

(1993) 06 GAU CK 0006
In the Gauhati High Court
Case No : Writ Appeal No. 81 of 1993

Subhash Gope and Another	Vs	APPELLANT
Utpal Nandi and Another		RESPONDENT

Date of Decision : 08-06-1993

Acts Referred:

Assam Municipal Act, 1956 — Section 11(3)
Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1983 — Rule 3
Constitution of India, 1950 — Article 14, 309

Citation : AIR 1994 Guw 47

Hon'ble Judges : U.L. Bhat, C.J.; R.K. Manisana, J

Bench : Division Bench

Advocate : A.R. Borthakur and D.P. Chaliha, for the Appellant;

Final Decision : Dismissed

Judgement

U.L. Bhat, C.J.—This writ appeal is filed against the judgment of the learned single Judge of this Court allowing the writ petition in Civil Rule No. 2825 of 1992. We have heard learned counsel for the appellants. We find it unnecessary to issue notice to the other side.

2. We are concerned in this case about the Constitution of Municipal Board, Dhekiajuli. u/s 11(3) of the Assam Municipal Act, 1956 (for short, the Act), ten Commissioners were elected by the electors and two, namely, appellants, were nominated by the State Government. These twelve Commissioners were to meet and elect the Chairman, and Vice-Chairman of the Board. At that stage one of the elected Commissioners filed the writ petition challenging the nomination of the appellants as Commissioners. The first appellant was nominated on the ground that he is a member of other socially and educationally Backward Classes (OBC), the second appellant was nominated as a member belonging to Scheduled Castes (SC). The writ petitioner contended that the first appellant did not belong to OBC and, in any event, his nomination would not be lawful since

three of the ten elected Commissioners belong to OBC. Nomination of second appellant was challenged on the ground that he does not belong to Scheduled Castes and he belongs to Barman community, which is recognised as Scheduled Caste only in Cachar. The first appellant filed counter-affidavit on behalf of himself and second appellant. On behalf of the State Government, Additional Secretary in the Department concerned has sworn the counter-affidavit.

3. The learned single Judge has held that the legislative purpose underlying Section 11(3) of the Act is to ensure that Scheduled Castes, Scheduled Tribes and OBCs are given representation in the Board and, therefore, all these communities are to be represented in the Board and the Government has no power to nominate a member of a category already represented in the Board. On this ground the nomination of the first appellant as representing OBC, which is already represented by three elected Commissioners, has been quashed. The learned single Judge held that the second appellant is not shown to belong to Scheduled Castes disregarding the certificate issued by the President, Assam Scheduled Castes Development Council. The reasoning and conclusions of the learned single Judge are now challenged.

4. Section 11 of the Act deals with the Commissioners of Municipal Boards. Subsection (1) of Section 11 states that the number of Commissioners of each Municipal Board shall be such as the State Government may, by notification determine in this behalf, subject to minimum of ten and maximum of thirty. Subsection (3) of Section 11 reads thus :

"Of the total number of Commissioners as determined under Sub-section (1), not more than two may be appointed by the State Government to represent Scheduled Castes, Scheduled Tribes and other socially and educationally Backward Classes, and the remainder shall be elected. The State Government may at any time, direct that all the Commissioners of any Municipal Board shall be elected."

5. The above provision confers power on the State Government to nominate not more than two Commissioners to represent Scheduled Castes, Scheduled Tribes and Other Backward Classes. The two appellants were nominated as representing Other Backward Classes and Scheduled Tribes, respectively, even though three among the elected Commissioners belong to Other Backward Classes (OBC), Learned single Judge took the view that the power of the State Government does not extend to nominate member of one of the three communities which is already represented among the elected commissioners. Learned counsel for the appellants contends that the statute has not imposed any such restriction on the power exercisable by the State Government which has absolute power to nominate two commissioners from any one of the three categories referred to even if such category or categories are represented among the elected commissioners.

6. In *Kathi Raning Rawat Vs. The State of Saurashtra*, a Constitution Bench

observed (at p. 132 of AIR):

""... If the legislative policy is clear and t definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself" cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute. The discretion that is conferred on official agencies in such circumstances is not an unguided discretion; it has to be exercised in conformity with the policy, to effectuate which the direction is given and it is in relation to that objective that the propriety of the classification would have to be tested. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the legislature, its action can certainly be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure the statute would be held on the face of it to be discriminatory irrespective of the way in which it is applied."

7. In *Biswambhar Singh and Others Vs. The State of Orissa and Another*, a Constitution Bench observed (at p. 144 of AIR):

"..... Whatever discretion has been vested in the State Government u/s 3 or Section 4 must be exercised in the light of this policy, and, therefore, it cannot be said to be an absolute or unfettered discretion...."

8. In *Ram Sarup Vs. The Union of India (UOI) and Another*, a Constitution Bench observed (at p. 252 of AIR):

"".....The question then is whether the discretion of the officers concerned in deciding , as to which Court should try a particular accused can" be said to be an unguided discretion, as contended for the appellant. Section 125 itself does not contain anything which can be said to be a guide for the exercise of the discretion, but there is sufficient material-in the Act which indicates the policy which is to be a guide for exercising the discretion and it is expected that the discretion is exercised in accordance with it."

9. In *LaLa Hari Chand Sarda Vs. Mizo District Council and Another*, the court held Section 3 of the Lushai Hills District (Trading by non-Tribals) Regulation (2 of 1953) and the Rules framed thereunder to be ultra vires. The Court observed (at p. 832 of AIR):

"Even though it may perhaps be said that the Sixth Schedule to the Constitution shows, a policy to safeguard the tribals from being exploited and the regulation was enacted in exercise of the power conferred thereunder that is not enough to save the restriction from the vice of being unreasonable. It provides no principles on which such a policy is to be implemented..... Indeed the Regulation does not

contain any provision laying down what is and what is not a proper cause for refusal. Equally does it not show any guiding criterion on which the Committee should decide to grant or refuse a licence or its renewal. ... Therefore even if the Sixth Schedule can be said to contain a policy and the Regulation may be said to have been enacted in pursuance of such a policy the analysis of the Regulation shows that that is not sufficient. Even if a statute lays down a policy it is conceivable that its implementation may be left in such an arbitrary manner that the statute providing for such implementation would amount to an unreasonable restriction."

See also *Maneklal Chhotalal and Others Vs. M.G. Makwana and Others*, and *Ram Bachan Lal Vs. The State of Bihar*,

10. In *M.M. Ipoh and Others Vs. Commissioner of Income Tax, Madras*, dealing with the challenge on Section 3 of the Income Tax Act, 1922 as conferring an unguided power on the statutory authority, the Supreme Court observed (at pp. 321 and 322 of AIR):

"Section 3 (of the Income Tax Act, 1922), does not, it is true, expressly lay down any policy for the guidance of the Income Tax Officer in selecting the association or the members individually as entities in bringing to tax the income earned by the association. Guidance may still be gathered from the other provisions of the Act, its scheme, policy and purpose, and the surrounding circumstances which necessitated the legislation. In considering whether the policy or principles are disclosed, regard must be had to the scheme of the Act."

11. In *the State of Mysore Vs. S.R. Jayaram*, a Constitution Bench considering a part of Rule 9(2) of the Mysore Recruitment of Gazetted Probationers" Rules, 1959 found that the Rule reserves to the Government the right of appointing to any particular cadre any candidate whom it considers to be more suitable for such cadre, that the Rules are silent on the question as to how the Government is to find out the suitability of a candidate for a particular cadre, that the Rules do not provide for the Government testing the suitability of any candidate for any cadre after the result of the examination is published and held that the Rule confers on the Government arbitrary power and therefore it was violative of Articles 14 and 16(1) of the Constitution and must be struck down.

12. If Section 11(3) of the Act is to be interpreted as conferring an absolute and unguided power on the Government to make nominations the provision may be perilously close to offending Article 14 of the Constitution. In the circumstances the court has a duty to see whether any guidelines can be inferred from the provision in question or the broad objects, purpose and scheme of the statute or the other provisions of the Act.

13. The Act, as the preamble indicates, is intended to provide for the organisation and administration of municipalities in Assam. The Act deals primarily with constitution of municipalities, constitution of municipal boards consisting of body of commissioners to administer municipalities, functions and

powers of the municipalities and various office-bearers and staff of the municipalities and administration and discharge of municipal functions. According to the scheme for constitution of municipal boards, the number of commissioners of each board is to be determined by the State Government. State Government may appoint Government servants as expert advisers who shall have the right to attend and speak at all meetings of the board without any right to vote. Of the total number of commissioners determined by the State Government, not more than two may be appointed by the State Government to represent Scheduled Castes (SC), Scheduled Tribes (ST) and other socially and educationally backward classes (OBC) and the remainder shall be elected. The Scheduled Castes and Scheduled Tribes specified under Articles 341 and 342 of the Constitution and other backward classes as notified from time to time by the State Government shall be deemed to be the SCs, STs and OBCs, respectively, within the meaning of the Act. The legislature in providing for nomination of members of such backward classes has taken note of the pre-ambular promise of the Constitution of social, economic and political justice as also the constitutional concern expressed for such backward classes and necessities of local self-government. Legislature obviously felt that in the stark reality of social, economic and political situation in the State, these backward classes may not secure elected representation or adequate elected representation." Local self-government without representation or adequate representation to the socially and educationally backward classes like SCs, STs and OBCs will not be real or effective local self-government. It is clear that the object of the provision is to ensure that the municipal Boards effectively represent SCs, STs and OBCs so as to become dynamic instruments of local self-government, development and grassroots democracy.

14. The provision for nomination contained in Section 11(3) of the Act read in the light of the objects and purpose of the statute and the Constitutional concern in regard to promotion of local self-Government and to render justice to such depressed and oppressed classes, must be taken to contain implicit and definite guide lines. The guidelines mainly are that the power of nomination must be exercised to make up for absence of representation or under representation of SCs, STs and OBCs among the elected commissioners. If two among the three categories are unrepresented, the Government is required to nominate suitable persons from the unrepresented categories. If one category alone is unrepresented and the other two categories are represented, the power is to be exercised having regard to the needs of the local self-government and the composition of electors. The same are the guidelines to be applied when all the three classes are represented. Naturally preference has to be given to the most backward among the three communities whenever it becomes necessary to make a choice of any one or two among the three categories. These broad guidelines are implicit in the provision read in the light of the broad scheme and object of the Act and viewed in the light of Constitutional concern referred to above. If the provision is read as containing these guidelines, it cannot be said that it confers

on the Government arbitrary and unguided power of nomination and the provision will not offend Article 14 of the Constitution.

15. Viewed in the light of the guidelines indicated above it is clear that the nomination of a person belonging to OBC in spite of three members of OBCs being elected as commissioners, has to be struck down as illegal. Nomination of the first appellant was rightly quashed by the learned single Judge.

16-17. Second appellant claims to be a member of Malo community and he further claims that Malo community is included in the Presidential List of Scheduled Castes. We find from the Constitution (Scheduled Castes) Order, 1950 that Malo community falls within item 2, Part-II relating to Assam. Therefore, the surviving controversy is whether the second appellant is a member of Malo community. The second appellant relied on a certificate issued by the President, Assam Scheduled Castes Development Council to show that he belongs to Malo community. The learned single Judge has not acted on this certificate.

18. Our attention is invited to certain parts of Rule 3 of the Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1983. Sub-rule (1)(a) of Rule 3, as it originally stood, stated that Scheduled Caste MLAs and Scheduled Caste MPs, subject to approval by the Deputy Commissioner, and members of the Advisory Council for Welfare of Scheduled Castes were authorised to issue caste certificates within the jurisdiction of the district which they represent and the Chairman of the Sub-Divisional Scheduled Castes Development Board within the jurisdiction of the subdivision concerned and the President and Vice-President of the Assam Anusuchit Jati Parishad and the Presidents of different district and sub-divisional units were authorised to issue certificates within their jurisdiction. By the amendment introduced in 1991 it is made clear that the Deputy Commissioner of the concerned district of which the candidate is a resident is authorised to grant certificate after holding enquiry through sub-Divisional Officers and functionaries. The Deputy Commissioners are empowered to obtain assistance as they think fit and proper from the members of the authorised Advisory Council for Welfare of Scheduled Castes, the Chairman, Sub-Divisional Scheduled Castes Development Board, President, Anuchuchit Jati Parishad and President of the district and sub-division level units of the Parishad. It is true, as pointed out by the learned counsel for the appellants, that this rule in terms applies only in cases of filling up vacancies in civil posts and not for nomination under the provisions of the Act. But then it is also not shown how President of Assam Scheduled Castes Development Council, is empowered to issue such certificate. The status and constitution of the organisation is not disclosed by the appellants, Therefore the certificate can have no sanctity. It is possible to hold that certificate issued by the Deputy Commissioner after due enquiry can be accepted in proof of the fact that a candidate belongs to Scheduled Castes or Scheduled Tribes or OBCs. The learned single Judge was right in disregarding the certificate relied on by the second appellant. In this view, the learned single Judge was justified in setting aside the

nomination of the second appellant.

19. We would, however, like to make it clear that the judgment of the learned single Judge and our judgment do not mean that the second appellant is not a member of Malo community or not a member of Scheduled Castes community. That matter has to be considered afresh by the State Government when it undertakes the process of making fresh nomination. It is expected that the State Government will satisfy itself about the status of persons to be nominated on the basis of reliable materials. With these observations the writ appeal is dismissed. There will be no order as to costs.