
(2020) 03 GAU CK 0015
In the Gauhati High Court
Case No : Writ Petition (C) No. 8955 Of 2019

Soma Chakraborty

APPELLANT

Vs

State Of Assam And 5 Ors

RESPONDENT

Date of Decision : 06-03-2020

Acts Referred:

Assam Municipal Act, 1956 — Section 298
Constitution Of India, 1950 — Article 243U(I), 311(2)

Citation : (2020) 03 GAU CK 0015

Hon'ble Judges : Prasanta Kumar Deka, J

Bench : Single Bench

Advocate : P J Saikia

Final Decision : Disposed Off

Judgement

1. Heard Mr. P. J.Saikia, learned counsel for the petitioner and Mr. D. Saikia, learned Senior Counsel assisted by Mr. A. Chaliha, learned counsel for all the respondents.

2. The notification No. UDD(M) 151/2009/358 dated 25.11.2019 was issued by the respondent no. 2 by way of which the respondent State in exercise

of power u/s 298 of the Assam Municipal Act, 1956 dissolved the Dibrugarh Municipal Board of which the petitioner was the Chairperson, with

immediate effect directing the respondent No. 4 to take charge of the Municipal Board. The said notification No. UDD(M) 151/2009/358 is under

challenge in this writ petition. The petitioner was elected as the Chairperson of the Dibrugarh Municipal Board(DMB, for short) in the Special Meeting

of the Board dated 24.4.2017 and assumed the charge. Some of the Ward Commissioners submitted a representation dated 26.9.2018 expressing their

no confidence on the petitioner. A Special Meeting of the Board was held on

31.10.2018 and the no confidence motion was passed and a resolution was taken for her removal.

3. The petitioner filed WP(C) 7684/2018 which was disposed of by setting aside the resolution dated 31.10.2018 with a liberty to the private

respondents therein to file fresh representation seeking for requisition of Special Meeting for no confidence against the petitioner. Though a fresh no

confidence motion was initiated against the petitioner but the same failed. Acting on some allegations after the second no confidence motion, the Joint

Secretary to the Govt. of Assam, Urban Development Department vide letter dated 11.4.2019 asked the petitioner to explain some of the allegations

against her. She replied vide her letter dated 8.7.2019. Again the Director of Municipal Administration, Assam respondent no. 3 on the basis of media

reports vide letter dated 14.10.2019 directed one Tasdiqur Rahman, SE & SEA to conduct an enquiry against the DMB. The petitioner cooperated

and respondent no. 6, the Executive Officer, DMB furnished all the documents and records but the Secretary to the Govt. of Assam, Urban

Development Department vide letter dated 24.10.2019 informed the petitioner several irregularities in the Board as per information of different

sources and identifying the charges specifically asked the petitioner to appear before the said authority on 4.11.2019. Vide letter dated 25.10.2019 the

petitioner requested for furnishing of the various enquiry reports to the Secretary, Urban Development Department for furnishing proper explanation.

As there was no communication nor any move to supply the same, she appeared before the authority on 4.11.2019. Certain questions were asked to

her and directed to write down her reply on oath and thereafter she could come to know from various print media that the DMB was dissolved by the

Government vide impugned notice dated 25.11.2019.

4. Mr. P. J. Saikia learned counsel for the petitioner assails the notification on the ground that the petitioner was never given opportunity to defend her.

Referring the letter dated 11.4.2019 against which the petitioner vide her letter dated 8.7.2019 replied, though the respondents considered the same to

be the reply against the purported show cause notice but, in fact the same cannot be considered to be a letter seeking for any explanation inasmuch as

by the said letter dated 11.4.2019, she was directed to take corrective measure on issues like lack of transparency , lack of record maintenance, to

look after/regulate the tender process etc. The respondent no. 3 vide his letter dated 14.10.2019 conducted an enquiry of the DMB through one Tasdiqur Rahman, S.E & S.E.A. of the said Directorate wherein the petitioner fully cooperated with him. Thereafter vide letter dated 24.10.2019 the list of alleged charges was issued to the petitioner thereby directing the petitioner to appear in person on 4.11.2019 to show cause as to why Section 298 of the Assam Municipal Act, 1956 (The Act, 1956, for short) should not be invoked. In the said letter dated 24.10.2019, it was specifically mentioned that on the basis of enquiries conducted by the Director, Municipal Administration and the Deputy Commissioner, Dibrugarh the charges were brought against the petitioner. Vide letter dated 25.10.2019 the petitioner sought for the copies of the alleged allegations as well as the enquiry reports. The enquiry reports were not handed over to the petitioner but even then she appeared before the concerned authority on 4.11.2019 and thereafter she was asked to answer some of the question which she did on oath. The questions were motivated in order to achieve the pre-determined decision of ousting the petitioner.

5. Mr. Saikia, learned counsel for the petitioner referring Section 298 of the Assam Municipal Act, 1956 submits that before dissolving the Board in case of incompetence, default or abuse of power, the State Government must have to form an opinion that the Board is not competent to perform or persistently makes default in performance of the duty imposed on the Board and then only on its satisfaction, the State Government is empowered to dissolve the Board. The manner in which the State Government formed its opinion and thereafter issued the impugned notification itself is not proper inasmuch as it is specifically mentioned in Section 298 of the Act, 1956 that such opinion is to be formed after giving a reasonable opportunity of being heard to the Board. As apparent from the show cause notice dated 24.10.2019 the charges referred therein were based on the enquiry reports by the Director, Municipal Administration and the Deputy Commissioner, Dibrugarh. In order to give her reply the petitioner sought for the enquiry reports which were not provided to the petitioner and as such non supply of enquiry reports itself is sufficient to set aside the impugned notification inasmuch as there is a specific violation of Section 298 of the Act, 1956 wherein it is specifically mentioned that reasonable opportunity of hearing must be given

to the petitioner.

6. One or two isolated failure to act would not amount to persistent default as stipulated under 298 of the Act, 1956. Persistent default in performance

of duty amounts to inability to perform which is a state of incapacity but it denotes a repeated failure to perform which is the result of conscious and

deliberate omission to act . In support of said contention, Mr. Saikia relies in Kerala Wakf Board and another Vs. State of Kerala and another

reported in AIR 1984 Kerala 57. The effect of Section 298 of the Act, 1956 is premature termination of the term of the Chairperson by casting upon

her the guilty of persistent default. Such action cannot be taken by the Government without any evidence. Relying Chandrama Tewari Vs. Union of

India reported in AIR 1988 SC 117, Mr. Saikia, further submits that principles of natural justice requires that the copy of the document relied upon

against the party charged should be given to him and he should be afforded to cross-examination of the witness and to produce witness in his defence.

The term "reasonable opportunity" includes an opportunity to deny the guilt and establish the innocence which a person can do if he is told what

the charge levelled against him and the allegation of such charges are based. Herein the present case in hand, the petitioner was not given the

opportunity to make her defence as per the accepted practice and procedure known to the law. Accordingly the impugned notification is liable to be

set aside and quashed.

7. The respondent no. 2 filed affidavit-in-opposition. Mr.D. Saikia learned Senior counsel for the respondents referring the statement made in the

affidavit-in-opposition submits that the Government of Assam in Urban Development Department vide letter dated 11.4.2019 issued specific 6(six)

nos. of allegations against the petitioner and after careful examination of authenticity of allegations and the enquiry reports dated 14.11.2019 of the

Director, Municipal Administration, Assam the show cause notice dated 24.10.2019 was issued to the petitioner seeking for her explanation of the

charges referred therein. Another enquiry report of Sri Tasdiqur Rahman SE & SEA, Directorate of Municipal Administration was preceded by the

Deputy Commissioner, Dibrugarh. In the enquiry report of Mr. Rahman it was reported gross official irregularities were found in the office of the

DMB while implementing various developmental works, Accounts/log books of

DMB were not maintained properly in respect of receipt and expenditure , vehicle register , Hoarding tax, assets, etc. The said enquiry officer also found irregularities in the tender process in allotment of markets and parking lots during 2015-16 and 2016-17. The petitioner on receipt of letter dated 24.10.2019 as directed appeared on 4.11.2019 before the Secretary Govt. of Assam, Urban Development Department. There she was shown all the relevant documents alongwith the charges made against her. Thereafter on her own volition the petitioner wrote her statement against the queries on oath. Accordingly the allegations that she was not given the opportunity to go through the records is totally false. From the various enquiry reports and having gone through the same, the petitioner admitted the charges on oath which is on record and such admission were taken into consideration before issuing the impugned notification. In compliance of Section 298 of the Act 1956, the petitioner was asked to appear on 4.11.2019 and on specific questions being put to her she admitted the charges which proves persistent default on the part of the Board within the scope of Section 298 of the Act, 1956. The petitioner was informed on 11.4.2019 about the default of the Board and before and after issuance of said letter dated 11.4.2019 enquiries were conducted and as there were no improvement in the functioning of the Board letter dated 24.10.2019 was issued informing the specific charges where the petitioner defaulted. Accordingly impugned notification was issued as per Section 298 of the Act, 1956 complying all its ingredients and as such no interference is required.

8. I have given due consideration to the submissions of the learned counsel. The records were called for and produced. From the records and the affidavit-in-opposition it is found as follows:-

(i) On 11.4.2019 letter was issued by the Joint Secretary to the Govt. of Assam Urban Development Department to the Chairman DMB with request

to take corrective measure on the following issues within one month. â?

- (A) Lack of persistency
- (B) Lack of record maintenance
- (C) No specific tender committee to look after / regulated tender process
- (D) Irregularities regarding Accounts/Hoardings
- (E) Irregularities regarding accounts of parking lots

(F) Irregularities regarding accounts of markets for the financial year, 2016-17 and 2017-18

(ii) Letter dated 25.10.2018 was issued by the Deputy Commissioner, Dibrugarh to the Director, Municipal Administration Department, respondent

no.3 in respect of receipt of written complaint alleging anomalies in the DMB and subsequent directions to the Treasury Officer, Dibrugarh to enquire

and the enquiry report wherein it was observed that due official procedures in different matters were not followed and official irregularities were also

detected in the accounts maintained by DMB relating to the settlement of markets, leasing out site for commercial development. The respondent No.3

visited on 11.10.2018 as per telephonic instruction of the Honâ??ble Chief Minister, Assam to review the function of DMB and thereafter a report

was submitted to the Secretary to the Govt. of Assam Urban Development Department.

(iii) Another enquiry report was submitted on 14.10.2019 by Tasdiqur Rahman SE & SEA of Directorate of Municipal Administration.

9. The petitioner was served with letter dated 24.10.2019 seeking explanation as to why Sec. 298 of the Act 1956 shall not be invoked against the charges:â??

(A) Improper maintenance of Main Cash Book/Log Books for office vehicles

(B) Improper maintenance of records of ULBsâ?? assets .

(C) Irregularities in leasing out Municipal Lands

(D) Conducting of Tender Process for allotment of market /Parking/ Hoardings etc without taking Boardâ??s resolution

(E) Financial Irregularities.

10. In the said show cause notice while framing the said charges the authority took note of several illegal activities which took place in DMB alleged

by different sources and the enquires conducted by the respondent no. 3 and respondent no.4 wherein the replies of the petitioner were not found to

be satisfactory. The petitioner upon receipt of letter dated 24.10.2019 vide her letter dated 25.10.2019 sought for copies of the allegations as well as

the enquiry reports. The same was disputed by Mr. Saikia, learned Senior Counsel that no such request was received by the concerned authority and

as such she appeared on 4.11.2019 and on her own volition having gone through the records answered the questions on oath thereby waiving her right

seeking for the documents as stated in the writ petition.

11. I have perused the records. It is found that the petitioner appeared before the Secretary and submitted one prayer to let her know the allegations/

charges against her. She was shown all the charges made against her on the basis of various enquires and thereafter she answered the questions on

oath put to her. There is no averment in the affidavit-in-opposition that the petitioner was supplied with each and every enquiry reports and to show

cause while issuing the letter dated 24.10.2019 alongwith the charges. The charges were framed on the basis of the inquiry reports so the petitioner

has a right to know the same.

12. Section 298 of the Act, 1956 stipulates before exercising the power by the State Government it has to form an opinion in respect of competency to

perform or persistently making default in the performance of the duties imposed on the Board or abuse of its power. Once the said opinion is formed,

a reasonable opportunity of being heard to the Board must be given and then only the power under the said provision could be invoked.

13. Article 243 U(I) of the Constitution alongwith its proviso are quoted hereinbelow:

â??243-U.Duration of Municipalities etc.(1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall

continue for five years from the date of appointed for its first meeting and no longer:

Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.â??

14. Section 298 of the Act, 1956 also stipulates about the reasonable opportunity of being heard must be given to the Municipal Board. Thus the said

right to hear is a constitutional right of the petitioner which must be followed in its strict sense.

15. In Khem Chand Vs. Union of India and others reported in AIR1958 SC 300 T. he term reasonable opportunity though in the light of Article 311(2)

of the Constitution of India was summarized as follows:

â??19. To summaries: the reasonable opportunity envisaged by the provision under consideration includes:

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges leveled against him are

and the allegations on which such charges are based;

(b) An opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other

witnesses in support of his defence; and finally

(c) An opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the

competent authority, after the enquiry is over and after applying his mind to the grainy or otherwise of the charges proved against the

government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant.

In short the subsistence of the protection provided by rules, like R. 55 referred to above, was bodily lifted out of the rules and together with

an additional opportunity embodied in S. 240(3) of the Government of India Act, 1935 so as to give a statutory protection to the government

servants and has not been incorporated in Art. 311(2) so as to convert the protection into a constitutional safeguard.â??

16. In Chandrama Tewari (supra) it was held that principles of natural justice required that the copy of the documents if any relied upon against the

party charged should be given to him and he should be afforded opportunity to cross-examine the witness and to produce his own witness in his

defence.

17. In Kerala Wakf Board (supra) a similar provision mentioning persistent default in performance of duty was under consideration and the term

persistent default and excess or abuse or abuse of power and its interpretation came out for its decision. It was held that the persistent default in the

performance of duty may not amount to incapability to perform which is a state of incapacity but it denotes repeated failure to perform which is the

result of conscious and deliberate omission to act. One or two isolated cases of failure to act would not amount to persistent default. If we consider

the aforesaid decision, in my opinion it is the duty of State Government to examine the facts and circumstances which are put as a defence by the

Municipal Board for explaining its conduct. The consequence of dissolution of the Municipal Board before completion of its term is a drastic step and

completion of the term is guaranteed by the Constitution. As such the State Government before invoking its power u/s 298 of the Act 1956 has a

statutory duty to strictly observe and see that there is no violation of the principle of natural justice against the Board.

18. In the present case in hand, as hereinabove stated the petitioner even on 4.11.2019 made a prayer before the Secretary, Urban Development

Department for the charges to be shown to her and as per the records she was allowed to go through the charges and thereafter she answered the

questions on oath. In my considered view as hereinabove stated there are various enquiry reports and a duty was cast upon the respondent State to

hand over all the enquiry reports at least alongwith the charge memo giving a chance to the petitioner to rebut the charges and give an explanation

against persistent default of the Board. From the records it is not at all discernible as to whether all the enquiry reports were shown to the petitioner.

Accordingly, I am convinced that before issuance of the impugned notification dated 25.11.2019 issued by the respondent no.2, the respondent State

failed to give appropriate opportunity to defend the Board by the petitioner and as such, I am constrained to set aside and quash the notification

bearing No. UDD(M) 151/2009/358 dated 25.11.2019.

19. The respondents shall be at liberty to issue fresh show cause notice alongwith all the enquiry reports on the basis of which the State respondents

formed its opinion that the Board persistently made default in performance of the duties imposed on it and not competent to perform the duties within a

period of 10(ten) days from the receipt of this copy of the order and thereafter a de novo proceeding shall be conducted and the same shall be

completed within a period of 15 days from the date of receipt of the response of the petitioner. On the other hand, the petitioner is directed to

cooperate so that the enquiry could be completed within the aforesaid period.

20. This writ petition stands disposed of with the aforesaid observation and direction. No costs.