
(1954) 05 GAU CK 0001

In the Gauhati High Court

Case No : Civil Rules No's. 146, 148 and 165 of 1953

Kali Kanta Choudhury and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 26-05-1954

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1954) 05 GAU CK 0001

Hon'ble Judges : Ram Labhaya, J;Deka, J

Bench : Division Bench

Advocate : S.K. Ghose and G.K. Talukdar, in Civil Rule No. 146 of 1953, N.M. Dam and S.C. Das, in Civil Rule No. 148 of 1953 and P.K. Gupta, in Civil Rule No. 165 of 1953, for the Appellant; S.M. Lahiri, General, D.N. Medhi, Sr. Govt. Advocate and C.R. Choudhuri, for the Respondent

Judgement

Ram Labhaya, J.—This order shall dispose of three petitions, Nos. 146, 148 and 165 of 1953, all under Article 226 of the Constitution of India. These petitions are directed against an order of the Governor of Assam by which approval to the appointment of the Petitioner in Civil Rule No. 146 of 1953, (Kali Kanta Choudhury) as Mouzadar was withheld and Respondent No. 6, Sarbeswar Patgiri was appointed Mouzadar in his place.

2. The facts bearing on the points" that" arise for determination in this case are as follows: Kali Kanta Choudhury was a Mauzadar of Kaklabari Mouza in Barpeta Sub-Division. Labhanya Kumar Choudhury who was Mouzadar of Uttar Bajali Mouza was suspended from the office of Mouzadar Kali Kanta Choudhury was ordered to take charge of the collection of the revenue in Uttar Bajali Mouza till the appointment of a permanent Mouzadar could be made. Applications were invited for a permanent appointment. The Deputy Commissioner by his order, dated 8-3-1953 decided to appoint Kali Kanta as the, permanent Mouzadar of Uttar, Bajali Mouza. In pursuance of this order, Kali Kanta furnished the security required by the rules. He also executed a Kabuliyat. There were rival claimants

for the office of the mouzadar. These claimants four in number appealed to the Revenue Minister of the State. On 10th July, 1953, an order was passed by which the appointment of Kali Kanta as Mouzadar of Uttar Bajali was not; approved. The main reason given for this decision was that the transfer of Kali Kanta from Kaklabari to Uttar Bajali was not in public interest. Respondent No. 6 was considered to be the most suitable candidate for appointment in his place. This order was communicated to Kali Kanta, the Petitioner on 18th August, 1953.

Kali Kanta and the two other Petitioners Sri Abhoy Charan Barman & Parikhit Chandra Chau-dhuri all assail the validity of the order of the Government of Assam passed on 10th July, 1953. This order was passed without hearing any of the candidates. Mr. Ghose, the learned Counsel for Kali Kanta, Petitioner in Rule No. 146 has argued that the Deputy Commissioner was the final authority so far as the appointment to the office of Mouzadar was concerned. When an appointment is made by him, his order is final. It is not subject to appeal. The rival claimants therefore had no right of appeal at all. The Government also had no jurisdiction to vacate the order of the Deputy Commissioner. He has relied on -- *Bijoy Chandra v. State of Assam*, AIR 1954 Gau 12 in support of his contention.

3. The contention rests mainly on the language of para 115 of the executive instructions contained in Chapter VIII Part II, of the Land Revenue Manual which contains rules under the Land and Revenue Regulation. Para 115 provided that Mouzadars shall be appointed" and dismissed by the Deputy Commissioner, but both the appointment and dismissal orders by the Deputy Commissioner were subject to the approval of the Commissioner. Later on, the direction contained in para 115 was amended and the words "subject to the Commissioner's approval" were deleted. The Deputy Commissioner thus remained charged with the duty of appointing and dismissing Mouzadars. Para 115 was again amended & the orders of appointment and dismissal of the Deputy Commissioner were made subject to the approval of the Government.

4. On the date when Kali Kanta was appointed Mouzadar, the Deputy Commissioner's power under the executive instructions was not absolute. He was not the final authority. His powers of appointment had been made subject to the approval of the Government. The order passed by the Deputy Commissioner expressly states that the appointment of Kali Kanta is subject to the approval of the Government. The Deputy Commissioner was not in any doubt as to his powers. Since approval of the appointment from the Government had to be obtained, the case was submitted to Government for necessary approval. There were petitions of appeal addressed to the Government. From the impugned order, it appears that these appeal petitions were read and considered. Reports of the Deputy Commissioner were also taken into consideration and after a consideration of all claims and reports, the decision embodied in the order dated 10th July, 1953 was arrived at.

No assistance could be derived by Mr. Ghose from the decision reported in *Bijoy Chandra v. State of Assam*, AIR 1954 Gau 12 for the reason that the Deputy

Commissioner is now admittedly not the final authority so far as the appointment of a Mauzadar is concerned. The observations made in the case to the effect that the decision of the Deputy Commissioner was final was on the basis of the language of the Executive Instruction (115) as it stood before the final amendment. No finality now attaches to the order of the Deputy Commissioner. The first contention of the learned Counsel therefore cannot prevail. The order is not final. It was subject to the approval of the Government for which the case was submitted to the Provincial Government.

5. The next question is whether the rival claimants had the right of appeal. The order appointing the Mouzadar was subject to the approval of the Government. The order is administrative in character. The appointment could be finalised only when the nominee of the Deputy Commissioner was approved by the Government. Till then, no appointment can be said to have been made. No question of appeal could therefore arise. The executive instructions contain no provision for appeal at that stage. Rival claimants to the office of the Mouzadar therefore had no right of appeal under the executive instructions which regulate the appointment and dismissal of the mauzadars.

6. The rival claimants submitted their representations to the Government. They were styled as appeals. The impugned order has described these appeals as petitions. As the Government had to give its approval to the appointment, the matter was before the Government for its consideration. The executive instructions do not bind the Government to a consideration only of the case of the person whose name has been proposed by the Deputy Commissioner nor is the Government precluded from considering any representations made to it by the persons concerned. Their cases had to come up for consideration even if no representations were made. The whole record has to go to the Government when it has to decide whether a particular person who is selected for the office of the Mouzadar should be finally appointed to that office or not. Even if therefore, there is no right of appeal given in the rules, the representations to the Government before the final decision is made would not contravene any express direction contained in the rules. As a matter of fact, it is a misnomer to call these petitions as "appeals". No final order had been passed till that stage and therefore, they should not be regarded as appeals at all. While the matter of the appointment was under consideration, rival claimants could certainly press their claims. Representations even though described as appeals would not be regarded therefore as incompetent nor can it be said that the Provincial Government had no jurisdiction to consider them.

7. No one of the candidates was heard. Since they were mere representations, there was no question of any hearing. These were not the appeals properly so called as observed above. The order of 10th July was certainly within the jurisdiction of the Provincial Government. It dealt with the question whether approval to the appointment of Kali Kanta should be given or withheld. It decided to withhold its approval. The question whether the final appointment should be

made by the Provincial Government or the case should be sent back to the Deputy Commissioner again for making a provisional appointment of another Mouzadar then arises. The Provincial Government made the appointment without any further reference to the Deputy Commissioner.

Mr. Ghose argues that the power of the Provincial Government was limited to granting or with-holding the approval. The final appointment of another candidate was beyond its jurisdiction, In -- Assam Fisheries Farms and Industries Ltd. Vs. The Development Commissioner and Others, this question arose under the rules framed for the settlement of fisheries under the Land and Revenue Regulation and also under the Fisheries Act. The settlements were subject to the approval of the Development Commissioner but the Rules did not expressly give him the power to make settlements directly. It was observed by the learned Chief Justice who delivered the judgment in the case that--

It is true that the rules do not confer the power on the Development Commissioner to make a settlement directly by himself unless, of course, such power can be spelled out from Rule 190A; but that could be only so where there is a previous sanction of the Provincial Government. This however, does not mean that in according or refusing sanction to a particular sale, the Development Commissioner is precluded from observing that settlement should be made in, favour of particular bidder.

The power of approval was held to include the power to make suggestions for fresh settlement. It must be observed that the rules which were being considered in that case had the force of law. They were not merely executive instructions as in this case. If no appointment could be finalised without the approval of the Provincial Government and if the whole case is before the Provincial Government, it cannot be regarded as having exceeded its power if it decided to differ from the Deputy Commissioner and selected another candidate for the office of the Mauzadar.

The Provincial Government had the whole case (sic) it & not merely the case of the candidate. The other candidates whose cases are considered and who have not been considered suitable for the appointment arose also before the Provincial Government. If the rule is interpreted as meaning that the Government has only to withhold or to grant approval to the proposal made by the Deputy Commissioner, then the appointment may not be finalised till the Deputy Commissioner by some chance selects a person whom the Government is prepared to approve. There may be a number of candidates. The case need not go several times to the Provincial Government with different nominations. When the record is before the Provincial Government and the qualifications of the different candidates which have been considered by the Deputy Commissioner are before it, it would not be acting in excess of its powers if it appoints someone who is not appointed or recommended by the Deputy Commissioner.

8. This conclusion necessarily follows from the fact that the appointments of

Mauzadar are made under executive instructions in the exercise of powers of the Provincial Government. By issuing executive instructions and permitting the Deputy Commissioner to appoint or dismiss Mauzadar subject to the approval of the Government, the power that vests in the Government has not been surrendered. It remains with the Government. The executive instructions are not rules which have the force of law. If these rules had the force of law, different consideration could arise. The powers of appointment that the Government possesses can be exercised even when the Deputy Commissioner has selected a candidate for the office and asked for the approval of the Government to his proposal. A surrender of powers of the Government is possible by legislative enactments or by rules which have the force of law. Mere executive instructions for the guidance of subordinate officers in making provisional appointments which are within the powers of the Government to make, do not have the force of such rules as may be enforced against the Government in a Court of law. The rules not having the force of law do not create enforceable rights.

9. In regard to the executive instructions, the learned Advocate-General has stated that these were not issued under any provisions of any enactment, enabling the Provincial Government to issue such instructions. Mr. Ghose, learned Counsel for Kali Kanta Chowdhury, Petitioner has not been able to show us that these instructions have the force of law. He merely urges that they are executive instructions framed by the Government and therefore, the Government is bound by them. This argument does not carry us very far. The executive instructions no doubt deal with very important matters. The appointment and the dismissal of Mauzadar is an important administrative act. The Mauzadar has to perform important functions. He is a public servant according to these instructions. He is charged with the duty of collecting land revenue, house tax, poll tax etc. Collection of grazing fees is also within the ambit of his authority. He also has special duties to perform. He is also a Deputy Commissioner's assistant in administrative matters. On being appointed, he becomes a revenue officer. It is necessary in these circumstances that the matter of his appointment and dismissal should not be left to executive instructions. There should be binding rules for the purpose and the Land and Revenue Regulation may be suitably amended if necessary for achieving this object the orders appointing or dismissing Mauzadars should also be appealable. These are however matters for the Provincial Government to consider. As things are, there being only executive instructions which authorise the Deputy Commissioner to make provisional appointments, it cannot be said that the Government acted in excess of its powers in appointing Mauzadars directly, when no appointment could be made without its approval.

10. Kali Kanta Chowdhury, the Petitioner was the Mauzadar in Kaklabari. His appointment in the other Mauza has not been approved. From the impugned order, it appears that the Government thought that his transfer from his own Mauza to the other mauza was not expedient. The implication of the order therefore is that he was to revert to his original mauza. As the order was not

quite free from doubt, we enquired from the learned Advocate-General about the intention of the Government. We have been assured that the impugned order has not the effect of removing him from the office of Mauzadar of Kaklabari Mauza to which he is free to revert. In these circumstances and in the view that we take of the matter, no case for interference under Article 226 is made out. The proceeding is again administrative in character. There is no right of appeal against it. No binding rule of law has been violated. The petition of Kali Kanta Chowdhury therefore must fail. The position of the other candidates can have no better fate. The question of principle in all the cases is the same. All the petitions are therefore disallowed. The rules are discharged. We, however, make no order as to costs.

Deka, J.

11. I agree.