
(2014) 07 GAU CK 0025
In the Gauhati High Court
Case No : Writ Petition (C) No. 1534/2013

Gobinda Mandal

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 17-07-2014

Acts Referred:

Citation : (2014) 3 GLD 72 : (2014) 4 GLT 195

Hon'ble Judges : Tinlianhang Vaiphei, J

Bench : Single Bench

Advocate : S.K. Goswami and P.K. Sharma, Advocate for the Appellant; R.K. Bora, Govt. Advocate, M. Hazarika, K. Choudhury, D. Choudhury, A.K. Choudhury, M. Choudhury and T. Ali, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Tinlianhang Vaiphei, J.—The legality of the order contained in the letter dated 18-8-2012 issued by the Principal Secretary to the Government of Assam, Urban Development Department (respondent 1) holding that the resolution dated 21-4-2012 removing the respondent No. 3 from the Chairmanship of Nalbari Municipal Board was untenable inasmuch as the Assam Municipal (Amendment) Act, 2012 requiring such removal by more than half of the whole number of the Commissioners was not fulfilled, is called into question in this writ petition.

2. So much of the facts as are necessary for disposal of this writ petition may be referred to at the outset. The petitioner is an elected Commissioner of Nalbari Municipal Board ("the Board" for short), which has altogether 12 elected Commissioners with two ex-officio Members, namely, the local MLA and one local MP. According to the petitioner, when the respondent 3 indulged in corrupt and other illegal activities in contravention of the provisions of the Assam Municipal Act, 1956 ("the Act"), some of the Commissioners on 27-3-2014 submitted a requisition for convening a Special Meeting u/s 43(2) of the Act to move a Motion of No-confidence against him, but he refused to do so. Aggrieved by this, some of the Commissioners issued another notice upon the respondent 3 on 12-4-2012

expressing their dissatisfaction with his conduct. On receipt of the notice, respondent 3 on the same day gave his reply without mentioning anything regarding the holding of the Special Meeting. This prompted the Commissioners to call the Special Meeting u/s 43(3) of the Act on 21-4-2012 to discuss the No-Confidence Motion against respondent 3; the notice was duly received by him on 27-3-2012. The respondent 3, however, failed/refused to call the special meeting whereupon the notice for the Special Meeting was issued on 17-4-2012 by showing the date of the meeting as 21-4-2012 at 11 AM at Nalbari Municipal premises. The notice was given to each of the Commissioners as well as ex-officio members including the respondent No. 3, who acknowledged the receipt thereon on 17-4-2012. The meeting notice was also publicised in the Office of the Nalbari Municipal Board as well as the local newspaper. Thus, according to the petitioner, the date of the Special Meeting to fixed for 21-4-2012 was known to all the Commissioners and the ex-officio members. The meeting, attended by six Commissioners and one ex-officio member, was accordingly held on 21-4-2012 with the subject being "Removal of Chairman u/s 28(2)" of the Act: three resolutions were unanimously passed by all the six commissioners and one ex-officio member present in the meeting. The respondent No. 3 was accordingly removed from the post of Chairman of the Board with immediate effect and the Vice-Chairman (Sri Baneshwar Das) was given the responsibility to run the office of the Chairman of the Board till a new Chairman was elected.

3. It is the contention of Mr. SK Goswamy, the learned counsel for the petitioner that when the said resolution was passed, the law regulating the issue in question i.e. Section 28(2) of the Act, had provided that an elected Chairman of the Board could be removed from his office by a resolution of the Board in favour of which not less than half of the whole number of Commissioners should have given their votes at a meeting specially convened for the purpose. He further submits that Section 28(2) has since then been amended by the Assam Municipal (Amendment) Act, 2012, which was notified in the Assam Gazette on 19-5-2012 by substituting the words "not less than half" by the words "more than half". It is the contention of the learned counsel that the amended provision came into force only on 19-5-2012 and is, therefore, prospective in operation. Thus, according to the learned counsel, the amended provision requiring more than half of the Commissioners to outvote the Chairman will not be applicable to the instant case inasmuch as the resolution removing the respondent No. 3 had been passed on 21-4-2012 when the amended provision had not come into force. So construed, contends the petitioner, inasmuch as the respondent No. 3 was removed by six Commissioners and one ex-officio member out of the total strength of 14 membership of the Board, the requirement of "not less than half of the whole number of Commissioners" has been satisfied, and the resolution removing the respondent No. 3 as Chairman of the Board cannot, therefore, be faulted with. Therefore, the decision of the respondent No. 1 dated 18-8-2012 holding to the contrary, contends the learned counsel, is perverse and is liable to be interfered with by this Court.

4. Refuting the contentions of the learned counsel for the petitioner, Mr. R.K. Bora, the learned Government Advocate, submits that the provision of the amended Section 28(2) is merely clarificatory/remedial in nature and is, therefore, retrospective in operation. According to him, as there had always been confusion as to the meaning of the expression "not less than half of the whole number of Commissioners" leading to potentially undesirable consequences some of the time, the State Legislature, with a view to clarify the meaning of the expression, has substituted it by the expression "more than half" in Section 28(2) of the Act. He submits that the amendment is clarificatory in nature or, at any rate, remedial in nature, which can only have retrospective operation and was operative when the resolution in question was passed i.e. even before the coming into force of the amendment. He presses into service the decision of the Apex Court in *Shakti Tubes Ltd. Vs. State of Bihar and Others*, to buttress his contentions. He, therefore, contends that the impugned order issued by the respondent No. 1 is consistent with the intention of the State Legislature and does not suffer from infirmity calling for the interference of this Court. As the contentions of Mrs. M. Hazarika, the learned senior counsel for the respondent No. 3, and Mr. D. Choudhury, the learned counsel for the respondent No. 4, substantially support the submissions of the learned Government Advocate in defending the impugned order, their submissions need not be separately recorded for the sake of brevity.

5. In order to appreciate the present controversy, it may not be out of place to refer to both the unamended and amended provisions of Section 28(2) of the Act, which are as follows:

28. Removal of Chairman or Vice-Chairman.- [(1) [***.]

(2) 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 number of Commissioners shall have given their votes at a meeting specially convened for the purpose.

The amended provision reads as follows:

28. Removal of elected Chairman or Vice-Chairman.- [(1) [***.]

(2) An elected Chairman or Vice-Chairman may be removed from his office by a resolution of the Board in favour of which more than half of the whole number of Commissioners shall have given their votes at a meeting specially convened for the purpose. * * *

(Italics mine)

6. Even a cursory look at the amended Section 28(2) of the Act will show that any possible doubt on the meaning of the number of Commissioners, who can remove an elected Chairman or Vice-Chairman, has been removed. Thus, it is

more than half of the whole number of Commissioners who can now remove an elected Chairman or Vice-Chairman. Since the voting right of an ex-officio member of the Board is not expressly excluded by Section 11(3)(b) unlike a member having special knowledge or experience in Municipal Administration appointed u/s 11(2) who has been denied of such voting right, the Commissioners contemplated by Section 28(2) to remove the Chairman or Vice-Chairman shall necessarily include the ex-officio member of the Board. The question which falls for consideration now is whether the amended provision has retrospective effect in operation or not? The law is now well-settled from a catena of judicial decisions that the presumption against retrospective operation is not applicable to declaratory statutes. The principle is, with due respect, succinctly and admirably explained by Hon'ble Chief Justice R.C. Lahoti (as he then was) in *Zile Singh Vs. State of Haryana and Others*, , in the following manner:

16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retroactivity is inapplicable to such legislations as are explanatory and declaratory in nature. A classic illustration is the case of *Attorney General v. Pougett* (1816) 2 Price 381 : 146 ER 130 (Price at p. 392). By a Customs Act of 1893 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s 4d, but the Act omitted to state that it was to be 9s 4d per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s 4d per cwt., but Thomson, C.B., in giving judgment for the Attorney General, said: (ER p. 134)

The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act: but that had relation to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act. (Price at p. 392)

17. Maxwell states in his work on *Interpretation of Statutes* (12th Edn.) that the rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it" (p. 225). If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the "inhibition of the rule" is a matter of degree which would "vary secundum materiam" (p. 226). Sometimes, where the sense of the statute demands it or where there has been obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p. 231).

7. In the case before us also, the expression "not less than half" had been intended by the Legislature to convey the idea that only a majority of the

Commissioners could remove the elected Chairman or Vice-Chairman, but by using the said expression, perhaps owing to bad legislative drafting, unnecessary controversy had been generated thereby making it a lawyer's paradise! In other words, by the use of the expression "not less than half" in Section 28(2) of the Act, either the intention of the Legislature appeared to have been frustrated, or had not been adequately articulated. In any case, it does not make any sense at all if one half of the Commissioners can remove an elected Chairman or Vice-Chairman even when the other parties have exactly equal number of the Commissioner on their side. Obviously, alive to the occasion, the Legislature has now amended the ambiguous provision in question. Thus, in my opinion, the amended provision is plainly declaratory/clarificatory/remedial legislation in nature which must have relation back to the time when the unamended Act was passed. So read, I have no hesitation to hold that the amended provision inserting the expression "more than half" is deemed to have been made applicable from the time unamended provision was originally passed. A fortiori, the petitioner and his party ought to have more than half of the number of the Commissioners when the resolution removing the respondent No. 3 was passed by the Commissioners. In the Board comprising of 14 Commissioners inclusive of the two ex-officio members, the Commissioners seeking removal of the respondent No. 3 did not obviously have more than half of the Commissioners including the ex-officio members who had given their votes to oust him as Chairman of the Board. Resultantly, the impugned order of the respondent No. 1 does not suffer from any infirmity of the nature warranting the interference of this Court.

8. Having said that I am still disturbed by the ugly and avoidable situation obtaining in the said Municipal Board. The scramble for power apparently remains unabated. The impasse needs to be broken. This Court cannot remain a silent spectator to the ongoing imbroglio in the Board. Since the Chairman or the Vice-Chairman is to be elected by the majority of the Commissioners, the Chairman, if he has lost the confidence of majority of the Commissioners, should not be allowed to continue by scoring brownie points in a court of law. If the Chairman does not enjoy the support of the majority of the Commissioners, he has no right to cling on to the office: that would be against the concept of government by majority. At the time of hearing, on my query, both the learned counsel appearing for the petitioner and the private respondents claim that neither of the parties have objection to a floor test to prove majority of their clients. If that is so, a floor test is the best solution to end this state of imbroglio.

9. For what has been stated in the foregoing, this writ petition is disposed of with the following directions:

1. The respondent No. 1 shall convene a Special Meeting u/s 43(3) of the Act within twenty days from the date of receipt of this judgment at the time and venue determined by him for discussion and voting on the Motion of Non-confidence moved by the petitioner and three others against the respondent No.

3 vide the notice dated 27-3-2012 (Annexure-I).

2. The Special Meeting so convened shall be conducted under the supervision of the respondent No. 1 or any official delegated by him for that purpose.

3. The meeting shall be conducted in accordance with the applicable practice and procedure of the Board.

4. Needless to say, the person elected by more than half of the whole number of the Commissioners who shall have given their votes in the Special Meeting shall be declared the Chairman of the Board.

5. Action taken report shall be submitted forthwith to this Court through the Registry.

6. The respondent No. 1 shall take necessary precaution to ensure that the Special Meeting as well as the voting is conducted smoothly and without any disturbance from any quarter.

7. If for any reason, the notice for the Special Meeting cannot be served upon any of the Commissioners immediately, the notice may be served through one prominent local paper, which shall be treated as proper service upon the Commissioners.