

(2011) 01 GAU CK 0020

In the Gauhati High Court

Case No : Writ Petition (C) No's. 4815 and 5596 of 2010

Smt. Junali Doley (Borah) and Others

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 31-01-2011

Acts Referred:

Assam Panchayat (Constitution) Rules, 1995 — Rule 6

Assam Panchayat Act, 1994 — Section 43, 43(1)

Assam Panchayati Raj Act, 1959 — Section 17(1)

Citation : (2011) 2 GLT 459

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : P.J. Phukan, A.B. Phukan, H. Baruah, in WP C No. 4815/2010, R.P. Sarmah, S.K. Singha and M.K. Neog, in WP C No. 5596/2010, for the Appellant; R.P. Sarmah S.K. Singha and M.K. Neog, in WP (C) No. 5596/2010 and G.A. Assam in WP (C) Nos. 4815 and 5596 of 2010, for the Respondent

Judgement

B.P. Katakey, J.—These writ petitions, being related to the no confidence motion brought against the President of Ghilamara Anchalik Panchayat under Lakhimpur Zilla Parishad, are taken up for disposal together. WP(C) No. 4815/2010 has been filed by the Vice President and 4(four) members of the said Anchalik Panchayat challenging the communication dated 12.08.2010 issued by the Chief Executive Officer of Zilla Parishad intimating the Executive Officer of the Anchalik Panchayat that as the resolution expressing want of confidence on the President of the Anchalik Panchayat (Respondent No. 8) has not been adopted by the majority of 2/3rd members, the same vitiates the provisions contained in Section 43(1) of the Assam Panchayat Act, 1994 (in short the 1994 Act) and as such no further action could be taken in that regard. A further prayer has also been made to declare that the office of the President of the Anchalik Panchayat stands vacated on 07.08.2010 when the resolution expressing want of confidence was passed in the special meeting of the Anchalik Panchayat.

2. WP(C) No. 5596/2010 has been filed by the President of Ghilamara Anchalik

Panchayat (Respondent No. 8 in WP(C) No. 4815/2010), challenging the notice dated 01.10.2010 issued by the Executive Officer of the Anchalik Panchayat convening an urgent meeting on 05.10.2010, which according to the writ Petitioner has been convened to elect the President of the Anchalik Panchayat, though the Zilla Parishad has refused to act on the resolution adopted in the meeting of the Anchalik Panchayat on 07.08.2010 expressing want of confidence on her, on the ground of not being passed by majority of 2/3rd number of members, as required under the provisions of the 1994 Act.

3. The relevant facts necessary for disposal of the present two writ petitions, which are not in dispute, may be noticed as under. Ghilamara Anchalik Panchayat was constituted with 9(nine) directly elected members, which however been reduced to 8 because of the death of one member, out of which, 6 members on 30.07.2010 gave a notice expressing want of confidence on the President of the Anchalik Panchayat, pursuant to which a special meeting was convened on 07.08.2010, wherein 5(five) out of 8(eight) existing directly elected members of the Anchalik Panchayat adopted a resolution expressing want of confidence on the President. The Executive Officer of the Anchalik Panchayat vide communication dated 07.08.2010 informed the Deputy Commissioner about the proceeding dated 07.08.2010, with copy to the Chief Executive Officer of the Zilla Parishad. By impugned communication dated 12.08.2010 the Chief Executive Officer of the Zilla Parishad informed the Executive Officer of the Anchalik Panchayat that as the 5(five) members of the Anchalik Panchayat do not constitute majority of 2/3rd of 8(eight) members, the resolution expressing want of confidence on the President cannot be treated to be valid, in view of the provision contained in Section 43 of the 1994 Act and as such no action can be taken on the basis of such resolution. Thereafter, a notice dated 01.10.2010 has been issued by the Executive Officer of the Anchalik Panchayat convening an urgent meeting of the Anchalik Panchayat fixing 05.10.2010 as the date for such meeting, which has been challenged in WP(C) No. 5596/2010.

4. I have heard Mr. P.J. Phukan, learned Counsel for the Petitioners in WP(C) No. 4815/2010, who are also the Respondent Nos. 7 to 11 in WP(C) No. 5596/2010 and Mr. R.P. Sarmah, learned Sr. counsel for the Petitioner in WP(C) No. 5596/2010, who is also the Respondent No. 8 in WP(C) No. 4815/2010. The learned State counsel appearing for the State Respondents has also been heard.

5. The learned Counsel for the Petitioners in WP(C) No. 4815/2010 referring to Section 43 of the 1994 Act has submitted that the President of the Anchalik Panchayat can be removed from the office by bringing a no confidence motion subject to passing of the same by a majority of 2/3rd of total number of the directly elected members of the Anchalik Panchayat and in the instant case since out of the 8(eight) existing directly elected members of the Anchalik Panchayat 5(five) supported such motion expressing want of confidence, it cannot be said that such resolution has not been adopted as required under Sub-section (1) of Section 43 of the 1994 Act. According to the learned Counsel the reasons cited

by the Chief Executive Officer of the Zilla Parishad in the impugned communication dated 12.08.2010 is erroneous and contrary to the provisions contained in Sub-section (1) of Section 43 of the 1994 Act, as while ascertaining the majority of 2/3rd of total number of directly elected members any fraction which is less than 5 has to be ignored. Mr. Phukan submits that the Chief Executive Officer of the Zilla Parishad has not ignored the fraction .33 in calculating the number of members constituting majority of 2/3rd members. Mr. Phukan in support of his contention has placed reliance on a Division Bench judgment of this Court in Samiruddin Ahmed v. S.D.O., Mangaldoi and Ors. AIR 1971 Gau 163 as well as a Full Bench decision of Allahabad High Court in Wahid Ullah Khan Vs. District Magistrate, Nainital and others,

6. Referring to the decision of the Apex Court in State of U.P. and Anr. v. Pawan Kumar Tiwari and Ors. (2005) 2 SCC 10 it has been submitted by Mr. Phukan that under the rule of rounding off, if part is one-half or more, its value has to be increased to one and if part is less than half then its value has to be ignored. According to the learned Counsel, in the case in hand, since 2/3rd of 8 constitute 5.33, the fraction .33 has to be ignored, the same being less than 5.

7. Mr. Sarmah, learned Sr. counsel appearing for the writ Petitioner in WP(C) No. 5596/2010, who is the President of the Anchalik Panchayat, supporting the communication dated 12.08.2010 issued by the Chief Executive Officer of the Zilla Parishad has submitted that to remove a President of Anchalik Panchayat by adopting the resolution expressing want of confidence, the same has to be passed by majority of 2/3rd of the total number of directly elected members. According to the learned Sr. counsel as the requirement of Section 43(1) of the 1994 Act is that such resolution has to be passed by majority of 2/3rd of total directly elected members, while calculating such 2/3rd, the total number of directly elected members is to be considered and not the number of existing directly elected members, irrespective of the vacancy in the office of any member and hence in the present case, the total number of directly elected members of the Anchalik Panchayat being 9, the resolution has to be supported by 6, to unseat the President. It has also been submitted by the learned Sr. counsel that even assuming that only the number of existing members is to be taken into consideration while calculating the 2/3rd, any fraction, howsoever small may be, cannot be ignored, in view of the specific provisions in Sub-section (1) of Section 43 of 1994 Act that such resolution has to be adopted by majority of 2/3rd of the total number of directly elected members and if such fraction is ignored, it would amount to emasculate the provision of its rigour and reduce the exercise to a formality.

8. Mr. Sarmah in support of his contention has placed reliance on the decision of a Division Bench judgment of this Court in Samiruddin Ahmed (supra), a Single Bench judgment of this Court in Jiten Saikia and Anr. v. State of Assam and Ors. 2004 (2) GLT 233 , a Single Bench judgment of Allahabad High Court in Smt. Meera Devi Vs. State of U.P. and others, a Division Bench judgment of Andhra

Pradesh High Court in Gogineni Koteswara Rao Vs. Government of Andhra Pradesh, Panchayat Raj, Hyderabad and others, and a Full Bench judgment of Bombay High Court in Ashok Maniklal Harkut Vs. The Collector of Amravati and Another,

9. Mr. Phukan, learned Counsel for the Petitioners in WP(C) No. 4815/2010, in reply to the submission made by the learned Sr. counsel appearing for the President of the Anchalik Panchayat, has submitted that it is being nobody's pleaded case that in calculating the majority of 2/3rd of the total members of the Anchalik Panchayat, the total number of members constituting the Panchayat, irrespective of whether there is any vacancy, has to be taken into consideration, the submission of the learned Sr. counsel for the President that there being total 9 members, 2/3rd would be 6, cannot be gone into in the present proceedings. It has also been submitted that the Single Bench judgment of this Court in Jiten Saikia (supra) cannot be held to be good law, the same being contrary to the provisions of the 1994 Act as well as the judgment of the Apex Court in Pawan Kumar Tiwari's case. Relating to the judgment of Allahabad, Andhra Pradesh and Bombay High Court, on which the learned Sr. counsel for the President of the Anchalik Panchayat has placed reliance, it has been submitted that the provisions in the Acts under consideration in the said cases are different from the provisions of the 1994 Act, as under those Acts the motion has to be passed by "not less than? the particular number of members. The wordings in those enactments are different from the wordings of the 1994 Act and hence those decisions, as cited by the learned Sr. counsel, cannot be applied in the case in hand, submits the learned Counsel.

10. The learned State counsel appearing for the State Respondents has not taken any stand in these proceedings. The State Respondents have also not been filed any affidavit-in-opposition.

11. In view of the aforesaid submissions made by the learned Counsel for the appearing parties, the questions which require determination by this Court in the present proceedings, are (i) whether in calculating the majority of the total number of directly elected members of the Anchalik Panchayat, any fraction, even if it is less than 5, can be ignored and (ii) whether the total number of members means the number of members constituting the Anchalik Panchayat or existing members of the Anchalik Panchayat at the time of consideration of the motion expressing want of confidence.

12. For determination of the aforesaid issues, the relevant provisions of 1994 Act are to be considered first. Section 43 of the 1994 Act provides for bringing motion of no confidence against the President and Vice President of Anchalik Panchayat. Sub-section (1) of Section 43 provides that the President and the Vice President of the Anchalik Panchayat can be removed from the office by a resolution expressing want of confidence in him/her, provided it is passed by a majority of 2/3rd of the total number directly elected members of the Anchalik Panchayat, in a meeting specially convened for that purpose with the approval of

the President of the Anchalik Panchayat. Sub-section (1) of Section 43 of the said Act, for better appreciation, is quoted below:

43. No confidence motion against the President and the Vice-President of Anchalik Panchayat. - (1) Every President and Vice-President of the Anchalik Panchayat shall be deemed to have vacated his office forthwith, if by a resolution express want of confidence in him is passed by a majority of two-third of total number of the directly elected the members of the Anchalik Panchayat. Such a meeting shall be specially convened with the approval of the President of the Anchalik Panchayat. Such meeting shall be presided over by the President if the motion is against Vice President and by the Vice-President if the motion is against the President. In case such a meeting is not convened by the Anchalik Panchayat within a period of fifteen days from the date of receipt of the notice, the Secretary of the Anchalik Panchayat shall refer the matter to the President of the Zilla Parishad with intimation to the Deputy Commissioner. The President of the Zilla Parishad shall then arrange for convening the meeting within fifteen days from the date of receipt of intimation. The Zilla Parishad President shall preside over such meeting but shall have no vote.

13. To determine the first issue it has first to be ascertained what would be 2/3rd of total number of directly elected members, for the purpose of carrying a motion expressing want of confidence on the President and the Vice President of the Anchalik Panchayat. If the total number of the directly elected members is an odd number, there would not be any difficulty in calculating the 2/3rd of such members, as it would be divisible by 3. But if the total number of members of an Anchalik Panchayat is an even number, while calculating the 2/3rd there would always be a remainder and in that case to arrive at the 2/3rd of such number, whether the remainder, if it is less than 5 is to be ignored or it has to be rounded to one, even if it is less than 5. No dispute has been raised by any of the parties to the proposition that when such remainder is 5 or more, it has to be rounded to 1.

14. Sub-section (1) of Section 43 of 1994 Act in clear terms has stipulated that the President and the Vice President of the Anchalik Panchayat can be removed from the office on expressing want of confidence only if a resolution in that respect is adopted by a majority of 2/3rd of the total number of directly elected members. A Single Bench of this Court in Jiten Saikia (supra) placing reliance on the provisions of Section 43(1) of the Act as well as a judgment of Punjab and Haryana High Court in Jardar Khan Vs. State of Haryana and Others, has held that any fraction, howsoever small may be, cannot be ignored while computing 2/3rd majority of the total members and such fraction should be read as one and consequently the result and number would be the next higher integer. It has also been held that such fraction would represent the corresponding opinion essential for comprising the required majority for unseating the President or the Vice President and thus cannot be ignored.

15. A Single Bench of the Allahabad High Court in Smt. Meera Devi (supra) has

also taken the similar view as has been taken by a Single Bench of this Court in Jiten Saikia's case. While interpreting the provisions contained in Section 14(1) of U.P. Panchayat Raj Act, which provides for removal of Pradhan from its office by adopting the motion of no confidence by a majority of 2/3rd of the members present and voting, it has been held that by applying the principle of rounding off any remainder cannot be ignored, while ascertaining the requisite majority of 2/3rd.

16. A Division Bench of Andhra Pradesh High Court in Gogineni Koteswara Rao (supra) while considering the provisions in Section 245(2) of Andhra Pradesh Panchayat Raj Act, 1994, which provides for unseating of Upa Sarpanch, President or Chairman of Panchayat by adopting motion expressing want of confidence carried with the support of not less than 2/3rd of the total number of members, has held that any fraction arises in calculating such number shall have to be treated as 1, since Rule 6 of the Rules framed under the said Act clarifies that in determining 2/3rd of the total number of members, any fraction arrived shall be construed as 1. There is, however, no such corresponding provision in Assam Panchayat (Constitution) Rules, 1995.

17. In Ashok Maniklal Harkut (supra) a Full Bench of Bombay High Court while interpreting the expression "not less than", occurring in Section 55 of Maharashtra Municipal Act has held that if a fraction is ignored then the majority will be less than the requisite number of councillors required to pass a motion of confidence against the President of the Municipal Council. It has also been held in the said judgment that if such fraction is ignored, it would be against the provisions of Section 55 of the said Act.

18. As noticed above, Sub-section (1) of Section 43 of the 1994 Act clearly provides that President or the Vice President of the Anchalik Panchayat can be removed from the office by adopting a motion expressing want of confidence by majority of 2/3rd of the total number of directly elected members of the Anchalik Panchayat. While calculating the 2/3rd number, if there is any remainder, howsoever small may be, the same cannot be ignored for the simple reason that the same would then not constitute the 2/3rd of the number of members, which is the minimum requirement for adoption of the resolution expressing want of confidence. An interpretation contrary to the same would be against the intention of the legislature as couched in Section 43(1) of the 1994 Act.

19. The submission of Mr. Phukan, learned Counsel that the principle of rounding off requires that any fraction, which is less than 5, is to be ignored, cannot be accepted, in view of the aforesaid discussion. Non-occurrence of the expression "not less than" before the 2/3rd of the total members in Section 43(1) of the 1994 Act would not in any way effect the requirement of passing of the resolution by majority of 2/3rd of the total number of directly elected members. The decision of the Apex Court in Pawan Kumar Tiwari's case cannot be applied in the facts and circumstances of this case as the said case relates to percentage of reservation on post for appointment and not relating to unseating of an

elected person by adopting the motion expressing want of confidence. The Division Bench judgment of this Court in Samiruddin Ahmed (*supra*) would also of no help to the Petitioners in WP(C) No. 4815/2010 as in the first proviso to Section 17(1)(ii) of the Assam Gram Panchayat Act, 1959, which was under consideration, it was stipulated that when $\frac{1}{3}$ rd is a fraction which is half or more than half of a whole number, then the number shall be rounded to the next higher number and if less shall be ignored. In 1994 Act and the Rules framed thereunder there is no such provision.

20. A full Bench of Allahabad High Court in Wahid Ullah Khan (*supra*), on which Mr. Phukan, learned Counsel has also placed reliance, has held that rounding of a figure is only where particular figure has to be arrived at. It has further been held that when majority could be any number, which is more than half, then any number which could be said to be more than half would be a majority number. In the said case the issue was whether under the provisions of U.P. Municipalities Act, which requires adoption of no confidence motion against the President of a Municipality by majority of more than half of the members, any resolution adopted by 8 out of 15 members would be in conformity with the provisions of the said Act or "majority of more than half" would be 9 out of 15 members. The issue was not whether any fraction which is less than 5 is to be taken as one for the purpose of ascertaining the majority of the half of the total members.

21. In view of the aforesaid discussion, in my considered opinion, any fraction, howsoever small may be, cannot be ignored for ascertaining the majority of $\frac{2}{3}$ rd of total members of the directly elected members of the Anchalik Panchayat, for adoption of the resolution expressing want of confidence, as, such fraction would also represents the view of the members and hence it has to be rounded to one, so as to adopt the resolution expressing want of confidence against the President and Vice President of the Anchalik Panchayat under Sub-section (1) of Section 43 of the 1994 Act. If such fraction is ignored the same would be contrary to the provisions of Sub-section (1) of Section 43, which requires adoption of resolution expressing want of confidence by majority of $\frac{2}{3}$ rd members.

22. In the instant case out of 8 existing members 5 members adopted the resolution expressing want of confidence on the Respondent No. 8 in WP(C) No. 4815/2010, who is the writ Petitioner in WP(C) No. 5596/2010. $\frac{2}{3}$ rd of 8 is 5.33. The fraction .33 therefore has to be rounded to one and hence, the required number for adoption of the no confidence motion would be 6 out of 8. The motion expressing want of confidence having been adopted admittedly by 5 members, the same cannot be held to be adopted as required by Sub-section (1) of Section 43 of the 1994 Act and therefore, the impugned communication dated 12.08.2010 issued by the Chief Executive Officer of the Zilla Parishad cannot be held to be contrary to the said provision of law.

23. In WP(C) No. 5596/2010, as discussed above, the notice dated 01.10.2010 issued by the Executive Officer has been put to challenge. By the said notice, the

President of the Anchalik Panchayat, the writ Petitioner in the said writ petition, has been informed about holding of a meeting of the Anchalik Panchayat on 07.08.2010. The said notice has been issued by the Executive Officer of the Anchalik Panchayat without any concurrence of the President and that too describing her as member of the Anchalik Panchayat and not as the President, despite the communication dated 12.08.2010 issued by the Chief Executive Officer of the Zilla Parishad. For the reasons recorded above, it has been held that resolution adopted by the Anchalik Panchayat in its meeting dated 05.10.2010 expressing want of confidence against its President is contrary to the requirement of Sub-section (1) of Section 43 of the 1994 Act and hence the impugned notice dated 01.10.2010 issued by the Chief Executive Officer of the Anchalik Panchayat describing the writ Petitioner as member of the Anchalik Panchayat is set aside.

24. The issue whether the expression "total number of directly elected members" occurring in Sub-section (1) of Section 43 of 1994 Act means the total number of members constituting the Anchalik Panchayat or the existing members at the time of consideration of the motion expressing want of confidence, has not been gone into the present writ petitions, being not required, as it has been held that the no confidence motion adopted, against the President of the Anchalik Panchayat, was not in conformity with the said provisions of law, the same having not been passed by 2/3rd of even the existing members of the Anchalik Panchayat.

25. WP(C) No. 4815/2010, therefore, stands dismissed. WP(C) No. 5596/2010 stands allowed. No cost.