

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 4502 OF 2003.

IN THE MATTER OF:

An application under Article 102 of the
Constitution of the People's Republic of
Bangladesh;

-AND-

IN THE MATTER OF:

Bangladesh Legal Aid and Services Trust
(BLAST).

-----Petitioner.

-VERSUS-

Bangladesh, represented by its Secretary,
Ministry of Law, Justice and Parliamentary
Affairs, Government of the People's Republic
of Bangladesh, Bangladesh Secretariat, Ramna,
Dhaka and one another.

-----Respondents.

Dr. Kamal Hossain with

Mr. Tanjibul Alam,

Ms. Amatul Karim and

Ms. Sadeka Jahan, Advocates

-----For the Petitioner.

Mr. Fida M. Kamal, Additional Attorney
General with

Mr. A.H.M. Mushfiqur Rahman, D.A.G.

-----For the Respondents.

Heard on: The 25th May, 20th, 23rd, 31st July and 1st August, 2005.

Judgment on: The 2nd August, 2005.

Present :

Mr. Justice A.B.M. Khairul Haque.

And

Mr. Justice A.T.M. Fazle Kabir.

A.B.M. Khairul Haque, J:

This Rule Nisi was issued at the instance of Bangladesh Legal Aid and Service Trust (BLAST) calling upon the Respondents to show cause as to why the Gram Sarker Ain, 2003 (Act VI of 2003), in particular Section 3 and 4(4) thereof, should not be declared void as being inconsistent with the Constitution and in particular Articles 7, 9, 11, 27, 28, 59 and 60 as being enacted without lawful authority and of no legal effect.

In this petition constitutional and consequent legality of Gram Sarker Ain, 2003 (Act VI of 2003) (the 'ACT' in short) is under challenge. It is stated in the petition that the pre-amble and other provisions show that the Act created an organization which is apparently supportive to the Union Parishad but would essentially undermine its functions which is an admitted local government body, that

the members of the said Gram Sharker, save and except the chairperson are nominated by the Upazila Nirbahi Officer, an executive, as such, it may undermine the workings not only of the Gram Sharker but also of the Union Parishad. It is further stated that since all the members of the Gram Sarker are nominated, this body will have no accountability to the villagers, when they sought to represent, that this is a body corporate created by an Act of Parliament, with definite functions but without any accountability.

This Rule was opposed on behalf of the respondent no.3, Secretary, Ministry of Land, by swearing an affidavit in opposition on 2.8.2003 although no such respondent is impleaded in this writ petition, but from the averments made in the body of the affidavit-in-opposition, it appears that in fact it was sworn on behalf of the Ministry of Local Government, Rural Development and Co-operative Division, the respondent no.2, denying all material allegations in the petition. It is stated in the affidavit in opposition that the Gram Sharker is a parallel body to the elected body of the Union Parishad, rather, it is its supporting body, created in order to assist the development work, maintenance of law and order and constituted for smooth functioning of the Union Parishad, that the Gram Sharker would only assist the Upazila Parishad, in running its administrative functions, that the Writ Petition itself is misconceived and based on misconception of the Articles 59 and 60 of the Constitution, that it is not inconsistent to the provisions of the Constitution, rather, it is enacted by the Parliament as a supportive body to the Union Parishad for ensuring the participation of the grass-root level people in the villages in its development activities. It is further stated that although Gram Sarker, is not a directly elected body but it is formed with the elected persons in order to assist the Union Parishad as its supporting organization but would not interfere or supercede the powers of the Union Parishad. It is further stated that the Gram Sharker is not an extension of the Union

Parishad and there is no apprehension of creating two classes of local governments in the country or its destruction or in no way impedes the goal of creating a vibrant system of grass-root democracy. It is further stated that the elected woman member of the Union Parishad would be the adviser to the Gram Sharker and that it is in addition to her duties as a member of the Union Parishad which would enhance her power and is not inconsistent with the provisions of Articles 27 and 28 of the Constitution.

Dr. Kamal Hossain, Advocate, appears with Mr. Tanjibul Alam, Ms. Amatul Karim and Ms. Sadeka Jahan, Advocates, on behalf of the petitioner while Mr. Fida M. Kamal Additional Attorney General, appears with Mr. A.H.M. Mushfiqur Rahman, Deputy Attorney General, on behalf of the respondents.

Dr. Kamal Hossain, the learned Advocate appearing on behalf of the petitioner took us through the various provisions of Gram Sharker Ain and submitted that although the Act was made for the purpose of creating a Gram Sharker, a village government but as a matter of fact these are Ward Sharkers and although it was created as a separate body as stated in both in the preamble and also in sub-section (3) of Section 3 but it would rather impede the functions and workings of the Union Parishad since all 13 of its members are nominated by the Upazila Nirbahi Officer of Circle Officer or a person authorized by them. He submitted that this body instead helping the functions of the Union Parishad would act as a clog on its normal workings and in the long run shall destroy the representative character of the Union Parishad which is a recognized and established local government body for nearly a hundred years. He further submitted that by keeping the provision for nominating as many as 13 members out of the total 15, the representative character of this body has been totally destroyed in violation of the idea enshrined in the Constitution, not on under Articles 7,9,11,59 and 60 of the Constitution but also in the Act itself as spelt out in the pre-amble. He further submitted that this legislation was created for

collateral purpose and since this was created for a collateral purpose this legislation is an instance of colourable exercise of legislative power on the part of the Parliament and consequently this law is ultra vires to the Constitution and unconstitutional. In support of his argument the learned Advocate relied on the decision in the case of Qudrati Elahi Panir etc. Vs. Government of Bangladesh, represented by the Secretary, Ministry of Local Government, Rural Development and Co-operative 44 DLR (AD) (1992) 319.

On the other hand, Mr. Fida M. Kamal, the learned Additional Attorney General submitted that under Article 65 of the Constitution, the Parliament of Bangladesh is competent to make any law for the welfare of the country of course, however, within the ambit of the Constitution, he hastened to add. He submitted that the whole purpose of the Gram Sharker Act is in the interest of 68 thousand villages of Bangladesh so that the interest of the people living in those numerous villages can be protected as well as enhanced. He further submitted that this Act is an on going process and in commensurate with the constitutional obligations of the Government for the decentralization of powers and functions leading to the development activities in the country down to the Gram Sharkers rooted to the villages itself and in this process there is no intention to obviate the functions of the Union Parishad or any other local government body, rather, the Gram Sharker is created to support the activities of the said local Government body. As such, this body has been created in the interest of the country as a whole. He further submitted that the question of conforming to the requirement of Articles 59 and 60 of the of the Constitution does not arise in the case of Gram Sharker Ain since Gram Sharker is neither an administrative unit not in a manner, of representative character and it is definitely not a local government body, as such, the question of conforming this body within the ambit of Articles 59 and 60 does not arise.

The learned Additional Attorney General maintained that this is an auxiliary body headed by the Gram Sarker Prodhan who is an elected member of the relevant Union Prishad, joined by an elected woman member and together they will work along with the representatives of the grass root people of the country, as such, he submitted that instead of having another administrative tier as envisaged in Articles 59 and 60, they would act as supportive body, to the Union Parishad, that the whole purpose of the Act is that the Union Parishad may not be detached itself from the grass root level but would have continuous rapport with the People in the grass-root of the country. Under such circumstances, he submitted that this law was made by the Parliament of the country, the competent legislative body with its legislative competence and in the overall interest of the country, as such, this Gram Sharker Ain is constitutionally valid and intra-vires to the Constitution. In support of his contention the learned Additional Attorney General also relied on the decision of the above noted Qudrati Elahi Panir's case.

We have perused the petition, affidavit-in-opposition and also heard the learned Advocates of both the sides. It appears that earlier there was another law for the village government, namely Asthanio Sharker (Gram Sharker) Ain, 1997 (vbxq miKvi (MÖvg miKvi) AvBb, 1997) (Act No. XXI of 1997). The said Act was repealed by Section 27 of this Act. This Gram Sharker Ain, 2003, was published in Bangladesh Gazette on 27.3.2003.

During hearing of the writ petition, both the parties relied on the case of Kudrat-E-Elahi Panir V. Government of Bangladesh 44 DLR (AD) (1992) 319, in support of their respective contentions, as such, we would consider this decision at same details.

Under the local Government (Upazila Parishad and Upazila Administration Re-organization) Ordinance, 1982 (Ordinance No. LIX of 1982) as amended, the administration at the Upazila level was re-organized and Upazila Parishad was constituted. Repeal of this Ordinance by the Ordinance No. XXX VII of 1991 which was subsequently made into an Act, namely, Act II of 1991, was challenged in this case, as ultra vires to Articles 59 and 60 and other provisions of the Constitution.

Shahabuddin Ahmed, C.J, traced the history of the Local Government institutions in this sub-continent in some details before embarking on the issues at hand. In dealing with the question as to the requirement that local Government can only be made in respect of an administrative unit, his Lordship held at para-28:

“28. Article 152(1), already quoted, has given a particular meaning of “administrative unit”. It means “a district or other area designated by law for the purpose of Article 59” Local Government in every administrative unit, therefore, means a local government either in a district or in any other area specifically designated by law. Learned Attorney General’s contention is that for the purpose of establishing a local Government in a district, the district should also be designated as an administrative unit. Mr. Ishtiaq Ahmed differs from the view and argues that as a district has been specifically included in the definition of “administrative unit”, no separate designation is necessary for setting up a local government there. He further contends that as Upazilas, Unions and municipalities are within the territorial ‘limit’ of a district, no separate designations of these areas also is necessary for establishing local governments there. He has tried to argue that if any local government is to be established in an area

involving more than one district, then only a designation of that area as an administrative unit will be necessary.

Elaborating the principle in respect of an 'administrative unit' his Lordship held at para-29:

“29. For true construction of Article 152(1) defining an administrative unit the primary rule of construction will be sufficient in this case. It is the words used in this Article which will give its meaning. The words in this Article are simple, clear and unambiguous, and on reading these words together a definite meaning emerges. For the purpose of finding out the legislative intention behind this provision no further effort need be made. In this Article the words “District or any other area” are to be read conjunctively, and if it is done.

a “district” is found to be an administrative unit, and for the purpose of Article 59, that is to say, for establishing a local Government there, no designation by law is necessary. But as regards “any other area” it will be an “administrative unit”. Only if it is specifically designated as such by law”.

The requirements that a local government institution must conform to the provisions of Articles, 59, 60 or 152(1) of the Constitution, his Lordship held at para-31;

“31. Now that these provisions of the Constitution are back all local bodies shall have to fulfill these constitutional requirements”.

In considering the contention of the learned Attorney General, as in this case, that without fulfilling the said requirements of the Constitution, the Legislature may also establish local governments, his Lordship held at para-32;

“32..... If so, there will be two classes of local governments in the country; one under the ordinary law and the other under the constitution. This will lead to a situation not contemplated by the Constitution.

has made specific provisions as to local Government, only these provisions shall have to be followed and complied with”.

A.T.M. Afzal, J. (as his Lordship then was) held that contention of the learned Attorney General as mischievous’, observed as follows at para-52;

“52. The contention of the learned Attorney General that the Legislature may without designating an area as an administrative unit for the purpose of Article 59 in exercise of its plenary legislative power (Article 65) establish local Government is mischievous as it would amount to defying the mandate of Articles 59 and 60 which cannot be permitted. The argument, therefore, must be rejected”.

On the said contention of the learned Attorney General, Mustafa Kamal, J. (as his Lordship then was) also agreed with the learned Chief Justice, in this respect, as observed at para-69.

In holding that the Upazila Parishad is not a local government institution, Shahabuddin Ahmed, C.J. held at para-40;

“40.....while dealing with the question as to whether the Upazila is an administrative unit we have found that it is not, and as such, an essential constitutional requirement for the Upazila Parishad to be a local government is not fulfilled. We have also found that the Upazila Parishad is not also wholly an elected body. This Parishad is therefore not a local government under the Constitution. Abolition of such a body violates no provision of the Constitution so as to attract the relief under Article 102 of the Constitution”.

A.T.M. Afzal J, in accepting the contention of Syed Ishtiaq Ahmed, observed at Para-51.

“51. As to his submission that by the aforesaid provision in Section 2(2) (kha), there was a covert attempt to continue the Upazilla Parishad through the Government servants in violation of the mandate in Article 59 that local Government should be entrusted to elected bodies, even though the repealing Ordinance / Act professed merely to abolish the Upazila Parishad and thus the same was colorable legislation. I think there is not such to add after what has been stated in the judgments of the learned Chief Justice and Mustafa Kamal J, Mr. Ahmed is right in his contention that the provisions of Articles 59 and 60 are limitations on the plenary legislative power of the Parliament in the field of Local Government”.

In concurring with the learned Chief Justice and Mustafa Kamal, J, his Lordships held at para-55;

“55..... I agree, that the Upazila Parishad not being a local Government within the meaning of Article 59, the abolition of such a body violates no provision of the Constitution. I would add that even if it were a local Government in terms of Article 59 even then the abolition thereof in the circumstances and as averred by the Government cannot be said to be violative of any provision of the Constitution. Upazila Parishad may not have been local Government strictly in terms of Article 59 but then it cannot be denied that it has all the attributes of a local Government

Because, his Lordship further held at para-57:

“57..... There is no constitutional limitation in Article 59 that the legislature cannot abolish a local government of a particular tier if it is considered necessary

Mustafa Kamal J, in considering the concept and characteristics of a local government observed at para 67;

“67..... Local Government, as a concept and as an institution, was already known to have possessed certain common characteristics, namely, local elections, procedure for public accountability, independent and substantial sources of income, clear areas for independent action and certainty of powers and duties and the conditions under which they would be exercised”

On the requirements of law for designating an administrative unit his Lordship held at para- 71;

“71. Fourthly, the first step that has to be taken to bring a local Government law in conformity with Article 59 is that parliament will have to designate by law administrative units of the Republic where it will either continue the existing Local government institutions or create new ones. The term “administrative unit” is a term of the Constitution having a definite meaning in Article 152 (1). A designation by law for the purpose of Article 59 is necessary in order to create as “administrative unit”. But after designating an area as an “administrative unit”. Parliament is not obliged to set up a local government therein. The Constitution does not mandatory require Parliament to do so. It does not say “There shall be a local Government in every administrative unit of the Republic”, Article 59 only says, “Local Government in every administrative unit of the Republic” i.e. if and when a local government is set up in an administrative unit. Article 59 does not mean conversely that local government in areas which are not designated as administrative units may be entrusted to bodies composed of persons to be decided by Parliament, elected or nominated. That will be colorable legislation”.

(The underlines are mine).

The purpose of the Gram Sharker Ain, 2003, as it appears from its preamble is to establish a village government of representative character, with the purpose to support the workings of the Union Parishad.

Section 2 gives the definition of various organs of the Gram Sharker. Section 3 forms the Gram Sharker as a corporate body.

Sub-section (3) of Section 3 reads as follows:

ÒMÖvg miKvi GKwU mswewaex ms'v nB#e Ges Bnvi 'vqx avivevwnKZv I GKwU mvavib mxj#gvni _vwK#e Ges GB AvB#bi weavbvejx mv#c#¶, Bnvi 'vei I A'vei Dfq cÖKvi m#úwË AR©b Kwievi, AwaKv#i ivwLevi Ges n—vš—i Kwievi ¶gZv _vwK#e Ges Bnvi bv#g gvgjv `v#qi Kwi#Z cvwi#e ev Bnvi wei"#× I gvgjv `v#qi Kiv hvB#eÓ|

Sub-Section (4) of Section 3 narrates that this Gram Sharker has been established as a supportive body to the Union Parishad.

Sub-Section (4) of Section 3 reads as follows:

Ò (4) GB AvB#bi Aaxb MÖvg miKvi msweav#bi Aby#"Q` 152 (1) G msÁvwqZ cÖkvmwbK GKvsk wnmv#e Mb" nB#ebv, Z#e Bnv BDwbqb cwil#`i mnvqK msMVb nB#eÓ|

The constituents of the Gram Sharker has been narrated in section 4. Sub-Section (1) of Section 4 envisages that a Gram Sharker shall be composed of one Gram Sharker Prodhan, one adviser and 13 members in each of the wards in the union, Sub-section (2) states that the member of the Union Parishad of the concerned ward shall be the head of the Gram Sharker and the member from the reserved seat of the Union Parishad shall be its adviser. Besides, there shall be 13 members in the Gram Sharker who be nominated by the concerned authority as envisaged in sub-section 5 of Section 4.

The said authority would nominate the following 13 members as stated in Sub-Section (4) of Section 4 reads as follows:

Sub-Section (4) of Section 4 reads as follows :

- (4) wbgœ ewY©Z e`w³MY m`m` wnmv‡e g‡bvbxZ nB‡e-
- (K) GKRb Mb`gvb` e`w³,
- (L)** GKRb cÖwk¶bcÖvß MÖvg cÖwZi¶v evwnbxi gwnjv m`m`mn wZbRb gwnjv;
- (M)** GKRb cÖwk¶bcÖvß MÖvg cÖwZi¶v evwnbxi cyi`l m`m`;
- (N)** GKRb K...IK;
- (O)** `yBRb fygxnxb K...IK;
- (P)** GKRb mgevq mwgwZi m`m`;
- (Q)** GKRb gyw³‡hv×v;
- (R)** GKRb wk¶K;
- (S)** GKRb e`emvqx; Ges
- (T)** GKRb wPwKrmK ev †ckv Rxwe:

It is spelt out in sub-section (5) of Section 4 that the members would be nominated under the supervision and control of the concerned authority and in case of any dispute regarding such nominations, the decision of the concerned authority shall be final.

Sub-Section (5) of Section 4 reads as follows:

Ò(5) Iqv‡W©i †fvUvi ZwvjKvq bvg Ab©fy³ Av‡Q Ggb †fvUvi‡`i‡K Aby`b GK`kgvs‡ki Dcw`wZ‡Z mvaviY mfvq mg‡SvZvi wfwË‡Z, cwiPvjbvKvix KZ©„c‡¶i ZË;veav‡b I mfvcwZ‡Z; m`m`MY g‡bvbxZ nB‡eb:

Zþe kZ© _vþK þh, Dnv gþbvbqþbi þ¶þÎ þKvb gnZþØZv
þ`Lv w`þj cwIPvjbvKvix KZ©„cþ¶¶i wmÜvš—B Pzovš—
ewjqv Mb” nBþeÓ|

It may be noted that sub-section (4) of Section 3 quoted above mentioned that this Gram Sharker shall not be a part of an administrative organ of the Government and it is also stated therein that it would, rather be a supportive body to the Union Parishad.

The learned Additional Attorney General on drawing our attention to the various provisions of this Act, especially those as mentioned above, submitted that this Act has been enacted by the Parliament, in its legislative competency, in order to perform the functions as mentioned in Section 16 of the Act, in Commensurate with that of the various functions of the Union Parishad which is an elected local government body, in order to support its various functions. The objections raised in this regard by Dr. Kamal Hossain are that merely in order to support the aforesaid elected body, this non-representative body of persons who admittedly would be nominated by the bureaucrats, put a clog on the functions of the elected representatives of the aforesaid local government body, thereby would frustrate not only the functions of the Union Parishad but also its elected representatives, enshrined so loftily in Articles 7,9,11,59 and 60 of the of the Constitution and would tend to make a mockery of those democratic principles accorded to aforesaid admitted local government body.

In the back drop of this legal position let us now examine the legality of the present Act as appears firstly from the pre-amble of the Act as stated above which envisages that this Gram Sharker will be a supportive organization but at the same

time it envisages that the said Gram Sharker will be a representative body (cÖwZwbwaZ;ig~jK)

The preamble of the Act reads as follows:

ÒþhþnZz Z...Yg~j ch©`vþq MÖvgxb RbMbþK Dbœqb
Kg©KvþÛ m³Zv Kiv I Zuvnvþ`i mvwe©K Dbœhb
wbwðZ Kivi DþÏþk` BDwbqb cwilþ`i mnvqK msMVb
wnmvþe cÖwZwbwaÿZ;ig~jK MÖvg miKvi MVb Kwiqv
MÖvgxb RbMþbi mvwe©K Dbœqb bwðZ Kiv mgxPxb I
cÖþqvRbxq;Ó

(The underlinings are mine)

It appears from the pre-amble that the character of the Gram Sharker would be of representative in nature (cÖwZwbwaZ;ig~jK). Its purpose would be to involve the villagers in the development works in the grass-root level and also to be a supportive organization to the Union Parishad.

In this connection, it should be noted that the pre-amble gives the scope of the statute in short. Although not an enacting part it gives an idea about the background purport, objects and subject- matter of the Act in question.

In explaining the principle, Lord Morton, in the case of A.G.V. H.R.H Prince Ernest Augustus of Hanover (1957) 1 All ER 49 (HL), held at page 60D.

“In fact, if the preamble were clear one way and the enacting part were equally clear the other way, there cannot be no doubt that the latter must prevail”.

In the same case, Lord Somervell propounded the principle thus at page-62
DE:

“Preambles differ in their scope and, consequently, in the weight, in any, which they may have on one side or the other of a dispute. There can be no rule. If, in an Act, the pre-amble is a general and brief statement of the main purpose, it may well be of little, if any value. The Act may, as has been said, go beyond or, in some respects, fall short of, the purpose so briefly stated. Most Acts contain exceptions to their main purpose, on the meaning of which such a pre-amble would presumably throw no light. On the other hand, some general and most local Acts have their limits set out in some detail. I will not hazard an example, but there may well be cases in which a section read with the preamble, may have a meaning different from that which it would have if there were no preamble. A court will, of course, always bear in mind that a preamble is not an enacting provision, but I think it must have such weight as it can support in all contests as to construction”.

His Lordship earlier held at 62 B:

“If, however, having read the Act as a whole, including the preamble, the enacting words clearly negative the construction which it is sought to support by the pre-amble that is an end of it”.

(The underlinings are mine).

The same principle was also followed by the Court of Appeal in the case of Oliver Ashworth (Holdings) Ltd. Vs. Ballard (Kent) Ltd. (1999) 2 All ER 791 (805, 806).

Since the Gram Sharker is highly projected as of representative character even though its members are not elected and also as supportive body to the Union Parishad, let us first trace the history of local government in villages and unions in this part of the world.

The village in some form or other, is in existence from time immemorial, so also the village head-men, council of elders, panchayets, in the villages in various names in different places in various times. They are respected by the villagers and their decisions on various problems which crop up from time to time, are being obeyed still today, without any legal sanction as such.

Under the British Rule, the District Magistrates used to appoint village panchayets for each village. It was empowered to appoint village choukidars and also to levy tax on the holding of the villages under the provisions of various laws, in order to maintain the choukidars and for construction of small roads and culverts and also for its maintenance.

Under the provisions of Bengal Local Self- Government Act, 1885 (Act III of 1885), three tiers of local governments were established, District Boards for the districts excluding the Municipal areas, Local Boards, consisted of five to nine elected members with the provisions for appointment of other members by the Divisional Commissioner. The members elected a Chairman from amongst themselves.

The Bengal Village Self Government Act, 1919 (Act V of 1919) renamed the Union Committee as the Union Board. It provided that two- third members would be elected by the rate-payers and the rest one-third would be nominated by the Government.

In 1947, the dominion of Pakistan came into being and in 1959, during its first Martial Law period the name Union Board was again changed, this time as Union council by the Basic Democracies Order, 1959 (PO 18 of 1959).

After liberation of Bangladesh, the name of the Union Council [sic] was again changed, firstly, as Union Panchayet and thereafter as the Union Parishad. Bangladesh Local Government (Union Parishad and Paurashava) Order, 1973 (PO 22 of 1973), provided for election of the Union Parishads. By the Local Government (Union Parishads and Paurashavas) (Amendment) Act 1973 (Act IX of 1973), Union Parishads were declared administrative units, by adding article 2C to the parent Order, for the purpose of Article 59 of the Constitution. The P.O. 22 of 1973, was, however, repealed by the Local Government Ordinance 1976 (Ordinance No. XC of 1976). This Ordinance provided for constitution of Union Parishads with Chairman, nine elected members and two women members to be nominated by the Sub-Divisional Officer. This Ordinance, so far the Union Parishad is concerned, was repealed by the Local Government (Union Parishads) Ordinance, 1983 (Ordinance No. LI of 1983). Section 3A was added to this Ordinance by the Local Government (Union Parishads) (Second Amendment) Act, 1992 (Act No. XLV of 1992) which provided that every union shall be an administrative unit for the purpose of Article 59 of the Constitution.

Palli Parishad Ain, 1980 (Act No. XXXIII of 1989) was enacted for ensuring the overall improvement of the village people. Section 4 of the Act formed a village Parishad (cj-x cwil') in each village consisting of one village headman (cj-x cÖavb) and 8 eight members including two women member: all of whom were to be elected by the majority of the voters. Its fund was to be audited by the Upazilla Nirbahi Officer or any officer nominated by him. This Act was repealed by the Asthania Sharker (Gram Parishad) Ain, 1997 ('vbxq miKvi MÖvg cwil') (Act XXI of 1997).

This Act was also made for ensuring overall improvement of the village people on formation of a Village Parishad of a representative character. Section 3 ensures that the Village Parishad would be an administrative unit within the meaning of Article 59 of the Constitution. This would be a corporate body and consisted of one Chairman, 9 (nine) male members and 3(three) women members. The member of the Union Parishad elected from the concerned ward would be the chairman while the rest of the members, would be elected from the voters of the ward in a general meeting on the supervision of the concerned authority empowered by the Government in this regard. The funds required for the functioning of the Gram Parishad was to be borne by the Union Parishad.

This Act XXI of 1997 was repealed by the Gram Sharker Ain, 2003. This Act was also made in order to involve the village people with development workds [sic] in its grass-root level and to establish a representative body, namely, Gram Sharker, as it appears from the pre-amble and as a supportive body to the Union Parishad, with a view to ensure the overall improvement of the village people.

Let us first scrutinize as to whether the Gram Sharker has got the representative character as stated in the pre-amble of the Act.

On examination of Section 4 of the Act it appears that this Gram Sharker shall consist of one Gram Prodhan, one Adviser and 13 members in each ward. The Gram Sharker Prodhan shall be the member of the Union Parishad for the concerned ward and the Adviser will be the member of the Union Parishad in its reserved seat for the concerned Gram Sharker within her constituency. The 13 other members will be nominated by the concerned authority. Since admittedly these 13 members are not elected but nominated by the concerned authority the Gram Sharker lacks the representative character. The learned Additional Attorney General, however,

strenuously argued that to attain the representative character, the members do not required to be elected all the time. He however did not elaborate the circumstances where the nominate members would also be of representative character. But when we look to this body professed to be of representative character and supportive or otherwise, to the Union Parishad, we have to read the word “cÖwZwbwaZ g~jK” appearing in the pre-amble of the Act and also its such ‘representative character in the light of the democratic spirit enshrined in the Constitution. The concept of elected members even for the local bodies, heralded by the Bengal Self Government Act, 1885, instead of being followed, was ignored in the 21st century. No plausible reason was given for such a shift from the elected to the nominated members. Being nominated, obviously they have got no accountability to the village people, whom they sought to represent but to the bureaucrats who nominate them. As such, this idea of nomination of 13 of its members is anything but democratic. It does not satisfy the requirement of democratic ideas, rather destroys the principles as glorified in Articles 7,9,11 and 59 of the Constitution. This Act is, no doubt demonstratively undemocratic, although enacted by the parliament.

But the earlier Act XXXIII of 1989 and the Act XXI of 1997 provided for plection of all the members of the Village Parishads but the present Act under sub-section (4) of Section 4 provided for nomination of all the members of the Gram Sharker. Besides, while this Act by sub-section (4) of Section 3 specifically took this body out of the ambit of Article 59 of the Constitution as an administrative unit but the earlier Act XXI of 1997, by section 3 specifically declared village parishads as administrative units as envisaged under Article 59. The Act No. XXXIII of 1989 was, however, silent in this respect but such silence was not unjustified since at the relevant period, Articles 59 and 60 were not in operation but were again revived by the Constitution (Twelfth Amendment) Act 1991 (Act XXVIII of 1991).

It may be noted that William Ewart Gladstone as the Prime Minister of Great Britain, envisioned development of Local Government institutions in India. On his encouragement Lord Rippon, the Governor General of India, placed his famous Resolution of 1882 before the Parliament at West Minister and the beginning of the local government institutions in India heralded its beginning although slowly and humbly.

Although the preamble envisages the Gram Sharker to be a representative body but all 13 of its members as mentioned in sub-section 4 of Section 4, are to be nominated by the concerned authority as stipulated in sub-section 5. The formation of gram sharker with all nominated members are clearly stipulated in sub-sections 4 and 5 without any ambiguity. This constitution of the Gram Sharker clearly negates the idea of its representative character and comes into conflict with the preamble.

It may be noted that preamble is not a part of the Act and in case of conflict with any provision of the Act, the provisions of the Act would prevail as transpired from the decisions quoted above. Reliance can also be made in this respect to what Mudholkar, J. observed in the case of Burakar Coal Co. Ltd. V. Union of India AIR 1961 SC 954 at para-5. This legal position was similarly explained by Dua J. in the case of Tribunal Parkash Nayyar V. The Union of India 1969 (3) SCC 99 at para-6 and duly approved by Pattanaik, J, in the case of Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. AIR 2001 SC 724 at para-13.

Although the learned Additional Attorney General, Submitted that even nomination of members of the Gram Sharker may be of representative character but we are of the view that although the pre-amble of the Act envisages the formation of the Gram Sharker with a representative character but the clear words of sub-section 4

and 5 of Section 4 show otherwise. The constitution of the Gram Sharker by the nominated members is anything but of representative character and negates the scheme of total democracy as glorified in our constitution and held by Mustafa Kamal, J. in Kudrat-E-Elahi Panir's case.

One of the purposes for creation of the Gram Sharker, is the development works in the villages at its grass-root. The function of the Gram Sharker are described in section 16 of the Act.

The other purpose, as contended by the learned Additional Attorney General, is its supportive role to the Union Parishad. This is also stated in the preamble as well as in sub-section 4 to Section 3 of the Act. As a matter of fact, the learned Additional Attorney General gave much importance to this supportive role of the Gram Sharker.

Section 3 creates the Gram Sharker, Sub-Section 1 states that there shall a Gram Sharker in each of the Wards. Sub-section 3 envisages that the Gram Sharker shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property, both movable and immovable and can sue and be sued in its own name. In short, it will be a corporate body with legal and metaphysical existence and distinguished from other body of associations. Sub-section 4 envisages that it will not be a part of the administrative unit as defined in Article 152(1) of the Constitution but it shall be a supportive body to the Union Parishad.

Section 3 reads as follows :

Ò3| MÖvg miKvi cÖwZôv -(1) GB AvB#bi weavb
Abymv#I cÖ#Z`K Iqv#W© GKwU Kwiqv MÖvg miKvi
_vwK#e|

(2) mswk-ó BDwbqþbi bvþgi ci IqvW© b^α^þii myPþK
MÖvg miKvþii bvg nBþe|

(3) MÖvg miKvi GKwU mswewae× ms[˘]v nBþe Ges Bnvi
˘vqx avivevwnKZv I GKwU mvavib mxj †gvni _vwKþe
Ges GB AvBþbi weavbvejx mvþcþ¶, Bnvi ˘—vei I A[˘]vei
Dfq cÖKvi m^αúwË AR©b Kwievi AwaKvþi ivwLevi Ges
˘vbvš—i Kwievi ¶gZv _vwKþe Ges Bnvi bvþg Bnv gvgjv
˘vþqi KwiþZ cvwiþe ev Bnvi wei“þ× I gvgjv ˘vþqi Kiv
hvBþe| GB AvBþbi Aaxb MÖvg miKvi msweavþbi
Abyþ”Q` 152(1) G msÁvwqZ cÖkvmwbK GKvsk wnmvþe
Mb˘ nBþe bv; Zþe Bnv BDwbqb cwilþi mnvqK msMVb
nBþe|Ó

One of the main arguments raised on behalf of the petitioner that although the Gram Sharker has a legal existence as a corporate body but it does not conform such a body as envisaged in Articles 59 and 50 of the Constitution. On the other hand, the consistent case of the learned Additional Attorney General is that the Gram Sharker although is a corporate body and has got all the incidents of such a body but since it is not an administrative unit, it need not conform to the provisions of Articles 59 and 60.

It is very true that a Gram Sharker as envisaged in the Act, is not an administrative unit, as specifically spelt out in sub-section 4 of Section 3 that is even worse, because it has got all the powers and functions of an administrative unit but without its obligations. It has got all the attributes of a local government body but its such status is curtailed, as if purposely by enacting sub-section 4 to section 3, to take it out of its existing status under the provisions of Act XXI of 1997, as an

administrative unit and also to make it a non-representative body by making provisions for nominations of all its members, thereby, as if purposely, robed its character as a local government body as it used to be earlier both under the Palli Parishad Ain, 1989 and also under Asthania Sharker (Gram Parishad) Ain, 1997.

On scrutiny of the various provisions of the Gram Sharker Ain, 2003, its following incidents, among others, emerge:

- i) Gram Sharker is a body corporate, distinguished from other kinds of associations.
- ii) All its members are nominated by the concerned authority.
- iii) It is a supportive body to the Union Parishad.
- iv) The member of the Union Parishad for the concerned Ward shall be ward shall be its chairman while the member of the reserved seat shall be its adviser.
- v) It is not an administrative unit.
- vi) Although it would receive its funds from the Union Parishad another sources but there is no provision for auditing its accounts.
- vii) Gram Sharker Ain, 2003, repealed the Asthania (Gram Parishad) Ain, 1997 (Act No. XXI of 1997), and replaced a local government institution by an institution, namely, Gram Sharker, constituted of nominated members who are not accountable to village People whom they sought to represent.
- viii) The members of the Gram Sharker owe their existence to the wishes of the bureaucracy.

It is strenuously argued on behalf of the Government that the Parliament in exercise of its legislative power under the Constitution, enacted the Gram Sharker Ain, 2003, as such its legality cannot be questioned.

This is not so always and in all respects. There is no doubt that the parliament is supreme in its legislative field. But like two other organs of the Republic, it is also a creation of the Constitution.

Article 65(1) of the Constitution reads as follows :

“65. (1) There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the Provisions of this Constitution shall be vested the legislative powers of the Republic” (the underlings are mine).

As such, the contention of the learned Additional Attorney General in respect of the supremacy of the legislative powers of the Parliament is subject to the provisions of this Constitution and certainly not unqualified.

In highlighting the requirements for the creation of a local government institution, Mustafa Kamal, J. held as follows in Panirs case.

“69. I cannot conceive of a local government existing in terms of Articles 59 and 60 and another outside of it. That will make a mockery of Articles 59 and 60 and will be in direct conflict with Article 7(1) of the Constitution namely, “ All powers in the Republic belong to the People, and their exercise on behalf of the People shall be

effected only under and by the authority of the Constitution”. If Parliament has to pass a local Government legislation. It has to conform to Articles 59 and 60, read with Article 152(1) with Articles 59 and 60 in the Constitution local Government legislation became very much a subject matter of legislation within the terms of the Constitution. Parliament is not free to legislate on local government ignoring Articles 59 and 60”.

On the question of scheme of democratic principles in the country, both at the centre and also in the grass root level, Mustafa Kamal, J. held as follows at para-72.

“72. Fifthly, from a combined reading of the Preamble, Articles 7, 9, 11, 59 and 60 of the Constitution it is clear that the makers of the Constitution devised a scheme of total democracy, both at the centre and at the level of local government. The preamble declares democracy to be a fundamental principle of the Constitution. Article 7(1) says that all powers in the Republic belong to the people and Article 11 proclaims that “the Republic shall be a democracy” Various autocratic regimes at various times vigorously persisted with the idea of an unrepresentative national government at the Centre but waxed eloquent on grass-root level democracy solely for the purpose of building up a power base. The makers of the Constitution wanted

no such half way house between autocracy and democracy. The choice was clearly for a fully democratic constitutional pattern, both at the national level and at the local level. And there lies the second step. Local Government “shall be entrusted to bodies, composed of persons elected in accordance with law” Special representation may be given to” peasants, workers and women”, as enjoined by Article 9, but not at the cost of robbing the local government institutions of their elected, hence representative character”.

(The underlinings are mine).

It appears that both the Palli Parishad created by the Act XXXIII of 1989 and the Gram Parishad created by the Act XXI of 1997, were constituted of elected persons and were local government institutions.

We specifically asked the learned Additional Attorney General as to why the representative character of the earlier Gram Parishad was destroyed and replaced by a body of nominated persons, making the Gram Sharker an autocracy, he was without any answer, save and except that even without the elected members, the Gram Sharker can be of a representative character. This explanation is illogical and we are unable to accept it.

Another contention of the learned Additional Attorney General in this respect, is that perhaps in enacting this Act, the Parliament was more concerned about the developments of the villages in the grass-root level, as such, consciously sacrificed the concept of election of the members of the Gram Sharker to that of the nomination

by the bureaucrats. He perhaps wanted to impress upon us that autocracy accelerates development and the democracy hinders it, as if sacrifice of democracy is the price to be paid for development of the country, as if democracy and development cannot be achieved together, as if in order to achieve one, the other has to be, of necessity, sacrificed.

This is not so and totally wrong. Rather, it is the other way around. In autocracy development is imposed upon the people and it is short lived and perhaps a few is benefited. With democracy, the development comes from the people and as a normal consequence, it has a long and lasting effect on the community. There is no reason why democracy and development cannot go hand in hand as fellow travellers.

This view would get support if we look at the world map. The countries with established democratic institutions are more prosperous to those with decades of authoritarian autocratic regimes. As such, the contention of the learned Additional Attorney General, is misconceived and fallacious.

It is also pointed out to the learned Additional Attorney General that how an institution like gram sharker which is neither an administrative unit nor a representative body, as such, not a local government, can be a supportive body to the Union Parishad which is decidedly a local government, He sought to explain that the Union Parishad, in performing its functions in the grass-root level, would get cooperation from the Gram Sharker.

But it should be remembered that the Union Parishad is in existence, in one form or other, for more than hundred years and since 1919 it has a representative character. The present Union Parishad is established by the Local Government (Union Parishads) Ordinance, 1983. This Ordinance is a self contained code and by Section 4 it was established as a body corporate with the own legal existence. By

Section 3A, it is an administrative unit and decidedly a local Government within the ambit of Article 59.

Since it is an independent institution, established under a law and comes within the description of a local Government as envisaged in the Constitution, it does not need any, support from any other body, not speak of a body like Gram Sharker which is dependent for its funds from the Union Parishad. It should be remembered that the Union Parishad, being a local government itself, can neither abdicate its functions nor becomes dependent on any other body. If it requires further support, it can get it from its own Ordinance, even if necessary by its amendment but need not look for support from other institutions which would tantamount to its dependence and curtailment of powers and functions. This is not envisaged or permissible under the Ordinance.

Rather, as a result of this kind of dichotomy of powers and functions, the purpose of the Union Parishad as a local government would suffer. It cannot be so. The intention of the Parliament in establishing the Gram Sharker, cannot be to make the Union Parishad, a local government, dependent on it in any way.

The next question that begs for consideration is as to whether the parliament can, in exercise of its legislative powers, replace a local government with a body which is not.

In United Kingdom, the Parliament is omnipotent. It is supreme in its legislative role. Still, there is an in-built limitation in the system. Leslie Stephens explains the position thus:

“.....It is limited, so to speak, both from within and from without: from within, because the legislature is the product of a certain social conditions, and determined by whatever determines

the society; and from without, because the power of imposing laws is dependent upon the instinct of subordination, which is itself limited. If a legislature decided that all blue eyed babies should be murdered, the preservation of blue eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it". (The underlinings are mine). (Quoted from Hilaire Barnett: Constitutional And Administrative Law, Fourth Edition, 2002 Page 196).

Sir John Donaldson MR, dwelt on the question in the case of R.V.H.M. Treasury ex-parte Smedley (1985) 1 All ER 589. In this case the payment from the consolidated Fund, without express parliamentary approval was challenged Sir John Donaldson MR., held:

“.....Before considering Mr. Smedleys” objections I think that I should say a word about the respective roles of parliament and the courts. Al though the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature which are immaterial for present purposes. It therefore behoves the courts to be over sensitive to the paramount need to refrain from trespassing on the province of Parliament or, so

far as this can be avoided, even appearing to do so. Although it is not a matter for me, I would hope and expect that parliament would be similarly sensitive to the need to refrain from trespassing on the province of the courts It is the function of Parliament to legislate and legislation is necessarily in written form. It is the function of the courts to construe and interpret that legislation. Putting it in popular language, It is for parliament to make the laws and for the courts to tell the nation, including members of both Houses of Parliament what those laws mean At the present moment, there is no order in council to which Mr. Smedley can object as being unauthorized.

..... In many, and possibly most, circumstances the proper course would undoubtedly be for the courts to invite the applicant to renew his application if and when an order was made, but in some circumstances an expression of view on question of law which would arise for decision if Parliament were to approve a draft may be of service not only to the parties, but also the each House of Parliament itself. This course was adopted in *R v Electricity Comrs, P London Electricity Joint Committee Co. (1920) Ltd. (1924) I KB 171 (1923) All ER Rep 150*. In that case an inquiry was in

progress, the cost of which would have been wholly wasted if, thereafter, the minister and Parliament had approved the scheme only to be told at that late stage that the scheme was ultra vires”.

(The underlinings are mine).

In our country, like the United States of America and India, the Constitution is supreme. All three organs of the Republic, owe its existence to the Constitution. The legislative powers of the Republic is vested in the Parliament but it is subject to the Constitution.

No doubt the Parliament enacts the laws but it is for the courts to tell the nation, including the members of the Parliament, what those laws mean. The role of the Courts, in the language of H.W.R Wade is:

“The Courts may presume the Parliament, when it grants powers, intends them to be exercised in a right and proper way. Since parliament is very unlikely to make provision to the country, this allows considerable scope for the courts to devise a set of canons of fair administrative procedure. Suitable to the needs of the time.” (The underlinings are mine). (Quoted from H.W.R. Wade: Administrative Law’ Fifth Edition, 1982.)

In this case, the Gram Sharkers under the provisions of Gram Sharker Ain, 2005, are created as corporate bodies but not as local government bodies. The

Parliament in its wisdom, can do so. It can create statutory corporations also but it cannot create a body which is professed to represent a section of the people but without their representation and without making it accountable to the said section.

The Gram Sharker is sought to represent the People of the village but all its members are nominated by the concerned authority. As such, they are neither the representative of the village people nor they are accountable to them. They are accountable to the bureaucracy. As such, in the name of the Gram Sharker, an autocracy has been created. This is against the spirit of the Constitution, so lucidly explained by Mustafa Kamal, J, in Panir's case at para-72, that there cannot be any half way house between the democracy and autocracy.

The Parliament may, in its wisdom, even abolish a local Government but cannot replace it with a body like Gram Sherker which is not a local Government, but dependent on bureaucracy. This is what we call a colourable legislation in the forceful language of Mustafa Kamal, J, in panir's case at para-71.

It may be remembered that in Panir's case, the dissolution of Upazilla Parishad was justified on the ground that it was not an administrative unit. But in the perspective of village, under the Act XXI of 1997, the Village Parishad was already an administrative unit and its members were elected from and amongst the village people, bearing a representative character, as such, was visibly and decidedly a local government. But the village parishad was abolished and was replaced by nothing better than the Gram Sharker which is demonstratively an autocracy in all respect, created by the Gram Sharker Ain, 2003, in violation of the democratic spirit enshrined in Articles, 7, 9, 11, 59 and 60 of the Constitution, as such, the said Ain, is not law and we are constrained to declare so.

Under the circumstances, the Gram Sharker Ain, 2003 (Act VI of 2003) is declared unconstitutional and void.

In the result, the Rule is made absolute but without an order as to costs.

A.B.M. Khairul Haque.

A.T.M. Fazle Kabir, J:

I agree.

A.T.M. Fazle Kabir.