

(2007) 11 GAU CK 0010
In the Gauhati High Court

Kuladhar Chakraborty and Others

APPELLANT

Vs

Abdul Khandakar and Others

RESPONDENT

Date of Decision : 12-11-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2008) 1 GLT 234

Hon'ble Judges : Jasti Chelameswar, C.J; Ashok Potsangbam, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Asok Potsangbam, J.—Writ Appeal Nos. 184 of 2006, 194 of 2006 and 248 of 2006 being analogous and are against the judgment and order dated 12.4.2006 passed by the learned Single Judge in W.P. (C) No. 6045/2005, are taken up together and disposed of by this common judgment and order.

2. Heard Mr. A.S. Choudhury, learned senior counsel and Mr. B.D. Konwar, learned Counsel on behalf of the appellants. Also heard Mr. K.N. Choudhury, learned Additional Advocate General, Assam and Mr. H.R.A. Choudhury, learned senior counsel appearing on behalf of the private respondents.

3. Writ petitioners, seven in number, filed Writ Petition No. 6054 of 2005 before the learned Single Judge challenging the list containing names of the private respondents on the ground that the private respondents did not possess matriculation certificates which was the condition for eligibility stipulated in the notification dated 26.6.2000 issued by the Additional Deputy Commissioner, Goalpara, for appointment of Gaonburas/Additional Gaonburas etc. It may be necessary for us to refer to the notification dated 26.6.2000 and the same is quoted below:

Govt. of Assam Office of the Deputy Commissioner: Goalpara (R.K.G Branch) No. GRF-1/2000/28 Date: 26.06.2000

To

1. The Circle Officer/Balijana/Matia/Dudhnoi/Rongjuli/Lakhipur.
2. Tohsildars/Balijan/Matia/Dudhnoi/Rongjuli/Lakhipur
3. Block Development Officer/Balijana/ Matia/Rongjuli/Lakhipur/Krishnai/Kushdhowa/Jaleswar

Sub: Appointment of Honorary Gaonbura/Additional Gaonbura.

Sir, With reference to the subject cited above you are informed that no application has been submitted for the posts of Gaonbura of the revenue villages listed in the list annexed herewith. You are therefore requested to collect applications from the areas already mentioned through the Office of the Gaon Panchayats/weekly market etc, and submit the same on or before 20.07.2000 in the Office of the undersigned.

The appointment of Gaonbura/Additional Gaonbura would be purely on honorary basis. They would not be able to claim any salary or payment. The Government will also not consider any of such demand in future.

The minimum educational qualification of the Gaonbura/Additional Gaonbura should be matriculation.

The applicants for the post of Gaonbura should submit their applications to the Circle Officers of the respective revenue villages. The appointments shall be made against each revenue village. The applicant should specify clearly for which revenue village candidature has been offered.

Enclo: A list.

Yours faithfully, Sd/-Illegible Additional Deputy Commissioner, Goalpara
26.06.2000.

4. Provisions of law prescribed for nomination, appointment and dismissal of Gaonburas finds place in the Executive Instructions No. 162 and 162 (A) of the Assam Land and Revenue Regulations, 1886, for short "the Regulation", and these two Executive Instructions hold the field for nomination, appointment and dismissal of Gaonburas in various Revenue Circles of the Districts of Assam. To enable us to appreciate the issue in question, Executive Instruction Nos. 162 and 162 (A) are quoted as follows:

162. Nomination and appointment of Gaonburas-

Gaonburas are appointed by the Deputy Commissioner. In the case of vacancy, the Deputy Commissioner shall take into consideration (a) the claims of the family of the late Gaonbura, (b) the wishes of the villagers and (c) the views of the Mauzadar, and shall appoint the person whom he considers most suitable for the post.

In charges consisting entirely of nisf-khiraj or lakhiraj estate the nomination of Gaonburas shall rest with the proprietors unless the nominee is plainly unfit.

The Deputy Commissioner may dismiss a Gaonbura from office after recording his reasons in writing.

162 (A). Appointment and dismissal of Gaonburas:

Gaonburas shall be appointed, suspended and dismissed, in case of Sadar Sub-Division by the Deputy Commissioner or the Sub-Divisional Officer (Sadar) and in case of outlying Sub-Divisions by the Sub-Divisional Officers.

If however the post of S.D.O. is vacant in case of outlying sub-Division, the powers of appointment, suspension and dismissal of Gaonburas may be exercised by the Assistant Commissioner or the Extra Assistant Commissioner of the outlying Sub-Division as may be authorized by the Deputy Commissioner by an order in writing in this behalf.

When a Gaonbura is suspended, the notice of suspension shall ordinarily be served on the Gaonbura by an Officer of the status of Revenue Officer who shall take over all official Books and papers from him.

The fact of Gaonbura's suspension shall be communicated to the raiyats of the villages concerned through the Gaon Panchayat or in any convenient manner and shall be reported to the Deputy Commissioner without delay. In case of outlying Sub-Divisions by the S.D.O.'s and in case of Sadar Sub-Divisions by the S.D.O's (sadar) if the order is passed by such officer. In the matter of appointment of Gaonburas, the following factors shall be taken into consideration:

- (1) The claims of the family of the Gaonbura.
- (2) The views of the Mouzadar.
- (3) The suitability of the person for the post.

5. The learned Single Judge disposed of the writ petition by holding that the notification dated 26.6.2000, as quoted above, is patently illegal and contrary to law governing the subject matter and, consequently, the notification dated 26.6.2000 and the select list of Gaonburas prepared pursuant to the aforesaid advertisement were quashed. The learned Single Judge further directed the competent authority to publish fresh advertisement for appointment of Gaonburas in strict compliance of the provisions mentioned in the Executive Instructions quoted above.

6. In these writ appeals, the impugned judgment and order has been assailed by the appellant substantially on two grounds, one being that the Executive Instruction is only an administrative instruction which can be modified and replaced by another one and, as such, it does not have the force of law, and another being that the learned Single Judge ought not to have quashed the advertisement in exercise of the discretionary power of the High Court under

Article 226 of the Constitution of India.

7. We have considered the rival submissions advanced by the parties. It is a settled position of law that Executive Instructions cannot supplant the Rules/Regulation but it can supplement the Rules/Regulation. In the present case, Executive Instructions issued under the Regulation are also incorporated as a part of the Regulation and any change to any of the existing Executive Instruction can be brought in by the competent authority either by modification/amendment or insertion of new provision in the manner provided by law. Government has introduced the Executive Instruction No. 162(A) by publishing the same in the Official Gazette. Thus, the valid Executive Instruction to guide the appointing authority while considering for appointment of Gaonburas is the provision contained in the Executive Instruction No. 162 (A) and the following factors are to be considered in the matter of appointment of Gaonburas:

- (1) The claims of the family of the Gaonbura.
- (2) The views of the Mouzadar.
- (3) The suitability of the person for the post.

8. Any addition or subtraction to the factors mentioned above can be made by the competent authority either by amending/modifying the existing Executive Instruction. In the absence of such modification/amendment of Executive Instruction No. 162 (A) or any other relevant Executive Instruction, Executive Instruction No. 162 (A) is to be followed and be adhered to by all the appointing authority while considering the appointment of Gaonburas. If Deputy Commissioners/Additional Deputy Commissioners are allowed to issue notifications by describing their own criteria which are contrary to the Executive Instruction No. 162 (A) for appointment of Gaonburas in the respective Districts, it will not only lead to a chaotic situation but it will also destroy the uniformity among the Districts of Assam in the matter of appointment of Gaonburas.

9. Further, the notification dated 26.6.2000 (which sought to consider the candidature of Gaonburas solely on educational qualification is a complete negation of the factors enumerated in the Executive Instruction No. 162 (A) and, as such, the finding of the learned Single Judge that the notification dated 26.6.2000 as contrary to the provisions prescribed in Executive Instruction No. 162 (A) is supported by cogent and sustainable reasons. The action of issuing notification dated 26.6.2000 by the Deputy Commissioner/Additional Deputy Commissioner, Goalpara is without legal competency and the notification is a nullity in law. Such patent illegality, as discussed above, was sufficiently noticed by the learned Single Judge while deciding the writ petition. Illegality cannot be allowed to be perpetuated and it must be stopped at the earliest and this is what has been done by the learned Single Judge in the present case.

10. For the reasons discussed above, we hold that the quashing of the list of Gaonburas prepared pursuant to the notification dated 26.6.2000 is justified and

the impugned judgment and order needs no interference. These writ appeals have no merit and accordingly, they are dismissed with no costs.