

(2011) 08 GAU CK 0044

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 183 (SH) of 2011

Chawas Lyngdoh

APPELLANT

Vs

Jaintia Hills Autonomous District Council & Ors.

RESPONDENT

Date of Decision : 19-08-2011

Acts Referred:

United Khasi Jaintia Hills Autonomous District Council (Appointment and Succession of Chiefs and Headmen) Act, 1959 — Section 3, 3

Citation : (2012) 2 GLT 230

Hon'ble Judges : Anima Hazarika, J

Bench : Single Bench

Advocate : Advocates appeared for the Petitioner: Mr. S. S. Dey, Mr. R: Jha, Ms. M. Jha, Mr. K. Kharmawplang, Mr. N. Khan & Ms. G Shallam, Advocates appeared for the Respondents: Mr. H.S. Thangkhiew, Standing Counsel, JHADC, Mr. P. Nongbri, Mr. L. Khyriem, Mr. GS. Massar, Sr. Advocate, Mr. K, Baruah & Mr. J.M. Thangkhiew, Advocates appearing for Parties

Judgement

Smti. Anima Hazarika, J.—By this petition under Article 226 of the Constitution of India, the Petitioner who is the Dolloi of Elaka Raliang has challenged two notifications dated 12.07.2011 and 19.07.2011 issued by the authorities of Jaintia Hills Autonomous District Council (JHADC for short), inter alia, seeking to conduct Election of Pator of Sumer Patorship under Ralian Elaka. The English translated copies of the two notifications as appearing in Annexures IV & V of the writ petition are reproduced herein below:

"OFFICE OF THE JAINTIA HILLS AUTONOMOUS DISTRICT COUNCIL, JO WAI"
GENERAL PUBLICNOTICE

Dated Jowai, the 12th July 2011 NO.JHADC/POL/4/PT/7879/106:

As per the directive of the High Court order dated 10.12.2010 in the WP(C) No. (SH)417/2010 and order dated 24.06.2011 in the Misc. Case No.(SH)220of2011 in WP(C)No.(SH) 283/2010, I hereby informed that the election of Pator at Sumer Patorship under Raliang Elaka will be held on August, 2011.

The Election of Pator will be conducted by the Office of the Jaintia Hills Autonomous District Council, Jowai in the presence of Dolloi, Elaka Raliang.

Only clans belong to (1) Paslein, (2) Sumer, (3) Papeng, (4) Manner, (5) Tangliang, (6) Latam and (7) Yndon has the right to contest for the post of Pator in the election as per traditional practices. Only male adult above 18 years of age residing under the area of Sumer Patorship has the right to vote during the election of Pator. It is therefore requested all Rangbah Shnongs (Headmen) of various villages under Sumer Patorship to inform the people in their respective village so that those have the right to vote can exercise their franchise.

The Programme for election of Pator will be announced shortly. Signed by Dy, Secretary, JHADC."

"OFFICE OF THE JAINTIA HILLS AUTONOMOUS DISTRICT COUNCIL:
JOWAI" NOTIFICATION

Dated Jowai, the 19 July, 2011 NO.JHADC/POL/4/PT/7879/107:

In connection with the election of Pator of Sumer of Sumer Patorship under Elaka Raliang in compliance with the notification dated 12.07.2011, the Office of the JHADC, Jowai deems it appropriate to issue a notification as herein below for the information and knowledge of the people of Sumer Patorship. 21.072011 The electoral roll shall be published in the Office of the JHADC, Jowai.

21.072011 The Office will receive application to for the enumeration of the voters 27.022011 and also any petition for the correction thereof. Forms for enumeration/correction shall be issued on payment of Rs.5/ each. Forms are available at the Office of the JHADC.

08.082011 The final electoral roll shall be published and sold at the cost of Rs. 100/ per set.

09.082011 Filing of the nomination papers to by prospective candidates. Nomi

10.082011 nation forms would be issued in the Office of the JHADC on payment of Rs.50/ each.

11.082011 Scrutiny of nomination papers allotment of symbols and withdrawal of nominations will be from 11.00 am.

17.082011 Date of polling at 7.00 a.m. to 4.00 p.m.

19.082011 Counting of votes and declaration of the results. Sd/

The Administrative Officer, Jaintia Hills Autonomous District Council Jowai dated Jowai, 19th July. 2011. Memo No .JHADC/POL/4/Pt/7879/107(A)

2. This petition was initially moved on 27.07.2011. On that day, on behalf of Mr. H.S. Thangkhiew, learned Senior counsel appearing on behalf of respondent Nos. 1 & 2 sought for time till 01.08.2011. Accordingly, time was granted till

01.08.2011 and on the same date, in the interim order passed in MC No.(SH) 260/2011, it was made clear that till the next date fixed, no action shall be taken on the basis of the notification dated 19.07.2011. When the matter was listed on 01.08.2011, learned counsel for the petitioner prayed for time till 03.08.2011 for obtaining necessary instruction. On 03.08.2011, learned counsel appearing for the petitioner prayed for listing the case on the next date. Accordingly, the case was listed on 04.08.2011 and on that day also, the learned counsel for JHADC did not place any instruction before this Court and also did not file any affidavit or any other document and prayed for fixing it on 09.08.2011 so as to enable him to file counter/objection. However, no affidavit etc. was filed by JHADC till 09.08.2011 and the matter was again fixed on 12.08.2011 for admission hearing with an understanding that keeping in view the nature of controversy, the matter would be taken up for disposal on 12.08.2011. However, on 12.08.2011 also, Mr. Thongkhiew, learned Senior counsel prayed for further 4 weeks time to file affidavit on behalf of the JHADC. The other respondents namely respondent Nos. 3 & 4, represented respectively by Mr. Khyriem, learned counsel and Mr. G.S. Massar, learned Senior counsel also did not file any affidavit. As already expressed earlier, considering the nature of controversy at hand as well as the constraint of time limit within which the election process of the post of Pator in question is to be completed, this Court felt it necessary to take up the matter for final disposal at this stage itself.

3. I have heard Mr. S.S. Dey, learned counsel appearing for the petitioner as well as Mr. H.S. Thangkhiew, learned Standing Counsel, JHADC assisted by Mr. P Nongbri, Advocate for respondent Nos. 1 and 2, Mr. L Khyriem, learned counsel for respondent No.3 and Mr. GS Massar, learned Senior counsel assisted by Mr. JM Thangkhiew, Advocate for respondent No.4.

4. The uncontroverted relevant facts in brief appearing in the writ petition and the connected legal provisions may be summarized as below :

After coming into existence of Jowai District as an Autonomous District, the Act of 1959, i.e. United Khasi Jaintia Hills Autonomous District Council (Appointment and Succession of Chiefs and Headmen) Act, 1959 was also made applicable to the Jowai Autonomous District Council.

Sections 2(a), (b), (g) and (i) of the 1959 Act reads as follows:

"2. Definition In this Act, unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say;

(a) "Chief means a Syiem, a Lyngdoh, a Dolloi, a Sirdar or a Wahadar as the case may be of any Elaka.

(b) "Custom" with reference to any Elaka means any rule regarding the appointment of a Chief or Headman for that Elaka which having been continuously and uniformly observed for a long time, has obtained the force of

law in that Elaka.

(g) "Elaka" means any administrative Unit in the District specified in Appendixes I, II and III or any other administrative unit to be constituted and declared as such by the Executive Committee.

(i) "Headmen" means a Myntri, a Syiem Raid, a Basan, a Lyngdoh Raid, a Matabor, Elector, a Pator, a Sangot and a Village elder."

Section 3 of the Act which contains the provision of Election and Appointment of Chiefs and Headmen reads as follows:

"Elections and Appointment of Chiefs and Headmen: Subject to the provision of this Act and the Rules made thereunder all elections and appointments of Chiefs or Headmen shall be in accordance with the existing customs prevailing in the Elaka concerned." 5. The term "existing customs prevailing in the Elaka concerned" pertaining to this particular Elaka of Sumer Patorship came in for consideration before a Division Bench of this Court in Civil Rule No: 199/1980 (Annexure 1 to the writ petition). The Division Bench had occasion to record the following facts and circumstances of the case and had also laid down the following ratio in respect of the custom of the Elaka concerned:

"...It is the case of the petitioner that as per the custom prevalent in the area under consideration, the Pator of Sumer was appointed and confirmed by the Dolloi of Raliang and his Durbar. This averment has been made in paras 5 and 6 of the petition. There is no denial to this averment. Respondent No. 5 has not made his appearance in this case, and the only counter filed is by respondent No. 4 who is the Dolloi of of Raliang and who has naturally supported the case of the petitioner.

3. In view of the clear averment in the petition that as per the custom of the Elaka, the Patar in question could have been appointed only by the Dolloi, we have no hesitation in holding that because of the provision in Section 3 of the, Act the District Council had no authority in law to make the appointment in question. The same is therefore set aside."

6. Very recently, the Durbar of Sumer Patorship represented by its Secretary had instituted a proceeding before this Court vide W.P.(C) No. (SH) 417/2010 where based on the submission of the parties thereto, this Court vide order dated 10.12.2010 had disposed of the said writ petition with a direction as follows:

"I dispose of this writ petition with a direction to the respondents authorities to take appropriate decision regarding holding of election to the post of Pator by secret ballot and under the supervision of the District Council and in presence of the Chief of the Elaka/Doloi within a period of one month from the date of receipt of a certified copy of this order for the interest of local people."

7. This was followed by another order dated 28.03.2011 passed by another Single Bench of this court in W.P.(C) No. (SH) 2837 2010 wherein acting on the

submission on behalf of learned counsel appearing for the JHADC to the effect that "election to the post of Pator of Sumer Patorship will be held within a maximum period of three months from today i.e. on or before 30.6.2011...", the counsel for the petitioner did not press the petition any further. Accordingly, the petition was disposed of by recording as thus "dismissed as not pressed in view of the statement of the learned counsel for the JHADC" While passing the aforesaid order, it was also made clear that unless the circumstances are very exceptional, no extension of time would be granted. Subsequently, the aforesaid notifications dated 12.7.11 and 19.7.11 which are subject matters of challenge in this petition, were issued.

8. On an application filed by the JHADC, praying for granting extension of time for holding election for the post of Pator, which was registered as Misc. Case No. (SH)220/2011 in WP(C)No.(SH)283/2010, Single Bench of this Court vide order dated 24.06.2011 disposed of the Misc. case as follows:

"Heard Mr. HS Thangkhiew, the learned Senior counsel assisted by Ms. N Shylla. the learned counsel for the applicants. Also heard Ms. A Paul, the learned counsel for the writ petitioner.

The application is for extending the time granted by this Court in the Judgment and Order dated 28.03.2011 in WP(C)No.(SH) 283 of 2010 for holding election for the post of Pator under Sumer Patorship, by three months. The application is strongly opposed by the learned counsel for the writ petitioner contending that there are no extra ordinary circumstances warranting the extension. She draws my attention to the observation made by this Court on 28.03.2011 that unless the circumstances were very exceptional, no extension of time would be granted. A number of difficulties has been expressed by the learned Senior counsel preventing the applicants from holding the election in time. In my opinion, the reason for not holding the election in time as projected by the learned Senior counsel did not appear to be in order. However, in the interest of justice, the applicants are given 45 days from today to hold the election and complete the same. "No extension shall be granted hereafter.

The misc. case stands disposed of."

9. Mr. Dey, learned counsel appearing for the writ petitioner in course of his submissions has formulated the following three points for consideration of this Court:

(i) Whether in view of the provisions of Section 3 of the Act of 1959 as well as the ratio laid down by the Division Bench of this Court in the judgment and order dated 1.07.1982 passed in Civil Rule No. 199/80, the JHADC could issue the impugned notifications dated 12.07.2011 and 19.07.2011 whereby the power of conduct of election has been taken over by the JHADC?

(ii) What is the effect of the two orders dated 10.12.2010 passed in W.P. (C)No. (SH)417/2010 and dated 28.03.2011 passed in W.P.(C)No. (SH) 283/2010?

(iii) If the impugned notifications are set aside by this Court, what consequential orders are fit to be issued by this Court to afford full justice to the parties?

10. Mr. Dey, learned counsel for the petitioner while pressing the provisions of Section 3 of the Act, has further laid stress on the ratio laid down by the Division Bench as well as by the custom of the Elaka which, according to Mr. Dey clearly ousts any jurisdiction of the JHADC to interfere in any manner in the matter of election to the post of Pator of Sumer Patorship. He further adds that it is the Dolloi and Dolloi alone who has the exclusive authority to hold election and appoint Pator in the Office of the Sumer Patorship. Referring to the provisions of Section 7 of the Act, 1959. Mr. Dey submits that the role of JHADC at best is to accept and keep in record the report of the Dolloi in respect of the conduct of election and appointment to the post of Pator of Sumer Patorship.

11. As regards the second point as formulated above, Mr. Dey learned counsel for the petitioner submits that the effect of the orders dated 10.12.2010 and 28.03.2011 can be that the post of Sumer Patorship has to be filled up within the time frame indicated in those orders by following the relevant statutory mandate as interpreted by the Division Bench in judgment and order dated 01.07.1982.

12. Mr. Dey lastly submits that to avoid any undue scenario, as apprehended by Mr. Thangkhiew, learned Sr. Counsel appearing for JHADC as well as the apprehension of any bias in the process of election, as expressed by Mr. Massar, learned Senior counsel appearing for respondent No.4, the District Civil and Police Administration of Jaintia Hills District can be directed by this Court to send Observer on the election day as well as to arrange for proper security for candidates, electors and election authorities. Mr. Dey has further stressed that respondent No .4 representing only the voice of 28 electors out of about more than 2000 electors can not be allowed to undermine the prevailing time honored mode of holding election in the Elaka. Recalling the manner and the customary procedure adopted in the last election to the post of Sumer Patorship held in the year 2006, Mr. bey submits that the election is held in a field of the Elaka where based on the number of contesting candidates, separate queues of electors owing allegiance to their respective candidates are drawn up and thereafter, on the basis of head count of such electors standing in separate queues, the name of the elected candidate who receives the maximum numbers of votes of electors is finalized by the Dolloi and his Durbar. These factual statements regarding the procedure adopted in the election of 2006 as stated by Mr. Dey, learned counsel for the writ petitioner, has not been controverted by the learned counsel for the respondents.

13. Mr. Thangkhiew, learned Senior counsel, while interpreting the contents of the two notifications dated 12.07.2011 and 19.07.2011 submits that the JHADC by these two notifications has not in any manner violated the statutory mandate of Section 3 of the Act. According to him these two notifications reveal the anxiety of the District Council to fill up the post of Pator of Sumer Patorship by way of conduct of a fair election. Mr. Thangkhiew further submits that the

election will be conducted in terms of the notifications in presence of the Dolloi and the notifications by no means take away whatever role is assigned to the Dolloi under the relevant statutory provision. Rather, the prevailing custom of the Elaka regarding holding of election by headcount or raising of hands is sought to be modernized by way of conduct of election by secret ballot system.

14. Mr. Massar, learned Sr. Counsel appearing for Respondent No. 4 has contended that the holding of election by way of show of hands or head counting of electors is prone to manipulation and bias of the Dolloi and it is at the instance of respondent No.4 that the process of election by secret ballot system, contemplated under the two notifications under challenge, had been issued by the JHADC. According to him the two notifications in challenge do not in any manner violate the custom of the Elaka or any prevailing statutory provision, rather the same paved the way for a fair election.

15. Mr. Khyriem, learned counsel appearing for Respondent No.3 has adopted the submissions made by Mr. Massar, learned Senior counsel and has submitted that the anxiety of respondent No.3 is to ensure a free and fair election at the earliest.

16. I have heard and considered the respective submissions of the learned counsel appearing for the parties. The election to the post of Sumer Patorship is already regulated by the statutory provisions of Section 3 of the Act of 1959. After the provisions of this Section 3 has been explained and interpreted by the binding ratio of the Division Bench of this Court by the judgment and order dated 1.7.1982, this Court does not have any hesitation in holding by way of reiteration of the law laid down in the aforesaid judgment and order dated 1.7.1982 that it is the Dolloi of Elaka Raliang who has got the sole authority and jurisdiction to hold election to the post of Pator of Sumer Patorship and the JHADC does not have any statutory power to take upon itself the role of conducting the election, as has been ordered and contemplated under the impugned notifications dated 12.07.2011 and 19.07.2011. Consequently, the two notifications dated 12.07.2011 and 19.07.2011 and any action taken in pursuance of the same by the Respondent Nos. 1 & 2 are hereby set aside and quashed.

17. It is also my considered view that the relevant statutory provisions of Section 3 of the Act and the ratio laid down by the Division Bench in the aforesaid judgment and order dated 1.7.1982 hold the field as binding law, the orders dated 10.12.2010 and 28.3.2011 passed by the two Single Benches of this Court in W.P.(C) No. (SH) 417/2010 and W.P.(C) No. (SH) 283/2010 can not be read and interpreted to have bestowed any authority on JHADC to conduct the election of the post of Pator of Sumer Patorship negating the role of Dolloi. Therefore, in view of the above, I hereby declare that the JHADC authority is not competent to conduct the election of the post of Pator of Sumer Patorship.

18. The above point Nos. (i) & (ii), as pressed by the counsel for the petitioner are answered accordingly.

19. As regards the contention of the Respondents that the prevailing custom and

practice of the Elaka regarding the mode of election can be changed by the District Council to suit the present situation where thousands of electors participated in the process of election which itself renders the customary process of raising of hands or headcount redundant, I am of the considered opinion that there is no material on record before this Court in this case to come to a conclusion that the Court in exercise of its extraordinary powers under Article 226 of the Constitution is either called upon or empowered to change and/or interfere with any prevailing customary practice of the Tribals residing in a Sixth Scheduled area, moreso, in the absence of any prima facie arbitrariness or lack of rationality negating any Constitutional mandate or prevailing legislative prescription. A mere difference of opinion as regards the rationale or relative merit in respect of a prevailing customary practice of the Tribals, visavis, a so called modern system or procedure adopted elsewhere is not sufficient to interfere with any established customary practice. In the instant case, the Dolloi being the authority appointed under law to conduct the election, as per custom it is his authority along with the collective wisdom of his Durbar to adopt or follow a procedure which will ensure free and fair election.

20. As regards the third point formulated above, this Court considering the gravity of the situation and anxiety expressed by the parties feels it appropriate to direct the Deputy Commissioner of Jaintia Hills District to depute a senior officer under his jurisdiction to act as independent observer for ensuring trouble free election in terms of the prevailing customary practice of the Elaka under the authority of Dolloi. The Deputy Commissioner shall be free to take all necessary steps to maintain law and order and discipline on the date of election as well as the dates prior to and after such election as he deems fit and proper.

21. The election and appointment to the post of Pator of Sumer Patorship shall now be held by the writ petitioner, the Dolloi without fail within 30th of September, 2011 with report thereof to be submitted by the Dolloi and his Durbar before the appropriate authority of Jaintia Hills Autonomous District Council within a week from the date of such election and appointment.

22. The writ petition is, accordingly, allowed. However, there shall be no order as to costs.