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**(2012) 07 GAU CK 0071**  
**In the Gauhati High Court**  
**Case No : Writ Petition (C) No. 2066 of 2012**

Baneswar Das

APPELLANT

Vs

State of Assam and Others

RESPONDENT

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**Date of Decision :** 18-07-2012

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2013) 1 GLT 257

**Hon'ble Judges :** A.K. Goswami, J

**Bench :** Single Bench

**Advocate :** S.K. Goswami, for the Appellant; D. Saikia, Addl. AG and Ms. M. Hazarika, Sr. Advocate, for the Respondent

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## Judgement

A.K. Goswami, J.—This is an application under Article 226 of the Constitution of India seeking a direction to the respondent Nos. 1 and 2 not to treat the respondent No. 3 as Chairman of Nalbari Municipal Board, for short, the Board, as he was removed from the post of Chairman, Nalbari Municipal Board in a special meeting held on 21.04.2012. A further prayer has been made for a direction to the respondent No. 2 to facilitate election of a new Chairman of the Board. The case of the writ petitioner, in short, is that the Board is constituted of 12 members of Commissioners and 2 Ex-Officio members. The petitioner is an elected Commissioner of the Board and was selected as the Vice-Chairman of the Board. The respondent No. 3 was selected as the Chairman of the Board. On 27.03.2012, 4 Commissioners issued a notice of no confidence motion against the respondent No. 3 and requested him to convene a special meeting for discussion of a motion of no confidence in accordance with the provision of Section 43 of the Assam Municipal Act, 1956, for short, the Act. No steps were taken on the said notice by the respondent No. 3 and on the contrary, on 07.04.2012, the respondent No. 3 issued a notice for a meeting to be held on 12.04.2012 to resolve certain matters. On 12.04.2012, 4 Commissioners issued a notice to the respondent No. 3 expressing protest and their intention to boycott the meeting and questioning the summoning of the meeting on 12.04.2012

instead of holding a special meeting for considering a no confidence motion.

2. On 12.04.2012, after the notice was given by the 4 Commissioners, the respondent No. 3 wrote a letter contending that the allegations leveled must be made specific and in absence thereof, the notice dated 27.03.2012, is illegal. The requisitionists convened a special meeting on 21.04.2012 by a notice dated 17.04.2012 in terms of Section 43 (3) of the Act to discuss the no confidence motion against the respondent No. 3. Accordingly, a meeting was held on 21.04.2012 which was attended by 6 Commissioners and 1 Ex-Officio member on the agenda "Removal of Chairman u/s 28 (2) of the Assam Municipal Act, 1956."

In the said meeting, three resolutions were passed unanimously-

(i) removing the respondent No. 3 from the post of Chairman and entrusting the petitioner with the responsibilities to run the office of the Chairman of the Board till a new Chairman was elected

(ii) to allow the petitioner to discharge the functions of President till the election of the new Chairman and

(iii) authorizing Vice-Chairman to call a Board meeting to complete the election to fill up the vacancy of Chairman as per Section 41 of the Act.

It is stated that all the Ward Commissioners and the Ex-Officio member present had cast their votes in favour of removal of the respondent No. 3 and as such the respondent No. 3 was duly removed from the post of Chairman and the resolutions passed in the meeting dated 21.04.2012 was communicated to the Deputy Commissioner, Nalbari, respondent No. 2, vide letter dated 23.04.2012 with a prayer to take necessary steps. It is stated that despite the removal of the respondent No. 3 from the post of Chairman of the Board, the respondent No. 3 continues to discharge his duties as a Chairman of the Board and the respondent No. 2 had also failed to take proper steps to remove the respondent No. 3 from the post of Chairman of the Board.

3. On 26.04.2012, the petitioner submitted a representation before the respondent No. 1 with a prayer for a direction to the respondent No. 2 not to treat the respondent No. 3 as a Chairman of the Board. As the respondent authorities did not respond by taking any steps towards removing the respondent No. 3 from the post of Chairman, the petitioner has approached this Court.

4. An additional affidavit has been filed by the writ petitioner stating that the notice dated 27.03.2012 was received by the respondent No. 3 on the very same day. It is also stated in the said affidavit that for the special meeting to be held on 21.04.2012, a notice was issued on 17.04.2012 signed by 4 Commissioners and the copy of the said notice was also given to all the Commissioners including the Chairman and also to the Ex-Officio members. It is also asserted in the said affidavit that the Commissioner of Ward No. 7 had received the notice on 17.04.2012, but she did not acknowledge receipt of notice. Notice for Commissioner of Ward No. 4 and Ward No. 2 were received by their daughters

and over and above, the notice dated 17.04.2012 was also published in the notice board of the Board. It is also stated that after removal of the Chairman, a new Chairman is to be elected within 45 days of the occurrence of the vacancy in terms of Section 41 (2) of the Act. However, the process is not yet started and the authorities are allowing the respondent No. 3 to discharge his functions as the Chairman of the Board. It is also stated that though on 10.05.2012, the respondent No. 3 was directed not to make any financial transaction by the Additional Deputy Commissioner, Nalbari till the disposal of the writ petition, the said order also came to be withdrawn on the very next day.

5. An affidavit has been filed by the respondent No. 3 raising preliminary objection with regard to maintainability of the writ petition in absence of non-joinder of necessary party in the form of Nalbari Municipal Board. It is also stated that no legal right of the petitioner has been violated and, therefore, the writ petitioner cannot maintain this application to invoke extra jurisdiction of this Court. The service of notice dated 17.04.2012 upon him is also disputed and it is stated that the said notice was served selectively on a couple of Commissioners. It is stated that 3 Commissioners had filed a complaint before the Deputy Commissioner, Nalbari informing him that they had not received notice for the meeting dated 21.04.2012. It is pleaded that resolutions passed in the said meeting cannot be construed to be the resolutions of the Board. It has been denied that provision of the Act was not violated while allegedly removing him from the post of Chairman of the Board.

6. The respondent Nos. 1 and 2 had also filed an affidavit through the Additional Deputy Commissioner, Nalbari. In the said affidavit, it is stated that the notice dated 17.04.2012 was received on 19.04.2012 and they had no knowledge as to whether in the meeting dated 21.04.2012, voting by way of ballot or otherwise took place. It is also mentioned that 3 Commissioners, i.e. Ward Commissioners of Ward Nos. 4, 7 and 11 had lodged complaint regarding non receipt of notice. It is further stated that after examining the resolution adopted in the meeting dated 21.04.2012, a letter was written to the respondent No. 1 on 25.04.2012 seeking instructions in the matter. Dismissal of the writ petition for non-joinder of the Board, being a necessary party has also been pleaded.

7. Though no such an affidavit has been filed, an affidavit-in-reply is filed to the affidavit-in-opposition of "respondent Nos. 2 and 3". In the said affidavit, it has been asserted that there is no question of impleading Nalbari Municipal Board as a party respondent as no relief was claimed against the Board. It is stated that there is no requirement of disclosing the allegations in the notice for holding for no confidence motion. Service of notice to all the Commissioners as well as Ex-Officio members is asserted once again. It is further pleaded that notice regarding special meeting to be held on 21.04.2012 was also published in the local Newspaper. It is also contended that the respondent No. 2 had been acting at the behest of local M.L.A., who is an Ex-Officio member of the Board. It is also stated that use of secret ballot paper to move a no confidence motion is not

required under the law and all the members present in the meeting were unanimously in favour of the motion.

8. I have heard Mr. S.K. Goswami, learned counsel for the petitioner who submits that there is no challenge to the removal of the respondent No. 3 by the resolution adopted in the special meeting of the Board held on 21.04.2012 and once the respondent No. 3 has been removed, continuance of respondent No. 3 as the Chairman of the Board is illegal and the respondent No. 2, prompted by the local M.L.A., is facilitating his continuance as Chairman of the Board. Therefore, he submits that a direction ought to be issued by this Court not to allow the respondent No. 3 to perform duties and functions of the Chairman of the Board with a further direction to the respondent No. 2 to elect a new Chairman as per provision of law. He has submitted that the plea taken in the affidavit-in-opposition by the respondents that the writ petition is liable to be dismissed for not making the Board a party, is wholly misconceived.

9. Mr. D. Saikia, learned Additional Advocate General, Assam, submits that Section 307 of the Act does not permit service of notice on any female member of the family and, therefore, admittedly, notice on 2 Commissioners were not served in accordance with law as notices were served on female family members of the Commissioners of Ward Nos. 4 and 11. Drawing attention to the notice issued to the M.L.A., which is enclosed by the writ petitioner, the learned counsel submits that there is no acknowledgement in the said notice unlike some notices which are also annexed in the said affidavit. The registration slip annexed with the notice shows that notice was only sent on 18.04.2012, that too, from Nalbari Municipal Board. It is contended by him that the very agenda of the meeting suggests that the meeting was not for discussion of no confidence motion but to remove the Chairman and, therefore, the actions taken and resolutions adopted in the meeting dated 21.04.2012 are null and void. It is also contended by him that translated copy of the notice of the said meeting held on 21.04.2012 does not correctly reflect the proceedings. It is also submitted by him that before any steps could be taken on the letters dated 23.04.2012, 25.04.2012 and 26.04.2012 by the authorities, writ petition was filed on 30.04.2012. It is submitted by him that in terms of Section 296-A, the State Government, Deputy Commissioner, the Director of Municipal Administration are required to see that the proceedings of the Municipal Board are in conformity with law and the State Government may, by order in writing, annul any proceeding which it considers not to be in conformity with law. The learned counsel relies upon *Ashem Bira Singh Vs. State of Manipur and Others*, to substantiate his arguments that the Board is a necessary party to the proceedings and the Board having not been made a party, the writ petition is liable to be dismissed on that score alone.

10. Ms. M. Hazarika, learned senior counsel for the respondent No. 3 submits that not only on the ground of not arraying the Board, which is a necessary party, but also for not impleading the local M.L.A. against whom allegations have been made, the instant application is liable to be dismissed. With reference to

the letter dated 25.04.2012 of the respondent No. 2 to the Commissioner and Secretary to the Government of Assam, Urban Area Development Department, the learned senior counsel submits that requisite steps were not taken for voting as required u/s 28 of the Assam Municipality Act, 1956. She had also pointed out that from the aforesaid, it appears that requisitionists did not notify all Ward Commissioners. The learned senior counsel submits that in terms of Section 47 (2) of the Act, a copy of the minutes of the proceeding of all meetings of the Board are required to be forwarded forthwith by the Board to the Deputy Commissioner and another copy to the State Government and in the instant case, minutes of the meeting was accordingly forwarded by the petitioner for necessary steps. The learned senior counsel places reliance in the case of Sumitra Ghosh Vs. Suprakash Sarkar and Others, to contend that the Deputy Commissioner has a statutory duty to see that special meeting in terms of the requisition made is held in accordance with law.

11. Section 10 of the Act provides that for each Municipality, a body of Commissioners designated as the Municipal Board having authority over the Municipality shall be established and such Board shall be a body incorporated by the name of the Municipal Board for the Municipality in question having perpetual succession and common seal, and by that name shall sue and be sued. Section 3 (5) defines the Commissioner to mean a person for the time being appointed or elected to conduct the affairs of any Municipality under the Act. Section 33 (2) provides that at the first meeting of the Municipal Board after the general election called at the instance of the Deputy Commissioner or the Sub-Divisional Officer, as the case may be, the Commissioners shall elect one member amongst the elected Commissioners to be the Chairman subject to approval of the State Government. Section 33 (3) provides that the Commissioners at the meeting convened for election of the Chairman u/s 33 (2) or at a subsequent meeting, elect one of the elected Commissioners to be the Vice-Chairman. Section 28 (2) provides that an elected Chairman or Vice-Chairman may be removed from his office by a resolution of the Board in favour of which not less than half of the whole Board of Commissioners shall have given their votes at the meeting specially convened for the purpose.

12. Since the question of maintainability of the writ petition has been raised by the learned counsel for the respondents on account of the Board not being made a party to the proceeding, it is only proper that the aforesaid issue is addressed at the beginning.

13. The Apex Court in Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar, , laid down that necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

14. The petitioner is not one of the 4 Commissioners who had given the requisition for holding a special meeting u/s 43 (2) of the Act for discussing a no

confidence motion against the respondent No. 3. Neither the Commissioners nor the Board except the Chairman of the Board has been arrayed as respondent in this case.

15. Going by the averments made in the writ petition as well as the minutes of the resolution dated 21.04.2012, it is difficult to say whether any vote has been cast. In the additional affidavit in paragraph 9, a categorical averment has been made that 6 Commissioners cast their votes in favour of removal of the respondent No. 3. The resolution of the meeting dated 21.04.2012 shows that the resolutions were unanimously adopted. Though Mr. S.K. Goswami is right in submitting that the resolution adopted in the special meeting held on 21.04.2012 expressing no confidence upon the respondent No. 3 is not under challenge, a writ Court must be, *prima facie*, satisfied that on the pleaded facts, a Mandamus can be issued, as prayed for. Some disputed questions of fact have also emerged, notably, with regard to service of notice. The argument of Mr. Goswami that as no relief has been prayed against the Board, the Board is not required to be made a party respondent is not entirely correct. It cannot be said that no relief at all is prayed for against the Board. The respondent No. 3 is the elected Chairman of the Board and a direction is sought for in this writ petition not to treat him as the Chairman of the Board, which, if granted, is going to affect the Board in the wider context. Even if it is held that the Board is not a necessary party, surely they cannot be any two opinions that the Board is a proper party. The writ petition may not fail for not arraying a proper party. However, in absence of the Board as a party to the proceeding, because of the controversies raised, a complete and final decision on the issues raised in this petition, bearing in mind the prayers made, is not considered by this Court to be a justified exercise of power under Article 226 of the Constitution of India.

16. But that is not the end of the matter. This Court in *Sumitra Ghosh (supra)*, has held that there is a statutory duty of the Deputy Commissioner to see that the proceeding of the Board is in conformity with law. If the respondent No. 3 has been removed in accordance with law pursuant to a no confidence motion validly adopted, he cannot be permitted to continue as the Chairman of the Board. Therefore, it is the bounden duty of the respondents to examine the process of initiation of the no confidence motion culminating in adoption of the no confidence motion against the respondent No. 3. As allegation has been leveled against the Deputy Commissioner, Nalbari regarding adoption of partisan attitude and as the petitioner had already represented to the Secretary to the Government of Assam, Urban Development Department, to intervene into the matter as the respondent No. 3 was duly removed from the post of Chairman after following the procedure laid down in the Act, this Court is of the considered opinion that the Commissioner and Secretary, Government of Assam, Urban Development Department will examine the validity of the no confidence motion in the touchstone of the resolution adopted in the special meeting held on 21.04.2012. This exercise has to be completed within a period of three weeks from the date of receipt of the certified copy of this order. If he is of the opinion

that the resolution adopted in the special meeting dated 21.04.2012 is in accordance with law, he shall issue appropriate directions to the Deputy Commissioner, Nalbari to see that the respondent No. 3 stops functioning as the Chairman of the Board. Consequential steps for filling up of the resultant vacancy in the Board shall also be taken without any further delay.

17. This Court, however, hastens to add that no reflection is cast on the Deputy Commissioner, Nalbari on the basis of the allegations leveled by the petitioner. However, directions, as aforesaid, is issued as the Commissioner and Secretary, Urban Development Department, is also an authority, superior to the Deputy Commissioner, who has a role to play under the provisions of the Act in the affairs of the Board. The writ petition is disposed of with the aforesaid observations and directions.