
(2003) 09 GAU CK 0046

In the Gauhati High Court

Case No : Writ Petition (C) No's. 7667, 8204 and 8205 of 2001

All Tiwa Students Union and Another

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 29-09-2003

Acts Referred:

Assam Panchayat Act, 1994 — Section 1(2), 18, 43, 45(3)

Constitution of India, 1950 — Article 243B, 243M, 244, 244(2)

Citation : (2003) 3 GLT 458

Hon'ble Judges : D.Bisws, J

Bench : Single Bench

Advocate : D.K. Mishra, M. Sarania, K.C. Boro, R.P. Sarmah, B. Chakraborty and U. Das, for the Appellant; A.K. Phukan, A.G., for the Respondent

Judgement

D. Biswas, J.—By this judgment, writ petitions W.P.(C) No. 8204 of 2001, 8205 of 2001 and 7667 of 2001 are being disposed of as they raise identical questions of law.

2. At the very outset, it would be apposite to have a look at the prayers made by the writ Petitioners. In writ Petition (C) No. 8204 of 2001, the Petitioners All Tiwa Students Union represented by its President have prayed for a Writ of Mandamus declaring that the Assam Panchayat Act, 1994 is not applicable in the Lalung (Tiwa) Autonomous Council areas and for further declaration that constitution of Gaon Panchayat, Anchalik Panchayat and Zila Parishad in the Lalung (Tiwa) Autonomous Council areas is illegal and also for quashing the impugned notification dated 19.11.2001 in so far it relates to the holding of Panchayat Election in the Lalung (Tiwa) Autonomous Council area. In Writ Petition (C) No. 8205 of 2001 similar directions have been sought including a direction for holding the Bodoland Autonomous Council election. In Writ Petition (C) No. 7667 of 2001, the Rabha Hasong Suraksha Parishad and others have sought for declaration that the election progress to the Panchayat in areas within the Rabha Hasong Autonomous Council is illegal and, consequent thereupon, for quashing

the impugned order dated 4.9.2001.

3. It may be mentioned here that the Court while issuing Rule in W.P.(C) No. 8204 of 2001 declined to interfere with the poll progress initiated in the Lalung (Tiwa) Autonomous Council Area. Similarly in W.P.(C) No. 8205 of 2001, Rule was issued on 10.12.2001. No. order was been passed on interim prayer. In W.P.(C) No. 7667 of 2001, only notice of motion was issued on 28.11.2001.

4. I have heard Mr. D.K. Mishra, learned senior Counsel assisted by Mr. M. Sarania and Mr. K.C. Boro, learned Counsel for the Petitioners and Mr. A.K. Phukan, learned Advocate General for the State of Assam assisted by Shri H. Munir, the learned State Counsel.

Brief facts in W.P.(C) No. 8204 of 2001.

5. The Petitioner No. 1. All Tiwa Students Union is an Association of students of Tiwa Tribes representing the Lalung Community. This Association launched a movement demanding Autonomous Council for the Tiwa people, Eventually, the Government of Assam decided to constitute a Lalung Autonomous Council with certain administrative powers to help develop the area inhabited by them. An accord was signed on 13.4.1995 between the Lalung District Demand Committee and the Government of Assam. Clause 5 of the Memorandum of Settlement clearly provided that the provisions of the Assam Panchayat Act, 1994 and the Assam Municipal Act, 1994 shall not apply in the areas included in the Lalung Village Council. In pursuance thereof, the Lalung Autonomous Council Act, 1995 was enacted. For political interests and other considerations, no initiative was taken by the State to hold the election of the Council despite demarcation of the council area by the notification dated 6.4.1996. On the other hand, the Government issued the impugned notification dated 19.11.2001 notifying the date of panchayat election and held the election in the Council area contrary to the agreement in Sub-clause (a) of Clause 5 of the Memorandum of Settlement. The Lalung (Tiwa) Autonomous Council Act, 1995 was enacted with the sole object of divesting powers to the people for self governance, identical with the objects of the Assam Panchayat Act, 1994. By constituting Panchayats, the State Government have brought into existence two local self authority exercising the same set of powers. Hence, the writ petition has been filed challenging the legality and validity of the Panchayat election.

Brief facts in W.P.(C) No. 8205 of 2001:

6. A memorandum of settlement dated 20.2.1993 was reached between the Bodo Students Union and Bodo People Action Committee, and the Government of Assam for setting up a district administrative authority within the State of Assam. In terms of the accord, the Bodoland Autonomous Council Act, 1993, hereinafter referred to as the BAC Act, 1993, was enacted. It received the assent of the President on 13 th May, 1993. The Act provided for constitution of Bodoland Autonomous Council with maximum autonomy within the framework of the Constitution comprising of contiguous geographical area between the river

Sankosh and Mazbat/the river Pasnoi for social, economic, educational, ethnic and cultural advancement of the Bodo people residing thereon. The Council has been assigned with as many as 38 subjects for self-governance akin to the powers and functions of the Panchayat. The sole purpose for creation of the Council is to preserve the cultural and ethnic identity of the Bodo people beside economic development. Despite that, the Government of Assam, contrary to the provisions of the BAC Act, 1993, decided to hold the panchayat election in the Bodoland areas by the notification dated 19th November, 2001. According to the writ Petitioners, in any given area two local self governing authority cannot function because of overlapping of the powers and the functions to be discharged. The Government's decision to hold the Panchayat Election is in derogation of the aspirations of the Bodo people reflected in the BAC Act, 1993. Hence, this petition has been filed for declaration that the Assam Panchayat Act, 1994 is not applicable to the Bodoland Autonomous Council Area and for quashing of the notification dated 19.11.2001 with direction to the Respondent State not to hold the panchayat election in the Council area.

Brief facts in W.P.(C) No. 7667 of 2001.

7. This petition has been filed by Rabha Hasong Suraksha Parishad, an organisation fighting for the cause of the Rabha Community residing in the State of Assam. In this petition, they have challenged the order dated 4.9.2001 issued by the Joint Secretary to the Govt. of Assam in the Panchayat and Rural Development Department rejecting the claim of the Petitioner Association for declaration that the provisions of the Assam Panchayat Act, 1994 and the Assam Municipal Act, 1994 are not applicable in the areas included in the village Council. The Petitioners case is that the memorandum of settlement signed on 10.03.1995 by the representatives of the Rabha Hasong Demand Committee and the Government of Assam was aimed to provide maximum autonomy within the framework of the Constitution for social, economic, educational, ethnic and cultural advancement of the Rabha people residing in the State of Assam. It was provided in Clause-5 of the Memorandum of Settlement that the provisions of the Assam Panchayat Act, 1994 and the Assam Municipal Act, 1994 shall not apply to the areas of the villages included in the village Councils. Consequent thereupon, the Rabha Hasong Autonomous Council Act, 1994, hereinafter referred to as the RHAC Act, 1995, was enacted. It provides for a General Council consisting of 30 members and an Executive Council consisting of 7 members. An interim Council was initially constituted by the Government on 20.07.1995 and it was re-constituted thereafter on 4.7.1997 which is still in office. But the village councils, as provided in the Act, have not been constituted. The Government also notified 306 revenue villages demarcating the boundary of the Council out of 862 revenue villages claimed by the Association. Demand for inclusion of more villages in the council area is still pending with the Government. Though the RHAC Act, 1995 provides for election to the village Council, the Government without taking initiative for holding election notified the dates for panchayat election contrary to the provisions of the Memorandum of Settlement and the

law. By the impugned order dated 4.9.2001, the State held that as such, there is no bar in holding the panchayat election in the areas included within the RHAC area. Aggrieved thereby, the Association has filed this petition.

8. The State has not filed any affidavit in any of the three writ petitions. However, Mr. Munir, learned State Counsel submitted a written argument on behalf of the Respondents only in W.P.(C) No. 8204 of 2001.

9. According to the State Respondent, the entire process culminating in the Memorandum of Settlement dated 13.4.1995 and the subsequent enactment of the Lalung (Tiwa) Autonomous Council Act, 1995 appears to be apolitical question and the Court may not interfere with the duly elected panchayat bodies. The maintainability of the writ petition has also been challenged on the ground that the Panchayat functionaries who have been duly elected but not arrayed as parties are required to be heard before adjudication of the disputes raised in the writ petition. Besides, it is submitted that the Act of 1995 do not incorporate any provision excluding any area within the jurisdiction of the Lalung Village Council from the purview of the Assam Panchayat Act, 1994. It is also submitted that the provisions of the Constitution in Part-IX particularly of Article 243M requiring amendment for excluding the Village Council area from the operation of the Assam Panchayat Act, 1994. Unless such legislative exercise is completed, the panchayat election already held cannot be set aside.

10. Let us first deal with the provisions of the constitution incorporated in Part - IX. Articles 243B, 243M and 244 read as follows:

243. B Constitution of Panchayats: (1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part.

(2) Notwithstanding anything in Clause (1), panchayats at the intermediate level may not be constituted in a state having a population not exceeding twenty lakhs.

243M. Part not to apply in certain areas-

(1) Nothing in this Part shall apply to the Scheduled Areas referred to in Clause (1), and the tribal areas referred to in Clause (2) of Article 244.

(2) Nothing in this Part shall apply to-

(a) the States of Nagaland, Meghalaya and Mizoram,

(b) the Hill areas in the State of Manipur for which District Councils exist under any law for the time being in force

(3) Nothing in this Part-

(a) relating to panchayats at the district level shall apply to the Hill areas of the District of Darjeeling in the State of West Bengal for which Darjeeling Gorkha Hill Council exists under any law for the time being in force.

(b) shall be construed to affect the functions and powers of the Daijeeling Gorkha Hill Council constituted under such law

(3A).

(4).

244. Administration of Scheduled Areas and Tribal Areas. (1) The provision of the Fifth Schedule shall apply to the administration and control of the Scheduled areas and Scheduled Tribes in any State other than the States of Assam Meghalaya, Tripura and Mizoram

2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam, Meghalaya, Tripura and Mizoram.

11. The above provisions of the constitution clearly provide for constitution of the Panchayats at the village, intermediate and district level in accordance with the provisions of Part - IX. Article 243M excludes the scheduled Areas and the Tribal Areas as referred to in Article 244 from the operation of this part only. Article 244(2) provides that the provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam, Meghalaya, Tripura and Mizoram. The Sixth Schedule to the Constitution provides for administration of the Autonomous Districts and Autonomous Regions in the tribal areas in the four North Eastern States including the State of Assam. The areas where the members of the Lalung Community reside are not within any declared autonomous district and autonomous region. Therefore, the provisions of Part - IX of the Constitution will apply in the Lalung dominated areas unless the provisions in Article 243M is suitably amended. This otherwise means that the provisions of the Assam Panchayat Act 1994 will be applicable in the Lalung Village Council area so long Article 243M remains unamended. Article 243B makes it mandatory for a State to constitute Panchayats at the village, intermediate, district level in every State having a population exceeding twenty lakhs. Unless excluded specifically by appropriate amendment of Article 243M, the state is under an obligation to hold panchayat election even in the areas inhabited by the members of the Lalung Community.

12. Mr. D.K. Mishra, learned senior Counsel relied upon the provisions of Sub-section (2) of Section 1 of the Assam Panchayat Act, 1994 in order to show that the provisions of this Act will not apply to the areas declared as village Council areas under the provisions of the Lalung (Tiwa) Autonomous Council Act, 1995. Mr. Mishra laid emphasis on the words "by any other Act" occurring in Sub-section (2) of Section - 1.

To appreciate this contention, the provisions in Sub-section (2) of Section - 1 are quoted below-

(2) It shall extend to the whole of Assam in the rural areas except the Autonomous Districts under the Sixth Schedule of the Constitution of India and shall exclude any area which has been or thereafter may be included in a

Municipality or a Town Committee or a Cantonment constituted under the Assam Municipal Act, 1956 and the Cantonment Act, 1924 respectively or by any other Act.

13. A close scrutiny of the aforesaid provision would show that any area which has been or subsequently included in a Municipality or a Town Committee or a Cantonment constituted under the Assam Municipal Act, 1956 and the Cantonment Act, 1924 respectively or by any other Act shall be excluded from the purview of the operation of the Assam Panchayat Act, 1994. In the considered opinion of this Court, the words "by any other Act" are relatable only to the areas which have been included in a Municipality or a Town Committee or a Cantonment. By no stretch of imagination, the words, "by any other Act" can be interpreted to have specified any area which has not been included in a Municipality or Town committee or a cantonment, Therefore, the areas included in the village Councils under the provisions of the Lalung (Tiwa) Autonomous Council Act 1995 not being included in any Municipality or a Town committee or a Cantonment cannot be taken out of the purview of the operation of the Assam Panchayat Act, 1994. To be precise, Assam Municipal Act, 1994 would continue to apply even in village Council areas unless included in any Municipality or a Town Committee or a Cantonment.

14. The above discussion shows that the provisions of the Assam Municipal Act, 1994 are applicable in areas falling within the jurisdiction of the Lalung village Council. On this background, let us examine the provisions in the Lalung (Tiwa) Autonomous Council Act, 1995.

Admittedly, there is no provision in this Act to the effect that the provisions of the Assam, Panchayat Act, 1994 will not be applicable in the areas included in the village councils. The non-obstante clauses available in Sections 18, 43 and 45(3) and a few other sections relate to the vesting of executive powers with the council and other ancillary matters. These sections cannot salvage the situation in so far as the question relating to the application of the Assam Panchayat Act, 1994 is concerned. There are overlapping in the distribution of subjects to the village Councils and the Panchayat. The non-obstante clauses in the sections by which subjects have been distributed cannot be linked with the question of enforceability of the Assam Panchayat Act of 1994. The mandate of the Constitution in Article 243B has to be followed by the State in letter and spirit till Article 243M is suitably amended with corresponding amendments in both the Assam Panchayat Act, 1994 and the Lalung (Tiwa) Autonomous Council Act, 1995.

15. Mr. Mishra, learned senior Counsel relied upon the judgment in Life Insurance Corporation of India Vs. D.J. Bahadur and Others, Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, and Allahabad Bank Vs. Canara Bank and Another, Mr. Mishra argued that the Assam Panchayat Act, 1994 shall not be applicable because of the implied repeal of this Act by the Lalung (Tiwa) Autonomous Council Act, 1995. But an implied

repeal is the last judicial refuse. In the instant case, the intention of the legislature in enacting the Lalung (Tiwa) Autonomous Council Act, 1995 was to vest executive powers with the village Councils on different subjects. What we find is that there has been overlapping in the distribution of subjects between the village Councils and the Panchayat. The problems arising out of the conflicting provisions in the distribution of different subjects can be sorted out by appropriate amendments. The intention to oust the operation of the Assam Panchayat Act is not discernible from the provisions of the Lalung (Tiwa) Autonomous Council Act, 1995. It would not be plausible to say that the overlapping in the provisions of the two Acts in the distribution of powers lead to the conclusion that the provisions of the earlier Act i.e. Assam Panchayat Act, 1994 have been repealed in its application to the village Council areas by the subsequent Act i.e. Lalung (Tiwa) Autonomous Council Act 1995. The legislature did not incorporate the agreement in Clause-5 of the Memorandum of settlement while enacting the Lalung (Tiwa) Autonomous Council Act, 1995 giving it overriding effect over the Assam Panchayat Act, 1994. That apart, the Assam Panchayat Act is a general statute flown from the constitutional mandate in Part-IX. The Assam Panchayat Act, 1994 was enacted prior to the Lalung (Tiwa) Autonomous Council Act, 1995 to streamline the pattern of the Panchayat administration in the State. Therefore, the ratios in D.J. Bahadur (Supra), Maharashtra Tubes (supra) and in Allahabad Bank (supra) can not be applied in the instant case.

16. There is no dispute at the bar that Clause-5 in the Memorandum of Settlement provided for exclusion of the application of the Assam Panchayat Act, 1994. But this agreement unless given legislative sanction is of no significance. This Court is required to interpret and enforce the relevant laws as in force. The Agreement for exclusion of the provisions of the Assam Panchayat Act, 1994 in the absence of legislative sanction cannot be enforced.

17. The writ petition was filed to stall the process of Panchayat elections. No stay order was granted by the Court. The election was duly held and the panchayat authorities have been constituted following the mandate of the electorate. The elected representatives of the Panchayats have not been arrayed as Respondents in the petition. Situated thus, any direction quashing the Panchayat election would lead to political turmoil and uncertainty. Hence, it would be best in the greater interest of the State to refer the matter to the State for apolitical solution of the problems arising out primarily from non-implementation of Clause-5 of the Memorandum of Settlement.

18. W.P.(C) No. 8205 of 2001 have been filed for stalling the Panchayat election in the Bodoland Autonomous Council Area as well as for direction for holding Council election in accordance with the provisions of the BAC Act, 1993. It may be mentioned here that a Division Bench of this Court in a Public interest Litigation No. 45 of 2001 disposed of on 17.1.2001 directed the Government of Assam to hold the election to the Bodoland Autonomous Council within a period

of six months. This direction has not been complied with by the State till date. The Council to be constituted under the Act has been assigned as many as 38 subjects for self-governance for the purpose of preservation and development of cultural and ethnic identity of the Bodo people including economic development. By now the Act of 1993 has been repealed in pursuance of the memorandum of settlement arrived in 2003 and, therefore, the memorandum of settlement and the legal provisions made in pursuance thereof will govern the field. The State has also not held the Panchayat election in the Bodoland areas though a notification was initially issued. Since a fresh settlement has been reached, the petition has virtually become infructuous. Steps will now have to be initiated in terms of the fresh settlement and the law made in pursuance thereof.

19. Petitioners case in W.P.(C) No. 7667 of 2001 have already been narrated in brief in para 7 of this judgment. The RHAC Act, 1995 was enacted with a view to constitute Autonomous Council and village Councils in accordance with the provisions of the Act for the purpose of self-governance. Section 18 of the Act shows that as many as 34 items have been assigned to the Autonomous Council for the purpose of self-governance. These items apparently overlap with the various items allocated to the panchayat authorities. There is no-obstante clause in this Act with regard to the application of the provisions of the Assam Panchayat Act, 1994. For similar reasons as in case of Lalung (Tiwa) Autonomous Council Act, 1995, it cannot be said that the provisions of Assam Panchayat Act, 1994 do not apply to the areas under the Autonomous Council constituted/to be constituted under the RHAC Act, 1995.

Despite agreement in Clause-5 of the Memorandum of settlement, the State Government did not include any provision in this Act to keep the areas within the jurisdiction of the Autonomous Council and village Councils out of the purview of the Assam Panchayat Act, 1994. Therefore, the Panchayat election in the RHAC area cannot be set aside unless the Acts are suitably amended. The matter has to be addressed by the State Government with reference to the Memorandum of Settlement reached between the Rabha Hasong Demand Committee and the State of Assam.

20. The writ petitions are disposed of with the following directions:

(i) Writ Petition (C) No. 8204 of 2001 filed by the All Tiwa Students Union and Writ Petition (C) No. 7667 of 2001 filed by the Rabha Hasong Suraksha Parishad are disposed of with the direction to the State Government to implement the Memorandum of Settlement reached between the Government of Assam and those two organizations.

(ii) Writ Petition (C) No. 8205 of 2001 is disposed of with the direction that the State Government shall initiate steps for implementation of the Memorandum of Settlement, 2003 in letter and spirit fulfilling the aspirations of the Bodo people.

No costs.