
(1972) 07 GAU CK 0005
In the Gauhati High Court
Case No : Civil Rule No. 431 of 1971

Dr. Nirendra Mohan Guha

APPELLANT

Vs

State of Assam and another

RESPONDENT

Date of Decision : 28-07-1972

Acts Referred:

Assam Municipal Act, 1956 — Section 298, 31

Citation : AIR 1972 Guw 104

Hon'ble Judges : P.K. Goswami, C.J.; R.S. Bindra, J

Bench : Division Bench

Advocate : A. Ali, for the Appellant; M.A. Laskar, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Goswami, C.J.—This application under Article 226 of the Constitution is directed against a notification dated 23rd June, 1971, issued by the Sub-divisional Officer (Executive), Goalpara, appointing 17th of August, 1971, as the date for holding a bye-election in respect of Ward No. VI of the Goalpara Municipal Board in consequence of death of one of the newly elected members. This bye-election was proposed u/s 31 of the Assam Municipal Act, 1956 (Assam Act XV of 1957), (briefly "the Act").

2. The petitioner is a rate-payer and voter of the Goalpara Municipal Board (briefly "the Board"). There was a general election of the Board on 28th April, 1969 and out of 12 wards, there was election in 8 wards and the election in the remaining 4 wards, viz., Nos. II, III, VII and XII could not take place on account of stay order from the District Judge in connection with appeals against nomination under the Act. While the appeals were pending, ten members of the existing Board resigned. Thereupon, by a notification dated 4th November, 1969, the Governor of Assam superseded the Board for a period of one year or till the Board is reconstituted, whichever is earlier, with effect from the date of the notification u/s 298 of the Act. The notification may be set out:

Whereas the Goalpara Municipal Board was asked by the State Government in its telegram No. MA. 569 dated 31-10-69 to show cause as to why the said Board should not be superseded for acts and omissions conveyed under aforesaid telegram u/s 298 of the Assam Municipal Act, 1956 (Assam Act XV of 1957): And whereas the Governor of Assam, after consideration of the explanation submitted by the said Board under its telegram dated 3-11-1969, is satisfied that the said Board has made defaults in its performance of duties imposed on it by and under the said Act and more specifically in respect of the duties enumerated below:-

(1) That the said Board failed to pass and submit its Budget Estimate for the year 1969-70 to the Commissioner of Plains Division for sanction and thereby violated the provisions of Rules 11 to 16 of the Assam Municipal (Accounts) Rules, 1961; (2) That out of total fourteen Commissioners of the Board, ten Commissioners have resigned -- thus making the activities of the Board stand-still;

Now, therefore, the Governor of Assam, in exercise of the powers conferred by Section 298 of Assam Municipal Act, 1956 is pleased to declare the said Board to be in default and not competent to perform the duties imposed on it by and under the said Act and to supersede the said Board for a period of one year or till the Board is reconstituted, whichever is earlier, with effect from the fourth day of November, 1969.

3. This notification was followed by another dated 31st October, 1970, which may also be quoted:

Whereas the period of supersession of the Goalpara Municipality will expire on the afternoon of 3rd November, 1970, vide Govt. Notification No. MA.5/69/53 dated 4-11-69; And whereas, the Governor of Assam is satisfied that there is no possibility of completing the general election of the Municipality immediately in view of Stay Orders issued by Court in respect of holding general election of some wards of the said Municipality:

Now, therefore, the Governor of Assam in exercise of the powers conferred by Section 298 read with clause (1) of sub-section (2) of Section 299 of the Assam Municipal Act, 1956 (Assam Act XV of 1957), is pleased to order that the period of supersession of the Goalpara Municipality be extended for a period of six months with effect from 4-11-70 (forenoon).

4. There was yet another notification dated 22nd April, 1971 which may also be quoted:

Whereas the period of supersession of the Goalpara Municipality will expire after 3rd May, 1971, vide Govt. Notification No. MA.5/69/Pt/2 dated 31-10-70; And whereas, the Governor of Assam is satisfied that the general election of the remaining 4 wards of the Municipality could not be held yet due to unavoidable reasons, which is expected to be completed shortly;

Now, therefore, the Governor of Assam in exercise of the powers conferred by Section 298 read with clause (1) of the subsection (2) of Section 299 of the Assam Municipal Act, 1956 (Assam Act XV of 1957), is pleased to order that the period of supersession of the Goalpara Municipality be extended for a further period of six months only with effect from 4-5-1971.

5. By December, 1970, the appeals were disposed of by the District Judge and, after their disposal, only election to two wards, viz., ward Nos. II and XII remained to be completed. The Sub-divisional Officer thereafter fixed election to these wards as well as for ward No. VI, the latter being a by-election, as stated above.

6. The petitioner submits that in view of the provisions of Section 299 (1) (a), the bye-election which is notified is illegal and incompetent under the Act. In order to appreciate the submission, we may read Sections 298 and 299, as amended by Assam Act II of 1966:

298. If, in the opinion of the State Government any Board is not competent to perform, or persistently makes default in the performance of the duties imposed on the Board by or under this Act or otherwise by law, or exceeds or abuse its powers, or in the event of failure on the part of the Board to provide such services as the State Government may, by notification in the Official Gazette, declare to be essential services, the State Government after giving the Municipal Board an opportunity for submitting an explanation in regard to the matter may, by notification, stating the reason for so doing, declare such Board to be incompetent, or in default, or to have exceeded or abused its powers, as the case may be, and supersede the Board for a period not exceeding one year at a time or dissolve the Board and order a fresh election as soon as possible; Provided that nothing in this section shall be deemed to require the State Government to give a personal hearing to the Board before any order is passed under this section.

299 (1). When an order of supersession or dissolution has been passed under the preceding section, the following consequences shall ensue;- (a) all the Commissioners of the Board shall, as from the date of the order, vacate their offices as such Commissioners; (b) all the powers and duties which under this Act may be exercised and performed by the Board whether at a meeting or otherwise, shall, during the period of supersession or in case of dissolution till the new Commissioners and the Chairman are elected or nominated, be exercised and performed by such person or persons as the State Government may direct;

(c) all property vested in such Board shall during the period of supersession or dissolution, as the case may be, vest in the State Government.

(2) On the expiration of the period of supersession, specified in the order, the State Government may-

(i) extend the period of supersession for such further term as it may consider necessary, but not exceeding a period of one year at a time, or (ii) reconstitute the Municipal Board by a fresh general election and the persons who vacated their offices under clause (a) of sub-section (1) shall not be deemed disqualified for election or appointment:

Provided that the State Government may at any time before the expiration of the period of supersession take action under clause (ii) of this sub-section.

7. Section 298 occurs in Chapter VIII of the Act with the heading "Control". The "Board" that is to be controlled is the Municipal Board (Section 3 (1)). Again, "Municipal Board" means the body of persons for the time being elected or appointed to conduct the affairs of any municipality under this Act (Section 3 (27)). The expression "for the time being" has reference to the Board that was functioning on the date of the passing of the order. It is that Board's activity or conduct that was called in question by action u/s 298. It is not possible to hold that Section 298 while controlling that Board which was functioning at the material time also takes in its sweep for control of the members elected in a general election to constitute, on completion, a new Board. The members who were elected in the general election have not yet constituted the Board for the purpose of the Act and, for that reason, are incapable of submitting any explanation against action u/s 298. This is inherent in the disciplinary action contemplated u/s 298 which cannot be interpreted in vacua regardless of its content. It is clear, the new Board that will take over after completion of the general election is inchoate at this stage with four wards yet to return their candidates. Section 298, so read, can work harmoniously along with Section 209. It is true that u/s 299 (1) (a) one of the consequences is that all the Commissioners of the Board shall, as from the date of the order of supersession, vacate their offices as such Commissioners. Now, "the Commissioners" mean the persons for the time being appointed or elected to conduct the affairs of any municipality under this Act (Section 3 (5)), and we have already noticed the definition of "Board" and "Municipal Board" earlier. In view of the above definitions, there is no escape from the conclusion that the words "all the Commissioners" in Section 299 (1) (a) will have reference only to the Commissioners of the outgoing Board which had defaulted in some way entailing action by the Government u/s 298 of the Act.

8. The general election already ordered in accordance with the provisions of the Act, if otherwise valid, is not affected by the action of the Government u/s 298 against the outgoing Board. The outgoing Board would have, in the ordinary course, continued under the law for four years commencing from the date of the first meeting of the newly constituted Board after a general election at which a quorum is present, unless extended (Section 26 (1)). We may note here Sec. 26 (5) which was inserted by Assam Act XXIX of 1966 which provides for an automatic dissolution of the Board u/s 298 with effect from the date of expiry of the term of office of the Commissioners and thereafter the provisions of Section

299 shall apply to the Board. This would go to show that the Act makes distinction between the outgoing Board, that is to say, the Board that is functioning at the time of supersession or dissolution and the Board that may be reconstituted next under the provisions of the Act. Once there is a supersession u/s 298, either after expiry of the period of supersession or prior to it, the State Government has to order for reconstituting the Municipal Board by a fresh general election. It, therefore, follows that there must be an order of the State Government for reconstituting the Municipal Board u/s 299 (2) (ii) of the Act.

9. Mr. Laskar, the learned Counsel for the State, in answer to a question put by the Court, stated that he was unable to produce from the records any order of the Government for reconstituting the Board. We, however, find that the order for reconstitution of the Board can be easily spelt out from the original order of supersession and the subsequent orders of the Government extending the period of supersession till completion of the general election, after election to the remaining wards, which had been stayed by the District Judge. In our view, no separate order, in express terms u/s 299 (2) (ii), which is ordinarily necessary in a case of supersession, is called for in view of the successive orders passed by the Government and of the peculiar circumstances of this case.

10. It is clear in this case that the Board was superseded by the Government for one year or till the reconstitution of the Board, whichever is earlier. At the time of passing of the order of supersession, and of orders of extensions, the Government took note of the general election that has already commenced and remained to be completed. That is the only reason why the Government in its order expressly made the orders of supersession dependent on the completion of the general election. The intention behind these orders is that the Board would not remain superseded the moment a new Board is reconstituted and is able to enter upon its duties under the Act. The original order of supersession in the peculiar facts and circumstances of the case is a composite order, not only of supersession of the Board, but also contains a ratification of the order for general election of the Municipality and requisite permission to complete the same, so that the new Board can take the place of the superseded Board. The order is a virtual order of dissolution of the outgoing Board with ordering of a general election, and since one is already afoot, it gives legal sanction to the same u/s 299 (2) (ii) of the Act.

11. Mr. Amjad Ali, the learned Counsel for the petitioner relied upon a Single Bench decision of the Calcutta High Court, reported in *Provat Chandra Sircar Vs. R.C. Sen, Administrator of the Budge Budge Municipality and Others*, in support of his submission that a general election of all the wards is necessary after a supersession of the Board and not merely partial election, be it a by-election. The Calcutta High Court was dealing with an order of supersession of the Commissioners of the Budge Budge Municipality under the provisions of the Bengal Municipal Act, 1932 and its consequences u/s 554 (2) of that Act. The Court quashed the by-election and ordered for a fresh general election of all the

wards. From the report of the decision we do not gather the terms of the order of supersession passed in that case. Besides, it appears that in that case "the State decided to reconstitute the Commissioners of the Municipality u/s 554 (2) (ii)" of the original Bengal Act, which is substantially similar to Section 299 (2) (ii) of the Assam Act. In pursuance of that order of the West Bengal Government, the District Magistrate was taking steps for holding a general election. This order was held to be invalid by the Civil Court at the instance of six Commissioners, who had been elected prior to the order of supersession. The Civil Court also issued a permanent injunction against the State and the Officers not to hold a general election in all the five wards. In compliance with the order of the Civil Court, the District Magistrate next time notified for holding election to the remaining wards to complete the general election. The petitioner in the Calcutta case, who was not a party to the title suit, made an application under Article 226 of the Constitution stating that a partial election was no longer permissible and that there should be a fresh general election of all the five wards. The Calcutta High Court allowed the application. We therefore find that in the Calcutta case, the State Government had issued an order u/s 554 (2) of the Bengal Act and the Civil Court alone was interfering with that order. Since the order u/s 554 (2) was there, which was a competent order under the law, there was no question of holding a partial election in that case. In the present case, there was no such order of the State Government to hold a fresh general election. On the other hand, we find the State Government's order even at the time of making the order of supersession, was to permit completion of the general election which had already taken place. This fact clearly distinguishes the present case from the Calcutta case relied upon by Mr. Ali. The submission of the learned Counsel, therefore, fails.

12. We should have expected the learned Counsel for the State to inform the Court what transpired after obtaining of the Rule on 13-8-1971. A preliminary objection could have been taken by the learned Counsel for the State inasmuch as, with the prayer for stay rejected at the time of obtaining of the Rule, the bye-election must have already taken place and the elected member should have been impleaded in this proceeding. There is no doubt that if the application were allowed, his rights would be affected.

13. In the result, the application fails and is dismissed. We will, however, make no order as to costs.

Bindra, J.

14. I agree.

Application dismissed.