(6) Since the Appellate Authority has not decided the question of dismantling of the water course by respondent No. 3 and about the entitlement of the petitioner to the restoration of the water course, no other option is left to us except to remand the case to the Appellate Authority for a fresh decision.

(7) The writ petition is, therefore, allowed, the order Annexure P-2 is quashed. As a necessary consequance of the acceptance of the writ petition, the case has to be remanded back to the appellate authority for taking a fresh decision and to determine the question involved in the case in the light of the observations made by us. The parties through their counsel are directed to appear before the Appellate Authority on October 16, 1995 who would pass necessary order at an early date and preferably within three months from the date of receipt of a copy of this order. No costs. A copy of the order be given *dasti* on payment.

(8) In the meanwhile, status-quo would continue at the spot.

J.S.T.

Before Hon'ble G. S. Singhvi & T. H. B. Chalapathi, JJ.

SURESH KUMAR & ANOTHER,—*Petitioners.*

versus

STATE OF HARYANA & OTHERS,—*Respondents.*

C.W.P. No. 6226 of 1995

9th October, 1995

Haryana Municipal Act, 1973—S. 9(3)—Haryana Municipal (Amendment) Act, 1994—Constitution of India, 1950—73rd Amendment—Art. 243-R—Nomination to the office of Municipal Commissioner—Government empowered to nominate upto 3 persons to Municipal Committee from amongst persons having special knowledge and experience of municipal administration—In the absence of material showing nominees fulfil conditions of S. 9(3). the nominations are liable to be quashed.

Held that, unless a person is possessed with special knowledge or experience in the municipal administration the Government cannot nominate him by exercise of power under Section 9(3) of the Act.
(Para 11)

Further held, that the ambit and scope of the power of judicial review has not been separately defined but in the last 40 years, this phrase has acquired a definite meaning and now it is well settled principle of law that the power of judicial review can be exercised over and in respect of all legislative and executive functions of the State and the concept of absolute power vesting in the Government or any individual has been successively negatived.
(Para 12)

Further held, that the power vesting in the Government to nominate three persons under clause (i) is not absolute but is dependent on the fulfilment of certain conditions by the persons to be nominated. Therefore, if it is found that the power has been exercised by the Government for nominating a person who does not have special knowledge or experience in the municipal administration, exercise of such power would be vitiated on the ground of arbitrariness and violation of the statutory provisions.
(Para 19)

Further held, that neither of the private respondents possesses special knowledge in the field of municipal administration nor do they possess any experience in the municipal administration and on its part, the Government did not at all apply its mind while nominating them to the municipal committees. The material placed before us shows that the persons whose duty is to apprise the Chief Minister of the requirements of law as well as the qualifications and experience of the persons to be nominated has singularly failed in their duty. This has resulted in nomination of those persons who did not fulfil the basic requirement of law.
(Para 20)

Y. K. Sharma, Advocate, *for the Petitioners.*

S. S. Dinarpur, Advocate, *for the Respondents No.* 3 *to* 5.

R. N. Raina, DAG, Haryana, *for the Respondents No.* 1 & 2 *in both the petitions.*

JUDGMENT

G. *S. Singhvi, J.*

(1) Both these petitions involve a challenge to the nomination of the private respondents to the Municipal Committee, Buria, Tehsil Jagadhari, District Yamuna Nagar and the Municipal Committee, Punhana District Gurgaon, under section 9(3) of the Haryana

Municipal Act, 1973 (for short, the Act). The petitioners have prayed to quash the nomination of respondents 3 to 5 (in C.W.P. No. 6226 of 1995) and of respondent No. 3 in C.W.P. No. 3874 of 1995.

(2) C.W.P. No. 6226 of 1995 has been filed by Suresh Kumar and Nur Mohammad who are residents and voters of Municipal Committee, Buria, Tehsil Jagadhari District Yamuna Nagar. Elections to Municipal Committee, Buria were held on 28th January, 1994 and in all eleven persons were declared elected as Municipal Commissioners. Four of them are women candidates and seven are male candidates belonging to general as well as backward class categories. Respondent No. 3 had contested election from Ward No. 2 but was defeated by one Shri Asgar Ali. After about two months of his defeat in the election, respondent No. 3 came to be nominated as member of the Municipal Committee,—*vide* Government notification No. 20th February, 1995 issued in the purported exercise of powers vesting in the Government under Section 9(3) of the Act. The petitioners have challenged the nomination of respondent No. 3 as well as that of respondents 4 and 5 on the ground that neither of them possessed any special knowledge or experience in municipal administration. According to the petitioners, respondent No. 3 is only primary pass and possesses. Some knowledge of Urdu and Hindi languages. Respondents 4 and 5 are also stated to have passed only 6th standard and do not possess any special knowledge or experience in the municipal administration and, thus, none of them could have been nominated by the Government under Section 9(3) of the Act.

(3) The writ petition has been opposed by respondents No. 1 and 2 as well as respondents 3 to 5. In their reply, respondents No. 1 and 2 have pleaded that Section 9(3) of the Act has been added to the Act,—*vide* Haryana Municipal Amendment Act, 1944 and in view of this provision, the Government is empowered to nominate members to tne Municipal Committees. According to the respondents, these members do not have any right to vote in the proceedings of the Municipal Committee and, therefore, the petitioners have no *locus standi* to challenge their nomination. In paragraph 4 of the reply, it has been stated that all the three nominated members (respondents 3 to 5) had contested the municipal elections and as such, they had possessed special knowledge and experience of the municipal administration.

(4) In their reply, respondents 3 to 5 have also questioned the *locus standi* of the petitioners. They have pleaded that there is no

bar against the nomination of a person who has been defeated in the municipal election. According to the respondents, the Government has got absolute power to nominate members under Section 9(3) of the Act and there is no constitutional infirmity in the impugned notification.

(5) C.W.P. No. 3874 of 1995 has been filed by Om Parkash who is a resident of Municipal Committee, Punhana. In all, eleven persons were elected to this Municipal Committee in the elections held in December, 1994. Respondent No. 3 contested the election but she was defeated. She has also been nominated to the Municipal Committee,—*vide* notification dated 20th February, 1995. The grounds of challenge to the nomination of respondent No. 3 are identical to the grounds set out in C.W.P. No. 6226 of 1995 and reply filed by the respondents is also on the same lines. Therefore, the detailed reference to the grounds raised in this petition and the reply is not necessary.

(6) The only point on which arguments have been advanced by the counsel for the parties and which calls for determination by the Court, has two facets ; first is whether the Government has absolute power to nominate members to the Municipal Committees under Section 9(3) of the Act and the second is whether nomination of the private respondents is vitiated because neither of them possesses special knowledge or experience in the municipal administration.

(7) Learned counsel appearing for the petitioners argued that power conferred upon the Government to nominate the members to the Municipal Committees is neither absolute nor unbridled but hedged with the condition that the persons nominated to tne Municipal Committees must be having special knowledge or experience in the municipal administration and, therefore, unless it is shown that the persons nominated have special knowledge or experience in municipal administration, the action of the Government is liable to be vitiated.

(8) On the other hand, learned Deputy Advocate General, Haryana, appearing for respondents No. 1 and 2 in both the petitions and the learned counsel appearing for the private respondents, vehemently argued that the power of the Government to nominate the members under Section 9(3) of the Act is absolute one and exercise of discretion by the Government cannot be interfered with by the Court.

(9) By virtue of 73rd Amendment of the Constitution, Part IX and IX-A have been added. Part IX deals with 'Panchayats' and Part IX-A deals with 'Municipalities'. Article 243-R of the Constitution deals with the composition of Municipalities. The same reads as under :—

"243-R. Composition of Municipalities :—(1) Save as provided in Clause (2), all the seats in a Municipality shall be filled by persons chosen by direct election from the territorial constituencies in the Municipal area and for this purpose each Municipal area shall be divided into territorial constituencies to be known as wards.

(2) The Legislature of a State may, by law, provide—

(a) for the representation in a Municipality of—

(i) persons having special knowledge or experience in Municipal administration ;

(ii) the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area ;

(iii) the members of the Council of States and the members of the Legislative Council of the State registered as electors within the Municipal area ;

(iv) the Chairpersons of the Committees constituted under clause (5) of Article 243-S :

Provided that the persons referred to in paragraph (i) shall not have the right to vote in the meetings of the Municipality ;

(b) the manner of election of the Chairperson of a Municipality."

(10) In compliance with Article 243-R of the Constitution, the Act has been amended by Haryana Municipal (Amendment) Act, 1994 and one of the amendments brought about in the Act is in Section 9. Section 9 as it stood prior to 1994 Amendment and as stands after amendment of 1994 reads as under :—

"Section 9—Constitution of committee—There shall be constituted a committee for each municipality consisting of such

number of elected members not less than seven as the State Government may fix in this behalf :

Provided that the number so fixed shall be exclusive of nominated members.

(Amended)

Section 9(1) & (2) xx xx xx

(3) In addition to persons chosen by direct election from the territorial constituencies, the State Government shall, by notification in the official gazette, nominate the following categories of persons as members of a Municipality :—

(i) not more than three persons having special knowledge or experience in municipal administration ;

(ii) members of the House of the People and the Legislative Assembly of State, representing constituencies which comprise wholly or partly the municipal area ; and

(iii) members of the Council of States, registered as electors within the municipal area :

Provided that the persons referred to in clause (i) above shall not have the right to vote in the meetings of the Municipality :

Provided further that the Executive Officer in the case of a Municipal Council and the Secretary in the case of Municipal Committee, shall have the right to attend all the meetings of the municipality and to take part in discussion but shall not have the right to vote therein."

(11) From the above, it is evident that the Haryana Legislature has given effect to the constitutional provisions incorporated in Article 243-R of the Constitution of India. Section 9(3) of the Act gives a mandate to the Government to nominate upto three persons having special knowledge or experience in the municipal administration. This shows that unless a person is possessed with special knowledge or experience in the municipal administration, the Government cannot nominate him by exercise of power under Section 9(3) of the Act. The very fact that the Statute specifies the qualification of the person to be nominated under Section 9(3) of the Act negates the argument of the learned Deputy Advocate General and

the learned counsel appearing for the private respondents that the Government is possessed with an absolute power to nominate any person under Section 9(3) of the Act.

(12) Apart from the fact that Section 9(3) of the Act contains the qualification of the persons who could be nominated by the Government, we are of the considered opinion that the argument of the absolute power as has been advanced by the learned counsel for the respondents deserves to be rejected. Articles 32 and 226 of the Constitution of India confer power of judicial review on the Supreme Court and the High Courts. While the Supreme Court is empowered to exercise its power under Article 32 in respect of the fundamental rights of the citizens only, much more power vests with the High Courts to issue appropriate writs for enforcement of the fundamental rights and for other purposes. The ambit and scope of the power of judicial review have not been separately defined but in the last 40 years, this phrase has acquired a definite meaning and now it is well settled principle of law that the power of judicial review can be exercised over and in respect of all legislative and executive functions of the State and the concept of absolute power vesting in the Government or any individual has been successively negatived.

(13) The power exercisable by the President of India under Articles 72 and 356 of the Constitution of India had also come under scrutiny of the Courts.

(14) In *State of Rajasthan and others* v. *Union of India and others* (1), a Constitution Bench of the Supreme Court held that "merely because a question has political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination..... Merely because a question has a political colour, the Court cannot fold its hands in despair and declare "Judicial hands off". The Court further held ; "But one thing is certain that if the satisfaction is *mala fide* or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it. This is the narrow minimal area in which the exercise of power under Article 356, Clause (1) is subject to judicial review and apart from it, it cannot rest with the Court to challenge the satisfaction of the President that the situation contemplated in that clause exists."

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(1) 1977 (3) S.C.C. 592.

(15) The matter has been again examined by nine-Judges Bench in *S. R. Bommai and others* v. *Union of India and others* (2), and it has been unanimously held that the Court possesses the power of judicialy reviewing a proclamation issued under Article 356 of the Constitution of India. In his judgment, K. Ramaswamy, J. has observed :—

> "Judicial review is a basic feature of the Constitution. The Supreme Court/High Courts have constitutional duty and responsibility to exercise judicial review as sentinel on the *qui vive*. The judicial review is not concerned with the merit of the decision but the manner in which the decision was taken.

Ramaswamy, J. further observed :—

> "Judicial review must be distinguished from the justiciability by the Court. The two concepts are not synonymous. The power of judicial review is a constituent power and cannot be abdicated by judicial process of interpretation. However, justiciability of the decision taken by the President is one of exercise of the power by the court hedged by self-imposed judicial restraint. It is a cardinal principle of our Constitution that no one, howsoever lofty, can claim to be the sole judge of the power given under the Constitution. Its actions are within the confines of the powers given by the Constitution. The Supreme Court as final arbiter in interpreting the Constitution, declares what the law is. Higher judiciary has been assigned a delicate task to determine what powers the Constitution has conferred on each branch of the Government and whether the actions of that branch transgress such limitations, it is the duty and responsibility of the Supreme Court/High Courts to lay down the law. It is the constitutional duty to uphold the constitutional values and to enforce the constitutional limitations as the ultimate interpreter of the Constitution. The judicial review, therefore, extends to examine the constitutionality of the Proclamation issued by the President under Article 356. It is a

(2) 1994 (3) S.C.C. 1.

delicate task, though loaded with political overtones, to be exercised with circumspection and great care. In deciding finally the validity of the Proclamation, there cannot be any hard and fast rules or fixed set of rules or principles as to when the President's satisfaction is justiciable and valid.

Judicial review may be avoided on questions of purely political nature, though pure legal questions camouflaged by the political questions are always justiciable. The courts must have judicially manageable standards to decide a particular controversy. Justiciability on a subjective satisfaction conferred in the widest terms to the political co-ordinate executive branch created by the constitutional scheme itself is one of the considerations to be kept in view in exercising judicial review. There is an initial presumption that the acts have been regularly performed by the President.

Judicial review is not concerned with the merits of the decision but with the decision-making process. This is on the premises that modern democratic system has chosen that political accountability is more important than other kinds of accountability and the judiciary exercising its judicial review may be refrained to do so when it finds that the controversy is not based on judicially discoverable and manageable standards. However, if a legal question camouflaged by policial thicket has arisen, the power and the doors of constitutional court are not closed, nor can they be prohibited to enter in the political field under the garb of political thicket in particular, when the Constitution expressly has entrusted the duty to it. The doctrine of political thicket is founded on the theory of separation of powers between the executive, the legislature and the judiciary. In deciding the political question the court must keep in forefront whether the court has judicially discoverable and manageable standards to decide the particular controversy placed before it, keeping in view that the subjective satisfaction was conferred in the widest terms to a co-ordinated political department, by the Constitution itself. If it is satisfied that a judicially discoverable and manageable issue arises, it may be open to the court to issue discovery order *nisi* and consider the

case and then issue rule *nisi*. It would thus be the duty and responsibility of the Supreme Court to determine and found law as its premise and lay the law in its duty entrusted by the Constitution, as ultimate interpreter of the Constitution, though it is a delicate task and issue appropriate declaration. The Supreme Court equally declares and determines the limit, and whether the action is in transgression of such limit."

(16) *In S. G. Jaisinghani* v. *Union of India* (3), their Lordships of the Supreme Court held that there was no scope for absolute power in our constitutional system. Their lordships observed :—

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (*See* Dicey-"Law of the Constitution"-Tenth Edn., Introduction ex.). "Law has reached its finest moments", stated Douglas, J. in United States *v.* Wunderlick (1951-342 US 98 : 96 Law Ed 113), "When it has freed man from the unlimited discretion of some ruler..... Where discretion is absolute man has always suffered." It is in this sense that the rule of law may be said to be the sowrn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes (1770-98 ER 327), "means sound discretion guided by law. It must be governed by rule not humour : it must not be arbitrary, vague and fanciful."

(17) In a later decision in *E. P. Royappa* v. *State of Tamil Nadu and another* (4), Bhagwati, J. speaking for the Constitution Bench

(3) A.I.R. 1967 S.C. 1427.
(4) A.I.R. 1974 S.C. 555.

of the Supreme Court declared that every action which is arbitrary and unreasonable will be treated as contrary to Article 14 of the Constitution of India.

(18) The same view has been reiterated in several decisions and in *Kumari Shrilekha Vidyarthi etc. etc.* v. *State of U.P. and others* (5), the Supreme Court after reviewing the entire case law on the subject, held as under :—

> "It can no longer be doubted at this point of time that Art. 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (*See* Ramana Dayaram Shetty *v.* The International Airport Authority of India, A.I.R. 1979 S.C. 1628 and Kasturi Lal Lakshmi Reddy *v.* State of Jammu and Kashmir, A.I.R. 1980 S.C. 1992). In Col. A. S. Sangwan *v.* Union of India, 1980 (supp.) SCC 559 : A.I.R. 1981 S.C. 1545, while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Art. 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Art. 14 and the requirement of every State action qualifying for its validity on this touch-stone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose."

(19) Keeping in view the legal position referred to above, if we examine Section 9(3)(i) of the Act, it becomes clear that the power vesting in the Government to nominate three persons under clause (i) is not absolute but is dependent on the fulfilment of certain conditions by the persons to be nominated. Therefore, if it is found that the power has been exercised by the Government for nominating a person who does not have special knowledge or experience in

(5)A.I.R. 1991 S.C. 537.

the municipal administration, exercise of such power would be vitiated on the ground of arbitrariness and violation of the statutory provisions.

(20) The second aspect of the question which requires examination is whether the private respondents are persons who have special knowledge or have experience in municipal administration. The notification dated 20th February, 1995 does not speak of the qualifications of the private respondents. However, in order to satisfy ourselves, whether the Government considered the requirements of Section 9(3(i) of the Act and examined the qualifications of the private respondents before nominating them to the two municipal committees, we sent for the relevant record of the Government. The learned Deputy Advocate General, Haryana has produced before us a file which contains several notifications issued under Section 9(3)(i) of the Act. Two of these notifications relate to 48 municipal committees including the municipal committees of Buria, Tehsil Jagadhari, District Yamuna Nagar and Punhana District Gurgaon. In this file, there is a list containing the desire of the Chief Minister of Haryana for nomination of three member each to as many as 74 municipal committees. This list has been sent by the Deputy Principal Secretary (General) to the Chief Minister, Haryana on 17th February, 1995 and below the list there is a note "Spoken to Hon'ble M.L.G. on phone at Gurgaon and he has ordered that orders in respect of above M.C.s may be issued today except the M.C.s falling in Gurgaon, Hissar, Karnal and Bhiwani Distts. in whose case orders be issued on 24th February, 1995." The file contains some other notifications and one application filed by Shri Rajinder Kumar son of Late Shri Ram Sarup for correction of his father's name. This file does not at all contain any material showing the qualifications of respondents 3 to 5 in C.W.P. No. 6226 of 1995 and respondent No. 3 in 3874 of 1995. Apart from this file, no material has been produced before us showing the qualifications possessed by the private respondents. Even the private respondents have not stated as to what are the qualifications possessed by them. Neither of them has come forward to say that he/she remained a member of the municipal committee in the past and, therefore, got experience in the municipal administration. Neither of them says that he/she has passed any examination or training from a recognised institution in the field of municipal administration. None of them says that he/she passed a diploma in Local Self Government. None of them has come forward with a plea that he/she has specialisation/expertise in the municipal laws or handled the cases relating to the municipal laws. It is. thus,

evident that neither the private respondents possesses special knowledge in the field of municipal administration nor do they possess any experience in the municipal administration and on its part, the Government did not at all apply its mind while nominating them to the municipal committees. The material placed before us shows that the persons whose duty is to apprise the Chief Minister of the requirements of law as well as the qualifications and experience of the persons to be nominated has singularly failed in their duty. This has resulted in nomination of those persons who did not fulfil the basic requirement of law.

(21) The underlying object of Article 243-R of the Constitution and Section 9 (3) of the Act is to confer power upon the Government to nominate some persons who are specialist in the field of municipal administration. Such persons may not like to contest the election but they can still be made members of the municipal committees so that Local Government Administration is benefitted by their specialised knowledge or experience in the field of municipal administration. This object has been singularly defeated by the impugned notification.

(22) For the reasons mentioned above, we allow both the writ petitions and quash the impugned notification nominating respondents 3 to 5 in C.W.P. No. 6226 of 1995 and respondent No. 3 in C.W.P. No. 3874 of 1995 to Municipal Committee, Buria, Tehsil Jagadhari, District Yamuna Nagar, and Municipal Committee, Punhana, District Gurgaon, respectively. These respondents shall cease to be the members of the Municipal Committees, henceforth. The petitioner shall get costs of Rs. 5,000 in both the petitions.

J.S.T.

Before Hon'ble R. P. Sethi & K. S. Kumaran, JJ.

ASHWANI KUMAR & OTHERS,—*Petitioners.*

versus

PUNJABI UNIVERSITY, PATIALA & ANOTHER,—*Respondents.*

C.W.P. No. 9761 of 1995

19th October, 1995

Constitution of India, 1950—Art. 226/227—Punjabi University Calender, 1987—Ordinance 14—Disqualification—Candidate disqualified from appearing in university examination for 2 years by Committee after being afforded a hearing—Whether such punishment excessive—Matter remanded back to Committee for reconsideration.