

(2004) 11 GAU CK 0031

In the Gauhati High Court

Case No : Writ Petition (C) No's. 7945, 9279 and 9309 of 2003 and 850, 1585 and 3203 of 2004

Jayanta Bora and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 17-11-2004

Acts Referred:

Assam Highways Act, 1928 — Section 2
Assam Panchayat (Financial) Rules, 2002 — Rule 47, 47(1), 58
Assam Panchayat Act, 1994 — Section 105, 106, 107, 108, 109
Assam Panchayati Raj (Financial) Rules, 1990 — Rule 58(2), 58(3), 58(4), 58(5), 58(6)
Constitution of India, 1950 — Article 243, 243B, 243G, 243N, 246(2)
Control and Management of Ferries Rules, 1968 — Rule 3, 4
Councils Act, 1861 — Section 22, 42, 48, 65, 65(2)
General Clauses Act, 1897 — Section 6
Government of India Act, 1935 — Section 100, 100(2), 292
Independence Act, 1947 — Section 18(3)
Northern India Ferries Act, 1878 — Section 10, 12, 3, 4, 7

Citation : (2006) 3 GLT 844

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Advocate : A.K. Goswami and D. Saikia, for the Appellant; A.C. Buragohain, I. Choudhury, D. Mazumdar and M.H. Choudhury, for the Respondent

Final Decision : Allowed

Judgement

Amitava Roy, J.—Proclaimed supremacy of the state in the domain of ferry settlement to the complete exclusion of the Panchayat Institutions and other Bodies and consequential settlement orders demonstrative of such assertion, constitute the driving cause of the present lis. The Anchalik Panchayats, particularly affected, feeling legally slighted by the resultant denudation of their statute conferred power in the related field and supersession of their awarded settlements seek redress. The beneficiaries of the settlements handed out by both the camps, to protect their interests, have joined the fray. The central theme being common, the contextual facts though marginally differ, the petitions

were analogously heard and deserve to be disposed of by a common judgment and order.

2. I have heard Mr. AK Goswami and Mr. D. Saikia, Advocates for the Petitioners and Mr. AC Buragohain, Additional Advocate General, Assam and Mr. P. Borah, for the State Respondents. Mr. I. Choudhury, Mr. D. Mazumdar and Mr. M.H. Choudhury, advocates supported the cause of the private Respondents.

3. The factual prologue sans unnecessary details provides the background. Three sets of petitions are involved. Essentially, therefore, the related facts have to be narrated individually.

WP(C) 7945/03. WP(C) 9279/03 & WP(C) 1585/04

4. Ujani Majuli Anchalik Panchayat claims that two ferry ghats named Phuloni Neemati Ghat under the Ratanpur Gaon Panchayat and Shikari Kachari Disangmukh ghat under Luitporia Gaon Panchayat are located within its territorial jurisdiction. According to it, following the constitution of the committee as envisaged under Rule 58(5) of the Assam Panchayatiraj (Financial) Rules, 1990, (hereafter referred to as the 1990 Rules of the Financial Rules) it formed eight Settlement Committees for the Gaon Panchayats under it for the settlement of the fisheries, markets and ghats situated within its territorial limits. Notice Inviting Tenders was published on 4.9.92 and on the completion of the process, amongst others, the Phuloni Neemati Ghat (the only ghat then in operation under it) was settled in favour of one, Maniram Das. The settlement committee at the Anchalik Panchayat level was reconstituted by the Government again on 31.5.94 in exercise of powers under Rule 58(5) of the Financial Rules. The Ujani Majuli Anchalik Panchayat thus continued to award settlements amongst others of the Phuloni Neemati Ghat since 1992-93 till 2002-03. In the meantime, the Shikari Kachari Dissangmukh Ghat also became operational. In the year 2003, the said Anchalik Panchayat invited tenders for settlement of the fisheries, markets and the above mentioned two ghats for the Panchayat year 1.7.2003 to 30.6.2004. The Phuloni Neemati Ghat for the said period was eventually settled with Shri Jayanta Bora against his tender bid of Rs. 99,999.99. As the matter rested at that, it transpired that the Director of Inland Water Transport, Assam, by order dated 11.8.2003, has settled the Phuloni Neemati Ghat in favour of Shri Lalit Das (Respondent No. 8 in WP(C) 15 85/04) for a period of three months at Rs. 8,750/- @ 35,000/- per year on experimental basis. This was followed by two other orders dated 11.8.2003 and 2.9.2003 confirming the arrangement and the private Respondent started the operation of the ferry service from 25.8.2003. These orders were challenged by Shri Jayanta Bora (awardee of the Anchalik Panchayat) in WP(C) 7945/03 and this Court by order dated 23.9.2003, while issuing notice of motion stayed the operation thereof.

5. In the meantime, the Anchalik Panchayat, having come to learn of the Office Memorandum dated 18.6.2004, issued by the Principal Secretary to the Government of Assam, Transport Department, arrogating to the Transport

Department of the State and the Directorate of Inland Water Transport Department, Assam, the absolute authority to control and manage ferries to the exclusion of all other Government departments, the Panchayat Institutions and other authorities, approached this Court with WP(C) 9297/03. The operation of the impugned Office Memorandum came to be stayed by this Court by order dated 23.1.2004 passed in the said writ petition.

6. The Director, Inland Water Transport, Assam, thereafter issued the order dated 12.2.2004 awarding to Shri Lalit Das (Respondent No. 8 in WP(C) 1585/04) the right to operate the Bogoriguri Neemati Commercial Cargo Passenger Ferry service for three months at Rs. 31,000/- per year on experimental basis. According to the Petitioner Anchalik Panchayat, Bogoriguri Neemati Ferry service, referred to in the order dated 12.2.2004 is within the Phuloni Neemati route under its territorial jurisdiction. Being aggrieved by the said settlement in favour of the private Respondent named herein above WP(C) 1585/04 has, therefore, been filed. These writ petitions comprise the first set. WP(C) 9309/03, WP(C) 3203/04 7. Majuli Anchalik Panchayat leads the attack in the second group of writ petitions. Here as well, consequent upon Government notifications under Rule 58(5) of the Financial Rules, the Anchalik Panchayat constituted committees for settlement of ferries, markets and ghats namely Salmora Neemati ghat, Dakhinpat Neemati ghat, Besamora Jangimukh "ghat and Bhelekimukh Kokilamukh ghat in the year 1992. Tenders were invited and settlements were made with due information to the Government. Since then, the Anchalik Panchayat settled the above named ghats from time to time. During 1997-98, another ghat, Chumoimari Neemati ghat under it also became operational. For the Panchayat year 2003-04, the Anchalik Panchayat invited tenders for settlement of markets, fisheries and the above named ghats. On the completion of the process, by order dated 21.8.2003, it settled the Salmora Neemati Ghat with Shri Moon Chandra Bhuyan. Similarly, the other four ghats were also settled with the successful tenderers. It was at that stage that the Director of Inland Water Transport, Assam, by order dated 6.11.2003, settled the Salmora (Majuli) Neemati (Jorhat) Ferry service with the one Dipankar Kharghoria (Respondent No. 8 in WP(C) 3203/04) for a period of one-year w.e.f. 12.11.2003 till 11.2004 @ 33,000/- per year on experimental basis. The said authority by the order dated 12.9.2003, settled the Kokilamukh 5.7.8 Spar (Jorhat) Koratipara (Majuli) Commercial Passenger and Cargo Ferry Service with one Shri Pabitra Kumar Bora (Respondent No. 9 in WP(C) 3203/04) for a period of one year @ 31,999/- per year on experimental basis. By two other orders dated 13.2.2004 and 22.9.2003, the same authority settled the Sumoimari Neemati Passenger and Cargo Service as well as the Dakhinpat (Majuli) Neemati Passenger and Cargo ferry service with Shri Makhan Das (Respondent No. 10) and Shri Siddhartha Moni Bora (Respondent No. 11) in WP(C) 3203/04 respectively. According to the Respondent No. 11 the original term has been extended thereafter from time to time. The Anchalik Panchayat has assailed these orders contending that the ghats which form the subject matter of the

settlements are located within its territorial jurisdiction and therefore, the Director of Inland Water Transport, Assam, had no authority to initiate a parallel Ferry Service by virtue thereof. This factual background relates to WP(C) 3203/04.

8. The Office Memorandum dated 18.6.2003, referred to above, has also been questioned by the Anchalik Panchayat in WP(C) 9309/03. Both the Anchalik Panchayats before approaching this Court had represented before the Respondent authorities highlighting the above anomalies however without redress.

WP(C) 850/04

9. This petition presents a slightly different background. The Petitioner was the awardee of Koraihua Bhuragaon ghat under the Pub Mangaldoi Anchalik Panchayat for the term 7.7.2002 to 30.6.2003. The Director of Inland Water Transport, Assam on 10.1.2003 settled Bhuragaon Dhansiri Ferry Service in favour of Respondent No. 4. Contending that the ghat so settled was within the boundaries of the Ferry service of the Petitioner, the settlement of the private Respondent was questioned in WP(C) 634/03"before this Court. The impugned order was stayed and with efflux of time, the Petitioner's period of settlement expired. The writ petition was accordingly closed as infructuous. By order dated 19.11.2003, the settlement of the private Respondent earlier impugned was extended for operation of Commercial Passenger cum Cargo service from Bhuragaon to Badulimukh Bharali via Kharupetia for a period of six months from 11.11.2004 to 30.6.2004. The power and authority of the Director, Inland Water Transport, Assam, to settle any ferry located within the territorial jurisdiction of any Anchalik Panchayat in face of the Assam Panchayat Act, 1994, and Appendix A to the Control and Management of Ferries Rules, 1968 and for that matter to grant extension of any such settlement, has been questioned. Hence, the affinity with the cause of action for the accompanying writ petitions.

10. No affidavit in opposition has been filed by the Respondents. The questions raised being pristinely legal, permissible it would be to advert straightway to the competing arguments. Apart from the relevant provisions of the Constitution of India both sides have made copious reference of the Northeastern India. Ferries Act, 1878 (hereafter referred to as the 1878 Act), Rules framed thereunder (referred to as the 1878 Rules) Control and Management of Ferries Rules, 1968 (referred to as the 1968 Rules), Assam Highways Act, 1928, (referred to as the 1928 Act) and of course, the Assam Panchayat Act, 1994 (referred to as the Panchayat Act).

11. Mr. Saikia has argued that in view of Article 243G of the Constitution of India read with the 11th Schedule with item No. 13 therein in particular, and Section 106 of the Panchayat Act, the concerned Anchalik Panchayat has the exclusive right to settle the ferries located within its territorial jurisdiction and therefore, the impugned Office Memorandum divesting it of such constitutionally conferred

authority is ab initio void and is liable to be adjudged illegal and unconstitutional. According to him, in terms of Article 243(d), an Anchalik Panchayat is a panchayat at the intermediate level as contemplated under Article 243B and in view of Section 49(12)(C) of the Panchayat Act, read with Section 106 thereof, all public ferries other than Government ferries within the territorial jurisdiction of the Anchalik Panchayat can be settled only by it and therefore, the impugned office Memorandum being in blatant contravention of the provisions of the Constitution and the Act, is nonest in law and is liable to be quashed. The learned Counsel contended that the 1878) Act and the Rules framed thereunder (which includes the 1968 Rules at best convey that the State Government can exercise control over only Government ferries as defined in the 1968 Rules and the ferries mentioned in Appendix A thereto but in face of the Constitutional provisions contained in Part IX of the Constitution as well as those of the Panchayat Act, such authority cannot be extended to the other public ferries. In that view of the matter, Mr. Saikia urged that the impugned Office Memorandum is patently illegal and without any authority of law as the same flies in the face of the Constitutional and other relevant legal provisions to the contrary and thus is not sustainable in law. He maintained that in the above legal framework the Anchalik Panchayat within whose territorial jurisdiction a public ferry is constituted, is the sole authority to manage, control and settle the same and any interference with such a right conferred by the Constitution as well as the Panchayat Act, is an unauthorized infraction thereof. He, therefore, asserted that the impugned Office Memorandum be quashed and an appropriate writ be issued restraining the State Respondents from interfering with the Anchalik Panchayat's right under the Constitution and the Panchayat Act, to control, manage and settle the ferries located within their respective territorial jurisdictions. The learned Counsel in order to reinforce his arguments placed reliance on the decision of the Apex Court in *Kailash Chand Sharma Vs. State of Rajasthan and Others*,

12. Taking up the cue, Mr. Goswami, while endorsing the above in substance, emphatically urged that the Panchayat Act being a conscious enactment in terms of constitutional aspiration embodied in Article 243G, thereby conferring an exclusive power on the Anchalik Panchayat, amongst others, to settle public ferries other than Government ferries, the provisions of the 1878 Act would, to the extent of repugnancy be subservient to the Panchayat Act. By a similar analogy, according to him, the Rules framed by the State Government or its delegatee under the 1878 Act, in case of any inconsistency with any provision of the Panchayat Act would be nonest. Mr. Goswami asserted that on a true construction of Article 243G of the Constitution, the state was enjoined to make a law to enable the Panchayat institutions to function as units of self Government with powers conferred on them to effectuate such a purpose and thus no interpretation that would render the law enacted otiose and frustrate the constitutional vision can be countenanced. This is so even if the 1878 Act is conceded a Central legislation status in the teeth of the Constitutional backing which the Panchayat Act enjoys, he urged.

13. Tracing the background of the dichotomy of legislative powers of the Federal and Provincial Legislatures vis-a-vis the subjects of legislation, Mr. Goswami argued that at the time of enactment of the 1878 Act, there was no delineation of such powers and as "ferry" is now a State subject, it cannot be construed to be a central legislation though the same finds place in the list of unrepealed Central Acts. Referring to Section 7 and 7A of the 1878 Act, Mr. Goswami contended that even before the Panchayat institutions were conceived of, the State power to entrust other authorities the management of ferries under its control is discernible and therefore, no inconsistency between 1878 Act and the Panchayat Act as such exists. According to him, taking the worst view, in case of any inconsistency or repugnancy between 1878 Rules, 1968 Rules and the Panchayat Act, all being State made laws, the Rules would to the extent of such inconsistency and/or repugnancy be void. The learned Counsel forcefully maintained that the Panchayat Act having been enacted to effectuate the underlying purpose of enabling the Panchayat institutions to function as independent local units of self Government and such law having conferred an exclusive right on the Anchalik Panchayats to manage and control all public ferries other than Government ferries within their territorial limits it is inconceivable that the Constitutional as well as the statutory mandate could be set at naught by an executive fiat. According to him, the impugned Office Memorandum on the face of it is without any authority of law and is liable to be declared illegal, void and unconstitutional.

14. Mr. Goswami maintained that in view of Section 23 of the Panchayat Act, any property within the jurisdiction of the constituent Gaon Panchayat of an Anchalik Panchayat vests in the said Gaon Panchayat by operation of law and no separate notification for such investiture is necessary. In terms of Section 49(12)(C) of the Act read with Section 23 thereof, the concerned Anchalik Panchayats" therefore have the exclusive right to manage and control the ferries located within their territorial jurisdiction. This arrangement is consolidated by conferring on the Anchalik Panchayats the power to do all acts necessary for or incidental to the carrying out of the functions entrusted or delegated to it as is proclaimed in Section 50 of the Act. The learned Counsel rested his submissions on the following authorities. *Municipal Corporation of Delhi Vs. Shiv Shanker*, *S.P. Gupta Vs. President of India and Others*, *Pt. Rishikesh and Another Vs. Salma Begum (Smt)*, *Union of India v. Mundra Salt & Chemical Industries Ltd.* (2001) 1 SCC 222.

15. Mr. Indranil Choudhury, supporting the State action, has argued that under Article 243G of the Constitution of India, a discretion has been left with the State Government to endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self Government and the Panchayat Act having been enacted pursuant thereto, there has to be a prior vesting of a public ferry in a Anchalik Panchayat by the Government so as to enable it to manage and control the same and in the process award the settlements thereof. Referring to Section 49(1)(d) and 49(12)(c) of the

Panchayat Act as well as Section 106 thereof, the learned Counsel urged that this requirement is clearly borne out by the same. He also referred to Section 133 of the Panchayat Act in this regard. According to him, the notification dated 31.5.94 constituting the committee at the Anchalik Panchayat level for settlement, inter alia, of ferries having been issued after 6.5.94, (the date on which the Panchayat Act had come into force) reveals that it was a conscious decision of the Government being aware of the relevant provisions of the Act, more particularly, Section 131 thereof as well as Article 243 N of the Constitution of India. In support of his argument of vesting as a necessary prerequisite for the Anchalik Panchayats exercise of power for control and management of ferries, the learned Counsel also invited the attention of this Court to Rule 47(1) of the Assam Panchayat (Financial Rules), 2002, (hereafter referred to as the 2002 Rules) and underlined that the two essential preconditions to authorize an Anchalik Panchayat to award settlement u/s 106 are the ferry ought to be a public ferry other than a Government ferry and it is vested in it. Mr. Choudhury maintained that Section 106 of the Panchayat Act cannot be construed to signify automatic vesting of ferries referred to therein and the said provision of the Act has to be harmoniously read for a meaningful purpose along with the 1878 Act and the Rules. He relied on a decision of this Court in *Md. Ranjal Ali Thakuria v. State of Assam* (1997) 1 GLT 158, in support of his submissions.

16. Mr. Mazumdar, has contended that the 1878 Act is a valid law in view of Article 366(10) and 372 of the Constitution of India and being an enactment on a subject in the State list, had it been in conflict with the Panchayat Act, the same would have been repealed thereby. Referring to Section 106 of the Panchayat Act, the learned Counsel asserted that the provision clearly manifests the retention of State authority in the matter of settlement of public ferries as contemplated therein and logically no absolute power of the Anchalik Panchayat was envisaged. He supported the arguments forwarded by Mr. Choudhury by also referring to Section 49 and Section 133 of the Panchayat Act. According to him, u/s 4 of the 1878 Act, an exclusive power has been reserved in the Government to declare any ferry to be a public ferry and therefore Section 106 of the Panchayat Act cannot exist de hors the 1878 Act. Pleading that a conflict between Section 7 and 7A of 1878 Act and Section 106 of the Panchayat Act would surface only if the concept of automatic and absolute vesting of all public ferries in the Anchalik Panchayats is entertained, he urged that the schemes of the two enactments do not permit such an interpretation. He referred to Rule 47(1) of the 2002 Rules against the plea of automatic vesting of ferries in the Anchalik Panchayats. He lastly contended that the Panchayat Act embodied a general law without particularly providing for allocation and control of ferries and therefore by implication did not repeal the 1878 Act, a special legislation, though enacted earlier in point of time.

17. The following authorities were relied upon by The South India Corporation (P) Ltd. Vs. The Secretary, Board of Revenue Trivandrum and Another, Maharaja Pratap Singh Bahadur Vs. Thakur Manmohan Deo and Others, Cantonment

Board, Mhow and Another Vs. M.P. State Road Transport Corpn., Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others,

18. Mr. M.H. Choudhury, adopting the above arguments submitted that the 1878 Act was not in conflict with the Panchayat Act and in any view of the matter the former enactment being a Central legislation, the same would prevail in the event of a repugnancy. He maintained that unless a ferry is declared to be a public ferry u/s 4 of the 1878 Act it cannot be settled by an Anchalik Panchayat.

19. The learned Additional Advocate General, Assam, initiating the debate on behalf of the official Respondents argued that the Panchayat Act did not contemplate automatic vesting of a public ferry in an Anchalik Panchayat within its territorial limits. He maintained that it was apparent from Section 49 and proviso to Section 106 of the Panchayat Act read with Rule 58 of the Financial Rules as well as the other Rules that the ultimate power with regard to any public ferry was retained with the Government. Logically, therefore, for the Anchalik Panchayat to settle a public ferry, the same would have to be formally vested in it by the Government, he contended. According to him, the concept of automatic vesting of public ferry in an Anchalik Panchayat, with the enactment of the Panchayat Act would be destructive of the scheme of the 1878 Act the Rules framed thereunder as well as Rule 58 and Rule 47 of the Financial Rules and 2002 Rules respectively. Referring to Article 243 G of the Constitution of India, Mr. Buragohain argued that the operation of a ferry service besides being a commercial activity, the infrastructure essentially necessary therefore is duly provided for in the Rules under the 1878 Act. Even in respect of ferries settled by the Anchalik Panchayats, the infrastructural aspects are attended to by the Government, which conclusively establish that prior vesting of a public ferry in an Anchalik Panchayat is a sine qua non to enable it to settle the same under the Panchayat Act. He contended that the provisions in the 1968 Rules requiring the Government to provide the operational facilities in the interest of public safety also detract from the concept of automatic vesting of a public ferry in an Anchalik Panchayat. Mr. Buragohain produced the Cabinet memorandum in support of the impugned decision and urged that the same has been taken in public interest.

20. Mr. P. Bora appearing for the Transport Department of the State while supporting the arguments of the learned Additional Advocate General contended that the Anchalik Panchayats neither have the infrastructural set up nor the technical expertise to ensure the safety of the commuting public. Further, frequent conflicts amongst the Anchalik Panchayats over their territorial supremacy and the resultant ruinous disputes and litigations have seriously undermined public interest. The impugned Office Memorandum was thus issued for streamlining all public ferries to prevent unavoidable and wasteful confrontations and thus foster public interest.

21. As the rival assertions center around the 1878 Act, Rule framed thereunder and the Panchayat Act with its Rules, to resolve the controversy, it is indispensable to ascertain whether a harmonious co. existence of these

legislations is logically possible. A probe into the respective legislative schemes of the above enactments has to be essentially the first step in the current adjudicatory exercise.

Northern India Ferries Act, 1878, (For short 1878 Act)

22. This is a Pre-Constitutional legislation to regulate ferries in Northern India and was brought in force in Assam from 1.4.1879 by a notification dated 12.3.1879 published in Assam Gazette. The word "Ferry" as dealt with in the interpretation clause contained in Section 3 has been assigned an inclusive definition. Under that section, ferry also includes a bridge of boats, pontoons or rafts, a swing bridge, a flying bridge and a temporary bridge and the approach to and landing places of a ferry. The State Government u/s 4 of the said Act has been empowered to declare, establish, define the limits of, change the course of and discontinue a public ferry. Power has also been vested to take possession of a private ferry and declare it to be a public ferry. The immediate superintendence of every public ferry has been generally vested in the Magistrate of the district in which such ferry is situated or in such other Officer as the State Government may from time to time appoint. Discretion has been retained by the State Government to entrust the management of any public ferry to any Officer, public body, District Council, District Board or a local Board in the State as envisaged in Section 7 and 7A. The tolls of any public ferry can be let by public auction for a term not exceeding five years with the approval of the Commissioner or by public auction or otherwise than by public auction for any term with the previous sanction of the State Government. The lessee is required to conform to the Rules made under the Act for the management and control of the ferry. u/s 9 all arrears due by the lessee of the tolls of a public ferry on account of his lease can be recovered from the lessee or his surety (if any) by the Magistrate of the District in which such ferry is situated as if they were arrears of land revenue. The power to cancel the lease has been exclusively reserved u/s 10 of the Act by the State and the lessee is required to surrender his lease to the State Government. Power to make Rules u/s 12 has been conferred on the Commissioner of a Division or such other Officer as the State Government may appoint, subject to the latter's control. The Rules are, inter alia, to provide for control and management of all public ferries and for Regulation of traffic thereat as well as for regulating the time at which and the manner in which and the terms on which the tolls of such ferries may be let by auction. The tolls u/s 15 of the Act are essentially to be fixed by the State Government in respect of a public ferry.

23. The provisions of the Act, as above, demonstrate all pervasive control of the State Government for all public ferries, which is unmistakably retained even if the management thereof is handed over to other authorities as contemplated u/s 7 and 7A thereof. The Rules required to be framed u/s 12 are also supposed to be comprehensively perceptive of all conceivable aspects bearing on the control and management of public ferries, letting thereof and the Regulation of traffic

thereat. No separate Rules have been contemplated for these purposes in the event of entrustment of public ferries to other authorities u/s 7 and 7A. In other words, such authorities though entrusted with the management of public ferries have to compulsorily comply with the other requirements of the Act and the Rules framed thereunder, which as alluded above display an absolute control of the State Government in this regard. The authorities contemplated u/s 7 and 7A, therefore, while managing the public ferries entrusted to them have to be subservient to the provisions of 1878 Act and the Rules framed thereunder.

1878 Rules

24. The preamble of these Rules discloses that made in exercise of power u/s 12 of the 1878 Act, these are meant to apply to only Government ferries. A Government ferry defined under the said Rules means a public ferry at least one of whose limits is on a Government Road as defined in the Assam Highways Act, 1928. "Government Road" u/s 2 of the Assam Highways Act, 1928, means a road vested in the Government or under the control and administration of the State Government and includes, inter alia, all lands and embarkments vested in Government or under the control and administration of the State Government and attached to a Government road. The definition, therefore, signifies that whereas a Government ferry has undisputedly to be a public ferry, the converse may not be true. The Rules deal in details with the Regulation, control and management of Government hand and power driven ferries and letting thereof on public auction and otherwise. The ferries are prescribed to be under the control of the Executive Engineer of the Public Works Department. Suitable ferry boat engines and masts for the Government ferries are to be supplied at the expense of the Public Works Department and the approach road to all Government Ferries and low-level approaches are also to be constructed and maintained by the said Department. The Rules provide for the minutest details regarding the management and control of such ferries and the mode of letting out the same. In short, the Rules furnish for an executive mechanism to effectuate the purposes of the 1878 Act relatable to Government ferries.

Control and Management of Ferries Rules, 1968 (as amended)(The 1968 Rules)

25. The preamble of these Rules framed u/s 12 of the 1878 Act though indicate that these are meant for the six major ferries referred to therein, the definition of ferry provided thereby and the other provisions thereof suggest that those are applicable to all ferries under the control of the State Government. "Ferry" is defined thus-

2(b) "Ferry" shall mean a ferry as defined and interpreted u/s 3 of the Northern India Ferries Act, 1878, and includes ferries specified from time to time in Appendix A as appended to these rules.

26. All ferries under Rule 3 are primarily placed in the control of the Executive Engineer, Inland Water Transport and can be let by public auction or by calling tenders. Power has been vested under Rule 4 in the Secretary to the Government

of Assam, Transport Department, to settle any ferry directly or by negotiations. For each ferry a suitable steamer/ferry vessel/engined mar boats/single boat as the case may be, is to be supplied at the expense of the Inland Water Transport and the approach roads to all transport ferries and low-level bridges are also to be constructed and maintained by the said Department. Under the Rules, the lessee cannot sub-let, encumber or transfer the ferry leased to him and is bound to transport all persons on payment of the authorized toll. A detailed procedure for letting of the ferries by public auction or by calling tenders has been laid down and the settlement essentially has to be with the approval of the Government. The Secretary to the Government of Assam in the Transport Department has been vested with the power of canceling a lease in case of violation or noncompliance of any of the provisions of the Rules or the conditions of the lease.

27. The provisions of the 1968 Rules are substantially in parimateria with the 1878 Rules on essential particulars. The 1968 Rules, however, provide an additional mode of letting out a ferry i.e. by direct settlement or negotiations by the Government. These Rules provide a complete set of provisions for Regulation, control and management of ferries. Noticeably the 1968 Rules though later in point of time; the 1878 Rules have not been superseded thereby. The two sets of rules, therefore, to co-exist the 1968 Rules must, therefore, be confined in their application to ferries including public ferries and that under Appendix A thereto other than Government ferries. Both these Rules, however, as required are in tune with the provisions of the parent legislation i.e. 1878 Act and exude the supreme control of the State Government over the ferries governed by it.

The Assam Panchayat Act, 1994

28. Its enactment followed the incorporation of Part IX in the Constitution of India in view of the Constitution (73rd Amendment) Act, 1992, which came into force w.e.f. 24.4.93. The Panchayat Act, which repealed the Assam Panchayati Raj Act, 1886, was brought in force from 6.5.94. As per the preamble it is to amend and consolidate laws relating to Panchayats in Assam. Under the Act, Panchayat institutions have been accommodated in a three-tier system with the Gaon Panchayat at the lowest level and the Zila Parishad at the highest rung. The Anchalik Panchayat forms the intermediate institution. Concerned as we are in the present controversy with the Anchalik Panchayats, the provisions of the Act applicable thereto would be mostly referred to.

29. u/s 5 of the Act, the State Government may by notification declare any local area comprising a revenue village or a group of revenue villages etc. to be a Gaon Panchayat, which is to consist of 10 members to be directly elected by voters of the corresponding territorial constituencies. For each development block, excluding such portions of the block as are included in the Town Committee or in a Municipality or under the authority of the Municipal Corporation, a Sanitary Board or Cantonment or notified area constituted by any

notification for the time being in force, an Anchalik Panchayat is to be constituted of one directly elected member from each Gaon Panchayat, the president of each Gaon Panchayat falling within the jurisdiction of the Anchalik Panchayat and the members of the House of the People and the Members of the Legislative Assembly of the State representing the Constituencies which comprise whole or partly the Anchalik Panchayat. Sections 31 and 32, which provide for herein above, therefore, proclaim the representative character of an Anchalik Panchayat qua its constituent Gaon Panchayats. Section 49 enumerates the general functions of the Anchalik Panchayat. The duties are earmarked under various broad heads one of those being "Roads, Buildings, Bridges, ferries, Waterways and other means of communication" under Clause (12) thereof. The duty of maintenance of boat, ferries and waterways not under the Government or any other local bodies has been entrusted under Sub-Clause (c) of Clause (12) of Section 49. Section 49(1)(d) requires that an Anchalik Panchayat would also perform such functions and would also execute such works as may be entrusted to it by the Government or the Zila Parishad. Residuary powers of an Anchalik Panchayat to do all acts necessary for or incidental to the carrying out the functions entrusted or delegated to it, has been reserved in Section 50.

30. All properties within the local limits of the jurisdiction of a Gaon Panchayat, other than any property maintained by the Central or State Government or a local authority or any other Gaon Panchayat vest in or belong to the Gaon Panchayat. This includes, inter alia, all public channels, watercourse, springs tanks, ghats reservoirs etc. in addition thereto, the Government may allocate to a Gaon Panchayat any public property situated within its local jurisdiction whereupon such a property would vest in and come under control of the Gaon Panchayat. An Anchalik Panchayat u/s 55 of the Act has been vested with the power to acquire, hold and dispose of property and enter into contracts. The standing committees of Anchalik Panchayat have been conceived of u/s 52 of the Act and the functions thereof are as delineated in Section 53.

31. The power of settlement of public ferries and distribution of sale proceeds has been conferred on the jurisdictional Anchalik Panchayat by Section 106 whereunder all public ferries other than Government ferries within the territorial jurisdiction of the Anchalik Panchayat shall be settled in the manner prescribed for a period coinciding with and not exceeding one financial year by inviting tenders, The procedure for inviting and submission of tenders, however, has to be as prescribed by the Government but the power of examination and final acceptance thereof vests in the general standing committee of the Anchalik Panchayat as specified in Section 52(1)(a). Under the provisos, the Anchalik Panchayat, in case of any dispute may refer such case to the Government or the aggrieved party may appeal to the Government whose decision in such an eventuality would be final. Further in cases of necessity, the Government may also intervene in the matter of a particular settlement and may also direct an Anchalik Panchayat for settlement of a public ferry falling within the jurisdiction of more than one Anchalik Panchayat or Zila Parishad. Under the said provision of

the Act, the Anchalik Panchayat has to meet the expenses for maintenance and improvement of the public ferries out of the sale proceeds of such ferries and received by it.

32. Section 123 envisages restriction or withdrawal of powers and functions from the Panchayat on its proposal or on the stultification of the government that any matter should cease to be in the list of the duties and functions of such Panchayat. On dissolution of a Panchayat institution all properties vested in it should vest in the Government as mandated in Section 125(4). Similarly, when the provisions of the Act are withdrawn from any Panchayat area, all properties, funds and dues vested in the corresponding Panchayat institution shall vest in the concerned Deputy Commissioner or the Sub-Divisional Officer as the case may be by who would make such allocation of the properties as deemed fit with the prior approval of the Government. u/s 131, till such time when new Rules are framed before the expiry of one year from the coming into force of the Constitution (73 rd Amendment) Act, 1992, the Rules framed under the Assam Panchayati Raj Act, 1886, would remain valid.

33. A plain reading of the provisions of the Act as above would unmistakably indicate that it is a complete code by itself, applicability whereof is not subject of the 1878 Act or any other enactment. Apart from the fact that the language employed in Section 106 of the Act is plain and unambiguous, no requirement of prior vesting of the jurisdictional public ferry as an essential precondition to enable the corresponding Anchalik Panchayat to award settlement thereof is discernible. In other words, no independent overt act of the Government vesting the public ferries in the Anchalik Panchayat can be read into the said provision as condition precedent for settlement thereof by it. The Government's role in the settlement process as referred to in the provisos besides being limited is also in isolated and specific eventualities and does not signify the requirement of prior vesting. It is obligatory on the part of the concerned Anchalik Panchayat to meet all expenses for maintenance and improvement of public ferries under it from the sale proceeds of such ferries. The provision for extending infrastructural facilities and the technical expertise by the Government as contained in the Rules framed under the 1878 Act cannot, in the face of Section 106 of the Act be said to be maintenance of ferries by the Government so as to divest the Anchalik Panchayat of its right to settle the same under the aforementioned provision of the said Act. The law makers, as Section 106 reveals made a conscious distinction between a public ferry and a Government ferry. To impose the requirement of prior vesting of a public ferry in the jurisdictional Anchalik Panchayat in the said provision, would amount to rewriting the same, which is impermissible. Assam Panchayati Raj Act, 1986 34. u/s 74, all public ferries other than government ferries within the territorial jurisdiction of an Anchalik Panchayat were required to be settled in the manner prescribed by inviting tenders and the detailed procedure for inviting, submission, examination and final acceptance of such tenders was to be as prescribed. Thus under the Assam Panchayati Raj Act, 1986 as well, the jurisdictional Anchalik Panchayat was conferred with the power of settling public

ferries located within its territorial limits. No requirement of any separate vesting of the public ferries was mentioned.

Assam Panchayati Raj (Financial Rules) 1990

35. Under Rule 58 thereof, markets or ferries or fisheries or pounds as are vested in or are placed under the control or administration of the Panchayat would be settled by inviting sealed tenders. Sub-rule (2), (3) and (4) lay down the format of the tender notice, mode of publication thereof and the manner of submission of tenders. Under Sub-rule (5), a committee was required to be constituted by the State Government, entrusted with the duty of preparing a comparative statement of the tenders, and to submit the same to the authority concerned for acceptance after recording its opinion.

36. This Court, while entertaining a challenge in *Md. Ranjal Ali Thakuria*, (supra), to the action of the Mayang Anchalik Panchayat of forwarding the tender papers in respect of settlement of a weekly bazaar u/s 105 of the Panchayat Act to the State Government; held, with reference to Article 243N of the Constitution of India and Section 131 of the Panchayat Act, that the provisions contained in Sub-rule 5, 6 and 7 of Rule 58 of the 1990 Rules providing for constitution of a committee by the State Government for examining the tender papers and forwarding the same to the Government were inconsistent with the mandate of Section 105 and therefore, would have no application to settlement of hats under the provisions of the Panchayat Act.

37. Section 106 with which we are concerned being similarly worded and no committee by the State Government being contemplated therein. Rule 58 of the 1990 Rules being common for the settlement u/s 105, 106, and 109 of the Panchayat Act, by the same analogy would make the committee constituted by the State Government on 31.5.94 wholly insignificant, more particularly, in the context of claimed Government control on the public ferries other than government ferries as envisaged u/s 106 of the Panchayat Act.

38. Moreover this provision in the face of Section 131 of the Panchayat Act as well as on framing of the Assam Panchayat (Financial Rules), 2002, as on date has lost relevance. The argument of the Respondents, built on the constitution of the committee by the State Government in exercise of powers under Rule 58 of 1990 Rules, therefore, fades into insignificance qua the plea of vesting.

Assam Panchayat (Financial Rules) 2002

39. Rule 47 provides for the procedure for the sale and settlement of markets, ferries, fisheries and pounds as permissible u/s 105, 106, 107, 108 and 109 of the Panchayat Act. Thereunder, such ferries as are vested in or placed under the control of the administration of the Panchayat Institution concerned are to be settled by inviting tenders. It provides the format of the tender notice, the mode of publication thereof and the manner of submission of tenders. The tenders are to be opened, processed and settled by a committee conceived of under the

Panchayat Act. The committee after recording its opinion is required to submit the comparative statement to the authority for acceptance. It is only in the case of any dispute that the matter has to be referred to the Government. This procedure accords with the letter and spirit of Section 106 of the Panchayat Act. With the framing of the 2002 Rules, the 1990 Rules stand annulled. It is noteworthy that Rule 47 relieves the concerned Panchayat Institution of the control of the State Government, hitherto exercised through the committee constituted by it.

40. In view of the provisions of the Panchayat Act and the 1990 and 2002 Rules public ferries other than Government ferries situated within the local jurisdiction thereof vest in it by operation of law till divested in a manner as contemplated under the Panchayat Act. In view of Section 106 thereof, the jurisdictional Anchalik Panchayat has the exclusive authority to settle such ferries subject to the procedure prescribed by the 2002 Rules (earlier 1990 Rules to the extent held valid and applicable in *Md. Ranjal Ali*, (supra)). The minimal Government control in the matter is as envisaged in the provisos to Section 106 which by no means suggest that a prior vesting of such public ferries is indispensably essential to clothe the concerned Anchalik Panchayat with the authority to award settlement thereof in exercise of its powers under the said provision of the Panchayat Act.

41. The expression "placed under control and administration of the Panchayat" as employed in Rule 47 of the 2002 Rules can logically be related to the third proviso of Section 106 whereunder the State Government may issue orders to an Anchalik Panchayat for settlement of a public ferry falling within the jurisdiction of more than one Anchalik Panchayat or Zila Parishad. This is independent, in my view, of the public ferries located within the territorial jurisdiction of the concerned Anchalik Panchayat which by dint of the provisions of the Panchayat Act vest in it and does not militate against the concept of automatic vesting of the jurisdictional public ferries in the concerned Anchalik Panchayat for the purpose of settlement u/s 106. To impose a requirement of fresh vesting as has been urged on behalf of the Respondents would amount to reading into Section 106 something not intended by legislature. The power of the Government as is discernible from the provisions of the Panchayat Act to allocate any public property to any Panchayat Institution is residuary in character and is in addition to the provisions vesting the properties in the respective Panchayat Institution. Any other interpretation would render the vesting provisions nugatory.

42. As alluded above, Section 106 does not indicate that a public ferry which is not a Government ferry needs to be additionally vested in it by the Government so as to enable it to settle the same. The Panchayat Act does not prescribe any such role for the Government to control the settlement process except that the procedure thereof has to be as prescribed understandably by framing Rules. It is in specified cases that some Government control has been comprehended. The mandate that the concerned Anchalik Panchayat has to meet the expenses for

maintenance and improvement of the public ferries from the sale proceeds thereof, in my view, confirms the concept of automatic vesting thereof in it. The expression "vest" appearing in Rule 58 of the 1990 Rules and Rule 47 of the 2002 Rules cannot restrict the operation of Section 106 by saddling it with a pre-condition of vesting of the public ferry in question by the State Government. In view of Section 23 of the Panchayat Act, read with Section 106 thereof, there is an inbuilt vesting of public ferries other than Government ferries in the concerned Anchalik Panchayat and the functions thereof as outlined in Section 49 also do not indicate anything to the contrary. Providing of infrastructural and operational facilities by the Government under the Rules framed under the 1878 Act does not ipso facto signify management thereof by the Government necessitating prior vesting of the concerned public ferries as a condition precedent for settlement by the jurisdictional Anchalik Panchayat. The expression "public ferry" used in Section 106 comprehends such ferry as already declared by the Government and therefore, does not logically detract from the power of the Anchalik Panchayat to settle the same. On the contrary, the delineation facilities the settlement thereof by the Panchayat institution. Section 123, 125 and 133 of the Panchayat Act as well reinforce the deduction in favour of automatic vesting. The argument of prior vesting is therefore one of mere convenience untenable in face of the constitutional imperative fashioned in the Panchayat Act.

43. Reverting to the provisions of the 1878 Act, it is easily decipherable therefrom that the central authority is the State Government with all permeating control over the public ferries. Even in case of entrustment of any public ferry to any other authority u/s 7 and 7A thereof such control is retained in the Government and the settlement of any such public ferry has to inevitably follow the Rules framed thereunder. No separate Rules have been contemplated for letting out such a ferry by the other authorities. The scheme of 1878 Act and the Rules framed thereunder, therefore, presents an arrangement conspicuously different and inconsistent with the one portrayed by the Panchayat Act and the Rules thereunder. Whereas in the 1878 Act and the Rules, an unassailable authority of the Government has been prescribed, Section 106 of the Panchayat postulates an exclusive dominion of the concerned Anchalik Panchayat in the matter of settlement of all public ferries other than Government ferries within its limits and to maintain the same with its funds. The Government role in such matters has been consciously controlled. Apart from the fact that the power of entrusting a public ferry u/s 7 and 7A of the 1878 Act is discretionary, if the requirement of prior vesting is insisted upon drawing the strength therefrom, it would render the operation of the Section 106 of the Panchayat Act conditional on the exercise of power u/s 7 and 7A of the 1878 Act which in absence of a clear provision in the Panchayat Act appears to be absurd. Another apparent disharmony in the two sets of legislation lies in the authorities empowered and the permissible methods of settlements. Whereas under the 1878 Act and its Rules, the prescribed State authorities can award settlement by public auction or inviting tender or even by direct settlement or legislation, the only authority

under the Panchayat Act and its Rules is the concerned Anchalik Panchayat and the settlement can be by inviting tenders alone. It, therefore, transpires that the provisions of the 1878 Act and the Rules framed thereunder, more particularly, the 1968 Rules so far as they relate to settlement of public ferries other than Government ferries vis-a-vis the relevant provisions of the Panchayat Act, more particularly Section 106 thereof stand in apparent confrontation and are visibly irreconcilable on essential periauticulars making them mutually destructive. The schemes of the 1878 Act and the Panchayat Act. with the respective Rules framed thereunder on the aspect of settlement of a public ferry other than government ferries are wholly incompatible and being repugnant to each other cannot harmoniously coexist.

Effect of repugnancy between 1878 and the Panchayat Act with the Rules framed thereunder.

44. The legislative background of the 1878 Act, a pre-constitutional law, deserves to be recited. The Charter Act of 1833 vested for the first time the legislative power in a single authority namely the Governor General-in-Council. By virtue of this authority vested in him u/s 22 of the Indian Councils Act, 1861, the Governor General-in-Council enacted laws for the governance of the country from 1834 to 1920. u/s 42 and 48 of the said Act, the Governor of the Presidency-in-Council and the Lieutenant Governor-in-Councils were conferred the powers to make laws and Regulations for the peace and good governance of their territories. Though the Act did not contemplate demarcation of legislative powers by separately specifying the subjects of legislation, the Governor of the Presidency-in-Council and the Lieutenant Governor-in-Council did not have the power of making laws or Regulations having any effect on the provisions of the Act or any other Act of Parliament in force or thereafter to be in force in such territories. Under the Government of India Act, 1870, a Governor of a Presidency-in-Council, Lieutenant Governor or Chief Commissioner was authorized to propose to the Governor General-in-Council a draft of any Regulations together with the reasons for proposing the same for the peace and governance of any part or parts of their territories and it was provided that the draft being approved by the Governor General-in-Council would have the like force of law as if made by the Governor General of India-in-Council at a meeting for the purpose of making laws and Regulations.

45. The Government of India Act, 1915 sanctioned classification of Central and Provincial subjects in relation to functions of Government for the purpose of distinguishing the functions of local Governments and local legislatures from the functions of the Governor General-in-Council and the Indian Legislature by framing Rules. The powers of the Indian legislature and the local legislatures were outlined in Section 65 and 80 A thereof. The subjects of legislation to delineate the respective limits of legislative power of the two legislatures, however, were not specified. The 1878 Act enacted in the meantime was not repealed. u/s 65(2), unless expressly so authorized by the Act, any Act of

parliament passed after 1860 and extended to British India could not be repealed by the Indian Legislature. The 1878 Act was, therefore, saved.

46. For the first time u/s 100 of the Government of India Act, 1935, the legislative subjects were enumerated. The federal legislature had the exclusive power to make laws on matters enumerated in List I of the Seventh Schedule, namely the Federal Legislative List whereas the Provincial Legislature was conferred the exclusive authority of making laws on matters in List II i.e. the Provincial Legislative list. Both the legislatures subject to the conditions contained in Section 100(2) could make laws on any of the matters in List III, the Concurrent Legislative List. Entry 18 in the Provincial Legislative list referred to above read thus:

Communications, that is to say, roads, bridges, ferries, and other means of communications not specified in List I; minor railways subject to the provisions of List I with respect to such railways; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List III with regard to such waterways; ports, subject to the Provisions in List I with regard to major ports; vehicles other than mechanically propelled vehicles.

47. "Ferry" was, therefore, made a subject of legislation in the Provincial Legislative list. By Section 292, existing laws were to continue. In the list of enactments repealed as can be located in the Tenth Schedule to the Act, the 1872 Act did not find place, which, therefore, was thus saved. It was saved too by virtue of Section 18(3) of the Indian Independence Act, 1947.

48. With the framing of the Indian Constitution, the 1878 Act was saved under Article 372 and by virtue of the adaptation of Laws Order 1950 issued by the President of India under Article 372(3) of the Constitution some minor modifications were made to the 1878 Act, inter alia, to the extent of its application. The 1878 Act as is evident from Chronological Table of unrepealed Acts is shown to be a Central Act being an Act of the Governor General-in-Council. The 1878 Act is thus an enactment on a subject in the Provincial Legislative list and has been saved as an existing law under the Constitution with the necessary adaptation and modification thereto.

49. On the scope of Article 372, the Apex Court in *South India Corporation Private Limited, (supra)*, ruled that the object thereof was to maintain the continuity of the preexisting laws after the Constitution had come into force till they were repealed, altered or amended by a competent authority. Negating the contention that the pre-Constitutional state law involved therein imposing a tax on a federal subject being inconsistent with the federal structure of the Constitution was void and therefore, could not be saved under the said Article, it was held that the word "subject to the other provisions of the Constitution" appearing in the said Constitutional provision should be extended a reasonable interpretation to carry out the intention of the Constitution makers and the word "other" can apply only to provisions other than those dealing with legislative

competence.

50. The import of this deduction is that a pre-constitutional law enacted by a legislature beyond the subjects of its domain under the Constitution would by itself not be invalid and can be continued under Article 372 of the Constitution till altered, repealed or amended by a competent legislature or other competent authority. Unmistakably, the competent legislature or competent authority as comprehended in Article 372 has to be as prescribed by the Constitution. In other words, any pre-Constitutional law either by the Federal or Provincial legislature and continued under Article 372 of the Constitution would be effective until altered, repealed or amended by a competent legislature or competent authority identified under the Constitution of India.

51. Under the Constitution, three entries, one each in the Legislative lists in the Seventh Schedule are necessary to be noticed to locate the correct placement of the legislative subject with which we are concerned namely "ferry". These are Entry No. 24 in List I, Entry No. 13 in List II and Entry No. 32 in List III. For ready reference, these are extracted herein below:

List I. 24. Shipping and navigation on inland waterways declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.

List II 13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; roadways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

List III 32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

52. The entry in the Union list can be safely excluded inasmuch as it deals with shipping and navigation of Indian Waterways declared by Parliament by law to be National Waterways and the rules of road thereof. Entry 32 of the concurrent list embraces shipping and navigation of Inland Waterways as regards mechanically propelled vessels, the rules of the road thereof and the carriage of passengers and goods of such waterways. Entry 13 of the State list is with regard to communications i.e. roads, bridges, ferries, and other means of communication not specified in List I. Comparing the language employed in Entries 13 and 32 as above and the specificity of the legislative subjects whereby "ferries" as a means of communication has been included exclusively in the State list in my considered view, it cannot be permissibly located within the ambit of Entry 32 of the Concurrent List. It does not appear to be the intention of the framers of the Constitution.

53. The contents of Entry 13 in the State list are substantially similar to those of Entry 18 of the Provincial list under the Government of India Act, 1935. The competent legislature for any enactment on "ferries" as a means of communication, in view of the defined legislative fields is, therefore, the State legislature. This assumes importance in view of the empowerment of the competent legislature to alter, repeal or amend any existing law continued under Article 372 of the Constitution of India adapted and/or modified thereunder. Under Article 372 such an existing law would continue to be in force until altered, repealed or amended by a competent legislature or other competent authority. The legislative competence of the State legislature to alter, repeal or amend the 1878 Act is, therefore, constitutionally conferred. As a matter of fact, the said Act has, meanwhile, undergone amendments by various state legislations, to name a few, the Assam Local Self Government Act, 1953 (Assam Act XXIV of 1953), Assam Panchayat Act, 1959, (Assam Act XXIV of 1959) etc.

Does the repugnancy between the 1878 Act and the Panchayat Act, on the power of management, control and Regulation of public ferries as already noticed, therefore, manifest an implied repeal of the 1878 Act to the extent of repugnancy?

54. The Panchayat Act admittedly has a Constitutional backing being enacted as a direct consequence of the Constitution (73rd Amendment) Act of 1992. The statements of objects and reasons for the said amendments expressly indicate that those were brought about dominantly to endow the Panchayat Institutions with such powers and authority as would be necessary to enable them to function as units of self-government in tune with the directive contained in Article 40 of the Constitution of India. The pre-eminent consideration which induced the amendments, was the revelation that the Panchayat Institutions existing in the country for a long time had not been able to acquire the status and dignity of viable and responsive people's bodies due to variety of reasons including insufficient devolution of powers and lack of financial resources. It was thus, felt that there was the need to enshrine in the Constitution certain basic and essential features of the local authorities including the Panchayat Institutions to impart certainty, continuity and strength to them. Provision, inter alia, was made in the Bill empowering the State legislature to confer by law such powers and authority on the local authorities including the Panchayat Institutions as may be required to enable them to function as institutions of self-government. This, therefore, is the backdrop of the Constitution (73rd Amendment) Act, 1992, and the amendments finally found their way in the Constitution attired in newly incorporated Part IX thereof.

55. Article 243(d) defines Panchayat to mean an institution of self-government constituted under Article 243B for the rural areas. Under Article 243B, there has to be in every state a Panchayat at the village, intermediate and district levels in accordance with the provisions of part IX. Article 243G empowers the legislature of a State to endow, by law, the Panchayats with such powers and authority as

may be necessary to enable them to function as institutions of self-government. It provides that such law may contain provisions for the devolution of powers and responsibility upon Panchayats at the appropriate levels, inter alia, with the responsibility to implement schemes for economic development and social justice relatable to the matters included in the 11th Schedule. Item 13 of the said schedule is extracted herein below:

13. Roads, culverts, bridges, ferries, waterways and other means of communication.

56. It is in exercise of the powers under this enabling Constitutional provision that the Panchayat Act had been enacted by repealing the Assam Panchayati Raj Act, 1986, to bring it in tune with the edicts of part IX. Logically, therefore, the provisions of the Panchayat Act have to be construed in a manner so as to effectuate the Constitutional objectives. Article 243G indubitably an enabling provision though once a law is made by the State legislature, to fulfil the Constitutional vision embodied therein, the same must be permitted a full play to achieve the underlying objectives for its enactment. No interpretation defeating the above purpose of the amendments would be permissible lest it is subversive of the motivating considerations enlivening the exercise. The following authorities on principle buttress the above view.

57. In *SP Gupta*, (supra), the Apex Court outlined the guidelines for interpreting the Constitution thus:

A constitution of a country is a living document and cannot therefore, be interpreted in a narrow pedantic sense. A broad and liberal spirit should inspire those who are called upon to interpret the Constitution. This does not mean that they are free to stretch or pervert the language of the Constitution. The broad purposes and the general scheme of every provision in the Constitution, its history, its objects and the result, which it seeks to achieve, should always be kept in view. Current usage and a prior reasoning should also be used as the tools of interpretation of the constitutional provisions. The Constitution of India in order to ensure sound administration has entrusted separate powers to different organs of the State, charging all of them with the joint responsibility of securing to all citizens of India, justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The said joint endeavour involves cooperation, mutual sympathy and understanding amongst all the organs.

58. Justice Marshall, while dwelling on textual interpretation of the language of a Constitution in *Sturges v. Crowninshield* 4L Ed 529 (1819) had this to say:

Although the spirit of an instrument, especially of a Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words...if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe

the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

59. That the interpretation of Constitutional provisions ought to be object oriented was highlighted in *S.R. Chaudhuri Vs. State of Punjab and Others*,

Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve.

We must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit.

60. The question involved in *Union of India and Anr. v. Mundra Salt and Chemical Industries and Ors.* (supra) was whether the land involved in the acquisition proceedings belong to Union of India or the Government Maharashtra. The Union of India claimed ownership on the basis of Section 37 of Bombay Land Revenue Code, 1879, which was resisted by the State on the plea that the Code was not applicable. On facts, it was noticed that the revenue for the land had been charged by the then Provincial Government which also wielded the administrative control thereof. Having regard to evolution of legislative powers of the federal legislature and noticing that for the first time the respective fields were effectively demarcated by the Government of India Act, 1935, and that the subject "land" and "land revenue" had been included in the Provincial list and came to be incorporated in the State list after the framing of the Constitution, it was concluded that the question of title under consideration being an issue after the enforcement of the Constitution of India, the claim of Union of India on the basis of the 1879 Code in the face of Government of India Act, 1935, and the Constitution of India could not be upheld.

61. The doctrine of implied repeal was recounted in details by the Apex Court in *Municipal Corporation of Delhi*, (supra), and the general principles thereof were highlighted thus.

It was laid in *Maine v. State*, that when two Acts are inconsistent or repugnant the latter will be read as having impliedly repealed the earlier. As the Legislature must be presumed in deference to the rule of law to intend to enact consistent and harmonious body of laws, a subsequent legislation may not be too readily presumed to effectuate a repeal of existing statutory laws in the absence of express or at least clear and unambiguous indication to that effect. This is essential in the interest of certainty and consistency in the laws, which the citizens are enjoined and expected to obey. The legislature, which may generally

be presumed to know the existing law, is not expected to intend to create confusion by its omission to express its intent to repeal in clear terms. The courts, therefore, as a rule, lean against implying a repeal unless the two provisions are so plainly repugnant to each other that they cannot stand together and it is not possible on any reasonable hypothesis to give effect to both at the same time. The repeal must, if not express, flow from necessary implication as the only intendment. The provisions operating together would lead to the Legislature. It is only when a consistent body of law cannot be maintained without abrogation of the previous law that the plea of implied repeal should be sustained. To determine if a later statutory provision repeals by implication an earlier one, it is necessary to closely scrutinize and consider the true meaning and effect both of the earlier and the later statute.

62. This view was reiterated in Pt. Rishikesh and Ann, (supra). It was held in T. Barai Vs. Henry Ah Hoe and Another, that even though the subsequent law made by the Parliament does not expressly repeal a State law even then the State law would become void as soon as the subsequent law of Parliament creating repugnancy is made. Such repugnancy, it was held, arise, where both the laws operate in the same field but cannot possibly stand altogether.

63. In support of the plea that the Panchayat Act is a general law and though later in point of time cannot repeal or abrogate the 1878 Act being a special law by mere implication, Mr. Mazumdar has pressed into service the decision of the Apex Court in Maharaja Pratap Singh Bahadur, (supra) wherein following oft quoted passage from Maxwall on Interpretation by Statue page 168 was relied upon.

A general later law does not abrogate an earlier special one by mere implicating. Generally specialibus non derogant, or, in other words, where there are general words in a later act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. In such cases, it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act.

64. This view, on principle, though on a different set of facts, was reiterated by the Apex Court in Cantonment Board M how and Anr. (supra), and Chandra Prakash Tiwari and Ors., (supra).

65. At this juncture, the following passage from Caries on Statute Law, Seventh Edition, page 381 is not out of context.

But the rule must not be pressed too far, for, as Bramwell L.J. said in Pellas v. Neptune Marine Insurance Co., a general statute may repeal a particular statute." And if a special enactment, whether it be in a public or a private Act, and a subsequent general Act are absolutely repugnant and inconsistent with one

another, the Courts have no alternative but to declare the prior special enactment repealed by the subsequent general Act.

66. The Apex Court in *Yogender Pal Singh and others Vs. Union of India* others, held on the theory of implied repeal thus:

It is well settled that when a competent authority makes new law which is totally inconsistent with the earlier law and the two cannot stand together any longer, it must be construed that the earlier law has been repealed by necessary implication by latter law.

67. On the same principle, while dealing with the applicability of Section 6 of the General Clause, Act, 1897, the Apex Court in *the State of Orissa Vs. M.A. Tulloch and Co.*, observed.

The entire theory in relation to implied repeals is that there is no need for the later enactment to state in express terms that the earlier enactment has been repealed by using any particular set of words or form of drafting but that if the legislative intent to supercede the earlier law is manifest by the enactment of provisions as to effect such supersession, then there is in law a repeal notwithstanding the absence of the words "repeal" in the latter statute.

68. The basic principles underlined is that where the provisions of a later general law are capable of being accorded reasonable and sensible application without entrenching upon the area of operation of the earlier special legislation, the earlier law should not be construed to have been repealed, altered or derogated from by use of general words or expressions in the general law in absence of any indication in that regard. This evidently would depend on the legislative pattern of the two laws and if placed in just a position, the provisions of the later law intended to be extended to the subjects covered by the earlier special law are wholly irreconcilable therewith defying harmonious coexistence, the special law must be deemed to have been repealed or abrogated to the extent of the incompatibility even by implication in absence of any repealing clause in the later enactment.

69. On a close survey of the legislative schemes of the 1878 Act, the Panchayat Act and the Rules framed thereunder undertaken as above clearly manifest that the corresponding provisions with regard to settlement of public ferries not being Government ferries are irreversibly in congruent. The doctrine "Generally specialious non derogant" is thus of no assistance to the Respondents in the present setting of facts.

70. In the schematic lay out of legislative relations under the Constitution as well, exclusive jurisdiction has been conferred upon a State legislature for enacting laws on matters enumerated in the State list Concurrent list grants powers of both the Union and State legislatures subject to the conditions enumerated in Article 246(2). The State legislature under the Constitution is not a delegatee of the Union Government and both the legislatures derive power

from the same Constitution and therefore within its appointed spheres have plenary powers. It is only in specific eventualities as envisioned in Article 249, 250 and 252 of the Constitution of India that the Union Legislature can make laws on a State subject. The power is severely circumscribed and approved in the exigencies comprehended in the aforementioned Articles. This underscores the mandate that no deviation normally is permissible from the legislative alignment conceived of by the Constitution makers. Having regard to the distribution of the legislative subjects under the Constitution and identification of "ferries" in the State list, the State legislature has the exclusive authority and competence to make laws thereon. Axiomatically, having regard to the Constitutional background, which the Panchayat Act enjoys in the event of confrontation thereof with the 1878 Act, rendering the co-existence of both the legislations an impossibility, the 1878 Act, therefore, to the extent of mutilating inconsistency and/or incompatibility has to be treated as impliedly repealed.

71. The extent of repugnancy has been noticed herein above and in the view of this Court the provisions in the 1878 Act and the Panchayat Act with the respective Rules framed thereunder so far as they relate to the settlement of public ferries other than Government ferries are wholly irreconcilable and mutually destructive of each other. As an inevitable consequence, therefore, the provisions of the 1878 Act and the Rules framed thereunder as are inconsistent with the provisions of the Panchayat Act are declared to have been impliedly repealed by the latter legislation. As a result, an Anchalik Panchayat u/s 106 of the Panchayat Act has the exclusive and absolute authority to settle a public ferry, which is not a Government ferry and located within its territorial jurisdiction in accordance with the Rules framed for such purpose.

Validity of the impugned Office Memorandum

72. On a bare reading of the Office Memorandum it is clear that the decision contained therein is not in exercise of any power of supervision or control, limited though, conferred on the State Government by the Panchayat Act. It proceeds on the premises that under the 1878 Act and the 1968 Rules, the Government of Assam in the Transport Department as well as the Directorate of Inland Water Transport, Assam, are the sole authorities with regard to control and management of ferries in the State. The action is sought to be justified on the consideration that settlement of ferries by other authorities have resulted in unfair competition giving rise to accidents/hazards. Further, the control and management of ferry service in the state by the State government through the Transport Department to the total exclusion of other departments of the Government or authorities or the Panchayat Institution is desirable to avoid duplicacy of settlements and to ensure streamlining of the operation of the ferries. The Cabinet Memorandum produced by the learned Additional Advocate General reveals that the contents of the Office Memorandum are verbatim reproduction of the recitals in the Cabinet Memorandum. No Cabinet decision, however, has been placed before this Court. The impugned decision, therefore, is

out and out on the purported exercise of power under 1878 Act and the 1968 Rules. The same being a blanket directive of general application does not seem to acknowledge even the existence of the Panchayat Act. Can such an omnibus decision in the face of specific provisions on the issue in the Panchayat Act be extended the judicial imprimatur?

73. The Panchayat Act contains few provisions empowering the Government to supervise the affairs of the Panchayat Institutions. u/s 121, the Government may at any time for reasons to be recorded cause an enquiry to be made against any of its officers with regard to any Panchayat institution on matters concerning it or in respect of which sanction, approval, consent or orders of the Government is required. The Government u/s 122 may issue directions to any Panchayat in matters relating to State and National Policies. u/s 123, on a proposal made by any Panchayat or on reasons to its satisfaction, the Government may withdraw from the Panchayat its powers, functions or duties in respect of any matter. The power of the Government to dissolve the Panchayat Institution on the ground of excess or abuse of powers, incompetency, and lapses in the performance of its duties is reserved in Section 125 and on such dissolution the properties vested in the Panchayat Institution during the period of dissolution would vest in the Government. u/s 133, on withdrawal of the provisions of the Act from any Panchayat area properties, funds and dues vested in the concerned Panchayat Institution would vest in the jurisdictional Deputy Commissioner or Sub-Divisional Officer.

74. The above provisions demonstrate that the Government has been endowed with the power of exercising over all supervision over the affairs of the Panchayat. Institutions but their routine administrative functioning is not contingent on Government approval. No all-pervasive control over the day-to-day affairs of the Panchayat Institution is discernible and the insignia of the perceptive autonomy of such Institution attuned with the Constitutional edict enshrined in Article 243G is manifest.

75. In this background, the impugned Office memorandum is nothing short of an executive fiat in brazen supersession of relevant statutory provisions and thus cannot be sustained alibi of purpose notwithstanding. The Cabinet memorandum and for that matter the Office Memorandum cannot be conceded a status or potential to exterminate living statutory provisions covering the field. To uphold such an administrative action would amount to approving the claim of absolute State power annihilating the Constitutionally conferred autonomy of the Panchayat Institutions as independent units of self Government the life purpose of the Constitutional amendments ushering in the Panchayat Act. By the impugned decision, the State authorities have arbitrarily arrogated to themselves exclusive control overall ferries to the exclusion of all authorities including the Panchayat Institutions, which is wholly antithetic to the rule of law on which our democratic polity is founded. Even assuming that it is a Policy decision on relevant considerations, the same cannot be sustained as it clearly supplants the

relevant statutory provisions to the contrary. The Apex Court in Kaliash Chand Sharma, (supra), had reiterated that a State policy to be valid has to be free from the vice of arbitrariness. The State authorities have reasons best known to them confined their attention only to the 1878 Act and the Rules there under which exhibits a total non-application of mind. The impugned exercise amounts to an abuse of the executive discretion and powers rendering it patently arbitrary, unconstitutional and null and void. In the wake of the above narrative and the conclusions recorded, the impugned office memorandum is quashed and the settlements awarded by the state authorities consequential to the said memorandum/notification are also held to be unsustainable and are hereby quashed. This determination, however, would not denude the State authorities of their power conferred by the Panchayat Act to take appropriate measures on the issue in accordance therewith. The petitions are thus allowed. No costs.