IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 8857 of 2015
With
SPECIAL CIVIL APPLICATION NO. 8877 of 2015
With
SPECIAL CIVIL APPLICATION NO. 8881 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE C.L. SONI **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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HANSAPUR GRAM PANCHAYAT & 10....Petitioner(s)

Versus

STATE OF GUJARAT & 7....Respondent(s)

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Appearance:
MR. ASIM PANDYA Advocate with MS SNEHA A JOSHI, ADVOCATE for the Petitioner.
MS. JYOTI BHATT AGP for the Respondents No. 1 - 4 , 6
MR MP PRAJAPATI, ADVOCATE for the Respondents No. 5 , 8
MR SIDDHARTH H DAVE, ADVOCATE for the Respondent No. 7

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CORAM: **HONOURABLE MR.JUSTICE C.L. SONI**

Date : 25/06/2015

ORAL JUDGMENT

1. By the present petitions filed under Article 226 of the Constitution of India, the sarpanch of Matarvadi Gram Panchayat, Ramnagar Gram Panchayat and Hansapur Gram Panchayat with some residents of villages have challenged the notification dated 27th April, 2015 issued by the Government in exercise of the powers under Clause (d) of Article 243 P of the Constitution of India whereby the areas shown in the schedule attached with the notification of the said three panchayats are notified to be part of the Patan Municipality.

2. The case of the petitioners is that the three villages Matarvadi, Ramnagar and Hansapur are having small population and the people of the villages are availing various facilities and the benefits of the schemes of the Central as well as the State Government and there are substantial funds available with panchayats for the development of the villages. It is averred in the petitions that it is on account of the resolution passed by the respondent No.7 Municipality, the process for inclusion of village areas in municipality was undertaken whereunder the Gram Panchayats were asked to send their consent by resolution to merge their villages with the Municipality. However, the Gram Panchayatys objected to such move by passing the resolutions and conveyed the objections to the concerned authorities. It is their further case that on account of their objections, the village panchayats were excluded from the first notification dated 28.1.2015 issued under Article 243(P)(d) of the Constitution of India. However, all of a sudden, without any consultation with the panchayats, fresh impugned notification dated 27th April, 2015 was abruptly issued without following any procedure and without

affording any hearing to the petitioners.

3. Learned Advocate Mr. Asim Pandya appearing with learned Advocate Ms. Sneha Joshi for the petitioners submitted that before issuing notification under section 243(P)(d) of the Constitution of India for notifying any area as Municipal area, consultation with the Panchayat was required or at least minimum procedure for inviting objection or suggestion is required to be followed for issuing such notification. Mr. Pandya submitted that in fact, when the first notification was issued, such procedure was undertaken as the objections of three gram panchayats sent through the concerned authorities like the Taluka Development Officer/District Development Officer were considered. Mr. Pandya submitted that the Government is well aware that exercise of power under Article 243(P)(d) of the Constitution of India for notifying any area of village as municipal area since entails civil consequences, bare requirement of consultation with the affected panchayats is required to be followed. Mr. Pandya submitted that at the time of first notification issued in the month of January, 2015after considering the objections of panchayats which could be said as consultation with the panchayats, it was decided not to notify areas of the above referred three villages as municipal areas, however, within short span of three months, without any fresh material or fresh consideration or any consultation with the panchayats, impugned notification came to be issued. Mr. Pandya submitted that there is no procedure provided in the Gujarat Municipalities Act, 1963 ("the Municipalities Act") for declaring or notifying any village area as municipal area and what is provided by Article 243(P)(d) of the Constitution of India is simple definition which cannot be termed as source of power for notifying any local area of village as municipal area of municipality. Mr. Pandya submitted that in absence of any provision either in the

Municipalities Act or in the Constitution for procedure to be followed before notifying any area as municipal area, the procedure as contemplated under section 7 of the Gujarat Panchayats Act, 1993 ("the Act") is required to be followed. Mr. Pandya submitted that for notifying any local area of village to be a municipal area, a complete cesser of the said area is first required by notification under section 243(g) of the Constitution as provided in section 7 of the Act and for such purpose, consultation with panchayat as per section 7 of the Act is must.

4. Mr. Pandya submitted that even in absence of any provision in the Municipalities Act for procedure to be followed for notifying any area as municipal area, fair play would require either to consult the affected panchayat or to consider the objections of such panchayats or of the residents as the decision to take out any area from the existing village to make part of the municipal area entails civil consequences for the residents of such area and for the members of the panchayat and, therefore, unless the proper procedure is followed either of considering the objections of the affected panchayats or its residents, the decision taken for cesser of local area of the village for declaring the same as municipal area could be said to be capricious and arbitrary. Mr. Pandya submitted that once conscious decision was taken after considering the objections of the Gram Panchayats not to include their areas in the municipality when the notification dated 28.1.2015 under Article 243(P)(d) of the Constitution was issued, no fresh decision for the purpose of notifying the areas of the gram panchayats as municipal areas could have been taken without fresh consultation with the gram panchayat. Mr. Pandya has relied on the decision in the case of Unchindhanal Group Gram Panchayat & Ors. v. State of Gujarat & Ors., reported in 2008 (2) GLR page 1275; Pruthvisinh Amarsinh Chauhan v. K.D. Rawat & Ors., reported in 2005(4) GLR page 2932; Nathalal M.

Patel v. State of Gujarat & Ors., 1993 (2) GLR page 992; State of Maharashtra and others versus Jalgaon Municipal Council and others reported in (2003)9 SCC 731, Sundarjas Kanyalal Bhatija and others versus Collector, Thane, Maharashtra and others, reported in (1989) 3 SCC 396; State of Punjab v. Tehal Singh and others reported in (2002) 2 SCC 7;Kalabharti Advertising v. Hemant Vimalnath Narichania and Ors.,AIR 2010 SC 3745.

5. Learned A.G.P. Ms. Bhatt appearing for the State and its authorities, learned Advocate Ms. Archita Prajapati appearing for learned Advocate Mr.M.P.Prajapati for the Taluka Development Officer and Talati of the Gram Panchayats and learned Advocate Mr. Dave appearing for the Municipality submitted that notifying any local area as municipal area in exercise of powers under Article 243(P)(d) is legislative act for which, principles of natural justice are not required to be followed. It is submitted that for declaring any local area of village a municipal area, consultation with the gram panchayat is not required as provided in section 7 of the Act. It is submitted that the areas of the Gram Panchayat which are now notified as municipal areas under the impugned notification are geographically surrounded and in the vicinity of the limits of the Patan Municipality, and, therefore, their inclusion in the limits of the municipality by declaring them as municipal areas became indispensable for the benefits of the residents of the said areas. They submitted that though the consultation with the panchayats is not required, the consents from the Gram Panchayats were invited before deciding to declare local areas of the villages to be municipal area, however, since they objected, their objections were duly considered before taking the decision to declare the areas of the gram panchayats as municipal area which could be said to have satisfied the requirement of consultation with the gram panchayats. They submitted that the process for notifying many areas of the gram panchayats, various districts was

on and in progress till the impugned notification was issued and, therefore, it could not be said that by the impugned notification, fresh decision was taken by the Government to notify the areas of the petitioners gram panchayats as municipal areas. They submitted that the impugned notification is in fact in public interest and since after due deliberation the decision is taken, this Court may not entertain the petitions in exercise of the powers under Article 226 of the Constitution of India.

6. Learned Advocate Ms. Archita Prajapati additionally submitted that when consultation with the panchayat is not required in the municipal law for declaring any local area of the village to be municipal area nor any provision is made in Art. 243(P)(d) to follow any procedure before exercising the powers under Article 243(P)(d) of the Constitution, it can be said that the legislature in its wisdom did not intend any consultation to be made with the panchayat.

7. Having heard the learned advocates for the parties, it appears from the letter dated 2.7.2014 of Chief Officer of Patan Municipality and letter dated 12.11.2014 of Taluka Development Officer at Annexure "C" collectively that pursuant to the communication dated 26.11.2013 from Collector for inclusion of the areas of the villages, the Municipality passed resolution for inclusion of such areas within its limit and asked the Gram Panchayat to send their consent. The Taluka Development Officer also asked panchayats to send their consent. However, the panchayats sent their objections to the Collector opposing move to include their areas in the limits of Municipality for various reasons. It is the case of the petitioners that based on their objections, the areas of their Gram Panchayats were not included when first notification was issued, and therefore, without consultation as

required by section 7(2) and without cesser of their areas by notification under Art.243 (g), the impugned notification in exercise of powers under Art. 243(P) (d) could not have been issued. Sec. 7 of the Act reads as under:

> "**7. Recommendation Specification of village. -** After making such inquiries as may be prescribed, the competent authority may recommend any local area comprising a revenue village, or a group of revenue villages, or hamlets forming part of a revenue village for being specified a village under clause (g) of article 243 of the Constitution, if the population of such local area does not exceed fifteen thousand.
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> (2) After consultation with the taluka panchayat, the district panchayat and village panchayat concerned (if already constituted), the competent authority may at any time recommend inclusion within or exclusion from any village any local area or otherwise alteration of limits of any village or recommend cesser of any local area to be a village, to the Governor for exercise of his powers under clause (g) of article 243 of the Constitution."

8. As per sub-section (2), recommendation for inclusion within or exclusion from any village any local area or alteration of limits of any village or cesser of any local area to be a village for exercise of powers under clause (g) of Art. 243 of the Constitution cannot be made without consultation with the panchayats. However, the question is whether such consultation is required when the exercise of powers is not for the purposes mentioned therein. The phrase "*for exercise of his powers under clause (g) of article 243 of the Constitution*" appears to be not of wide import but limits the consultation with the taluka panchayat, district panchayat or the village panchayat only when the powers under clause (g) of Article 243 of the Constitution of India are to be exercised for the purposes mentioned in sub section (2) of section 7 of the Act. Mr. Pandya however submitted that it is not possible to notify or declare any local area of the village to be municipal

area under Article 243(P)(d) of the Constitution of India unless the prior cesser of such local area in exercise of the powers under Article 243(g) is declared and, therefore, the notification under Article 243(g) of the Constitution of India must precede the issuance of notification under Article 243(P)(d) of the Constitution of India for which consultation is must and it thus comes to that before notifying any such area of village as municipal area, consultation with the panchayat is sine-qua-non. Such contention however, cannot be accepted in view of the clear language of section (2) of section 7 of the Act providing for consultation to recommend cesser of local area only to be a village for exercise of powers under Article 243(g) of the Constitution of India. The cesser of any local area of village contemplated if only for exercise of powers under Art. 243(g) the local area ceased will thus be recognized a village. Therefore, the consultation which is intended by the legislature by sub-section (2) of section 7 of the Act is only for the purposes provided therein and not for any other purpose.

9. The difference between Article 243P and 243Q could be easily noticed. Article 243P provides for the definitions wherein the municipal area and the municipality are differently defined. As per Article 243P(d), *municipal area* means the territorial area of a Municipality as is notified by the Governor whereas as per Article 243P(e) of the Constitution, *Municipality* means an institution of self-government constituted under Article 243Q. Therefore, when any local area is to be included within the territorial limits of any existing municipality, such area could be notified by the Government in exercise of the powers under Article 243P(d) of the Constitution as municipal area so as to be the part of territorial area of the municipality. By such exercise of powers, the Government is not constituting any municipality for the first time. Article 243Q (1) of the Constitution provides that there shall be

constituted in every State (a) a nagar panchayat for a transitional area, that is to say, an area in transition from a rural area to an urban area, (b) a Municipal Council for a smaller urban area and (c) a Municipal Corporation for a larger urban area. Article 243Q suggests to take into consideration various factors by the Government before constituting any municipality. However, no such provision for considering different factors is either made in Article 243P or in the Municipalities Act for declaring any local area as municipal area. Question still remains as to whether any local area of the village could be declared as municipal area just at the whims of the Government. Fair play in every action either administrative, executive or legislative is hall mark to confirm to the test of Art. 14 of the Constitution.

10. In the case of these three villages, how the decision was arrived was the question put to the learned A.G.P. and for that purpose, original file was called for. Learned A.G.P. Ms. Bhatt then made available the original file for perusal of the Court. On perusal of the file, the Court finds that the proposal was moved by the concerned department with the recommendation of the Collectors of the different districts including the district of Patan for inclusion of areas of villages in municipality. Map showing survey numbers comprised in the panchayats of these three villages with the proposal and the resolution passed by the municipality for their inclusion in Patan Municipality were put up for consideration. It appears that the objections of the three gram panchayats and the recommendation of the Collector and of Director of Municipalities were also placed for consideration. It appears that since there were many proposals for other districts for inclusion of areas of different villages in the municipalities within the districts, at the first stage of consideration, when the first notification dated 28.1.2015 was issued, the areas of the present three villages

recommended by the Collector were not included therein. However, it appears from the notings in the file that the process of consideration was on and it had not reached finality and during the process, it was brought to the notice of the concerned authority and the Hon'ble Chief Minister that considering the out growth of Patan Municipality reached to these three villages, their areas were required to be included in the limits of Patan Municipality. It appears that though there were objections from the Gram Panchayats, considering the development of village areas and the facilities extended by Municipality and the geographical situation of the areas of these three villages, on further deliberation which appears to have taken place before the Hon'ble Chief Minister on 16th March, 2015, it was decided to include the areas of these three villages in the limits of Municipality which culminated in issuing impugned notification in exercise of the powers under Art. 243P(d) of the Constitution. For such process undertaken, the Court does not find any lack of fair play in exercise of powers under Article 243P(d) of the Constitution of India. As the impugned notification is issued as part of on going process for inclusion of many areas of different villages in Municipality, it cannot be said that there was fresh decision for which impugned notification was issued. Therefore, decision in the case of Pruthvisinh Amarsinh Chauhan (supra) will have no application.

11. In the case of Jalgaon Municipal Counsil (supra), the Hon'ble Supreme Court examined the decision of the Government of conversion of Municipal Council (Jalgaon) to Municipal Corporation in exercise of the powers under Article 243Q of the Constitution of India. In the context of section 6 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, read with section 3 of the Bombay Provincial Municipal Corporations Act, the Hon'ble Supreme Court held that the

consultation with the municipal council was must before converting area of any municipal council into municipal corporation. Learned Advocate Mr. Pandya submitted that section 6(d) of the Maharashtra Municipal Council Act which provided for alteration of limits of municipal area, based on which the Hon'ble Supreme Court held that the consultation was must with the municipal council, was the same as provided in section 7(2) of the Act for cesser of the local area of municipality, and therefore consultation was must before impugned notification under Article 243(g) of the Constitution of India was issued. However, the difference between section 6(d) of the Maharashtra Municipal Councils Act and sub section (2) of section 7 of the Act is required to be noticed closely. In section 6(d) of the Maharashtra Councils Act, 1965, nowhere specific purpose is provided. It is in general form where consultation is provided for cesser of the area of municipal council for any purpose including the purpose for inclusion in the municipal corporation whereas sub section 2 of section 7 of the Act provides for cesser of local area of the village only for the purpose of constitution of a village in exercise of the powers under Article 243(g) of the Constitution of India. For such marked distinction between the two provisions, decision in the case of Jalgaon Municipal Council (supra) will be of no help to the case of the petitioners.

12. In the case of Unchindhanal Group Gram Panchayat (supra), the Court was considering the question about consultation under section 7(2) of the Act before taking the decision by the State Government to bifurcate the Gram Panchayat and not for the purpose of declaring any area of the village to be the municipal area. This judgment will have no application to the present case.

13. In the case of Nathalal M. Patel (supra), the Court was

considering the question about consultation under section 9(2) of the old Panchayats Act in connection with the decision of the State Government for division of the local area of Bavla Nagar Panchayat. This decision also will have no application to the facts of the present case.

14. The decision in the case of Kalabharti (supra) is relied on by the learned advocate Mr. Pandya to point out that the State is under obligation to act fairly without any ill will or malice in fact or in law. In para 25 of the said decision, it is observed that the legal malice or malice in law means something done without lawful excuse. It is an act done wrongfully and willfully without reasonable or probable excuse.

15. As stated above, present is a case where the Court finds that on account of outgrown of Patan Municipality to the areas of these three villages, the Government has found it necessary to exercise powers under Article 243P(d) of the Constitution of India and while exercising such powers, the Government has considered and deliberated upon the views of three panchayats and the concerned authorities and thus, there is no violation of any fair play nor could it be said that the decision is taken arbitrarily or capriciously. Therefore, there appears to be no legal malice as suggested by the learned advocate Mr. Pandya in the matter of notifying the areas of three villages as municipal areas in exercise of the powers under Article 243P(d) of the Constitution of India.

16. In the case of Tehal Singh (supra), the Hon'ble Supreme Court held and observed in para 7,8,9 and 10 as under:

> "7. The principles of law that emerge from the aforesaid decisions are - (1) where provisions of a statute provide for the legislative activity,

social and farm forestry, minor forest produce fuel and fodder, khadi, village and cottage industries, rural housing, rural electrification including distribution of electricity, non-conventional energy source, poverty alleviation programme, education including primary and secondary schools, adult and non-formal education, promotion of adult literacy, cultural activities, fairs and festivals, public health and family welfare, women and child development, social welfare etc. Further, a Gram Sabhas and Gram Panchayats have been conferred numerous other powers and duties enumerated in S. 35 of the Act. Besides that, the Gram Panchayat is entrusted with the judicial functions which are civil and criminal in nature. The power exercisable under Ss. 3 and 4 of the Act respectively by the Government was, therefore, not an exercise of a judicial or quasi-judicial function where the very nature of function involves the principle of natural justice or in any case of an administrative function effecting the rights of an individual. We are, therefore, of the view that on making of declaration under S. 3 of the Act determining the territorial area of Gram Sabha and thereafter establishing a Gram Sabha for that area is an act legislative in character in the context of the provisions of the Act.

9.Once it is found that the power exercisable under Ss. 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 principle of natural justice or provide for hearing to the resident 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. We have come across many enactments where an opportunity of hearing has been provided for before any area is excluded from one Gram Sabha and included it in different Gram Sabhas or a local authority. However, it depends upon the legislative wisdom and the provisions of an

i.e. making of a legislative instrument or promulgation of general rule of conduct or a declaration by a notification by the Government that certain place or area shall be part of a Gram Sabha and on issue of such a declaration certain other statutory provisions come into an action forthwith which provide for certain consequences; (2) where the power to be exercised by the Government under provisions of a statute does not concern with the interest of an individual and it relates to public in general or concerns with a general direction of a general character and not directed against an individual or to a particular situation and (3) lay down future course of actions, the same is generally held to be legislative in character.

8.Viewed in the light of the statement of law stated hereinbefore, we find that the provisions of Ss. 3 and 4 of the Act which provide for declaring territorial area of a Gram Sabha and establishing a Gram Sabha for that area do not concern with the interest of an individual citizen or a particular resident of that area. Declaration contemplated under S. 3 of the Act relates to an area inhabited by the residents which is sought to be excluded or included in a Gram Sabha. The declaration under S. 3 of the Act by the Government is general in character and not directed to a particular resident of that area. Further, the declarations so made under Ss. 3 and 4 of the Act do not operate for the past transactions but for future situations. Under the aforesaid situation, when declarations by issue of notifications by the Government are made under Ss. 3 and 4 of the Act respectively, determining the territorial area of a Gram Sabha and establishing a Gram Sabha for that area, such declarations become operative at once. Once declarations are made under Ss. 3 and 4 of the Act respectively and thereafter a Gram Panchayat is constituted under S. 10 of the Act, the entire remaining provisions of the Act becomes operative. On such declarations by a notification in the Gazette, the Gram Sabha - a body corporate comes into being with a number of powers and functions conferred upon it under the Act. As soon as Gram Sabha is established and Gram Panchayat is constituted, they are entrusted with many general functions viz., construction, repair, and maintenance of community assets, agriculture including agriculture extension, animal husbandry, dairy and poultry, fisheries,

enactment. Where the Legislature has provided for giving an opportunity of hearing before excluding an area from a Gram Sabha and including it in another local authority or body, an opportunity of hearing is sine qua non and failure to give such an opportunity of hearing to the residents would render the declaration invalid. But where the Legislature in its wisdom has not chosen to provide for any opportunity of hearing or observance of principle of natural justice before issue of a declaration either under S. 3 or S. 4 of the Act, the residents of the area cannot insist for giving an opportunity of hearing before the area where they are residing is included in another Gram Sabha or local authority. In Rameshchandra Kachardas Porwal and others v. State of Maharashtra, this Court held as thus : (SCC p.741, para 17)

"In one of the Bihar cases it was further submitted that when a market yard was disestablished at one place and established at another place, it was the duty of the concerned authority to invite and hear objections. Failure to do so was a violation of the yard at one place and establishing it elsewhere was therefore, bad. It was objections before a "market area" was declared under the Act, so should objection be invited and heard before a 'market yard' was established at any particular place. The principles of natural justice demanded it. We are unable to agree. We are here not concerned with the exercise of a judicial or quasi-judicial function where the very nature of the function involves the application of the rules of natural justice, or of an administrative function affecting the rights of persons, wherefore, a duty to act fairly. We are concerned with legislative activity; we are concerned with the making of a legislative instrument, the declaration by notification of the Government that a certain place shall be a principal market yard for a market area, upon which declaration certain statutory provisions at once spring into action and certain consequences prescribed by statute follow forthwith. The making of the declaration, in the context, is certainly an act legislative in character and does not oblige the observance of the rules of natural justice."

10. In the present case, the provisions of the Act do not provide for any opportunity of hearing to the residents before any area falling under a

particular Gram Sabha is excluded and included in another Gram Sabha. In the absence of such a provision, the residents of that area which has been excluded and included in a different Gram Sabha cannot make a complaint regarding denial of opportunity of hearing before issue of declarations under Ss. 3 and 4 of the Act respectively. However, the position would be different where a house of a particular resident of an area is sought to be excluded from the existing Gram Sabha and included it in another Gram Sabha. There the action of the Government being directed against an individual, the Government is required to observe principles of natural justice. For the aforesaid reasons, we are of the view that no opportunity of hearing was required to be given before making declarations either under S. 3 or S. 4 of the Act by the Government."

17. In the case of Sundarjas Kanyalal Bhatija and others (supra), the Hon'ble Supreme Court while examining the decision of the Government of merging of municipal areas so as to form Kalyan Corporation, held and observed in para 27 and 28 as under:

"27.Reverting to the case, we find that the conclusion of the High Court as to the need to reconsider the proposal to form the Corporation has neither the attraction of logic nor the support of law. It must be noted that the function of the Government in establishing a Corporation under the Act is neither executive nor administrative Counsel for the appellants was right in his submission that it is legislative process indeed. No judicial duty is laid on the Government in discharge of the statutory duties. The only question to be examined is whether the statutory provisions have been complied with. If they are complied with, then, the Court could say no more. In the present case the Government did publish the proposal by a draft notification and also considered the representations received. It was only thereafter, a decision was taken to exclude Ulhasnagar for the time being. That decision became final when it was notified under Section 3(2). The Court cannot sit in judgment over such decision. It cannot lay down norms for the exercise of that power. It cannot substitute even "its juster will for heirs".

> 28.Equally, the rule issued by the High Court to hear the parties is untenable. The Government in the exercise of its powers under Section 3 is not subject to the, rules of natural justice any more than is legislature itself. The rules of natural justice are not applicable to legislative action plenary or subordinate. The procedural requirement of hearing is not implied in the exercise of legislative powers unless hearing was expressly prescribed. The High Court, therefore, was in error in directing the Government to 'hear the parties who are not entitled to be heard under law."

18. In light of above and for the reasons stated above, the petitions are rejected. Notice discharged.

Sd/-

(C.L.SONI, J.)

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