
(2005) 08 GAU CK 0027

In the Gauhati High Court

Case No : WP (C) No's. 14 (K) and 27 (K) of 2005

Batou and Others

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 23-08-2005

Acts Referred:

Constitution of India, 1950 — Article 243R, 243R(2), 243S

Nagaland Municipal Council Act, 2001 — Section 12, 12(1), 12(2), 2(19), 21

Citation : (2006) 1 GLR 382 : (2006) GLT 513 Supp

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : A. Zhimomi, for the Appellant; L.S. Jamir, for the Respondent

Judgement

1. I have heard Mr. A Zhimomi learned Counsel for the petitioners, and Mr. L.S Jamir learned Government Advocate, Nagaland, appearing on behalf of the State respondents. None has appeared, on behalf of the private respondents.

2. By this common judgment and order, I propose to dispose of the two writ petitions, namely, WHO No. 14 (K)/05 and WHO No. 27 (K)/05, for, on the request of the learned Counsel for the parties, both the writ petitions have been heard together inasmuch as the same involve identical facts, raise common questions of law and the decision in any of the two writ petitions may have a bearing on the out-come of the other writ petition.

3. Though in a democracy, the right to cast vote is of great importance, it has never been recognised, in England, as a common law-right or civil right. Since we, in India, have followed Anglo-Saxon jurisprudence, the right to cast vote and elect has never been treated, in India, as a civil right or a fundamental right. A right to cast vote is, generally, governed by the statute or by way of agreed policy of a non-statutory body. At any rate, none can demand to cast vote in any election unless the right to cast vote is given under some statute, scheme or policy relevant thereto. In the case of local-self governments too, the right to elect and/or be elected is governed by statute enacted therefore. Observed the

Supreme Court in Rama Kant Pandey Vs. Union of India, , thus, "8... it will be useful to note that the right to vote or to stand as a candidate for election is neither a fundamental nor a civil right. In England also it; has never been recognised as a common law right. In this connection, we may usefully refer to the following observations in Jyoti Basu v. Debi Ghosal which reads as under : SCC 696.

The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by to Court in N.P. Ponnuswami v. Returning Officer, Namakkal Constituency and Jagan Nath v. Jaswant Singh. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory Creations they are, and therefore, subject to statutory limitation.

4. I may also usefully refer to Ram Chand Bhatia Vs. Shri Hardy, , wherein it was held, "8 ... The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute".

5. What surfaces from the above discussion is that when the Constitution or any statute makes provisions for election and embodies the conditions subject to which the elections are to be held, the same must be adhered to and; no right can be demanded either to stand in the election or to cast vote in the election unless the Constitution or the statute, as the case may, grant such a right.

6. With the above preparatory remarks, let me unfold the facts, which are not in dispute in the present writ petitions.

7. By a Notification, dated 21.12.2004 (Annexure A to the writ petition), issued by Secretary to the Government of Nagaland, Department of Local-Self government, the Government has constituted Chumukedima Town Council with eleven persons as elected members, three persons, namely, Shri Kuluvi Assumi, Shri Beituo Hamsa and Shri T Pongcheilemba Chang, as nominated members and the sitting member of the Legislative Assembly of Nagaland, namely, Shri HK Zhimomi, as the lone ex-officio member. Following the publication of the said Notification, a wireless telegraphic message was issued on 3.1.2005, by the respondent No. 3 herein, namely, Secretary to the Govt. of Nagaland, Local Self Government, Kohima, Nagaland, informing all concerned, inter-alia, that the nominated as well the ex-officio members shall have the voting rights, as the elected members, to elected the Chairperson and the Deputy Chairperson of the Municipal Council/Town Council. The petitioners herein, who are elected members

of Chumukedima Town Council, have impugned the Notification, dated 21.12.2004, aforementioned to the extent that the same appoints Shri Kuluvi Assumi, Shri Beituo Hamsa and Shri T Pongcheilemba Chang aforementioned, who are respondent, Nos. 7, 8 and 9 respectively in WP(C) No. 14(K)/05, as nominated members and the wireless message, dated 3.1.2005, aforementioned, whereby the Government clarified that the nominated as well as ex-officio members shall have the right to cast vote in the election of the Municipal/Town Council to be held for electing the Chairperson and the Deputy Chairperson thereof.

8. The case of the petitioners, when put in a narrow compass, emerges as follows : -

Election to Chumukedima Town Council has been held on 8.12.2004 and with the result of the election having been announced, on 9.12.2004, the petitioners, amongst others, stand declared as elected members of Chumukedima Town Council from the respective wards of the said Town Council. By the impugned Notification, dated 21.12.2004, aforementioned, the respondent Nos. 7, 8 and 9 were nominated as members of the said Town Council and the sitting member of Legislative Assembly, under whose constituency the said Town Council falls, was made an ex-officio member. Thereafter, the State-respondents issued a Notification by way of a wireless telegraphic message, dated 3.1.2005, aforementioned informing all concerned, inter alia, that the nominated as well as the ex-officio members were entitled to vote in the election of the Chairperson and the Deputy Chairperson of the Municipal/Town Council. However, Section 12 of the Nagaland. Municipal Council Act, 2001 (hereinafter referred to as "the Act"), according to the petitioners, does not permit the nominated and/or ex-officio members to cast vote in the elections held for the offices of the Chairperson and the Deputy Chairperson of the Municipal/Town Council. Hence, the impugned Notification, dated 3.1.2005, aforementioned is not sustainable in law. Coupled with this, the Government, in terms of the provisions of Section 21(4) of the Act, can nominate as nominated members of the Municipal Council/Town Council only such persons, who have special knowledge or experience in Municipal administration but in the case at hand, the respondent No. 7, who is a retired driver under a police project. Government of Nagaland, the respondent No. 8, who has been the former Chairman of Chumukedima village Council, and respondent No. 9, who has retired from the Nagaland Armed Police as a Havildar, are not the persons, who could have been nominated to the Town Council in terms of the provisions of Section 21(4) of the Act, for, they have no special knowledge or experience in Municipal administration. This apart the proviso to Article 243R,(a)(a)(i) of the Constitution of India debars nominated members from having voting rights and in this view of the matter, the impugned Notification dated 3.1.2005, to the extent that the same allows the nominated members to cast votes in the election of the Chumukedima Town Council is ultra vires the Constitution and needs to be interfered with.

9. The State-respondents have resisted the writ petition by filing their affidavits, wherein they have contended to the effect, inter alia, that both ex-officio as well as nominated members are competent, under the law, to vote in the elections to be held for electing the Chairperson and the Deputy Chairperson of a Town Council. It is also case of the State-respondents that for the purpose of being nominated under Sub-section (4) of Section 21 of the Act, it is not necessary that the person concerned has to have any special knowledge or experience in Municipal administration.

10. Before entering into the merit of the present writ petitions, what needs to be noted, at the very out set, is that Part-IXA has been introduced into the Constitution of India by way of Constitutional (74th Amendment) Act, 1992, in order to make local-self governments meaningful and effective. This amendment came into effect on 1st June, 1993. Article 243R, which appears in Part-IXA, deals with the composition of municipalities. It is, therefore, imperative that the provisions contained in Article 243R are borne in mind, while considering the merit of the present two writ petitions. For this purpose, I quote Article 243R, which runs as follows : -

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

(2) The legislature of a State may, by law, provide -

(a) for the representation in a Municipality of-

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

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

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

(iv) the Chairpersons of the Committees constituted under Clause (5) of article 243S :

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

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

11. A careful reading of Article 243R shows that while all the seats in a municipality shall, ordinarily, be filled up by persons chosen by way of direct election, the Legislature of a State may, by making law, provide for representation in a Municipality of four additional categories of persons, namely, (i)

persons having special knowledge or experience in Municipal administration ; (ii) the members of the House of the People and the members of the Legislative Assembly of the State representing " constituencies, which comprise, wholly or partly, the Municipal area ; (iii) the members of the Council of States and the members of the Legislative Council of the, State registered as electors within the Municipal area ; (iv) the Chairpersons of the Committees constituted under Clause (5) of Article 243S. The persons, who fall in category (i) aforementioned, that is, the persons, who are allowed to be representatives in any Municipality for reasons of the fact that they have special knowledge or experience in Municipal administration, are commonly known as "nominated members"; whereas the elected representatives, such as, the members of the House of the People or of the Legislative Assembly or of the Legislative Council or Chairpersons of various Committees constituted under Clause (5) of Article 243S are commonly called "ex-officio member", for, it is by virtue of holding the offices aforementioned that these persons are allowed to be representatives in the municipality.

12. A microscopic reading, as a whole, of Article 243R reveals that it is Article 243R(2)(a)(i), which relates to nominated members. For being allowed to be representative in a municipality by way of nomination or as a nominated member, the person concerned must have special knowledge or experience in Municipal administration and that such a nominated member shall not have the right to vote in the meetings of the municipality.

13. Keeping in mind what have been indicated above, when I turn to the Act, I notice that it is Section 21, which embodies the provisions as regards the composition of Town Council. Section 21 reads as follows : -

21. Composition of Town Council :

(1) Every Town Council shall have the elected, ex-officio and nominated members.

(2) The Government may, Notification divide the Town Council area into territorial constituencies to be known as wards for the purpose of filling up the seats in the Town Council by direct election.

(3) Members of the State Legislative Assembly representing Legislative Assembly constituencies which comprise wholly or partly the Town Council area shall be ex-officio members.

(4) The Government shall, by Notification, nominate such number of members, not exceeding one-fifth of the elected members, from amongst the persons having special knowledge or experience in Municipal administration.

14. The nominated members are, admittedly, dealt with by Section 21(4) of the Act. A careful reading of Section 21(4) clearly indicates that the Government can nominate only such a person as a nominated member for Town Council, who has special knowledge or experience in Municipal administration. In other words, a person, who has no special knowledge or experience in municipal administration,

cannot be nominated as a member in the Town Council in terms of the provisions of Section 21(4). Indeed, the eligibility criterion for selection and appointment of a person as a nominated member, imposed by Sub-section (4) to Section 21, is wholly consistent with the scheme of Article 243R.

15. In the above backdrop of the constitutional and statutory limitations as to who can be made nominated member in a Town Council, when I turn to the facts of the present cases, what attracts my eyes, most prominently, is that the respondent Nos. 7, 8 and 9 are, admittedly, nominated members but according to the petitioners, these members are not eligible for appointment as nominated members in any Town Council, for, none of these persons has any special knowledge or experience in Municipal administration. To support this assertion, the petitioners have averred in their writ petitions to the effect that the respondent No. 7 used to be a retired driver under the Police Project, Government of Nagaland, the respondent No. 8 used to be a Chairman of village council, which is distinct and different from a Municipal Council or Town Council, and as far as the respondent No. 8 is concerned, he is a retired Havildar of Nagaland Armed Police. The averments, so made by the petitioners in the present writ petitions, have gone wholly unchallenged by the private respondents concerned.

16. Moreover, despite the fact that Sub-section (4) to Section 21 requires that a person to be nominated as a nominated member in any Town Council must have either special knowledge or experience in Municipal administration, the State-respondents have asserted in their affidavit-in-opposition, that it is not necessary for a person to be nominated that he should have special knowledge or experience in Municipal administration. This assertion, on the part of the State-respondents, go to show that the selection of the private respondents, namely, Shri Kuluvi Assume Shri Beituo Hamsa and Shri T Pongcheilemba Chang aforementioned as nominated members suffer from complete non-application of mind. While it is not desirable for this Court to enter into the merit of the decision of the Government as to whom it should choose to be nominated members in terms of Sub-section (4) of Section 21, it is, undoubtedly, the duty cast upon this Court to ascertain whether the decision-making process, while selecting/choosing the private respondents as nominated members, was in accordance with law. The most relevant consideration, admittedly, for nominating a person as a nominated member, in any Town Council, shall, in the light of Sub-section (4) of Section 21, be that the person chosen shall have either special knowledge or experience in Municipal administration. This unavoidable, mandatory and most relevant aspect appears to have been completely lost sight of by the State-respondents, while nominating the respondent Nos. 7, 8 and 9 as nominated members. A decision-making process, which does not take into account the most relevant factor into consideration, must be held to suffer from non-application of mind. Such glaringly noticeable omission to take into consideration the most relevant factor, in the realm of local self Government, cannot be sustained.

17. Now turning to the question as to whether the ex-officio and nominated members could have been allowed to cast vote in the elections of the Town Council to be held or already held for electing Chairperson and Deputy Chairperson, what may be carefully noted is that it is Sub-section (19) of Section 2 of the Act, which defines "member" in relation to Municipal Council or a Town Council. A member, in relation to a Town Council, means, according to Sub-section (19) of Section 2, a member of the Town Council and includes the elected, ex-officio and nominated members. In short, the word "member" in the Act, signifies all categories of members, namely, elected, ex-officio and nominated.

18. A bare reading of Section 21, which we have already quoted above, clearly shows, if I may point out, that the Town Council consists of elected, ex-officio nominated members.

19. Coupled with the above, it is also worth noticing that it is Section 12, which deals with the election of Chairperson as well as Deputy Chairperson of Municipal Council and Section 22 lays down that the provisions, contained in Section 12, shall apply to Town Council and the provisions of election of Chairperson and Deputy Chairperson, contained in Section 12, shall be construed, as the provisions for election of the Chairperson and Deputy Chairperson of Town Council too.

20. In the light of what has been pointed out hereinabove, I quote herein below Section 12 : -

12. Election of Chairperson/Deputy Chairperson.

(1) The Municipal Council shall elect one of its elected members to be the Chairperson in the manner as may be prescribed in this behalf.

(2) The Municipal Council may also elect one of its elected members to be Deputy Chairperson in the manner under Sub-section (1).

(3) The election under Sub-sections 1 and 2 shall be conducted at a meeting of Municipal Council to be convened immediately after the meeting held for making and subscribing oath or affirmation by the members but not later than 6 months from the date on which the election of members is notified by the State Election Commission.

(4) The meeting for election of Chairperson and Deputy Chairperson of Municipal Council shall be convened and presided over by the Deputy Commissioner.

(5) If during the election of Chairperson or Deputy Chairperson, as the case may be, there is equality of votes between the candidates and the addition of vote would entitle one of such candidates to be elected as Chairperson or Deputy Chairperson, as the case may be the Presiding Officer shall decide between such candidates by lot to be drawn in their presence in such manner, as may be prescribed and the candidate on the lot fall, shall be deemed to have received an additional vote.

(6) The Chairperson and Deputy Chairperson shall enter upon their duties as such, immediately after their elections.

21. A close analysis of the provisions of Section 12, when read in the light of Section 22, shows that every Town Council shall elect one of its elected members to be Chairperson and one of its elected members to be the Deputy Chairperson. The right to elect the Chairperson as well as the Deputy Chairperson, u/s 12, appears to have been given to the Municipal council, which, in the light of the provisions of Sub-section (19) of Section 2, consists of not elected members, but also ex-officio as well as nominated members.

22. The question, therefore, which, now, arises for consideration is this : whether a nominated member shall have the right to vote and elect the Chairperson and/or the Deputy Chairperson of a Town Council under the Act ? On the first blush, Section 12 appears to have granted such a right to the nominated members. When, however, the right, so given by the statute, is considered in the light of the proviso to Sub-Clause (a) of Clause (2) of Article 243, it becomes crystal clear that a nominated member shall have no right to vote in the meetings of the municipality. Viewed from this angle it is but natural to infer that it is not permissible for the Legislature and/or for the State to allow any nominated member, or vest in any nominated member the right, to cast vote in the meetings of the municipality including the meetings of the Town Council, which may be held to elect the Chairperson and/or the Deputy Chairperson thereof. Considered, thus, one has no option but hold, and I do hold, that Section 12 of the Act must be read down not to confer any right on a person, nominated in terms of Section 21(4) of the Act and/or Section 9(4) of the Act, to cast vote in any meeting of the Municipality/Town Council including such meetings, which may be held to elect the Chairperson and/or the Deputy Chairperson thereof.

23. As regards the grievance of the petitioner that even ex-officio, members shall be held not to have the right to cast vote in the election of the Chairperson and/or the Deputy Chairperson, it may be pointed out that Article 243R permits the Legislature of a State to allow, in a municipality, amongst others, the Members of the Legislative Assembly of the State, who represent the constituencies, which comprise, wholly or partly, the municipal area, to be a representative. It is, thus, clear that unless the Legislature, makes law allowing members of the Legislative Assembly, whose constituency forms part of the municipal area or Town Council area, such a Member of the Legislative Assembly cannot form part of the municipality and/or the Town Council. Such a member, who is commonly known as ex-officio member, may, indeed, have the right to cast vote, for, unlike the embargo, which the proviso to Article 243R(2)(a)(i) imposes on the nominated members, right to cast vote, an ex-officio members right to cast vote suffers from no such limitation.

24. Bearing in mind the above aspects of the matter, when I revert to Section 21 of the Act, what I notice, if I may reiterate, is that the Town Council consists of, in terms of Section 21, not only of the elected members, but also of ex-officio

members, apart from the nominated members. While the nominated members, as already held hereinabove, do not have the right to cast vote, the fact remains that since the Constitution imposes no limitation on the Legislature to vest a right in the ex-officio member to cast vote, it becomes abundantly clear that a member of the Legislative Assembly, who, in terms of Sub-section (3) of Section 21, becomes an ex-officio member of a Town Council shall have, under the provisions of Section 12 read with Section 22 of the Act, the right to participate in the election of the municipal or Town Council for the purpose of electing the Chairperson and/or the Deputy Chairperson thereof and also cast vote in such elections.

25. What crystallises from the above discussion is that the impugned Notification, dated 21.12.2004, aforementioned to the extent that the same appoints respondent Nos. 7, 8 and 9 cannot be sustained or be allowed to survive. Similarly, the impugned Notification, dated 3.1.2005, aforementioned to the extent that the same allows the nominated members to cast vote can also not be allowed to stand good on record.

26. Considering, therefore, the matter in its entirety and in the interest of justice, the impugned Notification, dated 21.12.2004, aforementioned to the extent that the same appoints the respondent Nos. 7, 8 and 9 as nominated members are hereby set aside and quashed. The impugned Notification, dated 3.1.2005, aforementioned to the extent that the same allows voting right in favour of the nominated members shall also stand set aside and quashed.

27. Before parting with the present two writ petitions, it may be mentioned that since it has been pointed out on behalf of the petitioners, that during the pendency of these two writ petitions, the persons, who had been elected as Chairperson and Deputy Chairperson, have been replaced by persons, who have been elected in subsequent election held for this purpose, and the same has not been impugned by way of any writ petition before this Court, I refrain from passing any order(s) interfering with the election, which, during the pendency of these two writ petitions, has taken place for electing the Chairperson and/or the Deputy Chairperson of Chumukedima Town Council and/or with the election of those, who have been elected, during the pendency of these writ petitions, as Chairperson and/or Deputy Chairperson of Chumukedima Town Council.

28. With the above observations and directions, these two writ petitions shall stand disposed of.

29. No order as to costs.