
(2024) 03 GAU CK 0051

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 762, 844, 1161, 1232, 1352, 1485 Of 2024

Joynab Bibi And 17 Ors.

APPELLANT

Vs

Union Of India And 9 Ors

RESPONDENT

Date of Decision : 22-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 40, 243E, 243E(1), 243E(3), 243U
Assam Panchayat Act, 1994 — Section 7, 35, 68, 125, 125(4), 132, 138

Citation : (2024) 03 GAU CK 0051

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : Tj Mahanta, B. Rahman, Mu Mondal, Kr Patgiri, K. Mira, R. Islam, D. Saikia, K. Konwar, P. Barua, K. Phukan, R. Dubey, Ab Kayastha

Final Decision : Dismissed

Judgement

1. The subject matter of challenge in these writ petitions being similar, the same are disposed of by this common judgment and order. The petitioners herein have put to challenge an order dated 03.02.2024 of the Panchayat and Rural Development Department (hereinafter P&RD) by which concerned District Commissioner or his authorized officers have been allowed to officiate as the custodian of the properties of Gaon Panchayats (GP), Anchalik Panchayats (AP) and Zila Parishads (ZP) in the State of Assam for the gap period i.e., after completion of the term, as elections could not be held within the permissible time limit till holding of such elections. Challenge is also made to a subsequent order dated 14.02.2024 by which the District Commissioner had allowed different officers of the district to be custodian of the properties.

2. Before going into the issue involved and the grounds of challenge, it would be convenient if the background facts of the cases are narrated in brief.

WP(C)/762/2024

3. There are 18 numbers of petitioners and they were all Presidents of different

GPs in the district of Dhubri. Their term of five years was complete on or about 14.02.2024.

4. The four numbers of petitioners in this writ petition were the Presidents of different GPs in the district of Kamrup. The elections were held on 05.12.2018 and having declared as the winning candidate in the results announced on 13.12.2018, they had taken over charge immediately thereafter. Their term of five years was complete on or about 14.02.2024.

WP(C)/1161/2024

5. There are four numbers of petitioners, who were all elected as Presidents/ Members of different GPs/ APs / ZPs in the district of Barpeta. Their term of five years was complete on or about 14.02.2024.

WP(C)/1232/2024

6. There are three petitioners in this case. While the petitioner no. 1 was the President of Nayeralga AP, the petitioner nos. 2 and 3 were the Members of the said AP. Their term of five years was complete on or about 14.02.2024.

WP(C)/1352/2024

7. 35 nos. of petitioners have joined together in this writ petition, who were all elected Presidents / Members / Vice-Presidents of various GPs/ APs/ ZPs in the district of Hailakandi. Their term of five years was complete on or about 14.02.2024.

WP(C)/1485/2024

8. 7 nos. of petitioners have joined together in this writ petition, who were elected as President of different GPs in the district of Goalpara. Their term of five years was complete on or about 14.02.2024.

9. As indicated above, the grievance of the petitioners is with regard to the direction of the Government to take over the custody of the properties of their respective GPs / APs / ZPs vide the order dated 09.02.2024 on the expiry of the term of the said GPs / APs / ZPs till fresh elections are held. The primary contention of the petitioners is that there is a legal obligation of the authorities to hold the election of the GPs / APs / ZPs during the tenure of the earlier body and the handing over the charge to the newly elected body also has to be within the said tenure. However, the elections could not be held on time and therefore, the petitioners should be allowed to continue till such time when the elections would be held.

10. On the other hand, the contention of the State respondents is that there is no illegality in the aforesaid action as after completion of the term, no Member would have the right to continue in the said post.

11. I have heard Shri TJ Mahanta, learned Senior Counsel assisted by Shri B. Rahman, learned counsel for the petitioners in WP(C)/844/2024; Shri MU

Mondal, learned counsel for the petitioners in WP(C)/762/2024 and WP(C)/1232/2024; Shri KR Patgiri, learned counsel for the petitioners in WP(C)/1161/2024, Shri K. Mira, learned counsel for the petitioners in WP(C)/1352/2024 and Shri R. Islam, learned counsel for the petitioners in WP(C)/1485/2024. Also heard Shri D. Saikia, learned Advocate General, Assam assisted by Shri K. Konwar, learned counsel and Ms. P. Baruah, learned counsel for the State respondents, Ms. K. Phukan, learned CGC and Ms. AB Kayastha, learned counsel appearing on instructions of Shri R. Dubey, learned Standing Counsel, Assam State Election Commission.

12. Shri Mahanta, learned Senior Counsel has submitted that on the failure of the State Election Commission to hold election for constituting the new GPs / APs / ZPs upon the expiry of its term, as per Article 243E of the Constitution of India, the State Government or the Deputy Commissioner could not have issued the impugned directions for taking custody of the properties of such GPs / APs / ZPs. It is contended that the petitioners ought to have been allowed to continue to hold their respective posts until the newly elected Body assumes office. It is submitted that when the petitioners are not at fault for not holding the elections in time, the option available to the State to allow the elected representatives to continue would be a better option by which the concept of decentralization of powers would actually be kept alive.

13. As regards the statutory provisions mentioned in the impugned order, the learned Senior Counsel has submitted that Section 125 (4) of the Assam Panchayat Act, 1994 (hereinafter the Act) could not have been taken resort to inasmuch as, a reading of the said provision does not envisage any such powers being vested upon the State. It is submitted that Section 125 is in connection with dissolution of Panchayat and Section 125(4) is a provision as to how the situation in case of such dissolution would be taken care of. Though, Section 125(4) envisages a situation of taking over powers, duties and properties by the Government, the pre-condition is that the Panchayat in question is required to be dissolved. It is further submitted that such dissolution is a punitive action taken on certain allegations wherein there is abuse of powers or incompetency or persistent default etc. It is submitted that there being no such dissolution under Section 125, the provisions of Section 125(4) would not have been made applicable.

14. By referring to Article 243E of the Constitution of India, it is submitted on behalf of the petitioners that under Article 243E(1), the tenure of Panchayat has been laid down, which is five years. Under Article 243E(3) there is a mandate to hold and complete the election to constitute a Panchayat before the expiry of its duration which is five years. It is submitted that the aforesaid mandate of the Constitution of India has been grossly violated by the State and therefore, the petitioners cannot be made to suffer because of such failure on the part of the State.

15. The learned Senior Counsel has also submitted that during the tenure, there

was the pandemic of Covid-19 as a result of which the respective bodies could not function for almost 1½ years and this aspect has not been taken into consideration before passing the impugned orders.

16. Supporting the aforesaid submission of the learned Senior Counsel, Shri KR Patgiri, learned counsel appearing for the petitioners in WP(C)/1161/2024, has added that Article 40 of the Constitution of India deals with organization of village Panchayat. It is accordingly submitted that such organizations is under the Scheme of having a self Government at the grass root level and the functioning of such organization should be left with the elected representatives.

17. Shri MU Mondal, learned counsel appearing for the petitioners in WP(C)/762/2024 and WP(C)/1232/2024 has submitted that holding of timely elections in local self Government organization is a constitutional mandate and the State is bound to follow that mandate.

18. On behalf of the petitioners, reliance upon the following case laws have been made:

- i. 2007 (3) GLT 899 [Uttar Dhemaji GP Vs. State of Assam and Ors.]
- ii. Order dated 26.03.2018 passed in WP(C)/1727/2018 [Sujit Mandal and Ors. Vs. The State of Assam and Ors.]
- iii. (2022) 12 SCC 770 [Suresh Mahajan Vs. State of M.P.]

19. In the case of Uttar Dhemaji GP (supra), GPs / APs / ZPs which were dissolved were directed to be allowed to continue till the constitution of the new body without taking any major policy decisions and with restrictions in the expenditures.

20. It is submitted that vide the order dated 26.03.2018 in Sujit Mandal (supra), a direction was issued to allow the petitioner GP whose term had expired to continue till the constitution of the new Gaon Panchayat.

21. In the case of Suresh Mahajan (supra), a direction was given by the Hon'ble Supreme Court to hold timely election in local self Government. In this connection, paragraph 12 of the said judgment was referred to which is extracted hereinbelow-

"12. Therefore, we direct the State Election Commission by way of interim order to issue election programme without any further delay on the basis of the wards as per the delimitation done in the local bodies concerned when the elections had become due consequent to expiry of 5 (five) years' term of the outgoing elected body or before coming into force of the impugned Amendment Act(s) whichever is later. On that notional basis, the State Election Commission ought to proceed without any exception in respect of local bodies concerned where elections are due or likely to be due in the near future without waiting even for the compliance of triple test by the State Government for providing reservation to Other Backward Classes. We have no manner of doubt that only such direction would

meet the ends of justice and larger public interests consistent with the constitutional mandate that the local self-government must be governed by the duly elected representatives uninterrupted except in case of its dissolution before expiry of the term on permissible grounds.”

22. Per contra, Shri D. Saikia, learned Advocate General, Assam has vehemently opposed the writ petitions. As a preliminary objection, he has submitted that the State Election Commission which is a necessary party has not been made a respondent and on the ground of non-joinder of necessary party, the writ petitions are liable to be dismissed. He submits that vide the first order dated 03.02.2024 which is the subject matter of challenge, the properties of GPs / APs / ZPs were taken into custody by the District Commissioner of the respective districts and by the second impugned order dated 14.02.2024, the details of the officers who would be the custodian in the districts have been given.

23. The learned AG submits that under Section 7 of the Act, the duration of GP has been fixed as five years. The similar provision for Anchalik Panchayat is given in Section 35 and for Zila Parishad the duration is given in Section 68 and all those provisions clearly stipulates the duration to be five years. It is however fairly submitted that the provision of Section 125 (4) of the Act, though mentioned in the impugned orders, may not be relevant and by wrong mentioning of a particular provision of law, the action, per se cannot be declared as invalid. Reference has been made to Section 138 relating to delegation of powers and Section 132 relating to removal of difficulties.

24. The learned AG has also referred to the provisions of Article 243E of the Constitution of India wherein the duration of Panchayats have been laid down which is five years. It is submitted that when the constitutional mandate, as well as the Act in question has stipulated the duration to be five years, the prayer for extending the term beyond five years is not liable to be considered.

25. The learned AG has submitted that the case laws relied upon on behalf of the petitioners are distinguishable on facts as well as on the background. It is submitted that the case of Uttar Dhemaji (supra) was decided by taking into consideration certain decisions of the Hon’ble Kerala High Court and the Hon’ble Supreme Court in the case of Amrik Singh Vs. Union of India reported in AIR 1980 SC 1447 wherein it was laid down that concerned employee would not be victimized by the administrative lapses. Accordingly, in paragraph 14 (d) of the said judgment of Uttar Dhemaji (supra), a direction was given to allow the bodies to continue till the next elections are held. It is submitted that in any case, the aforesaid judgment is per incuriam the provisions of Article 243E(1) of the Constitution of India which appears to have been escaped the notice of the Hon’ble Court.

26. With regard to the order dated 26.03.2018 passed in WP(C)/1727/2018 [Sujit Mandal (supra)] is concerned, the learned AG submits that the aforesaid order was an interim order, which itself was based on an earlier interim order

passed in another case. Therefore, reliance upon the same cannot be made.

27. The learned AG has also relied upon the case of Hemant Narayan Rasne Vs. Commissioner and Administrator of Pune Municipal Corporation reported in (2022) 18 SCR 180. In the said case, Hon'ble Supreme Court was dealing with a case concerning the duration of Pune Municipal Corporation. After taking into account the mandate of Article 243U(1), the following observations have been made:

"When it is apparent that the duration of the Corporation itself is for a period of five years and no longer, as per the mandate of Article 243U(1) of the Constitution of India, duly reflected in Section 6 of the Act of 1949; and the term of the office of Councillors has specifically been provided to be co-terminus with the duration of Corporation in Section 6A of the Act of 1949; and then, the Standing Committee is to be consisting of "sixteen Councillors", we are unable to find any logic in the submissions made by the learned counsel for the appellant that even if the term of the Corporation comes to an end and even when the term of office of the Councillors comes to an end yet, the Standing Committee as existing on the date of completion of the terms of Corporation and Councillors shall continue to be in office until composition of the new Committee after elections. When no person could be said to be holding the office of the Councillor after completion of the term in view of the mandate of Sections 6 and 6A of the Act of 1949, it follows as a necessary corollary that the Standing Committee stands dissolved along with the completion of the term of the Corporation."

28. The learned AG submits that in the majority of the petitions, the principal prayer is to allow the petitioners to continue as President / Members of the respective GPs / APs / ZPs and only in a few petitions, there is prayer for holding timely election. It is submitted that while there is an obligation of the State to hold the elections in time for which efforts are on, it is only because of certain changes in the constituencies that fresh voter lists are being prepared for which the elections have been slightly delayed. It is however submitted that for the said reason, no right will accrue upon the earlier Members to continue.

29. It is also submitted on behalf of the State that in some of the petitions, the State Election Commission (SEC) has not been made party respondents. The petitioners however has responded most of the writ petitions had the SEC as a respondent and in those petitions where SEC was not initially made a party, applications have been for its impleadment. The learned AG submits that even if the State Election Commission is a party, the same would not lead to a situation where the duration of the earlier term can be extended.

30. The learned AG, by referring to a decision of the Division Bench of this Hon'ble Court in the case of Ratia Bordoloi Vs. State of Assam reported in 2021 (1) GLR 783 has further submitted that extension, if any, has to be during the subsistence of the earlier tenure. In the said case, the Hon'ble Court was considering the extension of the term of an Autonomous Council. The relevant

observation is extracted hereinbelow-

"12.4. We have already held that the discretion to be exercised by the Governor under Section 7(3) of the Act is to be exercised during the subsistence of the term of the Governing Council as the extension of the term will mean only continuation of the term by way of extension. Once the term of the General Council has lapsed, the members of the General Council will become *functus officio* and the question of extending their term does not arise once they have demitted office due to expiry of their term.

Any extension of term of a General Council once the term has lapsed would amount to revival of the General Council which is not contemplated under law. Hence, since the Governor has not undertaken the exercise for invoking his discretionary power under Section 7(3) of the Act, during the subsistence of the term of the outgoing General Council, the term of the existing General Council shall stand extended till the Governor (State Government) takes any decision in this regard."

31. In support of the submission that wrong quoting of Section 125 of the Act in the impugned order would not make the order invalid, the learned AG has relied upon the decision of *N. Mani Vs. Sangeetha Theater* reported in (2004) 12 SCC 278. In paragraph 9, the following has been laid down-

"9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law."

32. The learned AG submits that the entire controversy would be put to rest by the law settled by this Court in the case of *Surya Phukan Vs. State of Assam* reported in (2020) 6 GLR 767. In that case an identical issue had arisen with regard to the Municipal Boards in the State of Assam. It is submitted that by taking into consideration the *pari materia* provision in Article 243U of the Constitution of India pertaining to Municipal Board, it was held that such a claim to continue in office after the expiry of the term on the plea that fresh elections were not held is not legally tenable. It was held that the source of power to sit in the office of the Municipality is the mandate given by the people as voters which is only for the period prescribed in the statutes.

33. The learned AG accordingly submits that all the writ petitions are liable to be dismissed.

34. Shri R. Dubey, learned Standing Counsel, Assam State Election Commission, Assam has supported the views of the learned AG, Assam. Ms. K. Phukan, learned CGC submits that the Central Government does not have any significant role in this case.

35. Rejoining the submission, Shri Mahanta, learned Senior Counsel for the

petitioners has contended that the case of Surya Phukan (supra) is not applicable as the same relates to Municipal Boards whereas the present cases are connected to the Panchayats. Shri MU Mondal, learned counsel for the petitioners in WP(C)/762/2024 and WP(C)/1232/2024 as well as Shri KR Patgiri, learned counsel for the petitioners in WP(C)/1161/2024 and Shri R. Islam, learned counsel for the petitioners in WP(C)/1485/2024 submit that they have prayer to hold the elections also.

36. The rival submissions made by the learned counsel have been carefully considered and the materials before this Court have been duly scrutinized.

37. It is not in dispute that the elections for the GPs / APs / ZPs have not been held in time as provided by law. The primary issue which had arisen for consideration is that in the event of not holding the elections in time whether the tenure of the earlier elected representatives can be extended.

38. For better understanding of the issue at hand, the provisions of law connected to this lis are quoted hereinbelow. First let us examine the relevant provisions the Assam Panchayat Act, 1994.

"7. Duration of Gaon Panchayat- Every Gaon Panchayat, save as otherwise provided in this Act, shall continue for a term of five years from the date appointed for its first meeting: Provided that the term of the office fixed under this sub-section shall be held to include any period which may elapse between the expiration of the said period and the date of the first meeting of the Gaon Panchayat newly constituted in which a quorum shall be present when a Gaon Panchayat shall stand dissolved.

35. Duration of Anchalik Panchayat-

Every Anchalik Panchayat save as otherwise provided in this Act shall continue for a term of five years from the date appointed for its first meeting.

68. Term of Zilla Parishad –

Every Zilla Parishad except as provided in the Act., shall continue for a period which shall not exceed five years from the date of holding the first meeting.

39. The relevant provisions in the Constitution of India is also extracted hereinbelow-

"243E. Duration of Panchayats, etc.

(1) Every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer."

40. Sections 7, 35 and 68 of the Act mandate the term of an elected Body of GPs / APs / ZPs to be five years and in these cases, the admitted position is that the tenure of five years had expired on 14.02.2024 / 15.02.2024. Before such expiry, vide the impugned orders dated 03.02.2024 and 14.02.2024, the

properties of the respective GPs / APs / ZPs were taken into custody by the District Commissioner or his delegate. It is not the case of the petitioners that the functions were handed over to any third party by mala fide exercise of powers.

41. Article 243E(1) of the Constitution which is with regard to duration of Panchayat clearly lays down the same to be five years and no longer. When the Constitution of India itself lays down the duration in such categorical terms, any direction to extend such term would be in violation of the constitutional mandate.

42. So far as the order dated 26.03.2018 passed in WP(C)/1727/2018 - Sujit Mandal (supra) is concerned, this Court finds force in the submission of the learned AG that the aforesaid order was an interim order, which itself was based on an earlier interim order passed in another case. The relevant portion of the order dated 26.03.2018 is extracted hereinbelow-

"By this writ petition, the petitioners have put to challenge the aforesaid orders dated 03.03.2018 and 17.03.2018. Mr. Ali has also produced before the Court copy of an order dated 14.03.2018 passed in WP(C) No. 1374/2018. Perused the aforesaid order dated 14.03.2018. In view of the above factual background, it is considered appropriate to issue notice in this writ petition. Following the said order, it is provided as an interim measure that the petitioner Gaon Panchayats, whose term had expired on 23.03.2018, shall be allowed to function till the constitution of the new Gaon Panchayats. However, the petitioner Gaon Panchayats are restrained from taking any policy decision, and incurring any expenditure from the funds other than for the purpose of payment of salary to the staff and routine functions of the office without taking leave of the Court. ..."

43. This Court has further noticed that while the petitioners have placed reliance upon the interim order passed in the aforesaid case of Sujit Mandal (supra), it was not disclosed that the said case was finally disposed of vide an order dated 29.05.2018 whereby the writ petition along with a bunch of similar writ petitions was dismissed. In the aforesaid decision reported in (2018) 5 GLR 379, the lead case was Pub Mangaldai Anchalik Panchayat Vs. State of Assam and the case of Sujit Mandal (supra) [WP(C)/1727/2018] was also considered and dismissed. In paragraph 34, the earlier case of Uttar Dhemaji (supra) has been distinguished by taking into consideration the constitutional provision of Article 243 E. The said observation is extracted hereinbelow-

"34. In Uttar Dhemaji Gaon Panchayat (supra), this court permitted continuation of the earlier elected Panchayat bodies, whose term had expired, on the ground that the State could not take advantage of its own wrong and that the State had failed to hold the election before the expiry of the stipulated period of time. The fact situation in the present batch of cases is clearly distinguishable from that of Uttar Dhemaji Gaon Panchayat (supra) and, having regard to the proviso contained in Article 243E(1), I am of the considered opinion that it will not be permissible to allow the Panchayat bodies, whose term had already expired, to

continue to function and discharge the powers and duties as envisaged under the Panchayat Act.”

44. This Court is in agreement with the views expressed in the aforesaid case of Pub Mangaldai Anchalik Panchayat (supra). Further, apart from the facts under which the case of Uttar Dhemaji (supra) was decided being distinguishable, the said decision also appears to have been rendered on the basis of the certain decision on certain administrative default qua service law. It also appears that the aforesaid decision was rendered without taking into consideration Article 243E (1) of the Constitution of India. In any case, it is the constitutional mandate, as laid down in Article 243E (1) which will prevail.

45. This Court is of the view that the source of power to sit in the office of a Panchayats is the mandate given by the people as voters and that mandate is only for the period prescribed in the statute holding the field. This fact is fortified by the expression used by the Constitution makers in inserting the words “and no longer” in Article 243E (1). In absence of such mandate after expiry of the term prescribed by law, in the opinion of this Court, the petitioners would not have any enforceable right to maintain the present challenge. In fact, the very locus of the petitioners to maintain the present challenge would be questionable. The elections to the Panchayats being a part of the Constitution which is the corner stone of democracy, the authority bestowed by the electors upon the petitioners who are elected representatives had ceased immediately upon expiry of the term. This Court has also noticed that there is no provision for extension of the term in the Act of 1994 and in absence of any such provision, no right, whatsoever would accrue upon the petitioners to continue as President / Members of their respective Panchayats after expiry of the term.

46. This Court finds force in the contention made on behalf of the State that the ratio laid down in the case of Surya Phukan (supra) would be squarely applicable. In that case an identical issue had arisen with regard to the Municipal Boards and this Court by taking into consideration the *pari materia* provision in Article 243 U of the Constitution of India pertaining to Municipal Board had held that such a claim to continue in office after the expiry of the term on the plea that fresh elections was not legally tenable. Though a submission was made on behalf of the petitioners that the ratio laid down in the case of Surya Phukan (supra) would not be applicable as the same pertains to Municipality, this Court is unable to accept the said submission as it is the principle laid down which is to be seen and provisions of law under which such principle has been laid down.

47. Though a reference was made to Article 40 by the petitioners, the same is under Part IV of the Constitution of India pertaining to Directive Principles of State policy. That apart, the present arrangement is only till the holding of the elections of the respective GPs / APs / ZPs and therefore, eventually it would be the elected representatives who would function at the grass root level.

48. As regards the case of Suresh Mahajan (supra) relied upon by the

petitioners, the Hon'ble Supreme Court had also made it clear that no order of stay should be passed with regard to holding of elections as the same would amount to an indirect extension of the earlier body. The relevant extract is reproduced hereinbelow-

"28. We were also informed by the learned counsel appearing for the Madhya Pradesh State Election Commission during the course of arguments that some writ petitions are pending before the High Court in which interim orders have been passed and that may come in the way of the State Election Commission to notify the election programme. In that regard, we make it clear and also direct that the State Election Commission must abide by the directions and observations in this order uninfluenced by any order of the High Court or the civil court on the subject of elections of the local self-government concerned, as the case may be. If any order passed or to be passed hereafter by the High Court or the civil court in the State of Madhya Pradesh, is in conflict with the directions given by this Court, the same shall be deemed to have been superseded in terms of this order and not to be acted upon without the prior permission of this Court."

49. It is also held that simply due to mention of Section 125 of the Act, the impugned orders cannot, per se be declared illegal. As rightly pointed out, wrong quoting or misquoting of a provision of law shall not make an order illegal if otherwise the source of power can be traced. This position has been clarified by the Hon'ble Supreme Court in a catena of decisions including the case of N. Mani (supra).

50. In view of the aforesaid facts and circumstances, this Court is of the opinion that no enforceable rights, much less, any fundamental rights of the petitioners have been infringed. Accordingly, the writ petitions are held to be devoid of any merits and dismissed. However, this Court directs that the State authorities including the State Election Commission would take immediate steps to hold the elections for the Panchayats as per the constitutional mandate as the earlier term had expired more than a month back.

51. No order as to cost.