
(2014) 02 GAU CK 0062
In the Gauhati High Court
Case No : W.P. (C) No. 4555 of 2013

Runumi Gogoi

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 11-02-2014

Acts Referred:

Commission for Protection of Child Rights Act, 2005 — Section 17, 17(1), 18, 18
Constitution of India, 1950 — Article 226
Electricity Act, 2003 — Section 85, 85(5)
Penal Code, 1860 (IPC) — Section 21

Citation : (2014) 2 GLD 636 : (2014) 1 GLT 792

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : M.K. Choudhury, Mr. A. Barkataki, Ms. K.D. Sarmah, Ms. S. Saikia and Ms. B. Devi, Advocate for the Appellant; B.K. Sarma, SC, Social Welfare, Mr. J. Patowari, Mr. B.K. Kashyap, Mr. M. Mahanta, Mr. S.P. Roy, Mr. R.P.N. Singh, Mr. K. Rajbongshi, Ms. A. Talukdar, Mr. A.K. Roy, Mr. T.R. Roy, Mr. K.N. Choudhury and Ms. A. Borpujari, Advocate for the Respondent

Judgement

Ujjal Bhuyan, J.—By way of this petition under article 226 of the Constitution of India, petitioner, who is a member of Assam State Commission for Protection of Child Rights (State Commission) and is presently holding the charge of the office of Chairperson of the State Commission, has challenged the legality and validity of the Government notification dated 06.08.2013 issued by the Commissioner and Secretary to the Government of Assam, Social Welfare Department appointing respondent No. 6 as Chairperson of the State Commission. Facts of the case are not disputed and lie within a narrow compass.

2. Petitioner claims to be a child rights and social activist, associated with various organizations working for child and women welfare in the State.

3. By notification dated 04.03.2010 issued by the Commissioner and Secretary to the Government of Assam, Social Welfare Department i.e. by the second respondent, the State Commission was constituted by the Government of Assam

in exercise of powers u/s 17(1) and 18 of the Commissions for Protection of Child Rights Act, 2005 (Act). The State Commission was headed by Dr. Suchitra Kakoty as the Chairperson. By a subsequent notification dated 19.07.2011 issued by the second respondent, petitioner and another person viz., Shri Pranjal Saikia were nominated as members of the State Commission. When the Chairperson Dr. Suchitra Kakoty attained the age of 65 years, she was released from the office of Chairperson w.e.f. 07.08.2012 vide notification dated 04.08.2012. By the said notification, the second respondent was allowed to coordinate all activities on behalf of the State Commission till appointment of a regular Chairperson.

4. Following recommendation of the Selection Committee, petitioner, a member of the State Commission, was allowed to hold the charge of the office of Chairperson of the State Commission till appointment of regular Chairperson. This was conveyed vide notification dated 18.04.2013 issued by the second respondent. According to the petitioner, she took over charge of the office of Chairperson on 20.04.2013 and has been discharging her duties as Chairperson since then.

5. However, the second respondent issued the impugned notification dated 06.08.2013 appointing respondent No. 6 as Chairperson of the State Commission with immediate effect and until further order subject to her release on deputation/lien from her present assignment by the concerned department it may be mentioned that respondent No. 6 is a serving Lecturer of Government Banikanta College of Education.

6. It is this notification dated 06.08.2013 which is under challenge in the present proceeding.

7. Contention of the petitioner is that appointment of respondent No. 6 as Chairperson of the State Commission is de hors Section 18 of the Act which requires that the Chairperson should be appointed on the recommendation of a three member Selection Committee constituted by the State Government under the chairmanship of the Minister-in-Charge of the concerned Department, which in this case is the Social Welfare Department According to the petitioner, respondent No. 6 was appointed without any recommendation by the Selection Committee. On the other hand, petitioner is eminently qualified to hold the office of Chairperson but her case was never considered. Thus, appointment of respondent No. 6 as Chairperson of the State Commission is bad in law, being arbitrary and violative of the statutory requirement.

8. This Court by order dated 16.08.2013 directed the learned Standing Counsel of the Social Welfare Department to produce the relevant file relating to the impugned notification dated 06.08.2013 and in the meanwhile, stayed the said notification.

9. State of Assam in the Social Welfare Department has filed an affidavit through its Deputy Secretary Smti. Kavyashree Mahanta. Stand taken in the said affidavit is that impugned notification dated 06.08.2013 is not in violation of Section 18 of

the Act. A Selection Committee meeting was held on 10.04.2013 in which it was decided that petitioner would be in-charge Chairperson till appointment of a regular Chairperson. Thereafter, the Social Welfare Department received a petition from respondent No. 6 with her profile on 15.05.2013 seeking appointment as Chairperson of the State Commission. A meeting of the three member Selection Committee was held on 28.05.2013 in which it was decided to refer the matter to the Chief Minister's office. Thereafter, order of the Chief Minister to the effect that respondent No. 6 be appointed as Chairperson of the State Commission was received. Following the same, impugned notification dated 6.8.2013 was issued which is the only decision of the three member Selection Committee under the chairmanship of the Minister-in-Charge of Social Welfare Department which is in accordance with Section 18 of the Act.

10. Affidavit-in-opposition has also been filed by respondent No. 6. She had stated about her high educational qualification and the fact that she is working as a Lecturer in Mathematics in Government Banikanta College of Education, Guwahati. She has also stated about her long service in the field of child rights and child welfare which has been recognized by the Government. She has stated that she received information under the Right to Information Act, 2005 that a Selection Committee meeting was held on 28.05.2013 for selection of Chairperson of State Commission. As no decision could be arrived at in the said meeting, the Selection Committee decided to place the matter before the Chief Minister, Assam for a final decision. On 15.07.2013, the Chief Minister directed that pending all formalities respondent No. 6 be appointed as Chairperson of the State Commission. Pursuant thereto, petitioner was appointed as the Chairperson of the State Commission vide the impugned notification dated 06.08.2013. Education (Elementary) Department vide letter dated 21.11.2013 permitted respondent No. 6 to go on deputation to the Social Welfare Department following her appointment as Chairperson of the State Commission. According to respondent No. 6 she joined on 21.11.2013 and only then she could come to know about the stay order passed by this Court on 16.08.2013. She has alleged that copy of the impugned notification was not marked to her, which was issued to her only on 16.08.2013, the day stay order was passed. This according to the respondent No. 6 clearly indicates that officials of the Social Welfare Department are hand in gloves with the petitioner to thwart her appointment. She has also questioned the locus-standi of the petitioner to challenge her appointment as the petitioner is only holding charge as Chairperson till regular appointment is made, which is an adhoc-arrangement and confers no right on the petitioner to continue. Contending that there is no infirmity in the impugned notification dated 06.08.2013, respondent No. 6 seeks dismissal of the writ petition.

11. Heard Mr. M.K. Choudhury, learned Senior Counsel assisted by Mr. A. Barkataki, learned Counsel for the petitioner and Mr. K.N. Choudhury, learned Advocate General, Assam assisted by Ms. A. Borpujari, learned Counsel appearing for the official respondents. Also heard Mr. J. Patowari, learned

Counsel for respondent No. 6.

12. Mr. M.K. Choudhury, learned Senior Counsel for the petitioner submits that there was no selection by the Selection Committee and consequently there was no recommendation of respondent No. 6 by the Selection Committee for appointment to the office of Chairperson of the State Commission. Impugned appointment is therefore in violation of the statutory requirement and is liable to be interfered with. He further submits that petitioner has the requisite eligibility and eminence to be appointed as Chairperson and there is no justifiable reason in not considering the case of the petitioner.

13. Mr. K.N. Choudhury, learned Advocate General on the other hand submits that appointment of Chairperson of the State Commission is entirely within the discretion of the State and the State can appoint any person of its choice to be the Chairperson, who in its opinion is a person of eminence and has done outstanding work for promoting the welfare of children. Respondent No. 6 fulfills such requirement in the opinion of the State. Such appointment is guided by the pleasure doctrine and cannot be subjected to the rigour of judicial scrutiny. He submits that there is no allegation of bias and malafides in the appointment of respondent No. 6 as the Chairperson of the State Commission. In such circumstances, there is no room for any interference in the appointment of respondent No. 6. Learned Advocate General has also produced the file relating to appointment of respondent No. 6.

14. Mr. Patowari learned Counsel for respondent No. 6 has taken support of the submissions made by the learned Advocate General. He submits that respondent No. 6 fulfills the requirement of the post and there is substantial compliance of the provisions of the Act, more particularly Sections 17 and 18 thereof, while appointing the respondent No. 6. No case for interference is made out, he submits.

15. I have heard learned Counsel for the parties. I have also perused the relevant file.

16. Before proceeding further, relevant provisions of the Act may be briefly referred to.

17. The object of the Act is to provide for constitution of a National Commission at the central level and State Commissions at the state level for protection of child rights and for establishment of children's courts to ensure speedy trial of offences against children or of violation of child rights and related matters. The Act is an outcome of India's international commitment on child rights and also because of concern for children. A broad survey of the Act reveals that chapters II and III deal with constitution and functions of National Commission. Chapter IV comprising of Sections 17 to 24 deals with State Commissions. As per Section 17, a State Government may constitute the State Commission to exercise the powers conferred upon and to perform the functions assigned to a State Commission. The State Commission shall consist of a Chairperson and six

members. The Chairperson must be a person of eminence and has done outstanding work for promoting the welfare of children. Section 18 deals with appointment of Chairperson and other members. It provides that the State Government shall by notification appoint the Chairperson and other members. As per the proviso, the Chairperson shall be appointed on the recommendation of a three member Selection Committee constituted by the State Government under the Chairmanship of the Minister-in-Charge of the Department dealing with children. As per Section 19, the Chairperson or a member shall hold office for a term of three years and shall not hold office for more than two terms. The Chairperson can hold office upto the age of 65 years. According to Section 32, Chairperson and members of the State Commission are public servants within the meaning of Section 21 of the Indian Penal Code. Rule 36 empowers the State Government to make Rules to carry out the provisions of the Act including those relating to terms and conditions of service of the Chairperson and members of the State Commission and their salary and allowances.

18. Since Sections 17 and 18 of the Act are relevant, those are quoted hereunder:--

17. Constitution of State Commission for Protection of Child Rights-

(1) A State Government may constitute a body to be known as the.....(name of the State) Commission for Protection of Child Rights to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this Chapter.

(2) The State Commission shall consist of the following Members, namely:--

(a) a Chairperson who is a person of eminence and has done outstanding work for promoting the welfare of children; and

(b) six Members, out of which at least two shall be women, from the following fields, to be appointed by the State Government from amongst persons of eminence, ability, integrity, standing and experience in,-

(i) education;

(ii) child health, care, welfare or child development;

(iii) juvenile justice or care of neglected or marginalised children or children with disabilities;

(iv) elimination of child labour or children in distress;

(v) child psychology or sociology; and

(vi) laws relating to children.

(3) The headquarter of the State Commission shall be at such place as the State Government may, by notification, specify.

18. Appointment of Chairperson and other Members.- The State Government shall, by notification, appoint the Chairperson and other Members:

Provided that the Chairperson shall be appointed on the recommendation of a three Member Selection Committee constituted by the State Government under the Chairmanship of the Minister-in-charge of the Department dealing with children.

19. The functions and terms of reference of the State Commission are mentioned in the Government notification dated 4.3.2010 constituting the State Commission. For adjudication of the present lis, it is considered not necessary to make a detailed reference to the functions of the State Commission. Suffice it to say, the State Commission is mandated amongst others to examine and review the safeguards provided under any law for the protection of child rights and recommend measures for their effective implementation, inquire into violation of child rights and recommend initiation of proceedings in such cases etc.

20. From the scheme of Sections 17 and 18 of the Act as noticed above, it is clear that to be appointed as Chairperson of the State Commission, one must be a person of eminence and must have done outstanding work for promoting the welfare of children. The Chairperson is appointed by the State Government on the recommendation of a three member Selection Committee constituted by the State Government under the chairmanship of the Departmental Minister. A conjoint and meaningful reading of the aforesaid two provisions would make it abundantly clear that the Selection Committee must first be satisfied that the person being considered for appointment as Chairperson is a person of eminence who has done outstanding work for promoting the welfare of children. This satisfaction is the sine-qua-non for the Selection Committee to take the next step. Based on such satisfaction, the three member Selection Committee shall make the recommendation of the person whom it considers most suitable to be appointed as Chairperson. On the basis of such recommendation, the State Government shall make the appointment. The use of the word "shall" in Section 18 is indicative of the binding nature of the recommendation of the Selection Committee on the State Government. Language of Section 18 is very clear and unambiguous. of Chairperson. Firstly, the Selection Committee must satisfy itself that the person concerned is a person of eminence and has done outstanding work for promoting the welfare of children. Secondly, after satisfying itself that the person concerned fulfills the above requirement, the Selection CoRecommendation has to be made by the Selection Committee and on the basis of such recommendation, the appointment shall be made by the State Government. Thus, three steps are visualized while making the appointment committee shall recommend such person to the State Government for appointment as Chairperson of the State Commission. Thirdly and finally, the State Government acting on such recommendation of the Selection Committee shall appoint the person so recommended as the Chairperson of the State Commission. The scheme envisaged in Sections 17 and 18 of the Act forms the

substratum of the appointment of Chairperson and, therefore, though procedural in nature, it is of mandatory character.

21. Having examined and interpreted the scheme of appointment of the Chairperson of the State Commission, the related file dealing with appointment of respondent No. 6 as Chairperson of the State Commission, which has been produced by the learned Advocate General as per order of this Court, may now be looked into.

22. The file indicates that on 23.11.2012, the Departmental Minister had forwarded to the second respondent the bio-data and particulars of one Dr. Nani Gopal Goswami for appointment as Chairperson of the State Commission. The Minister instructed the second respondent to issue notification accordingly. On the basis of the Minister's letter dated 23.11.2012, the Deputy Secretary of the Social Welfare Department wrote to the Administrative Officer of the State Commission on 19.12.2012 requesting the latter to convene a Selection Committee meeting immediately. What happened thereafter is not very clear but on 02.02.2013 there is a note of the Chief Minister addressed to the Chief Secretary which says that respondent No. 6, Lecturer of Banikanta College of Education, Assam may be appointed as the Chairperson of the State Commission. On the same note and on the same day i.e. on 02.02.2013, the Chief Secretary wrote to the second respondent to issue order accordingly. The file also contains a brief profile of respondent No. 6 submitted before the Chief Minister. It appears that a meeting of the three member Selection Committee comprising of the Departmental Minister, second respondent and the Director of Social Welfare (respondent No. 4) was held on 26.03.2013. The Selection Committee recommended induction of Dr. Nani Gopal Goswami, whom the Departmental Minister wanted to be appointed as the Chairperson, as member of the State Commission and also decided that the petitioner, a member of the State Commission, be appointed as in-charge Chairperson till joining of a regular Chairperson. The Selection Committee further directed the Social Welfare Department to prepare a panel of eminent persons for induction as Chairperson of the State Commission. In the meanwhile, a letter dated 29.04.2013 was received from the Chief Minister's Secretariat addressed to the second respondent enclosing therewith the Chief Minister's note dated 02.02.2013 directing appointment of respondent No. 6 as the Chairperson of the State Commission. The letter stated that the Chief Minister had expressed displeasure at the delay in issuance of the notification appointing respondent No. 6 as the Chairperson of the State Commission pursuant to his above direction. It was further stated that it was the desire of the Chief Minister that the notification be issued immediately and the reasons for the delay be apprised to him. Respondent No. 6 also wrote to the second respondent on 14.05.2013 expressing her willingness to accept the post of Chairperson of the State Commission.

22.1 A meeting of the Selection Committee to select regular Chairperson of the State Commission was convened on 28.05.2013. In the meanwhile, there is

another note of the Chief Minister dated 15.05.2013 addressed to the Minister, Social Welfare stating that respondent No. 6 be immediately appointed as Chairperson of the State Commission. The Departmental Minister was asked to "take action immediately."

22.2. In the Selection Committee meeting held on 28.05.2013, it was observed that the Rules framed by the State Government under the Act is still at the draft stage and is yet to be finalized. It was observed by the Selection Committee that if any one from regular service was appointed as Chairperson of the State Commission, he would have to be paid salary but till now members of the State Commission have not been paid salary because of non-finalization of the Rules and also because of poor budgetary allocation to the State Commission. Releasing salary to one person and not releasing salary to other persons would not be justified. The Selection Committee therefore decided to bring the matter to the notice of the Chief Minister for final decision.

22.3. A perusal of the note-sheet indicates that on 15.06.2013, the second respondent put up a note before the Departmental Minister to bring to the notice of the Chief Minister the decision of the Selection Committee. The Departmental Minister put up the file before the Chief Minister on 28.06.2013. As per his note dated 15.07.2013, the Chief Minister directed that pending all formalities, respondent No. 6 be appointed as Chairperson of the State Commission. The Departmental Minister was asked to inform the Chief Minister about the action taken since there had been delay. Following the same, the impugned notification dated 06.08.2013 was issued.

22.4. The file further discloses that thereafter Shri R.L. Duarah, IAS, who was holding the post of Director of Social Welfare for more than two years during the period 2010-12, also submitted an application dated 04.09.2013 before the second respondent requesting consideration for appointment as Chairperson of the State Commission. Shri Duarah was then holding the post of Registrar of Co-operative Societies, Assam and his superannuation was due on 30.09.2013.

23. Thus, from the record it is abundantly clear that no recommendation was made by the three member Selection Committee, No satisfaction was recorded by the Selection Committee about the suitability of respondent No. 6 for appointment as Chairperson and consequently there was no recommendation of respondent No. 6 by the Selection Committee. Rather, it was a decision of the Chief Minister which was imposed on the Selection Committee. The Selection Committee in its previous meeting held on 26.03.2013 had directed the Social Welfare Department to prepare a panel of eminent persons for induction as Chairperson of the State Commission but it appears that no such panel was prepared. There was no consideration of the candidature of respondent No. 6 by the Selection Committee, not to speak of consideration of any other candidate. From the above, it is crystal clear that appointment of respondent No. 6 as Chairperson of the State Commission is not at all in accordance with the mandate of Sections 17 and 18 of the Act. This lapse is not only a procedural

defect but is an infirmity which strikes at the very root of the decision making process itself. As is well recognized, it is not the decision but the decision making process leading to the decision taken which the constitutional Court is concerned with while exercising the power of judicial review. In the present case, it is apparent that the decision making process leading to the appointment of respondent No. 6 as the Chairperson stood completely vitiated because of non-compliance with the scheme of appointment contemplated under Sections 17 and 18 of the Act.

24. Viewed in the above context, appointment of respondent No. 6 is clearly arbitrary and is in violation of the law. Having held so, this Court is unable to accept the contention of Mr. K.N. Choudhury, learned Advocate General that appointment of Chairperson of the State Commission being within the realm of absolute discretion of the State Government, is outside the reach of judicial scrutiny.

25. In *Rajesh Awasthi Vs. Nand Lal Jaiswal and Others*, , the issue before the Apex Court was selection to the office of Chairperson of UP State Electricity Regulatory Commission. Appointment of the appellant as Chairperson was set aside by the High Court on the ground of non-compliance with Section 85(5) of the Electricity Act, 2013. As per Section 85 of the Electricity Act, 2003, a Selection Committee has to be constituted to select members and Chairperson of the State Electricity Regulatory Commission. As per sub-section (5), the Selection Committee has to make recommendation for such appointment after finalizing the selection but before such recommendation, the Selection Committee should satisfy itself that such person does not have any financial or other interest which is likely to affect pre-judicially his functions as Chairperson. In that case, the Apex Court after examining the meaning and content of Section 85(5) held that there was clear infraction of the said provision while making the appointment and accordingly, the interference made by the High Court in the appointment of the appellant as the Chairperson was upheld. The Apex Court held as under:--

18. We are clear in our mind about the language used in sub-section (5) of Section 85 of the Act, which calls for no interpretation. Words are crystal clear, unambiguous and when read literally, we have no doubt that the powers conferred under sub-section (5) of Section 85 of the Act has to be exercised by the Selection Committee and the Committee alone and not by the Government. Some of the words used in sub-section (5) of Section 85 are of considerable importance, hence, we give some emphasis to those words such as "before recommending", "the Selection Committee shall satisfy" and "itself. The legislature has emphasized the fact that "the Selection Committee itself has to satisfy", meaning thereby, it is not the satisfaction of the Government which is envisaged in sub-section (5) of Section 85 of the Act, but the satisfaction of the Selection Committee. The question as to whether the persons who have been named in the panel have got any financial or other interest which is likely to

affect prejudicially his functions as Chairperson, is a matter which depends upon the satisfaction of the Selection Committee and that satisfaction has to be arrived at before recommending any person for appointment as Chairperson to the State Government. The Government could exercise its powers only after getting the recommendations of the Selection Committee after due compliance with sub-section (5) of Section 85 of the Act. The Selection Committee has given a complete go-by to that provision and entrusted that function to the State Government which is legally impermissible. The State Government also, without application of mind and overlooking that statutory provision, appointed the appellant.

* * * * *

23. We are of the view that non-compliance with sub-section (5) of Section 85 of the Act is not a procedural violation, as it affects the very substratum of the appointment, being a mandatory requirement to be complied with, by the Selection Committee before recommending a person for the post of Chairperson. We are of the view that non-compliance with sub-section (5) of Section 85 of the Act will vitiate the entire selection process since it is intended to be followed before making the recommendation to the State Government. Non-compliance with mandatory requirements results in nullification of the process of selection unless it is shown that performance of that requirement was impossible or it could be statutorily waived. The expression "before recommending any person" clearly indicates that it is a mandatory requirement to be followed by the Selection Committee before recommending the name of any person for the post of Chairperson. The expression "before" clearly indicates the intention of the legislature. The meaning of the expression "before" came for consideration before this Court in *State Bank of Travancore v. Mohd. Mohammed Khan* where the words "any debt due at and before the commencement of this Act to any banking company" as occurring in Section 4(1) of the Kerala Agriculturists' Debt Relief Act, 1970 were construed by the Supreme Court to mean "any debt due at and before the commencement of this Act". We, therefore, find it difficult to accept the contention of the learned Senior Counsel that this, being a procedural provision and non-compliance with sub-section (5) of Section 85 of the Act, is a defect curable by sending the recommendation back to the Selection Committee for compliance with sub-section (5) of Section 85 of the Act.

24. We are, therefore, in agreement with the High Court that the appointment of the appellant was in clear violation of sub-section (5) of Section 85 of the Act and, consequently, he has no authority to hold the post of the Chairperson of the Commission and the High Court has rightly held so. This appeal, therefore, lacks merits and the same is dismissed with no order as to costs.

25. Justice Dipak Misra, who concurred with the views of Justice Radhakrishnan in *Rajesh Awasthi*, however recorded his views in addition separately. He held as under:

49. It is seemly to state that the aforementioned provision employs the term "recommendation". While dealing with the concept of recommendation, a three-Judge Bench of this Court in *A. Panduranga Rao v. State of A.R.* has stated that the literal meaning of the word "recommend" is quite simple and it means "suggest as fit for employment". In the present case the Selection Committee as per the provision was obliged to satisfy itself when the legislature has used the word "satisfied". It has mandated the Committee to perform an affirmative act. There has to be recording of reasons indicating satisfaction, may be a reasonable one. Absence of recording of satisfaction is contrary to the mandate/command of the law and that makes the decision sensitively "susceptible. It has to be borne in mind that in view of the power conferred on the State Commission, responsibility of selection has been conferred on a High-Powered Selection Committee. The Selection Committee is legally obliged to record that it has been satisfied that the candidate does not have any financial or other interest which is likely to affect prejudicially his functions as Chairman or member, as the case may be. The said satisfaction has to be reached before recommending any person for appointment. It would not be an exaggeration to state that the abdication of said power tantamounts to breach of rule of law because it not only gives a go-by to the warrant of law but also creates a dent in the basic index of law. Therefore, the selection is vitiated and it can never come within the realm of curability, for there has been statutory noncompliance for the very inception of selection.

26. Thus, having regard to the discussions made above and in the light of the decision rendered by the Apex Court in *Rajesh Awasthi*, this Court is of the unhesitant view that appointment of respondent No. 6 as Chairperson of the State Commission is clearly vitiated for violation of the mandatory provisions of Sections 17 and 18 of the Act and therefore cannot be sustained. Accordingly, impugned notification dated 06.08.2013 is hereby set aside and quashed.

27. Though the impugned notification has been quashed, this Court would like to make it clear that it has not expressed any opinion on the relative merits of the parties. Writ petition is allowed. However, there shall be no order as to cost. The related file produced by the learned Advocate General is returned back.