

(2019) 09 GAU CK 0005
In the Gauhati High Court
Case No : Writ Petition (C) No. 183 Of 2019

Begum Afrooja Perveen

APPELLANT

Vs

State Of Assam And Ors

RESPONDENT

Date of Decision : 03-09-2019

Acts Referred:

Assam Panchayat Act, 1994 — Section 2(11), 2(12), 64, 64(1), 65(2), 65(1)(i), 70, 70(1), 132

Assam Panchayat (Constitution) Rules, 1995 — Rule (2), (8), (9), (10), 45, 45(1), 50, 50(1), 50(8), 51

Constitution Of India, 1950 — Article 243(c)(5)

Citation : (2019) 09 GAU CK 0005

Hon'ble Judges : A.K. Goswami, J; Manish Choudhury, J

Bench : Division Bench

Advocate : K.N. Choudhury, J.M.A. Choudhury, M. Nath, R. Dhar, M.K. Choudhury, S.K. Ghosh

Final Decision : Dismissed

Judgement

A.K. Goswami, J

1. Heard Mr. K.N. Choudhury, learned senior counsel assisted by Mr. J.M.A. Choudhury, learned counsel for the appellant. Also heard Mr. M. Nath, learned Standing Counsel, Panchayat & Rural Development appearing for respondent Nos.1 & 2; Mr. R. Dhar, learned State counsel for respondent Nos.3 & 4 as well as Mr. M.K. Choudhury, learned senior counsel, assisted by Mr. S.K. Ghosh, learned counsel for respondent No. 5.

2. This intra-Court appeal is directed against the judgment & order dated 20.06.2019 passed by the learned Single Judge in WP(C) No.1434/2019 filed by the appellant. It is to be noted that another writ petition being WP(C) No.1632/2019, filed by the present respondent No.5, was also disposed of by the aforesaid judgment & order.

3. The issue that revolves around in this appeal is with regard to election to the

post of President of the Karimganj Zilla Parishad. The appellant and the respondent No.5 having been elected to the Karimganj Zilla Parishad, had contested for the post of President of the Karimganj Zilla Parishad. There are twenty members in the said Zilla Parishad and there was equality of votes as both the appellant and the respondent No.5 secured ten votes each. In case of equality of votes, recourse has to be taken to toss of coin and the dispute has arisen with such toss of coin.

4. Rule 45(1) of the Assam Panchayat (Constitution) Rules, 1995 provides the manner and method by which one out of two candidates is to be elected in the event of equality of votes. The provision reads as under:

"45. Equality of Votes.-(1) If after the counting of votes it appears that two candidates of whom only one is to be declared elected, having received equal number of votes, the Deputy Commissioner or the Sub-Divisional Officer as the case may be, or any Officer authorised by him in this behalf, shall decide which of the two shall be declared elected by tossing up a coin in presence of such candidates. Each candidate shall be assigned one side of the coin by him or by the Officer just before the toss. The candidate whose side appears visible at the top of the coin after it has fallen flat on any plain ground or table, shall be declared elected."

5. Before we deal with the dispute, it would be appropriate to take note of the brief facts leading to holding of the meeting on 11.02.2019 in which toss of coin was resorted to.

6. The Deputy Commissioner, Karimganj had issued a notice dated 02.02.2019 under Section 70(1) of the Assam Panchayat Act, 1994 (for short, hereinafter referred to as 'the 1994 Act') read with Rule 50 of the Assam Panchayat (Constitution) Rules, 1995 (for short, hereinafter referred to as 'the 1995 Rules') indicating that the first meeting of the Karimganj Zilla Parishad will be held on 11.02.2019 at 11 a.m. in the conference hall of the Deputy Commissioner's office at Karimganj. It is in pursuance of the said notice, the first meeting of the 4th General Body of the Karimganj Zilla Parishad was held. Though the notice dated 02.02.2019 indicated that the meeting will be held at 11 a.m., it appears that the meeting was deferred till 4 p.m. on account of arrest of one of the members of the Zilla Parishad, namely, Abdul Sukkur, in connection with Karimganj P.S. Case No.116/2019. After both the appellant and the respondent No.5 polled equal number of votes, in terms of Rule 45 of the 1995 Rules, the Deputy Commissioner tossed a coin. The respondent No.5 had called 'heads' and the appellant 'tails' and while the coin was falling down, it touched a wall as well as a chair in the meeting hall and when it fell flat, it was observed that 'heads' side was visible. Because of some protestations, the Deputy Commissioner once again tossed the coin and this time the coin fell flat showing 'tails'. While the supporters of the appellant proclaimed victory and started celebrations, three members including respondent No.5 lodged a written complaint with regard to the decision to go for a second toss and demanded reconvening of the meeting

for selecting the President and Vice-President. The Deputy Commissioner, Karimganj addressed a letter dated 15.02.2019 to the Principal Secretary to the Government of Assam, Panchayat & Rural Development Department enclosing a copy of proceedings of the meeting held on 11.02.2019 soliciting necessary instructions in the matter.

7. WP(C) No.1434/2019 was filed by the appellant praying for setting aside the aforesaid letter dated 15.02.2019 of the Deputy Commissioner as well as the decision of the Government to accept the result of the first toss, thereby declaring the second toss to be invalid, as well as for a direction to allow her to continue as the President of the Zilla Parishad till completion of the term.

8. The respondent No.5 in his writ petition, on the other hand, had prayed for a writ of mandamus directing the Deputy Commissioner, Karimganj to declare the result of election for the post of President of Karimganj Zilla Parishad in terms of the first toss conducted on 11.02.2019 and praying for a declaration that the second toss conducted on 11.02.2019 is illegal and without jurisdiction.

9. By the judgment & order under challenge, the learned Single Judge observed as follows:

"From a cumulative reading of Section 65(1)(i) and Section 70 of the Panchayat Act read with Rule 45 of the Constitution Rules, it is evident that when it comes to the election of President, it has to be from amongst the elected members. Only the elected members can vote and decide who amongst themselves shall be the President. In case of a tie in the voting, the Deputy Commissioner shall resolve the situation by tossing of coin in the presence of such "candidates". Each of the "candidates" will be assigned one side of the coin and whoever calls correctly will be declared elected.

Without entering into the controversy regarding the first toss and the second toss as well as belated signing of the minutes of the meeting held on 11.02.2019, what is discernible from the materials on record is that in the meeting held for election of President on 11.02.2019 not only the elected members were present but there were other persons also, including MLA of North Karimganj Constituency. In so far election of President or Vice President of Zilla Parishad is concerned, an MLA or MP has no role to play and their presence is not required in the meeting. In fact, they are to be elected by the elected members from amongst themselves. To that extent, presence of MLA or MP is prohibited. Deputy Commissioner, Karimganj committed an error in allowing the MLA to be present in the said meeting and thereafter allowing him to intervene in the proceedings of the meeting by raising objections here and there. That apart, language of Rule 45(1) of the Constitution Rules is very clear which says that once there is equality of votes, the winner has to be decided by toss of coin which must be in the presence of such "candidates". Such candidates in the context of Rule 45(1) would mean only the candidates to the election of President or Vice President as the case may be. When the Deputy Commissioner

decided to go for tossing, he ought to have ensured that other than the two candidates in fray, no person should have been allowed to remain in the meeting hall, besides himself or official representatives. By allowing the MLA of North Karimganj Constituency and other persons to be present in the meeting, he did not ensure that a proper ambience was maintained for tossing up of coin. In the considered opinion of the Court, what transpired in the meeting held on 11.02.2019 and the subsequent decision taken by the Deputy Commissioner seeking instructions from the Government were totally beyond contemplation of Section 70(1) of the Panchayat Act and Rule 45(1) of the Constitution Rules."

10. Mr. K.N. Choudhury, learned senior counsel for the appellant with reference to the letter dated 15.02.2019 of the Deputy Commissioner, Karimganj submits that the Deputy Commissioner went for the second toss as there was complete unanimity as the coin in the first toss had touched a wall and a chair while falling to the ground and there is no dispute that in the second toss, the appellant's call came right. Having agreed for the second toss, subsequent observation by some members including respondent No.5 with regard to the second toss, will have no relevance, he submits. Drawing the attention of the Court to the letter dated 11.02.2019 submitted by respondent No.5 and two of his supporters addressed to the Deputy Commissioner, Mr. Choudhury submits that the fact that the appellant was declared as elected has even been accepted by them and, therefore, the learned Single Judge was not justified in directing that the process of election shall be conducted once over again. He has submitted that the reasoning assigned by the learned Single Judge that the Deputy Commissioner, Karimganj committed an error in allowing a Member of Legislative Assembly (MLA) to be present in the said meeting and in allowing him to intervene in the proceeding of the meeting is not sustainable in the eye of law. He submits that an MLA or a Member of Parliament (MP) is also a member of the Zilla Parishad and, therefore, it cannot be said that they are strangers to a meeting of the Zilla Parishad. He has also contended that interpretation of the learned Single Judge with regard to the expression "in presence of such candidates" as occurring in Rule 45(1) of the 1995 Rules that no other person other than the Deputy Commissioner or his official representative could be present in the meeting, is not correct. When there was no infirmity in convening the meeting held on 11.12.2019 and when the meeting was conducted in accordance with law, the learned Single Judge ought to have allowed the writ petition filed by the appellant. Drawing our attention to Pages 37 and 39 of the appeal papers, Mr. Choudhury has pointed out that after being declared elected as President, a Personal Security Officer was attached to the appellant and the landline phone as well as broadband connection of the President of Karimganj Zilla Parishad was also directed to be rectified. These, according to him, demonstrate in no uncertain terms that the appellant had been declared elected and had started functioning as President of Karimganj Zilla Parishad.

11. Mr. M.K. Choudhury, learned senior counsel for respondent No.5, on the other hand, submits that the letter dated 15.02.2019 does not reflect the true state of

affairs of the meeting held on 11.02.2019. He submits, with reference to the proceedings of the first meeting of the 4th General Body of the Karimganj Zilla Parishad, that the said minutes do not reflect that the Deputy Commissioner went for the second toss as everybody unanimously requested him to go for the second toss, but it reflects that he had resorted to the second toss because some members had demanded for a second toss. It is submitted by him that it does not really matter as to whether the coin touches any object or not and once the coin falls flat on the ground and whose call came correct is ascertained, necessary steps ought to be taken on that basis. The 1994 Act and the 1995 Rules do not envisage a second toss and, therefore, the very act of the Deputy Commissioner in going for the second toss is without jurisdiction. According to him, on the first toss, respondent No.5 having called it right, he should have been declared elected. However, the Deputy Commissioner chose to seek the opinion of the Government which, according to him, may not be unjustified with as, according to him, Section 132 of the 1994 Act prescribes such a course of action. It is submitted by him that the learned Single Judge correctly appreciated the provisions of the 1994 Act and the 1995 Rules in holding that presence of the MLA had vitiated the entire proceedings. It is in that circumstance, he submits that the direction as contained in the impugned judgment ought not to be interfered with and the democratic process should be allowed to be taken to its logical end in terms of the directions contained in the said judgment.

12. Mr. R. Dhar and Mr. M. Nath have submitted that in view of the situation that had emerged on 11.02.2019, the Deputy Commissioner had sought for appropriate instructions from the Government and, according to the views of the Government, no second toss is warranted under the provisions of the 1994 Act and the 1995 Rules and accordingly, observations were made that the result of the election should be declared on the basis of the first toss.

13. We have considered the submissions of the learned counsel for the parties and have perused the materials available on record.

14. Chapter-VI of the 1994 Act provides for establishment and constitution of Zilla Parishad. Section 64(1) under Chapter-VI provides that for every district there shall be a Zilla Parishad having jurisdiction, save as otherwise provided in the Act, over the entire district excluding such portions of the district as are included in a Municipality or a Municipal Corporation, as the case may be, or under the authority of Town Committee or Sanitary Board or Cantonment area or any notified area contrary to it under any law for the time being in force.

15. Section 65(1) provides for constitution of Zilla Parishad and it lays down that Zilla Parishad shall consist of -

- (i) the members directly elected from the territorial constituencies of the district;
- (ii) the Presidents of the Anchalik Panchayats;
- (iii) the Members of the House of People and the Members of the State

Legislative Assembly representing a part or whole of the district whose constituencies lie within the district.

Section 65(2) provides that all the members shall have the right to vote except the motion of no-confidence in which only the directly elected member and members as nominated by the Government shall exercise such rights.

Section 2(11) defines 'Member' to mean a member of a Gaon Panchayat or a Anchalik Panchayat or of a Zilla Parishad. Section 2(12) defines 'Ex-officio Member' to mean a member who is appointed to be a member by virtue of his office, and for the purpose of Gaon Panchayat or Anchalik Panchayat or Zilla Parishad may include local Members of Parliament, local Members of Legislative Assembly, State Government officials, representative of local Co-operative Societies and representative of local scheduled or non-scheduled banks.

16. What is noticeable is that although Section 65(2) mentions about members nominated by the Government, there is no provision for nomination of members.

17. Article 243-C(5) of the Constitution of India mandates that the Chairperson of (a) Panchayat at the village level shall be elected in such manner as the Legislature of a State may, by law, provide; and (b) a Panchayat at the intermediate level or district level, shall be elected by, and from amongst, the elected members thereof.

18. Section 70 is on the subject of Election of President and Vice- President of Zilla Parishad. It reads as under:

"70. Election of President and Vice-President of Zilla Parishad:- (1) When the Zilla Parishad is constituted under Section 64, the Deputy Commissioner shall call a meeting of the Zilla Parishad (which shall be called the first meeting of the Zilla Parishad) for the election of a President and a Vice-President by the from amongst the members directly elected under Section 65(1)(i). (highlighted by us) (2) The election of the President or the Vice-President of the Zilla Parishad and filling up vacancies in the said office and the determination of disputes relating to such election shall be in accordance with such rules as may be prescribed by the State Government/ Election Commission."

19. The provision as contained in Section 70(1) is grammatically not correct as the words 'by the' after the word 'Vice-President' and before the words 'from amongst the members' do not carry any meaning whatsoever. In our considered opinion, the words "by the from" should be read as "by, and from" in tune with the mandate of Article 243-C(5) of the Constitution. Section 70(1), in essence, provides that after the Zilla Parishad is constituted, the Deputy Commissioner is to call a meeting of the Zilla Parishad to be called 'the first meeting of the Zilla Parishad' for the election of a President and a Vice-President from amongst the members directly elected under Section 65(1)(i). In view of the above constitutional provision, there can be no manner of doubt that a Chairperson of the Zilla Parishad being a District Level Body or a President in the context of the

1994 Act, shall have to be elected by the elected members from amongst such elected members.

20. The notice dated 02.02.2019 about which reference was made in the earlier part of this judgment indicates that the said notice was issued fixing a date, time and place for the first meeting of the Karimganj Zilla Parishad. Notices were issued to the newly elected members of the Zilla Parishad requesting them to attend the meeting for the purpose of the following agenda items:-

(i) Oath taking of the newly elected Zilla Parishad Members.

(ii) Election of the Zilla Parishad President/Vice-President.

A copy of the notice was forwarded, amongst others, to the MP and MLAs of Karimganj District. A perusal of the notice goes to show that no request was made to the MP or the MLAs to attend the first meeting of the Karimganj Zilla Parishad. No information was given to the Presidents of the Anchalik Panchayat.

21. Rule 50(1), (2), (8), (9) and (10) of the 1995 Rules being relevant for the purpose of this case, are extracted hereinbelow for ready reference:

"50. Election of President and Vice-President of Zilla Parishad:- (1) The Deputy Commissioner, as under sub-section (1) of Section 70 of the Act, shall, as soon as possible after the completion of election as under sub-section (1) of Section 65 of the Act, convene the first meeting of the Zilla Parishad comprising the members as under sub-section (1) of Section 65 of the Act, by fixing a date, time and place and specifying the purpose and the causing a written notice to be served on each of the members of the Zilla Parishad at least seven days before the date so fixed. Such meeting shall be presided over by the Deputy Commissioner concerned and the Deputy Commissioner shall not be entitled to vote. (highlighted by us) (2) The Deputy Commissioner as under sub-rule (1) shall administer an oath of affirmation as under Section 134 of the Act, to all the members present before the commencement of the meeting.

.....

(8) The Deputy Commissioner shall, after completion of counting and recording of votes received by each candidates for each of the offices, declare the candidate who has secured highest number of votes against respective offices to be duly elected as the President and Vice-President of the Zilla Parishad concerned.

(9) In case of equality of votes in either of the said election, declaration of election shall be given by the Deputy Commissioner in the manner prescribed under Rule 45 of these rules.

(10) Declaration as to the election to the offices of the President and Vice-President of the Zilla Parishad by the Deputy Commissioner shall be final provided any dispute arises in the said election."

22. Mr. K.N. Choudhury has laid emphasis on the words 'each of the members' in Rule 50 to contend that Rule 50 amply demonstrates that for the purpose of holding the first meeting of the Zilla Parishad, a written notice is to be served on all members. Though at the first blush the argument appears to be sound, if we have a close look of the scheme of the Act, we will find that such an interpretation will not advance legislative intent. We have already noticed the purpose for which the first meeting of the Zilla Parishad was convened. Section 134 of the 1994 Act requires oath to be administered only to the elected members of a Zilla Parishad, Anchalik Panchayat or Gaon Panchayat. The words 'each of the members' occurring in Rule 50, having regard to the constitutional mandate under Article 243-C(5) as well as Section 70 would necessarily have to be limited to the elected members. The words 'after the completion of election' as in sub-section (1) of Section 65 of the Act will have meaning only if we read the aforesaid words as under Section 65(1)(i) as the completion of election is relatable only to Section 65(1)(i). Once we read the aforesaid provision in that light, it will appear without any shadow of doubt that notice is to be issued for the purpose of holding the first meeting of the Zilla Parishad only to the elected members and it is the elected members alone who are to take part in the proceedings. Reverting back to the notice issued on 02.02.2019, it will be worthwhile to remember that no notice was issued to the MLAs to be present. The appellant has not been able to explain as to how the MLA attended the meeting without being requested to be present in the meeting. It will be appropriate to recapitulate that no notice was issued to the Presidents of Anchalik Panchayat even by way of information though they are also members of the Zilla Parishad. If the contention of Mr. K.N. Choudhury is accepted, then as a logical corollary, it has to be held that the first meeting held on 11.02.2019 is not in accordance with law as Presidents of Anchalik Panchayat had not been called to the meeting.

23. A perusal of Rule 45 of the 1995 Rules would go to show that the candidate, whose call appears visible at the top of the coin after it has fallen flat on any plain ground or table shall be declared elected. In other words, if a candidate calls 'heads' and the 'heads' side of the coin appears after it had fallen flat, that candidate has to be declared as elected. There is nothing in the provisions of the 1994 Act or the 1995 Rules invalidating a toss on the ground that the coin had come in contact with any object before it finally settles on the plain ground or table. What is important is that it has to be ascertainable on which side the coin has fallen. When it has fallen either on the 'heads' side or 'tails' side, according to us, merely because while falling down in its trajectory it had touched an object, the same will not invalidate the toss. The Deputy Commissioner on the basis thereof was required to make a declaration. However, he chose to yield to the protestations of some members and decided to go for the second toss. From the minutes of the meeting dated 11.02.2019, we find that some members had protested contrary to the statement made in the communication dated 15.02.2019 that in view of unanimous request, the second toss was made. Rules

50(8) as well as 50(10) of the 1995 Rules make it abundantly clear that power has been conferred on the Deputy Commissioner to declare the result of the election after completion of counting and/or tossing up the coin. Having regard to the provisions, we are of the considered opinion that such declaration has to be made on the day of the first meeting itself and it cannot be postponed to some other date in order to obtain opinion from any quarter for the guidance of the Deputy Commissioner. If such a course of action is taken, it will amount to abdication of power conferred by statute on the Deputy Commissioner. Section 132 of the 1994 Act, upon which reliance is placed by Mr. M.K. Choudhury to impress upon the Court that the Deputy Commissioner was justified in seeking opinion of the Government, is not applicable in the present fact situation and the said provision operates on an entirely different field. The said provision enables the Government to take necessary action if there is any difficulty in giving effect to the provisions of the 1994 Act, which is not the case here.

24. How a declaration is to be made is provided for in Rule 51 of the 1995 Rules. It provides that soon after the election is over as under Rule 50, the Deputy Commissioner shall submit a list to the State Election Commission indicating the names and respective addresses of the person elected as the President, Vice-President and the Members of the Zilla Parishad for notification. There is no such material on record to indicate that such a list was ever furnished by the Deputy Commissioner. A reading of the minutes of the meeting held on 11.02.2019 as well as the letter dated 15.02.2019 do not even remotely suggest that any declaration declaring the appellant to be elected was made consequent upon the second toss. In absence of a declaration as required under the law, no significance can be lent to the attachment of a PSO to the appellant, because the very basis of such so called attachment is absent.

25. We are unable to agree with the observation of the learned Single Judge that at the time of toss of coin, no other person other than the 2(two) candidates besides himself or official representatives shall be allowed to remain present in the meeting hall. Toss of coin, when required, is also part of the first meeting of the directly elected members of the Zilla Parishad and, therefore, their presence cannot be ignored while the toss is resorted to. The words "presence of such candidates" as occurring in Rule 45, therefore, cannot be given a narrow interpretation and the same has to be read in the overall scheme of the 1994 Act and the 1995 Rules.

26. In view of the above discussions, we hold that the provisions of the 1994 Act and the 1995 Rules do not envisage a second toss to determine an elected candidate on the ground that the coin had touched some object in the process of its falling down and that the provisions of the 1994 Act and the 1995 Rules also do not admit of presence of any other person other than the elected members of the Zilla Parishad in the first meeting of the Zilla Parishad to be called by the Deputy Commissioner in terms of Section 70 of the 1994 Act. We find ourselves in agreement with the ultimate conclusion and the directions of the learned

Single Judge. Accordingly, we find no merit in this appeal and resultantly, the appeal is dismissed.