
(2008) 09 GAU CK 0041

In the Gauhati High Court

Case No : Writ Petition (C) No. 2193 and Miscellaneous Case No. 1894 of 2008

Gopal Ch. Patowary and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 15-09-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 243(W), 243U, 243X
Gauhati Municipal Corporation (Second Amendment) Act, 2006 — Section 425(A)
Gauhati Municipal Corporation Act, 1971 — Section 16, 17, 17(2), 22, 29

Citation : (2009) 2 GLR 219

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : A.K. Bhattacharyya, S. Katakey, R. Islam and R. De, in Writ Petition and K.N. Choudhury and R. Chakraborty, in Misc. Case, for the Appellant; K.N. Choudhury, R. Chakraborty and D. Saikia, in Writ Petition and S. Katakey in Misc. Case, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—The Petitioners, the erstwhile councillors of the Gauhati Municipal Corporation (GMC), who otherwise would have continued as Councillors upto January 2009, but for the dissolution of the elected body by the impugned order, have invoked the writ jurisdiction of this Court assailing the legality and validity of the action on the part of the State Respondents towards dissolving the elected body.

2. As stated above, the Petitioners are the elected Councillors of the GMC representing different Wards. Be it stated here that the last general election of the GMC was held for 57 Wards and 57 Councillors got elected, out of which one died. Be it also stated here that the general strength of the body is maximum 60 records have revealed that in addition to the elected members, there are 8 ex-officio members with voting rights.

3. A general meeting of the elected body of the corporation was held on 7.5.2008

and amongst others, the resolution for election of Mayor and Deputy Mayor was also adopted. As per the resolution, the election was to be held on 22.5.2008. Such resolution had to be adopted as the term of office of both the Mayor and the Deputy Mayor was to expire on 22.5.2008. The proceedings of the general meeting held on 7.5.2008 and the resolutions adopted therein were communicated to all concerned including the State Government.

4. After the aforesaid meeting and the resolution, the Municipal, Secretary, GMC circulated the agenda of the election of the Mayor and the Deputy Mayor vide Annexure-A notice dated 15.5.2008 intimating the time and venue of the election, which was 22.5.2008 at 11.00 AM at the GMC Conference Hall. After the notice, the Commissioner, GMC by his Annexure-B letter dated 15.5.2008 allocated duties and responsibilities to the officers mentioned in the letter for smooth functioning of the election. However, in the meantime, the Municipal Secretary, GMC issued a notice dated 21.5.2008 (Annexure-C), inter alia, stating that due to resignation of nearly 50% of the Councillors of the GMC and as directed by the Government vide letter dated 21.5.2008, the scheduled election would stand postponed until further order. Be it stated here that 21.5.2008 was a declared holiday on account of Janmotsava of Sri Sri Madhabdev and consequently, State Government offices including that of GMC remained closed and were not functioning.

5. According to the Petitioners, they came to know about the postponement of the election only on 22.5.2008, when they went to attend the election as scheduled. Immediately on coming to know about the same, the Petitioners alongwith 25 other Councillors (totaling 29) submitted an application (Annexure-D) before the Commissioner, GMC requesting him to hold the election within three days as per the provisions of Section 84(2) of the GMC Act, 1971. On 26.5.2008, the Petitioners filed a writ petition registered and numbered as WP(C) No. 2077/2008 apprehending dissolution of the corporation and also assailing the aforesaid notice dated 21.5.2008. However, on the date of filing the writ petition, the elected body of the corporation was dissolved with immediate effect by the impugned order dated 26.5.2008 (Annexure-F) purportedly invoking the provisions of Section 425(1) of the GMC Act, 1971.

6. As per the aforesaid order dated 26.5.2008, attention of the Government was attracted to a particular news item dated 8.5.2008 under the caption "bid to open toll-gates" wherein it was elaborated that in the general body meeting of the corporation a decision had been taken to open toll-gates contrary to the Government instruction and the orders of this Court in that regard. The order also indicated about issuance of show cause notice to the corporation by letter dated 15.5.2008 u/s 425 of the Act as to the reasons for taking such decision. The order further mentioned about the purported reply dated 19.5.2008 of the corporation containing the note of the Mayor. As per the order, legal opinions were obtained from the Legal Remembrances. Assam as well as the Advocate General of the State pertaining to the matter and the consequent decision to

dissolve the corporation as per the provisions of Section 425(1) of the Act.

7. It is the case of the Petitioners that they could come to know about the purported show cause notice and the purported reply only from the impugned order. According to them, no notice was ever served on the corporation and that they were also not aware of any reply submitted in respect of the notice. On enquiry, they came to know that it was the Commissioner, GMC, who had received the show cause notice and thereafter, without intimating the elected body furnished reply. According to the Petitioners, the Commissioner, in spite of receipt of applications from the Councillors failed to furnish copy of the show cause notice, but only furnished a unsigned copy of the reply (Annexure-G).

8. It is in the aforesaid fact situations, the Petitioners have invoked the writ jurisdiction of this Court assailing the legality and validity of the entire exercise on the part of the Government towards dissolution of the elected body. Apart from the ground that no notice was served on the corporation towards dissolution of the elected body, it has also been urged that the manner and method in which the elected body has been dissolved is violative of the constitutional mandates. According to the Petitioners the grounds assigned in the impugned order are non-existent and the dissolution of the elected body on such grounds is nothing but colourable exercise of power.

9. It has been urged in the writ petition that the State Government does not have any role to play in the affairs of the municipality since it is a body corporate and guided by its own Act and the Constitution of India. That being the position, the scheduled election could not have been postponed irrespective of resignation tendered by 27 Councillors of the particular political party. Be it stated here that after such resignation tendered by 27 Councillors, the body comprised of 29 Councillors and 8 ex-officio members with voting rights.

10. Counter affidavits have been filed both by the GMC as well as the State Respondents in the Guwahati Development Department. In both the affidavits, the action on the part of the State Respondents has been justified. According to the affidavits, the action on the part of the elected body of the corporation warranted interference invoking the power u/s 425(1) of the Act. In the affidavit-in-reply filed by the Petitioners, their stand in the writ petition has been reiterated.

11. Mr. S. Katakey, learned Counsel for the Petitioners, in his persuasive pursuits and elaborate arguments submitted that the entire action on the part of the State Respondents is actuated by mala fide and colourable exercise of power. According to him, there being failure towards compliance of the principles of natural justice before the impugned action was taken as mandated under the provisions of the Act as well as the Constitution of India and the manner and method in which a democratically elected body was set at naught warrant interference of this Court.

12. Countering the above argument both Mr. K.N. Choudhury, learned Additional

Advocate General, Assam assisted by Ms. R. Chakraborty, learned Additional Senior Govt. Advocate, Assam as well as Mr. D. Saikia, learned Standing Counsel, GMC upon a reference to the purported resolution adopted by the body in its meeting held on 7.5.2008 towards opening toll-gates, which according to them was in violation of the direction of this Court and was without the approval of the Government submitted that such action on the part of the elected body created a situation in which the Government had no option than: to invoke Section 425(1) of the Act. Both Ms. R. Chakraborty, learned State Counsel and Mr. D. Saikia, learned Standing Counsel, GMC have produced their respective records. In addition, Mr. Choudhury, learned Additional Advocate General, Assam pressing the Misc. Case No. 1894/ 2008 submitted that the writ petition is bad for non-joinder of necessary parties. According to him, the writ petition cannot be adjudicated upon in absence of the Mayor and the Administrator of the corporation.

13. I have given my anxious consideration to the submissions advanced by the learned Counsel for the parties. I have also gone through the relevant files, in which the impugned decision has been taken. In consideration of the same, I now proceed to deal with the matter judging the viewpoints expressed by the learned Counsel for the parties.

14. But for the dissolution of the elected body by the impugned order dated 26.5.2008, the elected body would have continued up to 11.1.2009. Article 243U of the Constitution of India provides duration of Municipalities, etc., in terms of which every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for 5 years from the date appointed from its first meeting and no longer. It further provides that a Municipality shall be given a reasonable opportunity of being heard before its dissolution. The Government took its impugned decision in the form of the impugned order dated 26.5.2008 invoking the provisions of Section 425(1) of the GMC Act, 1971. As per the said provision, if, at any time, the Government is satisfied that a corporation is not competent to perform or persistently makes default in the performance of the duties imposed on it by or under the Act or any mother law, or exceeds or abuses its powers, the Government may, by notification, in which the reasons for so doing shall be stated, declare the corporation to be superceded for a period not exceeding one, year. However, before such an order is made, a reasonable opportunity to show cause shall be given to the corporation.

15. Section 423 and 424 of the Act empower the Government to annul illegal proceedings of the corporation and to suspend its action. If the Government is of the opinion that the execution of any resolution or order of the Corporation is in contravention of or in exercise of the powers conferred by the Act or of any other law for the time being in force or is likely to lead to a breach of the peace or to cause injury or annoyance to the public or to any class or body or persons, the Government may by order in writing, suspend the execution of such resolution or ordered, or prohibit the doing of any such act. However, before such an action,

the Government will have to give the corporation an opportunity of showing cause why such an order should not be made, unless in the opinion of the Government the immediate making of such order is necessary.

16. Needless to say that the life of a democratically elected body must not be curtailed by the authority, which is empowered to do so unless the situation is so grave that such curtailment is unavoidable. Section 425(1) of the Act envisages such situations, which are - Corporation is not competent to perform; persistently makes default in the performance of the duties imposed on it or exceeds or abuses its powers. During the course of hearing learned Counsel for the Respondents submitted that it is the third category in which the matter falls and because of which the Government had to take the decision to dissolve the body coupled with the fact that in the meantime 27 Councillors had resigned.

17. If we go by the show cause notice dated 15.5.2008, copy of which has been annexed to the counter affidavit filed by the Respondent corporation, the only allegation made was that the General Council of the corporation had decided to re-open the toll-gates in violation of the judgment of this Court in *Zakir Hussain v. State of Assam* 2003 (1) GLT 644, as well as the order dated 12.6.2006 passed in PIL Case No. 33/2006 at a time when the State Government was examining the matter of framing of bye laws for installation of toll-gates. It is on that ground the notice was issued asking to show cause. The plea relating to issuance of notice only to the Commissioner, GMC and not to the purported offending body and the submission of show cause reply too by the Commissioner without placing the show cause notice to the General Council for its reply will be dealt with a little later.

18. In response to the aforesaid show cause notice, the Commissioner, GMC submitted his reply on 19.5.2008 stating that contrary to his consistent stand against opening the toll-gate, the General Body of the corporation took the decision for opening of toll-gates in its meeting held on 7.5.2008. In the show cause reply, it was further indicated that in the general body meeting majority of the Councillors supported the proposal for opening the toll-gates, although, the Mayor was of the view that the Government approval in the matter should be awaited. As per the purported view of the Mayor, incorporated in the show cause reply, she had to comply with the request of constituting the Monitoring Committee to work out the modalities towards supervision and collection of tolls from the toll-gates.

19. Although, in the notice, only allegation made was the purported violation of the orders of this Court in resolving to open the toll-gates, but in the impugned order, three additional grounds towards dissolution of the General Council have been assigned. They are - (i) the purported arising of dramatic and unprecedented situation due to tendering of resignation by about 50% of the Councillors; (ii) the views of the Advocate General and (iii) in spite of receipt of the show cause notice, the General Council not reversing its earlier decision to open toll-gates.

20. It is in the above context, Mr. Katakey, learned Counsel for the Petitioners referred to the decision of the Apex Court in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, in which it was emphasized that an order made by the statutory functionary based on certain grounds must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. This view has been reiterated in Bhikhubhai Vitthalbhai Patel and Others Vs. State of Gujarat and Another, .

21. Strictly speaking, it is not a case of supplementing the grounds assigned in the impugned order in the form of affidavit or otherwise. However, the emphasis on the part of the Petitioners was by way of bringing an analogy with that kind of a situation in the instant case in view of the fact that the allegations made in the show cause notice being only in respect of the purported resolution to open toll-gates in defiance of the orders of this Court, but in the impugned order additional grounds of obtaining legal opinions and the resignation tendered by some of the Councillors were assigned, According to the Petitioners irrespective of resignation tendered by 27 Councillors, the General Body of the corporation comprising of 29 Councillors could have continued for its entire life span as per the provisions of the Act and the Constitution of India. Further case of the Petitioners is that if the legal opinions obtained in the matter formed basis of the impugned order, it was incumbent on the part of the Government to apprise the same beforehand by way of show cause notice to the General Body of the. corporation.

22. Section 425 deals with the powers of the government to supercede a corporation under the circumstances stated therein. The only-circumstance indicated in the show cause notice was the purported resolution adopted towards opening toll-gates in defiance of the orders of this Court. The question is as to whether, even if such an allegation is accepted, same would fall in the categories under which the Government upon recording satisfaction to do so can supercede the corporation. In the show cause notice there is no allegation of any incompetence, making persistent default or exceeding or abusing its powers. However, during the course of hearing learned Counsel for the Respondents submitted that although there was no such allegation, but going by the conduct of the General Body in adopting resolution towards opening the toll-gates in defiance of the orders of this Court, same was in the category of exceeding or abusing its powers.

23. At the first instance it must be pointed out that on a reading of the minutes of the meeting of the Body held on 7.5.2008, nothing could be gathered that the Body took a resolution to open the toll-gates. What has transpired is that the Councillors comprising the Body in the meeting held on 7.5.2008, discussed on various issues pertaining to the corporation including that of finance. In the meeting the provisions of the Act and the existing by-laws of the corporation framed in 1976 and 1997 was also discussed. It was also pointed out that in

Zakir Hussain {supra}, this Court held the 1997 by-laws to be invalid. It was further discussed that the matter was sent to the Government for approval permitting the corporation to install toll-gates at prescribed places. Some members expressed the view that the tax could be collected under the 1976 by-laws and that there was no ban imposed either by the Government or this Court towards opening of toll-gates.

24. During the discussion of the matter, it was resolved to constitute an all party committee to examine the matter in its true prospective. It was also observed that the committee should sit early and finalise the matter. As to whether in view of the decision in Zakir Hussain (supra) and the observation made in the PIL, there was complete ban on opening toll-gates is not the issue to be resolved in this proceeding. In the PIL, the order passed by this Court was that the Government would take appropriate decision in the matter as expeditiously as possible preferably within three months. The court discussed about the contention of the Petitioner that the proposal for establishment of toll/check gates to be set up within GMC area should be finalized and that the Government had misinterpreted the ratio of the judgment in Zakir Hussain (supra). It was also noted that according to the Petitioner such inaction on the part of the Government amounted to interference in the functioning of the corporation.

25. In Zakir Hussain (supra) the 1997 by-laws, inter alia, permitting installation of check gates in the National Highway was under challenge. It was observed that the GMC did not have the power to install collection counter on the National Highway under 1997 by-laws and setting up of the same on the National Highway was completely illegal. It was further observed that the 1997 by-laws could still survive, if the same were read subject to limitation that the collection counters could not be set up by the Municipality on the National Highway. It was in that context Mr. Katakey, learned Counsel for the Petitioners submitted that what is barred is the setting up of toll-gates in the National Highways but not setting up of the same beyond National Highways coupled with the empowerment as per the provisions of the Act and the 1976 by-laws read with Article 243X. He submitted that it was a methodical ploy on the part of the Government to fall back on the aforesaid judgment and the observation made in the PIL projecting the same to be so serious so as to attract dissolution of the Corporation invoking the provision of Section 425 of the Act.

26. Apart from the fact that in the minutes of discussions held on 7.5.2008, there was no resolution as such to open toll-gates from a particular date, the discussion in the meeting only pertained to opening, of toll-gates keeping in mind the observations made in Zakir Hussain (supra). To examine the matter in detail, the all party committee was constituted. In the show cause notice such course of action on the part of the elected members of the Body was faulted with and the Commissioner was issued with the show cause notice asking him to furnish reply. Such transaction of business in the General Council of the corporation and when there is nothing to show that in fact any workable

resolution towards opening toll-gates in defiance of the orders of this Court was adopted, the action on the part of the Government to dissolve the Body on that score cannot be said to be backed by any logical, reasonable and justifiable reasons, except the determined effort to dissolve the Body for the reason other than any valid reasons. Further, even accepting that intact such resolution as indicated in the show cause notice was adopted, same could have been tackled taking recourse to the provisions of Section 423/424 of the Act discussed above.

27. We now proceed to deal with the plea of the Petitioners that the show cause notice addressed to the Commissioner and the reply thereto submitted by the Commissioner was not the compliance of the mandates envisaged u/s 425(1) of the Act and Article 243U of the Constitution of India. It is in this context, learned Counsel for the parties have referred to various provisions of the Act.

28. Section 4 dealing with Municipal Authorities provides that there shall be a corporation charged with the Municipal Administration of the City of Guwahati to be known as the Municipal Corporation of Guwahati. For efficient performance of the functions of the corporation there shall be Municipal Authorities like the Standing Committee and the Commissioner. Section 5 makes provision for constitution of the corporation with councillors subject to maximum of 60 members. As per Section 5(2) the corporation shall be a body corporate with perpetual succession. Section 29 deals with appointment of Commissioner, who shall not be a member of the corporation but shall be a whole time officer of the corporation with the right to attend all the meetings of the corporation without any right of voting. Dealing with his power, Section 34 provides that the executive power for the purposes of carrying out the provisions of the Act shall be vested in him, which, however, shall always be subject to restrictions, limitations and conditions imposed.

29. As per Section 51 of the Act, for the purposes of constituting the corporation, the Commissioner shall, by one or more notifications published in the official gazette, call upon all the Wards to elect Councillors in accordance with the provisions of the Act. Section 52 provides that when a vacancy occurs in the office of a councilor, the Commissioner shall, as soon as may be, after the occurrence of such vacancy by notification in the Official Gazette call upon the Ward concerned to elect a person for the purpose of filling the vacancy. However, no election shall be held to fill a vacancy occurring within 6 months prior to the holding of a general election u/s 50(1).

30. Section 53 of the Act provides the procedure, if election fails or is set aside. As per Section 55 the term of office of the councilor shall be for 5 years and shall commence on the date of first meeting after publication of the result of the general election u/s 56. Section 84 dealing with quorum provides that no business shall be transacted at any meeting of the corporation unless such meeting has been called by Mayor or Deputy Mayor or by person authorized nor unless a quorum shall be present. The quorum necessary for the transaction of a business at a meeting shall be one half of the total number of Councillors of the

corporation in respect of the subject mentioned u/s 84(2). For all other business a quorum shall be one third of the total number of Councillors.

31. While the learned Counsel for the Respondents, upon a reference to Section 84 argued that with the resignation tendered by 27 Councillors, quorum necessary for transaction of business was not available, learned Counsel for the Petitioners submitted that apart from the fact that the same is not the issue, such quorum will have to be accounted for on the basis of the total number of existing Councillors. Section 5 only provides the limit of maximum number of 60 Councillors and the same is not a fixed number. Thus, the number of Councillors could be less than 60 also, As noted above, the general election was held for 57 Wards and out of the 57 elected Councillors one having died there remained 56 Councillors. In my considered opinion the quorum in the meeting which is one half of the total number of Councillors will have to be read in that context and not taking into account the maximum number of 60 Councillors. The situation will be the same even after resignation tendered by 27 Councillors.

32. Coming back to the question of notice to the corporation as per Section 425 and a reasonable opportunity of being heard as provided for under Article 243U of the Constitution of India, as noted above, the show cause notice was issued to the Commissioner, who also submitted the reply with the observation of the Mayor. The very basis of the show cause notice was the purported resolution adopted in the General Council meeting. Thus, it was incumbent to apprise the General Body about the show cause notice enabling the members to discuss the same towards furnishing reply thereof. That was never the case. The show cause notice was never placed for discussion in the meeting of the corporation and the Petitioners and for that matter the members were in complete dark about the show cause notice. They were also not aware of the reply furnished by the Commissioner with the endorsement of the Mayor.

33. Most importantly, as per the impugned decision, in spite of the show cause notice, the General Body did not reverse its earlier resolution to open toll-gates. Such a finding in the impugned order is totally perverse inasmuch as the General Body did not get any opportunity to reverse or revise its decision pertaining to the toll-gates as the show cause notice was never placed before it. As noted above, the show cause notice and reply thereto confined in between the Government and the Commissioner, GMC and the same was never brought to the notice of the General Body. The show cause notice was neither addressed to the General Body of the corporation nor was placed before it. Consequently, the reply was also not by the General Body in the form of resolution or otherwise. Thus apart from non-compliance of the constitutional mandates envisaged under Article 243U of the Constitution of India, there was also violation of the provisions relating to reasonable opportunity of being heard by way of a show cause notice to the offending body.

34. It was argued that since the show cause notice and the reply were placed before the Mayor and her view in the matter was also obtained, that was

sufficient notice to the General Body. From the records, it appears that the Mayor was asked to furnish her view in respect of the resolution of the General Body to open toll-gates who in turn, disowned her voluntary participation in the resolution making process stating that although she was of the opinion that the approval of the Government should be awaited but in view of the majority decision she had to comply with the request of constituting the Monitoring Committee. The minutes of the meeting held on 7.5.2008, copy of which has been annexed to the counter affidavit speak otherwise. It reflects that the Mayor whole heartedly supported the proposal stating that the subject-matter was not controversial and that to improve the financial condition of the corporation the resolution should be adopted. Be it stated here that the officials of the GMC prepared the reply to the show cause notice and simply placed before the Mayor, who in turn obliged the officials by approving the same with her aforesaid view.

35. Section 425(1) of the Act and Article 243U mandate reasonable opportunity of being heard. Such opportunity must be provided to the General Body, which admittedly was never provided. It is a unique case of its kind in which although the whole basis of dissolution of the Body was the purported resolution adopted by it and the show cause notice was also issued on that basis, but the Councillors forming the General Body of the corporation were never apprised of the same. The reply was furnished by the Commissioner with the view of the Mayor as indicated in the reply itself. That was not the compliance of the reasonable opportunity of being heard. Although, as per Section 17 of the Act, the Mayor is the head of the corporation and shall be responsible to, the corporation, he alone does not constitute the corporation. In absence of placing the show cause notice in the General Body by the Commissioner and mere obtaining the endorsement of the Mayor in the show cause reply, there was no compliance of the requirement of Section 425(1) and Article 243U of the Constitution of India. Section 17(2) only speaks of correspondence between the corporation and the Government or other authority, which shall be by the Commission, which by no stretch of imagination can be said to be to the extent of replying to the show cause notice meant for the General Council.

36. I have gone through the records produced by the learned State Counsel as well as the Standing Counsel representing the corporation. Curiously enough, the records do not reveal anything in respect of processing the matter relating to issuance of show cause notice and the reply thereto, which is normally done in official transactions. The normal procedure is to put up note etc. in the official file towards decision making process, but in the instant case same is totally absent.

37. On perusal of the File No. GDD.73/2007 produced by the learned State Counsel, what has transpired is that the matter relating to election of Mayor and Deputy Mayor in view of the eminent expiry of the term of said two offices was processed by various notings and the matter was finalized towards holding the election on the scheduled date, i.e., 22.5.2008. However, the Secretary, GDD by, his note dated 17.4.2008 to the concerned Minister expressed his opinion that

since the term of Mayor was for one year and the term of the elected body would expire in January 2009, neither the term of the Mayor could be extended, beyond 22.5.2008 nor could a new Mayor be appointed for less than a year. Such view expressed by the Secretary was patently wrong as was also opined by the learned Advocate General about whose opinion, there is mention in the impugned order. As per the un-amended provisions of the Act, the term of the office of the Mayor is one year. However, after the amendment, same is 5 years by way of direct election. In the event of electing the Mayor and the Deputy Mayor on the date fixed, i.e., 22.5.2008, their term of office would have expired in January 2009 on completion of 5 years term of the General Body. There was no question of providing one year term of office to the Mayor and the Deputy Mayor and it would have been co-terminus with the expiry of the General Body in January 2009.

38. After the aforesaid note dated 17.4.2008, the concerned Minister by his note dated 29.4.2008 recommended for dissolution of the corporation on expiry of the term of the Mayor on 22.5.2008. In the note, it was also observed that the decision regarding the date of fresh election would be taken after consulting the State Election Commission. The note was put up before the Chief Minister; who by his endorsement dated 1.5.2008 agreed to the proposal. Thereafter, the concerned Minister directed the Secretary to initiate process with the Legal Remembrance, to finalize the notification.

39. With the aforesaid decision to dissolve the corporation, it is not understood as to what was the necessity to take resort to the show cause notice etc. Nothing is discernible as to what prompted the Secretary, GDD to furnish the note dated 17.04.08 followed by the decision of the Minister to dissolve the General Body. The matter went even up to the extent of direction of the Minister to finalize the process of issuance of necessary notification in consultation with the LR.

40. After the aforesaid development the matter took a sudden turn with the note dated 7.5.2008 "Pls take immediate action as discussed" followed by further note dated 8.5.2008 "Pls issue show cause notice to GMC as ordered by the Secy." Thereafter draft, etc., was put up for signature and what followed thereafter has been noticed above.

41. Show cause notice was issued on 15.5.2008 by the Secretary to the Govt. of Assam in the GDD department only asking the Commissioner, GMC to show cause whether it was a fact that the General Council of GMC had adopted a resolution to open toll-gates for Guwahati city and if so, why the Govt. should not take action u/s 425 of the GMC Act for violation of Section 425(A) of the Act as amended. Ironically enough, on the same date the Secretary, GDD furnished a note to the Minister, GDD stating that the decision of the General Council Body of the GMC to open toll-gates had been taken unilaterally and for that, show cause letter to the GMC should be issued and the draft of the show cause notice was also placed before the Minister.

42. After the aforesaid note dated 15.5.2008, the Secretary, GDD put up another note, which is - "Hon"ble Minister is out of station. I have discussed the matter with him and obtained his telephonic approval. The letter at Flag "A" may be issued". Thereafter the draft was placed by note dated 16.5.2008 following which another note was furnished on the same date indicating issuance of the show cause notice. The note further desired for making request to proceed with the process of election of Mayor and Deputy Mayor as per the provisions of the Act. The note further requested to sign the draft show cause notice. The note was furnished by the Joint Secretary and thereafter the note on the same date, i.e. 16.05.08 - "draft may be approved" was placed before the Secretary.

43. From the above, it will be seen that the show cause notice was either issued or shown to have been issued on 15.5.2008, although it remained at the draft stage with the final approval only on 16.5.2008. A note was put up in the file on 19.5.2008 to the effect that the LR, Govt. of Assam had furnished the views as was earlier requested. The note further stated to send the letter to the GMC. The note was also followed by further note to the Secretary which is - "We may be allowed to issue the letter to the Commissioner, GMC of the Secy. decides so." Thereafter the Secretary by his note dated 19.5.2008 stated about the discussion with the Minister and the telephonic directions towards issuance of the particular letter.

44. Then followed the resignation tendered by 27 Councillors on 21.5.2008 (a holiday) detailing which a note dated 21.5.2008 was put up to the Secretary wherein it was also indicated that the resolution of the General Body in respect of toll-gates and the execution thereof could be prohibited u/s 424 of the GMC Act. It was also pointed out that the Corporation could be dissolved u/s 425 of the Act in case of deriving satisfaction for doing so. Further note was put up on the same date to agree with the proposal. It was also stated in the note that the decision to open toll-gates was in violation of the rules. The Secretary, GDD by his note dated 21.5.2008 apprised the Minister, GDD about the scheduled date of election of Mayor and Deputy Mayor on 22.5.2008 and observance of necessary formalities in that regard. The Minister was also apprised of the resignation tendered by 27 Councillors. In the note it was opined that legal view in the matter would be required and in the meantime the election of the Mayor and Deputy Mayor be postponed. The Minister by his note dated 21.5.2008 directed to obtain the view of the learned Advocate General which was obtained on 26.5.2008.

45. After the aforesaid note dated 21.5.2008 of the Minister, GDD the Secretary, GDD by his note dated 23.05.08 made a detailed discussion about the matter. In his note fault was attributed in respect of the purported decision of the General Body of the Corporation to open the check gate and formation of monitoring committee. It was pointed out that Mayor in her note indicated that majority of the councillors had supported the proposal to open toll-gates in the meeting held on 7.5.2008. The note further indicated about issuance of show cause notice on

15.5.2008 and the provision of Section 425(1) of the Act. By the note the Secretary suggested for obtaining legal opinion. The Minister accepted the views of the Secretary and directed to obtain the opinion of the Advocate General by his note dated 23.5.2008. On the same date the Secretary requested the learned Advocate General to give his opinion in the matter who in turn furnished his opinion on 26.5.2008.

46. After obtaining the view of the learned Advocate General a note was put up on 26.5.2008 to prepare the draft order to dissolve the GMC. Thereafter the Secretary, GDD by his note dated 25.6.2008 apprised the Minister about the developments and the opinion of the learned Advocate General. In the note earlier discussion with the Minister and preparation of the draft order towards dissolving the Corporation was also indicated for perusal and approval. Since everything was made ready including the draft order as per the discussion which the Secretary had with the Minister, naturally the Minister by his endorsement dated 26.5.2008 approved the proposal with a direction to issue the order. Thereafter the impugned order was issued.

47. The aforesaid revelations in the file bearing No. GDD. 73/2007 point out the following:

The decision to dissolve the Corporation was already taken on 29.4.2008 by the Minister and the same was also approved by the Chief Minister on 1.5.2008. Such approval was on account of the view expressed by the Secretary, GDD by his note dated 17.4.2008. The decision having been taken to dissolve the Corporation, it is not really understood as to what was the necessity to make the show of show cause notice etc. As noticed above, after the decision to dissolve the Corporation with a direction to issue notification etc., suddenly notes dated 7.5.2008 and 1 8.5.2008 were initiated in the file for issuance of show cause notice.

48. Ironically even before the draft show cause notice was approved on 16.5.2008, the show cause notice was either issued or shown issued on 15.5.2008. Although the show cause notice was issued, till that stage the process of election of Mayor or Deputy Mayor was not abandoned as would be evident from the note dated 16.5.2008. Up to that stage there was no decision to dissolve the Corporation by invoking the provisions of Section 425(1) of the Act. Such a decision was taken at a later stage, although the show cause notice did mention about Section 425 of the Act. There was no indication in the show cause notice that the Corporation would be dissolved. In the show cause notice indication was to take action u/s 425(A) which was incorporated by way of amendment to the GMC Act. Such incorporation was by GMC (Second Amendment) Act, 2006. Section 425(A) empowers the Govt., to give such direction to the Corporation on questions of policy as it may consider it to be necessary in the public interest, in writing and the Corporation would be bound by such direction. Thus, apparently and admittedly, the show cause notice was prior in point of time of any tentative decision to dissolve the Corporation, and

the same was also to take action u/s 425(A) of the amended Act which does not empower the Govt. to dissolve the Corporation. In other words, the show cause notice, although did mention Section 425 of the Act, but was not in the direction towards decision making process to dissolve the Corporation.

49. It was only after the aforesaid show cause notice etc. the authorities thought of dissolving the Corporation and obtained legal opinions. The LR in his opinion dated 19.5.2008 pointed out that the term of Office of the Mayor although only for one year, but would be co-terminus with the expiry of the term of the General Body in January 2009. Pointing out the provisions of Section 425, it was opined that recourse to the section could be had for the reasons mentioned therein, but before dissolving the Corporation reasonable opportunity of being heard should be given to the Corporation. Learned Advocate General also in his opinion dated 25.6.2003 pointed out the requirement of the provisions of Article 243(U) and Section 425(1) of the Act. However, the authority without issuing any show cause notice, issued the impugned order dated 26.5.2008 taking recourse to the purported show cause notice earlier issued on 15.5.2008 which in fact was never issued with the intention to dissolve the Corporation. As indicated above, the notice was issued for taking action u/s 425(A) of the amended Act. This is precisely the reason as to why throughout the discussion in the notes, there was no mention of the said show cause notice dated 15.5.2008. The legal opinions obtained also opined that in case of taking recourse to dissolution of the Corporation, same should be in compliance of the show cause notice, etc. This is also precisely the reason as to why the show cause notice except mentioning about the purported resolution to open toll-gates, did not mention anything else. It is in this context, the "letter" about which there is mention in the notes dated 19.5.2008 will have to be considered as to whether the same was meant to be the show cause notice for invoking Section 425(1) of the Act. Nothing is discernible and the letter is shrouded by mystery.

50. In the aforesaid situation it cannot be said that there was compliance of the requirements of Article 243(U) of the Constitution of India and Section 425(1) of the GMC Act. Apart from the fact that no show cause notice issued pursuant to the decision to dissolve the Corporation on the grounds indicated in the file about which discussions have been made above, the earlier show cause notice dated 15.5.2008 was also not placed before the General Body of the Corporation. As noticed above, the show cause notice was issued to the Commissioner, GMC who in turn furnished the reply incorporating the views of the Mayor. When the very basis of the show cause notice was the purported resolution of the General Body, it was incumbent on the part of the Commissioner to place the same before the General Body for discussions etc. It was only after that, the reply to the show cause notice would have been possible. The Respondents cannot take the plea that since the matter relating to show cause notice was within the knowledge of the Mayor, any default on her part in not placing the same before the General Body will not make the impugned order illegal.

51. The mandate of Section 425(1) of the Act and Article 243(U) of the Constitution of India is clear and unambiguous. The show cause notice to the Commissioner, GMC and the reply thereto by him cannot be the compliance of the said mandates, even if the Mayor was apprised of the same. Records of the GMC in file No. GSC/0/2/02-03 have revealed that the notice was received by the Commissioner and he also prepared the draft reply taking advice of the Assistant Legal Advisor of the Corporation. After everything was done, the reply was approved by the Mayor with her view on the show cause notice. If this is compliance of Section 425(1) and Article 243(U), anything can be done by the Govt. in the name of such so-called compliance.

52. Article 243(W) of the Constitution of India describes the powers, authority and responsibilities of the Municipalities in terms of which the Municipalities are entitled to function as institution of local self government. Contrary to such constitutional position of the Corporation, the Govt. imposed dissolution of the same, a democratically elected body. The entire episode gives an impression that everything was done with the hidden agenda to see the dissolution of the Corporation with some oblique motive and purpose. The entire process was with the understating of the Secretary, GDD that since the term of office of the Mayor would be less than one year which according to him would be contrary to the provision of the Act, although subsequently he realized that such term of office would be co-terminus with the expiry of the term of the General Body in January 2009 to which fact the legal opinions were also furnished. It was on that basis the Minister connected with GDD department directed for dissolution of the Corporation which was also endorsed by the Chief Minister.

53. The episode relating to issuance of show cause notice suddenly sprang up thereafter in the file from nowhere. What followed thereafter has been noticed above. There was no show cause notice issued in respect of the impugned order dated 26.5.2008, although the order mentions about the earlier show cause notice dated 16.5.2008 which, however, was in a different context. The manner in which the said show cause notice was issued, has also been noted above. The LR in his opinion furnished on 19.5.2008 clearly indicated that recourse could be had to Section 425(1) of the Act only after providing reasonable opportunity of being heard. However, the Govt. in its wisdom thought it prudent not to wait any more and issued the impugned order dated 26.5.2008 taking recourse to the purported show cause notice dated 15.5.2008, although by the said show cause notice it was only asked to furnish reply whether it was a fact that the General Council had adopted resolution to open toll-gates and if so why action u/s 425A of the Act as amended would not be taken. The Commissioner, GMC promptly furnished the reply on 19.5.2008.

54. In *S.L. Kapur v. Jagmohan* AIR 1981 SC 136, the Apex Court held that opportunity should have been given to the municipal committee before its supersession. In that case, Section 16 of the Punjab Municipal Act expressly provided for an opportunity to be given to the member concerned whereas

Section 238(1) did not provide for such an opportunity. Repelling the argument that by necessary implication, it must be considered that the principle of *audi alteram partem* was excluded, the Apex Court held that it can not be by way of a necessary inference that if opportunity is expressly provided in one provision and not so provided in another, opportunity is to be considered as excluded from that other provision. It was observed thus:

...We have already referred to some of the relevant provisions of the Punjab Municipal Act to indicate some of the rights and duties of the Committee under that Act. A Committee as soon as it is constituted, at once, assumes a certain office and status, is endowed with certain rights and burdened with certain responsibilities, all of a nature commanding respectful regard from the public. To be stripped of the office and status, to be deprived of the rights, to be removed from the responsibilities, in an unceremonious way as to suffer in public esteem, is certainly to visit the Committee with civil consequences. In our opinion the status and office and the rights and responsibilities to which we have referred and the expectation of the Committee to serve its full term of office would certainly create sufficient interest in the Municipal Committee and their loss, if superseded, would entail civil consequences so as to justify and insistence upon the observance of the principles of natural justice before an order of supersession is passed.

55. As per the impugned order dated 26.5.2008 the Corporation did not reverse its decision to open toll-gates in spite of the show cause notice. That situation never occurred inasmuch as the General Body was never apprised of the show cause notice. Such observation in the impugned order would go to show that there was total non-application of mind in passing the impugned order. If the Govt. was of the view that the Corporation did not mend itself, it was more so necessary to ensure, placing of the show cause notice before the General Body for discussion and eventual decision. Such a ground towards passing the impugned order being non-existent one, the very foundation on that basis itself is wrong.

56. Much was emphasized on the situation which occurred due to resignation of 27 Councillors. There is nothing to indicate that with such resignation the Corporation became non-existent and functionless. Section 5 of the Act provides only maximum number of Councillors which is 60, which does not mean that the Corporation and for that matter the General Body must consists of 60 Councillors. As noticed above, even the general election was declared and held for 57 Wards. As per Section 52 of the Act when a vacancy occurs in the office of a Councillor, the Commissioner shall, as soon as may be, after the occurrence of such vacancy by a notification in official Gazette, call upon the ward concerned to elect a person for the purpose of filling the vacancy. No election shall be held to fill a vacancy occurring within six months prior to the holding of a general election. As regards the forming of quorum, the matter has been discussed above. Further there are 8 ex-officio members with voting rights. Be that as it

may, when there is non-compliance of the mandatory procedure laid down in Section 425(1) of the Act and Article 243(U) of the Constitution, whatever reasons are furnished, same cannot save the impugned order dated 26.5.2008.

57. It may not be out of context to mention here that 27 Councillors although tendered resignation on the same date, i.e., on 21.5.2008, there is no formal acceptance of the same, except the endorsement of the same date in each of the resignation letters given by the Mayor - "Accepted and please put up". There is no such endorsement in her own resignation letter both as Mayor and Councillor. As per Section 16, Mayor's resignation shall be by way of notice to the Corporation and shall take effect from the date when it is placed before the Corporation. As regards the Councillors and Deputy Mayor, such resignation is to be to the Mayor and shall take effect from the date of its acceptance by the Mayor.

58. Resignation from any office is always a bilateral action - tendering and acceptance. In the instant case everything was done instantaneously on 21.5.2008 which was a holiday. Acceptance was on the body of the resignation letters without any formal communications of the same. In such a situation, it could be argued that mere endorsement of acceptance on the body of the resignation letters without formal communication of the same is to acceptance. Official notes or any note on the body of any representation may not be the formal expression or doing something, unless communicate in writing. Further, the resignation letters are not in the Corporation's file, but are in the file of the State Govt. Be that as it may, same being not the issue or beyond the issue, no opinion is expressed in this regard.

59. In *Tarlochan Dev Sharma Vs. State of Punjab and Others*, , the Apex Court dealing with the expression "abuse of power", was observed that same cannot mean use of power which may appear to be simply unreasonable or inappropriate. An honest though erroneous exercise of power or an indecision is not an abuse of power. A decision, action or instruction may be inconvenient or unpalatable to the person affected but it would not be an abuse of power. A singular, or casual aberration or failure in exercise of power is not enough; a course of conduct or plurality of aberration or failure in exercise of power and that too involving dishonesty or intention is "abuses its powers" within the meaning of Section 425(1) of the Act. The Legislature could not have intended a elected body by popular verdict to be shown exit for a single innocuous action or error of decision.

60. Dealing with the requirement of principles of natural justice, as in the instant case, the Apex Court in the said decision observed, thus:

12. One of the requirements of the principles of natural justice, as incorporated in second proviso to Section 22, is that the reasons for the proposed removal have to be communicated to the person proceeded against. The purpose of such communication is to enable him to furnish an explanation of his conduct or his

act or omission which is likely to be, construed as an abuse of power. If it is clear that the facts constituting gravamen of the charge have to be communicated. It follows as necessary corollary therefrom that what has not been communicated or not relied on in the show cause notice as a ground providing reason for the purposed removal cannot be relied upon as furnishing basis for the order of removal. The person proceeded against u/s 22 of the Act has to be made aware of the precise charge which he is required to meet and, therefore, he must be apprised of the exact content of the abuse of power attributed to him. The authority taking decision must apply its mind also to the explanation furnished by the person proceeded against and this must appear from the order passed u/s 22.

61. In *Gyan Chand and Others Vs. State of Haryana and Others*, , the Apex Court having found that the issue raised in the writ petition was that the order of supersession of the municipal committee was by way of mala fide exercise of power and without giving opportunity of being heard, found fault with the High Court in dismissing the writ petition in limine and directed the High Court to dispose of the writ petition in accordance with law with the following observations:

In the present case the Appellants are responsible persons. Appellant No. 2 is the President and Appellant No. 3 is the Sr. Vice-President of the Committee which has been superseded. The other Appellants had been elected members of that committee. In our judgment in a case of present kind, the writ petition ought not have been dismissed in the manner in which it was done without obtaining any return from the Respondents and considering the same.

62. The present one is a case where the impugned order is vitiated by perversity. The conclusion of dissolving the General Body was drawn from such facts wherefrom such conclusion does not even prima facie flow. As discussed above, the impugned order is based on non-existent grounds. It is vitiated by colourable exercise of power and hence liable to be struck down within the well settled parameters of judicial review of administrative action.

63. From the above discussions the irresistible conclusion arrived is that the entire action on the part of the Govt. towards dissolution of the Corporation was contrary to the laid down procedure and in violation of the constitutional mandate. Both the Secretary, GDD and the Commissioner, GMC acted in the matter not applying their sound discretion, but acted to implement the hidden agenda as was instructed to them. This is precisely the reasons as to why the Apex Court in the case of *Taralochan Dev Sharma (supra)* observed, thus:

In the system of Indian democratic governance as contemplated by the Constitution, senior officers occupying key positions such as Secretaries are not supposed to mortgage their own discretion, violation and decision-making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants

to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a government servant. No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In *Anirudhsinhji Jadeja* this Court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion; discretion exercised under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this Court in *Purtabpore Co. Ltd.* are instructive and apposite. Executive Officers may in exercise of their statutory discretions take into account considerations of public policy and in some context, policy of a Minister or the Government as a whole when it is a relevant fact or in weighing the policy but they are not absolved from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for instructions by a superior to bind them.

64. I now proceed to deal with the plea raised in the miscellaneous case being Misc. case No. 1894/08 in which a plea has been raised that the writ petition is not maintainable in view of the non-joinder of necessary parties. According to the State Govt., the Mayor and the Administrator of GMC are necessary parties to this proceeding. This stand on the part of the State Government is not only fallacious but unfortunate. The Petitioners have assailed the legality and validity of the action on the part of the Govt. towards issuance of the impugned order dated 26.5.2008. It is the own stand of the said Respondents that 27 Councillors including the Mayor have resigned. If that be so, the Mayor is no longer holding the office.

65. The Administrator has been appointed by notification dated 26.5.2008 to run the affairs of the Corporation in absence of the General Body. The Administrator is none other than the Secretary to the Govt. of Assam in the GDD department, who is party Respondent in the proceeding. The Corporation is well represented in the proceeding and, thus, naturally all its officers who represent the Corporation. It is not a case in which the issue raised in this writ petition cannot be answered merely because the Mayor who has since resigned and the Administrator who has been subsequently appointed pursuant to the dissolution of the General Body are not party to this proceeding in their such capacities. It is the own case of the Respondents that the Commissioner, GMC represents the Corporation in all respects including the show cause notice etc. who is very much party to this proceeding. Thus, the plea raised in the Misc. case is not sustainable and stands rejected.

66. For the aforesaid reasons, the impugned order dated 26.5.2008 cannot withstand the judicial scrutiny and/or judicial review under Article 226 of the Constitution of India. Consequently, it is interfered with by setting aside and quashing the same.

67. Writ petition is allowed, leaving the parties to bear their own costs.