

(1972) 08 GAU CK 0011
In the Gauhati High Court
Case No : Civil Rule No. 194 of 1971

Nikunja Choudhury

APPELLANT

Vs

The State of Assam and others

RESPONDENT

Date of Decision : 30-08-1972

Acts Referred:

Constitution of India, 1950 — Article 14
Penal Code, 1860 (IPC) — Section 409

Citation : AIR 1973 Guw 13

Hon'ble Judges : P.K. Goswami, C.J.; M.C. Pathak, J

Bench : Division Bench

Advocate : P. Choudhuri, B.M. Goswami, M.K. Bhattacharjee, for the Appellant;
G.K. Talukdar, Sr. Govt. Advocate, J.P. Bhattacharjee and S.K. Sen, for the
Respondent

Final Decision : Allowed

Judgement

P.K. Goswami, C.J.—Rangiya had been in enjoyment of the status of a small town under the Municipal Act for several years. On 20th December, 1969, the State Government constituted the Rangiya Municipality in the said notified area with effect from 21st December, 1969, and included it in the First Schedule to the Assam Municipal Act, 1956 (Assam Act No. XV of 1957) (briefly "the Act"), under sub-section (1) of Section 33 thereof. By another notification of the same date, the Governor of Assam determined the total number of Commissioners to be ten, including two appointed Commissioners, the remaining to be elected. By yet another notification of the same date, the Governor, u/s 24 of the Act, ordered that all the Commissioners of the Rangiya Municipality shall be appointed by the Government and thereupon appointed ten Commissioners including the petitioner and the 4th respondent with effect from 21st December, 1969 "until the general election is held". By yet another notification of the same date, the Governor appointed the petitioner as Chairman of the Rangiya Municipal Board with effect from 21st December, 1969, (F. N.). The petitioner assumed charge of the Chairman and continued, when on 19th April, 1971 the Governor removed him

from the chairmanship under sub-section (I) of Section 28 of the Act with effect from the date of the receipt of that order by him. The said order of the Governor, marked as Annexure "D" to the petition, shows that a copy of the same was sent to the Deputy Commissioner, Kamrup, "with reference to his telegram 1/83CA dated 16-2-71", amongst others.

2. In sequence, therefore, we may set out the contents of the telegram of 16th February, 1971, which is filed as Annexure "B" to the counter-affidavit submitted by the Secretary to the Government of Assam, Municipal Administration, on behalf of the first three respondents:

Secretary Municipal Administration Shillong

1/83CA (.) Preliminary enquiry into affairs of Rangiya Municipality reveals that nominated Chairman Nikunja Choudhury has defalcated large sums of money from said Municipal fund and has committed serious irregularities (.) Suggest his immediate removal from office Chairman and instead Vice Chairman Devendra Kalita appointed to run Municipal affairs till formal election takes place (.) Intend arresting Nikunja Choudhury and accountant u/s 409, Indian Penal Code on formal complaint by Board Members and lodge criminal proceedings (.) Wire approval (.) Kindly arrange immediate Audit accounts Rangiya Municipality.

DEPCOM

It also appears from Annexure "A" dated 14th December, 1970 to the aforesaid counter-affidavit that six members of the Municipal Board (briefly "the Board") including the Vice-Chairman and the 4th respondent wrote to the Government making certain allegations against the petitioner. It would be appropriate to quote the letter in extenso:

"We the following Commissioners of the Rangiya Municipal Board, appointed by the Government beg to place before you the following facts with prayer to take action thereon.

Sri Nikunja Chaudhury was appointed as Chairman by the Government with (sic) 9 other Commissioners were also appointed in the Ad Hoc Committee of the Rangiya Municipal Board.

After his appointment as Chairman the laid Sri Nikunja Chaudhury indulged in activities to suit his personal end ignoring the interest of the Board. Major illegal practices, arc not absent during the tenure of his service as Chairman.

His activities caused us to loss (sic) faith or confidence on him. Out of the said 10 Commissioners (including the Chairman himself) we the six Commissioners have completely lost faith on him and we have now decided not to support him in any way. We have grounds to feel that his continuance in the post of Chairman would be detrimental to the interest of the Board.

In view of the above we shall be obliged if you please take action u/s 28 of the Assam Municipal Act, 1956 and remove him from the post of Chairman, Rangiya

Municipal Board with immediate effect".

This letter was copied to the Deputy Commissioner, the Commissioner and to the Minister-in-charge of Municipal Administration.

3. The petitioner also wrote to the Deputy Commissioner on 17th February, 1971 (Annexure "C" to the petition) complaining against the 4th respondent, who was the outgoing Chairman, that

"that Rs. 18,810.41 which had been collected as tax by the then Rangiya Town Committee during the year 1969-70 was not entered in the Cash Book of the Town Committee."

He requested "to appoint an auditor to audit the account for the year 1969-70" and "to make necessary arrangements to recover the said amount." This letter was also copied to the Secretary, Municipal Administration, Shillong, amongst others. The petitioner also stated that "the audit report would reveal which is submitted very recently that on which way the matters are moving and for whose interest."

4. To complete the narration, we may also quote paragraph 5 of the aforesaid counter-affidavit of the Government:

"That as regards the statements made in paragraph 10 of the petition, I beg to state that the petitioner who was appointed as the Chairman of the Municipal Board was removed u/s 28 (1) of the Assam Municipal Act, as it was considered necessary for the best interest of the Municipality for smooth and efficient running of the affairs of the Board. It came to the notice of the Government that under the Chairmanship of the petitioner, the Board was not smoothly running in view of the fact that six out of the 10 (ten) Commissioners of the Board lost their confidence on the Chairman as well as reported defalcation of Board's huge money by him. As it was found by the Government that it may not be possible for the petitioner to run the administration efficiently and smoothly as majority of the Commissioners have lost faith on him, the Government had to take action u/s 28 (1) of the Assam Municipal Act. A copy of the petition submitted by the Commissioners and a copy of Deputy Commissioner's telegram are annexed herewith as Annexure SA" and Annexure B" respectively".

As will appear from the above paragraph, the reply is with reference to paragraph 10 of the petitioner's affidavit wherein it is stated "In this notice no reason has been shown and no ground has been given about the cause of his removal from the Chairmanship of the Municipality"

5. The petitioner avers in paragraph 11 of the petition that Section 28 (3) restricts the power of the Government in taking action u/s 28 (1) and further states as follows:-

"The action of the State Government as such in removing the petitioner from the Chairmanship of the Rangiya Municipality is illegal, ultra vires of the powers

given under the Act and (sic) (the State Government?) acted mala fide in removing the petitioner from the office of the Chairmanship."

The Secretary in the counter-affidavit in paragraph 6 answers as follows:

"That as regards to (sic) the statements made in paragraph 11 of the petition, I beg to state that action was taken by the State Government u/s 28 (1) of the Assam Municipal Act, is a removal simpliciter as provided under the law.

A notice u/s 28 (3) of the Assam Municipal Act is not necessary as alleged in view of the fact that the petitioner has not been removed on any charge of disobedience of the provision of the Act or Rules made thereunder or persistently omitting or refusing to carry out any lawful orders".

It is rather surprising that the allegation of mala fide alleged in paragraph 11 is not specifically denied in paragraph 6 of the counter-affidavit. The petitioner reiterates this plea of mala fide in a further affidavit in reply filed on 21st August, 1972, where he stated:

"These illegal, arbitrary, capricious actions has (sic) been taken without being heard. The petitioner begs to state that the action of the State Government is mala fide passed at the instance of Respondent No. 4 for his benefit."

There is, however, no rejoinder to this part of the affidavit by the Government. It may be, however, stated that the Government very fairly disclosed to the Court the reasons that prompted their action for the removal of the petitioner.

6. The short point that arises for consideration is whether the petitioner's removal without giving him any prior notice or offering any opportunity to show cause against any allegations is void under the law.

7. It is submitted by Mr. P. Chaudhuri on behalf of the petitioner that the action taken behind the back of the petitioner without giving him any inkling of the so-called allegations is illegal, arbitrary and mala fide. The learned Senior Government Advocate on behalf of the first three respondents and Mr. J. P. Bbattacharjee on behalf of the 4th respondent submitted that there is wide power and jurisdiction of the Government u/s 28 (1) of the Act to remove an appointed Chairman at any time and, in such a case, the appointed Chairman is not entitled to any notice nor to any opportunity to show cause. Besides, they submit, action u/s 28 (1) is removal simpliciter and is not by way of punishment nor for the grounds mentioned u/s 28 (3) to attract the procedural safeguard of that subsection, and that action of the Government is, therefore, lawful and valid and no exception can be taken to the impugned order of removal.

8. The history of the municipal legislation in the State is a story of experiment and exercise in self-government in civic administration. The first two Acts, viz., the Bengal Municipal Consolidation Act, 1876 and the Bengal Municipal Act, 1884, the provisions whereof were made applicable in Assam, were repealed by the Assam Municipal Act, 1923, as the earlier two Acts were "in some respects

antiquated, inadequate and unsuited to the conditions of the Province". This Act after going through several amendments was again repealed by the Assam Municipal Act, 1956 (Act XV of 1957), which came into force on 1st November, 1957. This Act was also amended several times, lastly by the Assam Municipal Amendment Act (Act II of 1966), so far as informed. The Act is a self-contained code for municipal administration with 337 sections, with power to make rules, bye-laws and subsidiary rules. We will only notice the scheme of the Act revealed from the provisions of the law with particular reference to the position and status of the Chairman, who alone is concerned in this application.

9. The preambles of all the Acts commencing from 1923 consistently recite "whereas it is expedient to make better provision for the organisation and administration of municipalities in Assam". Law framed by the legislature, therefore, is a continuous endeavour in betterment. What was at an earlier time unsuited, inadequate or inconvenient or even archaic was everytime sought to be improved and bettered by legislative process. What is then the real object of a municipal law? Inter alia, briefly, it seeks to educate the people to administer the local affairs themselves so that the citizens deserve entrustment of duties and responsibilities of such duties for administering the affairs of the Municipal Board, consisting of Commissioners with a Chairman and a Vice-Chairman constituted for a municipality. Without delving into antiquity, a reference to Section 10 of the Act discloses that "there shall be established for each municipality a body of Commissioners designated as the Municipal Board having authority over the municipality. Such a Board shall be a body corporate by the name of the Municipal Board of having perpetual succession and a common seal, and by that name shall sue and be sued." The number of Commissioners are determined by the Government u/s 11 and they may be elected in accordance with a procedure laid down Under the Act. The Commissioners may be also appointed by the Government and in the present case the members of the Rangiya Municipality, on its first constitution, emerging out of the earlier Town Committee, were appointed by the State Government u/s 24 of the Act, which provides for such appointment "until the general election is held".

Under Section 33, the State Government has included the Rangiya Municipality in the First Schedule of the Act and thereupon the Government appointed the petitioner as the Chairman, as noted earlier. There is no difference in duties and responsibilities of a Chairman elected or appointed. Section 37 provides for the powers of Chairman in wide and general terms and he "shall, for the transaction of the business connected with this Act, or for the purpose of making any order authorised thereby, exercise all the powers vested by this Act in the Board". By the provisos to Section 37, the Chairman shall not exercise certain powers and particularly by the second proviso, he "shall not act in opposition to, or in contravention of, any order of the Board at a meeting, or exercise any power which is directed to be exercised by the Board at a meeting". The Act, in a pragmatic manner, makes distinction between the powers of the Board and those of the Board at a meeting. Generally speaking, for innumerable purposes of the

Act and for effective municipal administration the Chairman acts for the Board as provided under the law. From the earliest legislation, the law describes the "status and tenure of office of the Chairman and Vice-Chairman" (Section 34). It has also provided for removal of Chairman and Vice-Chairman (Section 28) as it has provided for their appointment or election (Section 33). It will be appropriate to quote here Sections 28 and 34 of the Act.

"28. (1) The State Government may at any time remove a Chairman appointed by it

(2) An elected Chairman or Vice-Chairman may be removed from his office by a resolution of the Board in favour of which not less than half of the whole number of Commissioners shall have given their votes at a meeting specially convened for the purpose.

(3) The State Government after giving an opportunity to explain, may remove the Chairman or Vice-Chairman from his office if he is persistently omitting or refusing to carry out or disobeying the provisions of this Act and the rules thereunder or any lawful orders issued thereunder or he becomes incapable of so acting or is declared insolvent or is convicted by a Criminal Court for any offence involving moral turpitude."

"34. (1) Notwithstanding anything contained in Section 11, every Chairman or Vice-Chairman appointed under the preceding section, if not already a Commissioner of the Municipal Board of which he shall have been appointed Chairman or Vice-Chairman, shall from the date of appointment, during the term of his office, enjoy subject to the provisions of Section 45 all the rights and privileges and be subject to all liabilities and disabilities of a Commissioner of the Municipal Board to which such appointment relates.

(2) Except as otherwise provided in this Act, every Chairman and every Vice-Chairman whether appointed or elected, shall hold office from the date of his appointment or election, to the date of the election or appointment of the Chairman of the Board after the next general election, including the former but excluding the latter of these dates, and shall be eligible for re-appointment or re-election."

Under Section 35, the Chairman ceases to hold office when he ceases for any reason whatever to be a Chairman. By Section 40, the Board may grant leave of absence to its Chairman or Vice-Chairman for a period not exceeding three months in any one year and if the Chairman or the Vice-Chairman overstays his leave, he shall be deemed to have vacated his office and the acting Chairman or Vice-Chairman, as the case may be, shall continue to act for him till the vacancy has been filled up by appointment or by a fresh election at the next meeting of the Board. Section 41 provides for filling up of casual vacancies of Chairman and Vice-Chairman, when the vacancy is caused by resignation, removal, death or absence on leave and the person appointed or elected shall fill such vacancy for the unexpired portion of the term for which such Chairman or Vice-Chairman

would otherwise have continued in office. Both u/s 33 (2) and u/s 41 (1), both as amended by the Assam Municipal (Amendment) Act II of 1966, the election of the Chairman "shall be subject to the approval of the State Government, but pending such approval the person elected shall be competent to discharge the duties of the Chairman.

10. The above provisions go to clearly emphasise the status and position of a Chairman, be he elected or appointed. While a Chairman may be appointed in a given case by the Government the Chairman, who is elected, has also to await the approval of the Government. Although in the 1923 Act, mention is made of a salaried Chairman or Vice-Chairman and he was entitled to receive such allowances as the Board may think fit (Section 32 of the 1923 Act), in the present Act, if the Board thinks fit he can receive only conveyance allowance and is debarred from receiving any salary or remuneration for services rendered by him and no Commissioner is allowed to receive any salary or remuneration for the services rendered by him in any capacity whatsoever, except travelling allowance. (Section 42). It is, therefore, clear that a Chairman who offers his services, whether he is appointed or elected, holds a very responsible office of respect and is expected to dedicate his service to the service of the people amongst whom he lives. It has also to be assumed that the Government, when it appoints a Chairman, pays due regard to the reputation, ability, integrity and devotion of the person selected to be the Chairman of the Board. Any decent man is not expected to canvass for such appointments. We will, therefore, have to consider the question of removal of a Chairman in the context of his status and tenure unequivocally laid down under the Act.

11. It is understandable that removal of a Chairman, be he appointed or elected, may be for just cause, to mention only few of the grounds described in Section 28 (3). These grounds by themselves may not be exhaustive and therefore Section 28 (1) may be called in aid when some other cogent reasons are disclosed for taking action against the Chairman. It is difficult to hold that Section 28 (1) may be invoked by the Government without rhyme or reason, say for the colour of the eyes of the Chairman or that he has a flat nose. In the entire scheme of the provisions of the Act and of Section 28 (1), such an intention cannot be attributed to the legislature in engrafting Section 28 (1). Although, therefore, the Government may at any time remove a Chairman appointed by it, it can only remove him for an appropriate cause and it necessarily follows that he should be given a reasonable opportunity to meet any allegations which have prompted such a severe action as removal from a public office held by him under a statute with a definite tenure attached to the same under the law. The tenure of the office described in Section 34 (2) is reiterated and emphasised u/s 41 (1) referring to "the unexpired portion of the term for which such Chairman would otherwise have continued in office....." Section 28 (1) thus interpreted may be free from any possible constitutional objection on the score of Article 14 of the Constitution. Since, however, it is admitted that no notice to show cause has been given by the Government before

the impugned action, the order of removal is bad on that score. The rules of natural justice have not been dispensed with expressly in the Act nor is it possible for us to hold that these are so done by necessary implication.

12. Mr. Chaudhuri wanted to argue that Section 28 (1) is unconstitutional and Violative of Article 14, which we, however, did not allow him to do in view of the fact that the point was not taken in the application. He, however, drew our attention to a decision of the Supreme Court reported in *Ram Dial and Others Vs. The State of Punjab*, where their Lordships struck down Section 14 (c) of the Punjab Municipalities Act as violative of Article 14 of the Constitution and observed as follows: -

In the present case, however, S. 16(1) Which deals with removal of a member for reasons given in cls. (a) to (g) is completely covered by Section 14 (e) which deals with vacation of a seat in the public interest, and it is open to the State Government either to proceed under one provision or the other for exactly the same reasons. One of the provisions provides for notice and hearing while the other does not and is, therefore, more drastic and arbitrary. In these circumstances there is in our opinion a clear discrimination in view of Article 14.....

13. There is another strong reason why the order should be set aside. We have found that the Government has taken action against the petitioner on the complaint of the Deputy Commissioner and the six Commissioners to the effect that the petitioner lost confidence of the majority of the members and was reported to have defalcated the "Board's huge money". These are serious allegations against a Chairman, be he appointed or elected, and if action is admittedly taken on such allegations, it is only fair and consistent with the rules of natural justice which would apply even if it be an administrative action to afford the petitioner a reasonable opportunity to meet these allegations. The form of the order, which is in terms of Section 28 (1), is not therefore decisive of the matter. Besides, appointment and tenure of a Chairman for a fixed term as envisaged under the Act cannot be *durante bene placito* (during good pleasure) and in that context removal may well be equated with dismissal as these two words have come to acquire a technical meaning and cannot be said to be unknown to the legislature. Removal, therefore, beyond doubt, connotes slur or stigma on the reputation of the public functionary. We are fortified in this view by the following observations of the Supreme Court in *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, :

"There can be no doubt that removal - I am using the term synonymously with dismissal - generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling of some imputation or charge against the officer

which may conceivably be controverted or explained by the officer."

The order, therefore, clearly affects the right of the Chairman to continue in office for a specified term laid down under the law and is visited with evil consequences. In that view of the matter as well the order is vitiated for non-compliance with the rules of natural justice and is invalid.

14. In the result, the impugned order of removal of the petitioner is quashed and the first three respondents are directed to for bear from giving effect to the same. The application is allowed with costs, which we assess at Rs. 200/- to be paid equally by the Government and the 4th respondent. The Rule is made absolute.

M. C. Pathak, J.

15. I agree