been placed on record as Annexure-R/1. Counsel for the State further contended that the action of the respondents is legislative in nature, therefore, the provision of the principles of natural justice would not be made applicable in the present case and the action cannot be interfered with in exercise of judicial review by this Court under Article 226 of the Constitution of India.

6. In the reply filed on behalf of the State it is further submitted that the census data was collected of the consisting village panchayats and it came on record that total population of all the village panchayats constituting Municipal Council, Manpur is 204447 which is more than 20000. Accordingly, the matter was forwarded to the State Government for taking appropriate action.

7. It is further contended that in the instant case the concerned village panchayats are in process of transition to an urban area inasmuch as the measure source of livelihood of the villagers is no more through agriculture and there are rice mills and cement factories available in the concerned village panchayats which are in aid of the sources of revenue for the villagers, therefore, it was considered to form a transitional area of Nagar Panchayat first and,

therefore, the decision was taken to constitute the municipal council by the impugned Notification.

8. Regard being had to the similitude of controversy involved in this batch of writ petitions, they are being disposed of by a common. The pivotal issue requires to be considered in this petitions is - *"Whether the constitution of a Municipality or extension of its boundaries is an administrative or legislative function; and whether such action can be interfered with in exercise of judicial review by this Court ?"* The said issue has been considered in a greater detail by one of us (Hon'ble the Chief Justice – as Judge of the High Court of Punjab & Haryana at Chandigarh) in a Division Bench judgment rendered in the case of ***Gram Panchayat, Manne Majra and others vs. State of Punjab and others [CWP No.17225 of 2008, decided on 2-4-2012]***.

9. Adverting to the colossal issue cropped up for consideration in the present case, it is apt to reproduce Section 5 of the Act:

> **"5. Constitution of Municipal Councils and Nagar Parishads.-** (1) There shall be constituted,-
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> (a) a Municipal Council for a smaller urban area; and

(b) a Nagar Parishad for a transitional area, that it is to say, an area in transition from a rural area to an urban area;

Provided that a Municipal Council or a Nagar Parishad, as the case may be, 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 or a group of such establishments in that area and such other factors as he may deem fit, by public notification specify to be an industrial townwhip:

Provided further that when an area is notified to be a transitional area, the Gram Panchayat having jurisdiction over such area shall continue to function until a duly elected Nagar Parishad is constituted under this Act.

(2) In this section, `a smaller urban area' or `a transitional area' means such are 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 factors, as he may deem fit, specify, by public notification for the purposes of this Act.

(3) xx xx xx. "

10. From a plain reading of the aforesaid provision the basic features for constitution of a Municipal Council or Nagar Parishad are :

(i) population of the area;

(ii) density of the population therein;

(iii) revenue generated for local administration;

(iv) percentage of employment in non-agricultural activities;

(v) economic importance; and

(vi) such other factors as may deem fit.

11. A Division Bench of this Court has also considered similar issue in the case of ***Rajdhar Singh vs. State of M.P. and another, [1995 MPLJ 152]*** relying on the judgment passed by the Apex Court in ***Sunderjas Kanyalal Bhathija vs. Collector, Thane, AIR 1990 SC 261*** *and* held that the action of the State grouping two or more villages as a unit of local government, in exercise of the statutory powers under the M.P. Panchayat Raj Adhiniyam (1 of 1994) is legislative in character and, therefore, interference by the High Court is impermissible.

12. To appreciate the issue involved in the present case, in proper perspective, it is condign to deal with the factum as to what are the administrative and legislative functions. It has been laid down that there is a large area of overlap between what is plainly legislative and what is plainly administrative function. But, the courts nevertheless for practical reasons, have distinguished legislative orders from the rest of the order by reference to the

principle that the former is of general application and they are made formal by publication and for general guidance with reference to which individual decisions are taken in a particular situation.

13. A Seven-Judge Bench in ***Prag Ice and Oil Mills v. Union of India, 1978(3) SCC 459***, wherein an order fixing the price under the Essential Commodities Act, was subject matter of consideration, held to the following effect:-

> "37. We think that unless, by the terms of a particular statute, or order, price fixation is made a quasi-judicial function for specified purposes or cases, it is really legislative in character in the type of control order which is now before us because it satisfies the tests of legislation. A legislative measure does not concern itself with the facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind or class. In the case before us, the Control Order applies to sales of mustard oil anywhere in India by any dealer. Its validity does not depend on the observance of any procedure to be complied with or particular types of evidence to be taken on any specified matters as conditions precedent to its validity. The test of validity is constituted by the nexus shewn between the order passed and the purposes for which it can be passed, or, in other words by reasonableness judged by possible or probable consequences."

14. In ***Ramesh Chandra Kachardas Porwal v. State of Maharashtra, (1981) 2 SCC 722***, the court was considering the

establishment of market yard in terms of the State Agriculture Marketing Board Acts. It was held that declaration by notification of the government that a certain place shall be a principal market yard for a market area, is an act legislative in nature and does not oblige the observance of the rules of natural justice.

15. In ***Union of India and another v. Cynamide India Ltd. And another, 1987 (2) SCC 720,*** the question arose regarding fixation of price of the drugs under the Drugs (Price Control) Order 1979 issued under the Essential Commodities Act, 1955. In the said case, the Hon'ble Supreme Court observed that the legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing. It was further held that there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate, in which case the "substantial non-observance" of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. Such right given is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi-judicial. But,

where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity. It was held to the following effect :

> **"6.** Occasionally, the legislature directs the subordinate legislating body to make "such enquiry as it thinks fit" before making the subordinate legislation. In such a situation, while such enquiry by the subordinate legislating body as it deems fit is a condition precedent to the subordinate legislation, the nature and the extent of the enquiry is in the discretion of the subordinate legislating body and the subordinate legislation is not open to question on the ground that the enquiry was not as full as it might have been. The provision for "such enquiry as it thinks fit" is generally an enabling provision, intended to facilitate the subordinate legislating body to obtain relevant information from all and whatever source and not intended to vest any right in anyone other than the subordinate legislating body. It is the sort of enquiry which the legislature itself may cause to be made before legislating, an enquiry which will not confer any right on anyone.
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> **14.** We may refer at this juncture to some illuminating passages from Schwartz's book on "*Administrative Law*" 1976, pp. 143-44. He said:-
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> "If a particular function is termed 'legislative' or 'rule-making' rather than 'judicial' or 'adjudication', it may have substantial effects upon the parties concerned. If the function is treated as legislative in nature, there is no right to notice and hearing, unless

a statute expressly requires them. If a hearing is held in accordance with a statutory requirement, it normally need not be a formal one, governed by the requirements discussed in Chapters 6 and 7 The characterization of an administrative act as legislative instead of judicial is thus of great significance" As a federal court has recently pointed out, there is no 'bright line' between rule-making and adjudication. The most famous pre-APA attempt to explain the difference between legislative and judicial functions was made by Justice Holmes in *Prentis* v. *Atlantic Coast Line Co, (1908)211 US 210, 226* 'A judicial inquiry', said he, 'investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.' The key factor in the Holmes analysis is time: a rule prescribes *future* patterns of conduct; a decision determines liabilities upon the basis of *present* or *past* facts. The element of applicability has been emphasized by others as the key in differentiating legislative from judicial functions. According to Chief Justice Burger, 'Rule-making is normally directed toward the formulation of requirements having a *general* application to all members of a broadly identifiable class. (Dissenting in American Air Lines, Inc. v. CAB, 359 F 2d 624, 636) An adjudication, on the other hand, applies to *specific* individuals or situations. Rule-making affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be

> definitely affected; adjudication operates concretely upon individuals in their individual capacity."

16. In ***Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223***, the Constitutional Bench of the Hon'ble Supreme Court was considering the determination of price of the sugar in terms of subsection 3(3-C) of the Essential Commodities Act, 1955 in respect of sale price of the sugar by each individual producer. The stand of the State before the Hon'ble Supreme Court was that determination of the price of sugar in terms of sub-section 3-C of the Essential Commodities Act, is of general application, therefore legislative in character. Omission, if any, to consider any peculiar problems of individual producer is not a ground for judicial review. Reliance was placed on an earlier judgment in **Cynamide India Ltd.'s case (supra)**. The Court held to the following effect:-

> "**32.** .... …… Wade points out that legislative power is the power to prescribe the law for people in general, while administrative power is the power to prescribe the law for them, or apply the law to them, in particular situations. A scheme for centralising the electricity supply undertakings may be called administrative, but it might be just as well legislative. Same is the case with ministerial orders establishing new towns or airports etc. He asks: "And what of 'directions of a general character' given by a minister to a nationalised industry? Are these various orders legislative or administrative?" Wade says that the correct answer

would be that they are both. He says: "...there is an infinite series of

gradations, with a large area of overlap, between what is plainly legislation and what is plainly administration".(*Ibid.)* Courts, nevertheless, for practical reasons, have distinguished legislative orders from the rest of the orders by reference to the principle that the former is of general application. They are made formally by publication and for general guidance with reference to which individual decisions are taken in particular situations.

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33. According to Griffith and Street, an instruction may be treated as legislative even when they are not issued formally, but by a circular or a letter or the like. What matters is the substance and not the form, or the name. The learned authors say: "...where a Minister (or other authority) is given power in a statute or an instrument to exercise executive, as opposed to legislative, powers — as, for example, to requisition property or to issue a licence — and delegates those powers generally, then any instructions which he gives to his delegates may be legislative". Where an authority to whom power is delegated is entitled to sub-delegate his power, be it legislative, executive or judicial, then such authority may also give instructions to his delegates and these instructions may be regarded as legislative. However, as pointed out by Denning, L.J., (as he then was) a judicial tribunal cannot delegate its functions except when it is authorised to do so expressly or by necessary implication: see *Barnard* v. *National Dock Labour Board, (1953) 2 QB 18, 40.*

34. Kenneth Culp Davis says: “What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity”. Justice Holmes' definition, which is what is called the “time test” and which Davis describes as one which has produced many unsatisfactory practical results, reads:-
(*Prentis v. Atlantic Coast Line Co., 211 US 210.)*

“A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial....”

35. The element of general application is often cited as a distinct feature of legislative activity. In the words of Chief Justice Burger, “rule making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class”.(quoted by Bernard Schwartz in Administrative Law p. 144 (1976). Bernard Schwartz says: “An adjudication, on the other hand, applies to specific individuals or situations. Rule making affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely affected;

adjudication operates concretely upon individuals in their individual capacity". According to Schwartz, the "time test" and the "applicability test" are workable in most cases, although in certain situations distinctions are indeed difficult to draw.

36. A statutory instrument (such as a rule, order or regulation) emanates from the exercise of delegated legislative power which is the part of the administrative process resembling enactment of law by the legislature. A quasijudicial order emanates from adjudication which is the part of the administrative process resembling a judicial decision by a court of law. This analogy is imperfect and perhaps unhelpful in classifying borderline or mixed cases which are better left unclassified. (See Davis, Administrative Law Text. P. 123).

37. If a particular function is termed legislative rather than judicial, practical results may follow as far as the parties are concerned. When the function is treated as legislative, a party affected by the order has no right to notice and hearing, unless, of course, the statute so requires. It being of general application engulfing a wide sweep of powers, applicable to all persons and situations of a broadly identifiable class, the legislative order may not be vulnerable to challenge merely by reason of its omission to take into account individual peculiarities and differences amongst those falling within the class.

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44. The individual orders, calculating the "amounts" payable to the individual producers, being administrative orders founded on the mechanics of price fixation, they must be left to the better instructed

> judgment of the executive, and in regard to them the principle of *audi alteram partem* is not applicable. All that is required is reasonableness and fair play which are in essence emanations from the doctrine of natural justice as explained by this Court in *A.K. Kraipak* v. *Union of India*, (1969)2 SCC 262 See also the observation of Mukharji, J., as he then was, in *Renusagar, (1908) 1 KB 441.*
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> **45.** Price fixation is in the nature of a legislative action even when it is based on objective criteria founded on relevant material. No rule of natural justice is applicable to any such order. It is nevertheless imperative that the action of the authority should be inspired by reason: *Saraswati Industrial Syndicate Ltd*, (1974)2 SCC 630. The government cannot fix any arbitrary price. It cannot fix prices on extraneous considerations: *Renusagar."*

17. A Constitution Bench in **PTC India Limited v. Central Electricity Regulatory Commission, (2010) 4 SCC 603**, was analysing the provisions of the Electricity Act, 2003. It was observed that the decision-making and regulation-making functions are both assigned to Centralised Electricity Regulatory Commission. A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also a part of administrative process resembling a judicial

decision by a court of law. Approving the view taken in Shri Sitaram Sugar Co. Ltd's case (supra), it was held to the following effect:-

> **"51.** In *Narinder Chand Hem Raj* v. *Lt. Governor, H.P., (1971)2 SCC 747.* this Court has held that power to tax is a legislative power which can be exercised by the legislature directly or subject to certain conditions. The legislature can delegate that power to some other authority. But the exercise of that power, whether by the legislature or by the delegate will be an exercise of legislative power. The fact that the power can be delegated will not make it an administrative power or adjudicatory power. In the said judgment, it has been further held that no court can direct a subordinate legislative body or the legislature to enact a law or to modify the existing law and if courts cannot so direct, much less the tribunal, unless power to annul or modify is expressly given to it.
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> 78. One more aspect needs to be mentioned. The judgment of this Court in *Shri Sitaram Sugar Co. Ltd.* has laid down various tests to distinguish legislative from administrative functions. It further held that price fixation is a legislative function unless the statute provides otherwise. It also laid down the scope of judicial review in such cases."

18. In view of the above, it can be held that a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases, whereas an administrative act is the making and issue of a specific direction or the application of a

general rule to a particular case in accordance with the requirements of policy. Legislation is the process usually operating in future, administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases. An adjudication, on the other hand, applies to specific individuals or situations. But, these are only a broad distinctions. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts. The said factors have been applied for holding that the fixation of price under the provisions of the Essential Commodities Act or tariff under the Electricity Act, 2003, are legislative in nature. Such principles have been applied even in respect of the constitution of the Municipality or extension of its limits, the reference to such judgments is made hereinafter. The Hon'ble Supreme Court judgment in **Tulsipur Sugar Co. Ltd. v. Notified Area Committee, (1980) 2 011SCC 295**, to return a finding that challenge to the creation of Notified Area Town Area on the ground that it was done without affording opportunity of hearing or filing of objections, is not sustainable. In the aforesaid case a Notified Area Committee was constituted in terms of Section 241 of

the Punjab Municipal Act, 1911, which does not provide for any opportunity of hearing as is provided in Sections 4 to 7 of the Act.

19. In the case of **Sunderjas Kanyalal Bhathija (supra)** the Apex Court has held that the rules of natural justice are not applicable to legislative activities and the constitution of Nagar Panchayat is a legislative activity. Same principle has been followed by a Division Bench of this Court in **Rajdhar Singh (supra)**.

20. In the case of ***State of Punjab vs. Tehal Singh, (2002) 2 SCC 7,*** a challenge was made to the establishment of Gram Sabha Khanpur and its territorial area without affording any opportunity of hearing to the residents of the area. In para 9 the Apex Court ruled thus:

> **9.** Once it is found that the power exercisable under Sections 3 and 4 of the Act respectively is legislative in character, the question that arises is whether the State Government, while exercising that power, the rule of natural justice is required to be observed. It is almost settled law that an act legislative in character — primary or subordinate, is not subjected to rule of natural justice. In case of legislative act of legislature, no question of application of rule of natural justice arises. However, in case of subordinate legislation, the legislature may provide for observance of principles of natural justice or provide for hearing to the residents of the area before making any declaration in regard to the territorial area of

a Gram Sabha and also before establishing a Gram Sabha for that area."

21. Thus, we are of the considered opinion that constitution of a Municipal Council and Nagar Parishad is a legislative function and the principles of natural justice would not be made applicable therein. The maxim *audi alteram partem* does not become applicable to the case by necessary implication. As per stand of the State Government, the respondents have taken into consideration the population of the area, as one of the consideration for constituting the Municipal Council or Nagar Parishad or a transitional area and in this regard a Notification dated 27-12-2011 was also published and placed on record as Annexure-R/1.

22. We also do not find any merit in the contention of the petitioners that the Notification is unconstitutional and arbitrary, as it has adversely affected the term of the existing elected bodies of the Gram Panchayats. In view of the provisions enshrined in Article 243U of the Constitution of India and also the pronouncement of law by the apex Court in the case of the **Jalgaon Municipal Council and others (supra)** that in case the local body is dissolved by operation of law, then its term can be shortened. No other point has been canvassed before us.

23. Although, a public interest litigation has been held not to be maintainable in such matters by a Division Bench of this Court in **Rajdhar Singh (supra)**, however, the same has not been dismissed on the same, because the other petitions have been filed raising individual grievances by the ex-office bearers of the Gram Panchayats and the inhabitants of the Gram Panchayats.

24. In view of the preceding analysis, we do not find any merit in the present of writ petitions and the **same are hereby dismissed**. No order as to costs.

(Hemant Gupta)
Chief Justice

(Vijay Kumar Shukla)
Judge

ac.