

(2001) 12 GAU CK 0003
In the Gauhati High Court
Case No : Writ Petition (C) No. 4313 of 2001

Prakanta Warisa and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 04-12-2001

Acts Referred:

Assam Autonomous Districts (Constitution of District Councils) Rules, 1951 — Rule 4, 7(1), 7(3)
Government of India Act, 1935 — Section 52(1), 91(1)

Citation : (2001) 3 GLT 500

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : N.M. Lahiri, N. Choudhury, S.K. Ghosh, S.C. Kayal and R.C. Paul, for the Appellant; A.K. Phukan, A.G., A.M. Mazumdar, S.S. Dey, S. Sarma, M. Bhuyan, M. Nath and B.D. Das, S.C. and N.C. Hills, for the Respondent

Judgement

D. Biswas, J.—The notification dated 13.6.2001 (Annexure-I V) issued by the Commissioner and Secretary to the Government of Assam, Hills Areas Department has been challenged in this writ petition. By this notification on expiration of five year term of the North Cachar Hills Autonomous Council, the Governor of Assam in exercise of powers under sub-para (2) of Paragraph 16 of the Sixth Schedule of the Constitution of India read with Rule 4 of the Assam Autonomous Districts (Constitution of District Councils) Rules, 1951, assumed to himself with immediate effect all the functions and powers vested in and exercisable by the North Cachar Hills Autonomous Council, and made all such powers and functions exercisable by the Deputy Commissioner, North Cachar Hills District on his behalf.

2. The Petitioners are the erstwhile members of the North Cachar Hills Autonomous Council (hereinafter referred to as the Council) and they were elected to the Council in the election held on 3.6.96. Their grievance is that the first meeting of the Council was held on 14.6.96 and the term of the last Executive Committee was due to expire on 14.6.2001. well ahead of the time of

the Petitioners made requests to the Respondent Nos. 1 and 2 for holding the election of the Council before expiry of the term. The Executive Committee also adopted resolution to that effect and forwarded the same to the Governor through Respondent Nos. 1 and 2. But no step was initiated to hold the election. The Executive Committee again passed a resolution on 28.5.2001 requesting the Government to hold the election on due date to enable the new Executive Committee to take over charge. The resolution was forwarded to the Governor through Respondent No. 2 on 29.5.2001 which evoked no response. Anticipating that the Respondent Nos. 1 and 2 were not interested in holding election and that they were rather making time for an opportunity to invoke the provisions of sub-para (2) of Paragraph 16 of the Sixth Schedule, the writ Petitioners approached this Court by filing W.P.(C) No. 3971/2001 praying for intervention by the Court. The learned Advocate General appraised the Court that the Government had not taken any decision in the matter and, on such submission, the petition was dismissed as premature. Apprehension of the writ Petitioners transformed into reality when the impugned notification was issued by the Government on the last day of the term of the Council. The Petitioners expressed grievance as the term of the Council has not been extended as per provisions of Sub-rule (3) of Rule 7 of the ; Assam Autonomous Districts (Constitution of District Councils) Rules, 1951.

3. The State Respondents pleaded that the report submitted by the Enquiry Commission authorised to investigate the public complaints is indicative of various financial improprieties and irregularities. Apart from this, the writ Petitioners themselves expressed that it would not be feasible to hold election within time because of heavy rains, landslides, floods and the disturbed law and order situation. The impugned notification has been issued after taking into consideration of relevant factors i.e. expiry of the term of the Council, views of the Executive Committee and the report of the Enquiry Commission substantiating financial mismanagement and irregularities. It is further submitted that the writ Petitioners themselves in their representation submitted to the Chief Minister requested for postponement of the election by Anr. year after expiry of its term in the month of June, 2001 on the ground of deteriorating law and order situation, extremist activities and rainy season. It was obviously intended by them to continue in, office without election in view of the provisions in Sub-rule (3) of Rule 7 of the Assam Autonomous Districts (Constitution of District Councils) Rules, 1951, for short the "Rules". According to the State Respondents, the notification has been issued in public interest and, hence, no writ would lie.

4. I have heard Mr. N.M. Lahiri, learned counsel for the writ Petitioners and Mr. A.K. Phukan, learned Advocate General, Assam, and Mr. A.M. Mazumdar, learned senior counsel and Mr. B.D. Das, learned Counsel for the Respondents. The dispute obviously centres around the legality and validity of the impugned notification issued under sub-para (2) of Paragraph 16 of the Sixth Schedule of the Constitution and the right of the writ Petitioners to continue in office by virtue of the provisions of Sub-rule (3) of Rule 7 of the Rules, 1951 till the next

election is held.

5. Before the above questions are taken up for consideration, it would be necessary to place on record that in *D. Uphing Maslai and Another Vs. State of Assam and Another*, this Court answered certain basic questions with regard to the maintainability of the writ petition filed challenging notification under sub-para (2) of Paragraph 16 of the Sixth Schedule and held as follows:

(i) Powers of the Governor in sub-paragraphs (1) and (2) of Paragraph 16 of the Sixth Schedule of the Constitution are discretionary powers of the Governor and the Governor is not required to act in aid and advice of the Council of Ministers while exercising such powers;

(ii) Actions taken or orders passed under the aforesaid sub-paragraphs are amenable to limited judicial review for the purpose of ascertaining as to whether the Governor has acted in exercise of his discretion. Once the Court is satisfied that the Governor has exercised his discretion, the Court should not embark upon a search for adequacy of reasons;

(iii) The challenge to the orders passed by the Governor as ultra-vires of the Constitutional provisions is maintainable without the Governor being made a party in the writ petition;

(iv) Consultation with the State Government and the concerned District Council before the powers in sub-paragraph (1) and (2) of Paragraph 16 are invoked is a must, but the Governor is not bound to act on such advice, opinion or the views tendered by the Council of Ministers and the concerned District Council;

(v) ...

(vi) ...

(vii) ...

6. It would appear from above that a writ petition is normally maintainable for the limited purpose of ascertaining as to whether the Governor has acted in exercise of his discretion for reasons upon which the Governor is satisfied that a situation has arisen in which the administration of an Autonomous Council cannot be carried on in accordance with the provisions of the Sixth Schedule. Here, however, the situation is different. The notification was issued on expiry of the five year term of the Council. Therefore, it would be of not much significance to examine the matter in order to determine whether the Governor has acted in exercise of his discretion or not. But the controversy does not end here. The Petitioners' grievance is that they ought to have been allowed to continue in office as per provisions of Sub-rule (3) of Rule 7 of the Rules of 1951 since the election could not be held due to failure of the concerned authority.

7. Mr. Lahiri, learned senior counsel laid much emphasis on the object behind the Sixth Schedule in order to highlight that the administration of an Autonomous District has to be carried out by the elected representatives even during the

interregnum period between expiration of the term of the Council and the next election. Mr. Lahiri, argued that the provisions of Sub-rule (3) of Rule 7 of the Rules of 1951 provide for the Executive Committee of a District Council in office immediately prior to the date of dissolution of the Council to continue till the next election. In his opinion, under no circumstances the Governor could have assumed the functions to himself and designate the Deputy Commissioner of North Cachar Hills Autonomous District Council as the Administrator. It was further argued that the notification was issued without application of mind and without consultation with the District Council.

8. Mr. A.M. Mazumdar, learned senior counsel and Mr. A.K. Phukan, learned Advocate General defended the notification. Apart from argument on adequacy of reasons, both the learned senior counsel emphatically submitted that the provisions of Sub-rule (3) of Rule 7 will not operate on its own only because the election could not be held before expiration of the term of the Council and the Executive Committee. Moreover, the learned Counsel urged upon the Court not to act upon Sub-rule (3) of Rule 7 on its literal interpretation which is ex-facie opposed to the Constitutional provisions embodied in sub-para (6) of Paragraph 2 of the Sixth Schedule.

9. Section 91(1) of the Government of India Act, 1935 deals with the expression "excluded area" and "partially excluded area". The expression means such areas as His Majesty may by order in Council declare to be "excluded areas" or "partially excluded areas". Part-II of the Sixth Schedule to the Act of 1935 includes the North Cachar Hills (in the Cachar District) as a "partially excluded area". The point of distinction between "excluded area" and "partially excluded area" as highlighted by Mr. Lahiri, learned Senior Counsel, is that while both classes of areas are excluded from the competence of provincial and federal legislature, the administration of "excluded area" is vested with the Governor acting in his discretion, while the "partially excluded area" is vested in the Council of Ministers subject, however, to the Governor exercising his individual judgment. Clause (e) of Sub-section (1) of Section 52 provides that the Governor in exercise of his functions shall have special responsibilities in securing peace and good governance of areas. Therefore, the concept of administration of the "partially excluded areas" by the Governor in his discretion was ingrained in the Government of India Act of 1935. The above provisions of the Act of 1935, which provides for autonomy and self governance, is the basis for incorporation of the Sixth Schedule. The argument was advanced to show that the provisions in the Sixth Schedule aim at devolution of powers to the people of the tribal areas for administration by their elected representatives. There cannot be any dispute that all efforts be made to ensure that the representatives of the people of the tribal areas run the affairs of the District Council. Assumption of powers by the Governor in exercise of sub-para (2) of Paragraph 16 of the Sixth Schedule is an exception only on compelling circumstances. Paragraph 2(6A) of the Sixth Schedule provides for extension only when circumstances exists which in the opinion of the Governor render holding of the election impracticable. To

appreciate better, we may read hereinbelow sub-para (6A) of Paragraph 2 of the Sixth Schedule:

(6A) The elected members of the District Council shall hold office for a term of five years from the date appointed for the first meeting of the Council after the general elections to the Council, unless the District Council is sooner dissolved under paragraph 16 and a nominated member shall hold office at the pleasure of the Governor:

Provided that the said period of five years may, while a Proclamation of Emergency is in operation or if circumstances exist which, in the opinion of the Governor, render the holding of elections impracticable, be extended by the Governor of a period not exceeding one year at a time and in any case where a Proclamation of Emergency is in operation not extending beyond a period of six months after the Proclamation has ceased to operate:

Provided further that a member elected to fill a casual vacancy shall hold office only for the remainder of the term of office of the member whom he replaces.

10. The Constitutional provision quoted above clearly shows that the Governor is empowered to extend the term of the Council for a period not exceeding one year when circumstances exist in which holding of election is rendered impracticable. It is clear from the first proviso that the Governor is to act in his discretion to form an opinion as to whether holding of election of a District Council is impracticable before the Governor decides to extend the term of office. The word "may" incorporated in sub-para (6A) quoted above clearly shows that the extension of term is discretionary even when the Governor is of the opinion that holding of election is not practicable.

11. Sub-rule (3) of Rule 7 couched in a different language makes it mandatory to allow the existing Executive Committee to continue in office till formation of the new Executive Committee. The provisions in Sub-rule (1) of Rule 7, however run counter to the provisions of Sub-rule (3). Both read together will show that the provisions of Sub-rule (3) will come into operation when the Executive Committee suffers premature dissolution.

12. The position in the instant case is that the impugned notification was issued on the last day of the five year term. Therefore, it is not a case of premature dissolution. The notification was issued to assume the powers and functions on expiry of the five year term. The provisions in sub-para (6A) of paragraph-2 clearly show that the Governor has been given discretion to take decision in the matter of extension only when the Governor is satisfied that it is not reasonably practicable to hold election within time. Therefore, the provisions of Sub-rule (3) of Rule 7 will have to be read in consistence with the Constitutional provisions embodied in sub-para (6A) of Paragraph 2. Consequently, the word "shall" incorporated in Sub-rule (3) shall have to be read as "may" which would facilitate the Governor to act as per Constitutional mandates in sub-para (6A) of Paragraph-2.

13. Besides the rule making powers available in sub-para (7) of Paragraph 2 of the Sixth Schedule are confined to the subjects enumerated in sub-para (6) of Paragraph 2 which do not include the powers of extension of the term of office of the Executive Committee. Hence, the provisions in Sub-rule (3) are opposed to Constitutional provisions and, therefore, this Court will not act upon it. Although the provisions of Sub-rule (3) of Rule 7 have not been challenged in this petition, yet the Court cannot act contrary to what is provided in sub-para (6A) of Paragraph 2.

14. Consequently, it emerges that powers of extension of the term of an Executive Committee of a District Council as embodied in sub-para (6A) of Paragraph 2 is discretionary even when the Governor is of the opinion that circumstances exist which render the holding of election impracticable. The Petitioners, therefore, have no enforceable right for continuance in office after expiration of the term on the ground that the election could not be held within time.

15. It would appear from the impugned notification that the concerned District Council authorities communicated their views that holding of election during the rainy season would not be congenial and this statement in the notification is supported by resolutions and representations submitted by the District Council available on record. Therefore, the Executive Committee of the Council cannot blame the State authorities or the Governor's Secretariat for inaction in the matter.

16. The reasons for the Governor's decision not to extend the term is available in the impugned notification itself. The relevant excerpts are reproduced below:

Whereas the Governor of Assam having considered Reports on financial mismanagement of the present Council is of the opinion that extension of the present term of North Cachar Hills Autonomous Council beyond the date of its expiry will not be in public interest.

17. I have examined the office file produced before me. It appears that the Governor has after application of mind on all aspects and particularly the report about financial mismanagement formed the opinion that the present term of the Council could not be extended in public interest. Reasons are available in file. This Court acting within its inherent limitations under the Constitution should refrain from embarking upon discussion about adequacy of reasons.

18. The provisions in sub-para (2) read with para-20BA of the Sixth Schedule shows that the Governor is required to act in his discretion after consulting the Council of Ministers and the North Cachar Hills Autonomous Council. Mr. Lahiri, argued that no consultation as envisaged was undertaken by the Governor before the impugned notification was issued. But the provisions relating to consultation is relevant only when there is premature dissolution of the Council. The District Council having already spent its full term and the members ceasing to hold office, no question of consultation would arise in the instant case.

19. On consideration of all the facts and circumstances, particularly that the notification was issued on the expiration of the term of the Council, this Court is of the opinion that the Petitioners are not entitled to any relief although the Constitutional scheme envisage that all efforts be directed to administer the tribal areas by the elected representatives.

20. The petition stands dismissed. Cost easy.