
(2015) 09 MEG CK 0009
In the Meghalaya High Court
Case No : WP(C) No. 306 of 2014

Sainkur Dewkhaid and Others

APPELLANT

Vs

Khasi Hills Autonomous District Council, Shillong and Others

RESPONDENT

Date of Decision : 10-09-2015

Acts Referred:

Constitution of India, 1950 — Article 13(b), 226, 372

Citation : (2015) 09 MEG CK 0009

Hon'ble Judges : S.R. Sen, J

Bench : Single Bench

Advocate : P. Nongbri, for the Appellant; P.S. Nongbri and B.M.R. Chyne,
Advocates for the Respondent

Final Decision : Disposed off

Judgement

S.R. Sen, J—The petitioner's case in a nutshell is that:

"This is an application under Article 226 of the Constitution praying for quashing and setting aside the impugned order dated 12.6.2014 issued by the respondent No. 2 and Notification dated 17.6.2014 issued by the respondent No. 4.

The factual matrix of the case in brief is that Malaisohmad Syiemship as of now comprises of 5 (five) villages having 6 (six) recognized clans which constitute the Electoral College to elect a Syiem/Chief but Dewsawbah Clan became extinct in the past century and left with only 5 (five) clans as per the customary practices prevailing. The 5 (five) clans namely are:-- (i) Dewkhaid, (ii) Dewsaw, (iii) Sohtun (Ruah), (iv) Nohriang and (v) Ronsang. This customary practices has been in existence since time immemorial and has attained a legally enforceable and customary rights in the Syiemship by virtue of its long practice by generations after generations. At one point of time, the then Deputy Commissioner had allowed the male adults to vote and elect the then Chief (Syiem) of Malaisohmad Syiemship in 1893 and declared the results on 23.1.1893. This was vehemently objected by the eligible 5 (five) clans and

Captain D. Herbert the then Deputy Commissioner of Khasi and Jaintia Hills after thorough enquiry and examination of the historical evidences had finally settled the controversy by nullifying the earlier order and vide order dated 6.1.1903 held that as per the customary practices prevailing for generations, it is only the 5 (five) Myntris from the respective clans who were the eligible electors to elect a Chief (Syiem) of Malaisohmad Syiemship and the people had no customary right to participate in the election.

The respondents district council in exercise of powers under paragraph 11 of the Sixth Schedule of the Constitution of India, the respondent District Council has enacted the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act, 1959 (for the sake of brevity herein referred to Act of 1959). In the said Act of 1959, Sub Section (b) and (h) of Section 2 of the Act it has laid down amongst others the mode of election, appointment and removal of Chief and Headman. Section 3 of the Act of 1959 provides for Election or Nomination and Appointment of Chief and Headmen. Section 3 of the Act of 1959 also clearly stipulates that the election or nomination and appointment of Chief shall be in accordance with the existing customs prevailing in the Elaka concerned and/or in accordance with the orders as the Executive Committee may issue from time to time.

The respondents District Council has also all along given recognition and acceptance to the said customary practice. The then Chief Executive Members of the District Council vide order dated 08.12.1969 passed in Political Case No. 9 of 1967 after relying on the previous decision and other documents clearly held that the election/nomination to the post of the Chief/Syiem of Malaisohmad Syiemship can be done by the Myntris. Other instance is also available such as when the Executive Members of the United Khasi and Jaintia District Council, Shillong vide public Notice dated 12.01.1970 informing the general public that the then Chief/Syiem had been elected by the Myntris/Electors of the Hima. In one instance, the then Chief Executive Member after examination of the matter, in its report dated 02.07.1970 clearly reported to the House that according to the prevailing custom, the Syiem/Chief would be only nominated/elected by the Myntris/Electors. Therefore, the above customary practices continue to exist and in force thereafter. The above customary practice was again translated into action by the respondent District Council vide its public notice dated 24.04.1973 whereby, the respondent District Council had invited the five Myntris to meet in the District Council for the purpose of electing the Chief/Syiem as per the Act of the 1959. The respondent district council had on many occasions approved and notified the names of the 5 (five) Myntris as the Electors to elect the Syiem/Chief of the Hima. Due to a complaint/objection raised with regard to the rights of the people in the Hima to elect the Chief/Syiem, the respondent District Council in pursuance to the reference made by the Returning Office under Section 4 of the Act 1959 had considered the said matter amongst others in its entirety and after referring to and relying on the report/decision of the Captain D. Herbert of 1903 along with historical evidences had vide order dated 20.7.2007 come to the

conclusion that no election to the post of Chief would be held by the people except by the five Myntries/Electors of the Hima.

The aforesaid practice of election to the post of the Chief/Syiem, under the Act 1959 was also applied in the last election conducted by the respondent District Council in the year 2008 wherein the five Myntris were the electors to elect the Syiem/Chief. The 7 (seven) clans in the Hima of Malaisohmad vide resolution dated 01.02.2014 again confirmed and supported that there are five Myntris duly elected by their respective clan and recognized by the respondent District Council. In view of the WP (C) No. 117 of 2012 filed by the two complainants/writ petitioners herein challenging the decision of the respondent District Council to reinstate the outgoing Chief/Syiem, this Hon"ble Court vide Judgment and order dated 27.02.2014 had set aside the said reinstatement order dated 21.12.2011 and further directed the respondent District Council to conduct an election to elect the full fledged Chief/Syiem of Malaisohmad Syiemship within the period of three month as per of the provision of Act of 1959. Thereafter, vide letter dated 26.04.2014 requested the respondent Executive Member In-Charge Elaka to conduct the election to the post of Chief/Syiem as per the prevailing custom and tradition safeguarded and protected by the Act of 1959 and further, formally informed again that they are the competent Myntris/Electors of the Malaisohmad Syiemship. The respondent Returning Officer instead vide Public Notice dated 19th May, 2014 notified to the public that the respondent District Council has decided to hold the election by allowing the male adults who are the genuine residents of Malaisohmad Syiemship to elect the Chief/Syiem as happened in the election of the Chief/Syiem in the year 1893. Further the respondent District Council invited the eligible candidate to file their nomination papers on or before 04.06.2014 as per the custom and tradition of the Hima by relying on the earlier order dated 23.01.1893 which has already been nullified by the then Deputy Commissioner. The above decision is completely contrary to the well established customary practices which has been in practice and as reflected in the order dated 17.01.1903 of the then Deputy Commissioner Khasi Jaintia Hills.

Being aggrieved with the above decision, the writ petitioners had filed their protest/representation dated 21.05.2014 before the respondent District Council to uphold and the customary practice to elect the chief by the electors for the interest of the entire Hima Syiemship. Subsequently, a writ petition being W.P. (C) No. 184 of 2014 was filed before this Hon"ble Court challenging the Public Notice dated 19.5.2014 and this Hon"ble Court vide order dated 2.6.2014 was pleased to direct the respondent No. 2 Executive Committee, KHADC to dispose of the representation dated 21.5.2014 of the petitioners within ten days.

Pursuant to the Notification dated 19.5.2014 announcing the elections in Malai Sohmat Syiemship and calling for eligible candidates to file nominations papers, 5 (five) candidates filed their nominations papers. The respondents on receipt of the nominations papers from the eligible candidates vide Notification dated

5.6.2014 after scrutiny was pleased fix 13.6.2014 as date of election (polling). It is pertinent to state herein that the above Notification dated 5.6.2014 was issued inspite of the fact that the issue regarding as to who will constitute the Electoral College to elect a Chief (Syiem) is yet to be decided. Thereafter on the same date and in compliance to the order dated 2.6.2014 passed by this Hon"ble Court, the respondents vide letter dated 5.6.2014 was pleased to fix 10.6.2014 at 2.00 pm for hearing of the representation filed by the petitioners. On receipt of the same, the petitioners then on 10.6.2014 were present before the respondent No. 2 for hearing and also filed a written argument in support of the their contentions. As such, the matter was heard in the presence of all parties concerned and was informed that necessary orders will be passed.

The petitioners were under the impression that necessary order will be passed before the elections were to be held but surprisingly the respondents without passing any order to decide the most vital issue as to who will constitute the electoral college as per the directions of this Hon"ble Court, has gone ahead and held the election on 13.6.2014 wherein all the male adults of Malaisohmat Syiemship were allowed to elect a Chief (Syiem). It is pertinent to mention herein that the writ petitioners who are the eligible Myntris to elect the Syiem as per the customary practice have not participated nor cast their vote on the aforesaid date of election. The action of the respondent district council is in violation of the direction contained in the order dated 2.6.2014 passed by this Hon"ble Court and against the prevailing customary practices in Malaisohmad Syiemship. Further, the action of the respondent in going ahead with the election is with an ulterior and clear motive to unsettle the prevailing customary practice which has been recognized by the respondent District Council themselves. It is important to state herein that the elections were held when the petitioners were not made known of the Order as to who will constitute the Electoral College.

Prior to the election being held on 13.6.2014, the petitioners along with other 204 residents of Malaisohmad Syiemship vide letter dated 12.6.2014 had protested that they will not participate in the election as the same will not be held as per the prevailing custom. After the elections were held, the office of the respondent No. 2 vide Notification dated 17.6.2014 declared the election results wherein Shri. Paialast Iawrod was declared elected. It is reiterated herein that the order to decide as to who will constitute the Electoral College was never made known to the petitioner. After the elections were already conducted and results declared, the petitioner No. 3 received a letter dated 12.6.2014 on 26.6.2014 at around 9.00AM from the process server of the respondent district council stating therein that representation dated 21.5.2014 is rejected as the petitioners has not been able to make out a case. Further, the aforesaid letter also stated that "Detailed Order will be given in separate order sheet". On receipt of the same, the writ petitioner No. 1 immediately on the same day vide letter dated 26.6.2014 filed an application under Right to Information Act, 2005 requesting to furnish a copy of the order.

The entire conduct of the respondent District Council smacks of malafide, and manipulation is writ large on the entire proceedings. Firstly, the copy of the order was withheld and not supplied thus precluding and preventing the petitioners from taking any further action to halt the illegal and un-customary procedure of elections. The respondent District Council ought to have furnished the order within a day or two but reasons best known to them the order dated 12.6.2014 was furnished only 23.7.2014, that too under an application under the Right to Information Act. The entire exercise conducted by the respondent district council is highly irregular and illegal inasmuch as the denial of a copy of the impugned order in time was made with the sole motive to thwart the petitioners and leave them with no time to seek remedy and somehow to render their claims useless. Secondly, the action of the respondents was made with the clear intent to distort and to forcefully change the prevailing customary practice. Thirdly, the actions of the respondents are in gross contravention of the directions of this Hon'ble Court which had given appropriate directions for settlement of the issue. Fourthly, the respondent District Council has gone against its own mandate and past decisions wherein it has recognized and preserved the customary practice, as far as the customary practice for election of Syiem Malaisohmad is concerned. Thus, the actions of the respondent District Council has severely affected the rights of the writ petitioners whose customary rights have been in existence and have been practicing for more than 100 years without any change. The delay in furnishing the copy of the impugned order dated 12.6.2014 to the petitioner, also gives a strong indication that at the time when the election was conducted, the impugned order dated 12.6.2014 was apparently not passed and the same was deliberately kept under wraps until the elections had been concluded. As aforementioned, the manner in which the entire exercise was conducted was to suppress the rights of the petitioners and to change the traditional customary practice. Under the Sixth Schedule, the respondent district council primary functions is to preserve, protect and safeguard the prevailing customs of these areas, and in fact work towards its codification. In the instant case, the respondent instead, has totally distorted and changed the prevailing existing custom which has been in existence since time immemorial and as such its actions have gone against the very principles for which it was established.

The impugned order dated 12.6.2014 passed by the respondent district council was on the basis of a complaint filed by some residents of Malaisohmad Syiemship. The respondent district council ought to have enquired into the allegations as to how the last election was conducted and further the respondent district council ought to have taken action on the persons who are trying to destroy the sanctity of the post of Syiem but unfortunately, the respondent district council instead has given a total go by to the existing prevailing custom by purportedly taking the concept of democracy in a wrong premise. The core question of the dispute at hand is the determination of the custom and its prevalence in Malaisohmad syiemship and its violation by the respondents. Article 13(b) of the Constitution of India defines "law" and the same includes

"custom" or usage. The prevalent custom will therefore necessarily mean "law in force" until altered, repealed or discontinued by enactment as provided in Article 372 of the Constitution. As such, by mere executive fiat, the respondents cannot change or distort the custom. The action of the respondents and the entire proceedings embarked upon therefore are unconstitutional, illegal and are liable to be interfered with by this Hon'ble Court.

The respondents acted illegally, arbitrarily and discriminatorily in passing the impugned order dated 12.6.2014 and notification dated 17.6.2014 inasmuch as the respondent district council which is an autonomous body under the Sixth Schedule of the Constitution of India whose primary functions is to preserve, protect and safeguard the prevailing customs in the Khasi States. In this instant case just on a mere complaint filed by some vested interests, the respondent district council without enquiring into the matter and without taking any action against the persons who are trying to destroy the sanctity of the post of Syiem and has mechanically changed the customary practice for electing a Syiem which has been in existence since time immemorial. As such, it is a fit case for interference in exercise of powers under Article 226 of the Constitution of India".

2. Mr. P. Nongbri, learned counsel appeared on behalf of the petitioners and submits that, in Malaisohmad Syiemship prior to 1893 the Syiem was elected by five clan members and this was the customary practice from time immemorial. But after that, the then Deputy Commissioner, Khasi and Jaintia Hills in 1893 published the notice for election of the Syiem by which the adult male members of the Syiemship were allowed to elect the Syiem. But this was vehemently objected by the five clan members. In the year 1903 an enquiry was conducted by Captain D. Herbert, the then Deputy Commissioner, Khasi and Jaintia Hills and after thorough enquiry, recommended a book which has been compiled and written by him called Succession to Syiemships in the Khasi States. After the recommendation of Captain D. Herbert the election was held by the five clan members to elect the Syiem of the said Syiemship. But, the matter in dispute occurred in the year 2014 when the respondent No. 4 issued a notification dated 19.05.2014 to conduct the election by the adult male members of the Syiemship. Against the said notification, the petitioner filed a representation dated 21.05.2014 before the District Council and when the petitioner found that no action was taken with regard to his representation, he approached this High Court by way of a writ petition bearing WP(C) No. 184 of 2014 and this Hon'ble Court vide judgment and order dated 02.06.2014 directed the representation of the petitioner to be considered within 10(ten) days.

The learned counsel for the petitioners further contended that the District Council did not comply the judgment and order of this court in letter and in spirit rather issued a notification on 05.06.2014 inviting the nomination and passed for hearing the representation on 10.06.2014 and subsequently, fix the date of election on 13.06.2014 inspite of the protest made by the petitioner. Thereafter, the petitioner receive a letter from the District Council on 26.06.2014 stating

that their representation was rejected though the impugned order was shown to be passed on 12.06.2014. Then the petitioner applied for the copies through RTI and found that, their representation has been rejected without any proper ground. The learned counsel for the petitioners further submits that, thereafter the petitioner approached this court again by way of this instant writ petition.

3. In reply to the submission advanced by Mr. P. Nongbri, learned counsel for the petitioners, Ms. P.S. Nongbri, learned counsel for the respondents No. 1-4 (KHADC) submits that the election was conducted by the people of the Syiemship as it was required due to change of time and circumstances. She also referred to Section 3 of The United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Acts, 1959.

The learned counsel for the respondents No. 1-4 (KHADC) further submits that the election was conducted as per the section referred above and therefore, there is nothing wrong in the order passed by the District Council to held the election by the adult male members. She also prays that the petition may be dismissed or remand back to the District Council.

4. None has appeared for and on behalf of the respondent No. 5.

5. After hearing the submissions advanced by Mr. P. Nongbri, learned counsel for the petitioners and Ms. P.S. Nongbri, learned counsel for the respondents No. 1-4, I find that, the respondents No. 1-4 has acted hurriedly without going to the root cause of the matter. Section 6 of Succession to Syiemships in the Khasi States under Chapter Malaisohmad Syiemship written by Captain D. Herbert, it is understood and clear that, under no circumstances should an election by the people be held. For easy reference, Section 6 of Succession to Syiemships in the Khasi States is reproduced herein as under:

"6. Recommendations.--I would recommend that, on a vacancy occurring in the Syiemship, the heads of the five clans Nyrwah, Ka Jied, Dewkhait, Nohriang, and Ronsang be called upon by name to nominate a new Syiem. Such nomination should be published in the State and a date be fixed before which objections, if any, should be lodged. If no objections are raised, the nominee of the durbar should be reported to the Chief Commissioner for confirmation.

If objection is made, the Deputy Commissioner should proceed to Dewsaw, the capital of the State, after summoning the heads of the five clans, and should record their votes for the new Syiem. The candidate nominated by the majority of the durbar should be appointed Syiem.

Under no circumstances should an election by the people be held.

Camp Nongkuba, The 7th January, 1903.

Sd/- D. HERBERT, Deputy Commissioner, Khasi and Jaintia Hills".

6. On bare perusal of Section 6 of Succession to Syiemships in the Khasi States, it is understood and clear that, as and when the office of the Syiemship becomes

vacant, the Syiem to be elected by the heads of the five clans and in no circumstances an election by the people to be held and this tradition was in practice from time immemorial. But, for the reason best known to them, practice changed taking into recourse Under Section 3 of The United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Acts, 1959 which is reproduced herein as under:

"3. Election or Nomination and Appointment of Chief and Headmen:-- Subject to the provision of this Act and the Rules made thereunder, all elections or nominations and appointment of Chiefs and Headmen shall be in accordance with the existing custom or prevailing in the Elaka concerned and or in accordance with the orders as the Executive Committee may issue from time to time. The Secretary of the Executive Committee or any Officer appointed by the Executive Committee, in this behalf shall be the Returning Officer for all nominations or elections under this section".

7. On perusal of Section 3 of The United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Acts, 1959, it is understood that, the Chiefs and Headmen shall be in accordance with the existing custom prevailing in the Elaka or in accordance with the orders as the Executive Committee may issue from time to time.

From record it is not clear what was the change of circumstances which compel the respondents to elect the Syiem by the people? Therefore, I find that, it is a fit case to remand back to the respondents (KHADC) to relook into the matter deeply in consultation with the people of the Elaka and then to pass an effective order. Accordingly, the impugned orders passed hurriedly by the respondents (KHADC) are hereby set aside and the matter is hereby remand back to the respondents (KHADC) to do the needful and they should complete their work within 4(four) months from the date of receipt of a certified copy of this judgment and order.

8. The Registry is directed to send a copy of this judgment and order to the respondents (KHADC) immediately.

9. With these observations and directions, the matter stands disposed of.