

(2020) 07 GAU CK 0011

In the Gauhati High Court

Case No : Writ Petition (C) No. 2151, 2135 Of 2020

Surya Phukan

APPELLANT

Vs

State Of Assam And Ors

RESPONDENT

Date of Decision : 14-07-2020

Acts Referred:

Assam Municipal Act, 1956 — Section 26(1), 26(5), 298, 299
Constitution Of India, 1950 — Article 56(1), 56(1)(c), 62(1), 162, 243(K), 243(U),
243(U)(3)(a), 243(ZA)

Citation : (2020) 07 GAU CK 0011

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : M Biswas, P N Goswami

Final Decision : Dismissed

Judgement

1. The subject matter of challenge of these two writ petitions being similar, the same are disposed of by this common judgment and order. The

petitioners herein have put to challenge an order by which, on the expiry of the term of the Municipal Board, it is provided that the charge should be

handed over to the Deputy Commissioner and Sub-Divisional Officer (Civil). The further prayer made in these two writ petitions is to allow the

petitioners to continue in their positions of their respective Municipal Boards till fresh election for the same is held. Â

2. For better appreciation of the issue at hand, bereft of details, the minimum facts can be culled down as follows.

3. WP(C) No.2135/2020 is filed by the erstwhile Chairman and three members of Ward Commissioners of the Hailakandi Municipal Board (for short

HMB) whereas, WP(C) No.2151/2020 is filed by the erstwhile Chairman of the North Lakhimpur Municipal Board (for short LMB). The petitioners

were elected in their respective posts and the tenure prescribed under Section 26(1) of the Assam Municipal Act, 1956 (for short Act) being five

years, the said period was coming to an end. At that time, instead of issuing notification for holding a fresh election, an order dated 01.04.2020 was

passed by the Deputy Commissioner, Hailakandi observing that on completion of the five years term, Shri Tridib Roy, Circle Officer, Hailakandi

Revenue Circle and Executive Officer, HMB was entrusted to take over the Board w.e.f. 03.04.2020. The aforesaid communication was issued

pursuant to a WT Message dated 31.03.2020 issued by the Urban Development Department, Government of Assam to the Deputy Commissioners

and the Sub-Divisional Officers (Civil). While the petitioners in WP(C) No.2135/2020 have annexed the order of appointing the Executive Officer to

run the Municipal Board in question, no such order has been annexed so far as WP(C) No.2151/2020 is concerned. In fact in WP(C) No.2151/2020,

no order of actual handing over of charge to the Executive Officer has ever been annexed. So far as LMB is concerned, such order was issued by the

Deputy Commissioner. It is the case of the petitioners that the elections not being able to be held within the prescription of the statute, regarding

tenure for reasons not attributable to the petitioners, in lieu of the present action of running the Municipal Board by the Executive Officer/Deputy

Commissioner, the petitioners, who were the elected representatives be allowed to continue in the office till such elections are held. It is contended

that such action would be inconsonance with the constitutional mandate of having a federal structure of governance wherein decentralization of

powers are to be carried out and administration should be run from the grass root level.

4. I have heard Shri KP Pathak, learned Senior Counsel for the petitioners assisted by/along with Shri M Biswas, learned counsel. I have also heard

Ms. M Bhattacharjee, learned Addl. Senior Govt. Advocate representing the State of Assam as well as Shri N Borah, learned Standing Counsel,

Assam State Election Commission. I have also heard Shri D Saikia, learned Senior Counsel, who has been appointed as Amicus Curiae in this case.

5. Shri Pathak, learned Senior Counsel for the petitioners submits that for a fair adjudication of this case, the following issues would require

consideration: -

1. Issue: Whether on the failure of the State Election Commission to hold election for newly constituting the Hailakandi Municipal Board upon the expiry of its term, in terms of Article 243 U (3) (a) of the Constitution of India, for reasons other than the existing pandemic reasons, the State

Government or the Deputy Commissioner could have issued the impugned order dated 01.04.2020 directing the Circle Officer to take charge of the Municipal Board?

2. Issue : If answer to the Issue No.1 is in the negative, whether the outgoing elected Body of the Municipal Board, under the facts and circumstances of the case, ought to have been directed to continue to hold the charge of the Municipal Board till the newly Body assumes office?

Accordingly, the learned Senior Counsel has advanced his arguments in connection with the above two issues formulated by him.

6. It is submitted that the impugned action is not in consonance with the constitutional mandate to have an elected representative at all stages, including the grass root level. It is submitted that when the petitioners are not at fault for not holding the election in time, the option available to the State to allow the elected representatives to continue would be a better option by which the concept of decentralization of powers would actually be kept alive.

7. As regards the statutory provisions mentioned in the impugned order, the learned Senior Counsel has submitted that Section 26 (1) of the Act could not have been taken resort to inasmuch as, a reading of the said provision does not envisage any such powers being vested upon the State. Drawing the attention of this Court to the affidavit-in-opposition filed by the Department in WP(C) No.2151/2020, it is submitted that the State Government could not have taken the aforesaid stand as the entire responsibility of conducting the election is vested upon the State Election Commission and the role of the State Government is only to assist the Election Commission. No reasons having been disclosed by the Election Commission in these proceedings, the State is precluded from taking up any defence in this regard. Alternatively, it is submitted that even assuming that the stand of the State Government is the stand of the Election Commission, Rule 19 of the Assam Rules of the Election of Commissioners of Municipal Boards under the Assam Municipal Act, 1956 (for short hereafter Rules) mandates the Commission to initiate the process for holding election at least three months

prior to the expiry of the present term. However, no such steps were seen to be initiated which was to be done latest by 01.01.2020 and at that time,

the reason of pandemic was not existing at all. It was only vide notification dated 25.03.2020 that pandemic was declared. It is further submitted that

the reason cited as "various reasons" is absolutely vague and do not deserve any consideration.

8. Dealing with the grounds rely upon by the State Government in the affidavit, the learned Senior Counsel for the petitioners has submitted that the

ratio laid down by this Court in the case of Bimalendu Roy & Ors. Vs. State of Assam & Ors. has to be understood in the context of the facts of the

case and the same cannot be mechanically adopted to suit the purpose of the State Government to defend itself. In the said case, a Division Bench of

this Court, while striking down Section 26(5) of the Act had allowed the Executive Officers to take over the Municipalities for the interim period taking

note of the fact that private persons were nominated by the State Government and it was the choice between nominated private persons and the

Executive Officers of the Government. It is further submitted that Section 26(5) of the Act having been struck down, the present action would be in

violation of the direction of the Division Bench.

9. The attempt of the State Government to rely upon Article 162 of the Constitution of India has been severely criticized by the petitioners by

submitting that the powers conferred to the State Government by Article 162 of the Constitution is subject to the other provisions of the Constitution of

India. It is submitted that running of a Municipality through an Executive Officer is against the very definition of Municipality being a local self-

government only.

10. The learned Senior Counsel has also drawn an analogy between Article 243U with Articles 56(1) and 62(1) of the Constitution of India. It is

submitted that the term an election of the President embodied in the aforesaid two articles being almost identical, the Government had no other option

but to allow the elected Members to continue till holding of the election.

11. Shri Pathak, learned Senior Counsel lastly submits that even assuming that Article 162 of the Constitution empowers the State Government to take

the aforesaid measures to run the Municipality, such powers need not necessarily mean running of such Municipality through an Executive Officer. By

referring to the “doctrine of silence” as adopted by the Hon’ble Supreme Court, it is submitted that when the Constitution is silent on any

issue, the said doctrine can be taken resort to uphold the spirit and the basic structure of the Constitution which include a federal structure with

decentralization of powers. In support of the aforesaid submissions, Shri Pathak, learned Senior Counsel relies upon the following decisions: -

1) (1974) 2 SCC 33 (In Re Presidential Poll);

2) (2006) 8 SCC 352 (Kishansingh Tomar Vs. Municipal Corporation of the City of Ahmedabad & Ors.); and

3) (2010) 12 SCC 1 (Bhanumati & Ors. Vs. State of Uttar Pradesh & Ors.).

Reference has also been made to the case of Bimalendu Roy & Ors. Vs. State of Assam & Ors., reported in (2010) 6 GLR 388.

12. In the case of In Re Presidential Poll, the Hon’ble Supreme Court had held that the outgoing President, notwithstanding the expiration of the

term continues to hold office under Article 56(1) until his successor enters upon office. For ready reference, paragraph 18 of the said judgment is

extracted hereinbelow: -

“18. The term of office of the President is fixed. The election to fill the vacancy caused by the expiration of the term is to be completed before the

expiration of the term. It is in that context that the outgoing President notwithstanding the expiration of the term continues to hold office under Article

56 (1) until his successor enters upon office. The successor can only enter upon his office after he takes the oath under Article 60. He can take oath

only after the election. It is possible that the successor cannot enter upon his office on the day following the expiration of the term of office of the

outgoing President for unavoidable reasons. That is why Articles 56 (1) (c) and 62 (1) are to be read together to give effect to the constitutional intent

and content that the election to fill the vacancy caused by the expiration of the term of the President is to be completed before the expiration of the

term.”

13. The case of Kishansingh Tomar (supra) has been referred in support of his submission that under exceptional circumstances, the tenure of a

Municipality may be extended, however, the same shall not be a regular feature. Paragraph 21 is quoted hereinbelow: -

“21. It is true that there may be certain man-made calamities, such as rioting

or breakdown of law and order, or natural calamities which could distract the authorities from holding elections to the municipality, but they are exceptional circumstances and under no (sic other) circumstance would the Election Commission be justified in delaying the process of election after consulting the State Government and other authorities. But that should be an exceptional circumstance and shall not be a regular feature to extend the duration of the municipality. Going by the provisions contained in Article 243- U, it is clear that period of five years fixed thereunder to constitute the municipality is mandatory in nature and has to be followed in all respects. It is only when the municipality is dissolved for any other reason and the remainder of the period for which the dissolved municipality would have continued is less than six months, it shall not be necessary to hold any elections for constituting the municipality for such period.â??

14. The case of Bhanumati (supra) has been cited to bring in the concept of â?? doctrine of silenceâ?. The relevant paragraph 49 is quoted

hereinbelow: -

â??49. Apart from the aforesaid reasons, the arguments by the appellants cannot be accepted in view of a very well-known constitutional doctrine, namely, the constitutional doctrine of silence. Michael Foley in his treatise on The Silence of Constitutions (Routledge, London and New York) has argued that in a Constitution â??abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the Constitution that they evoke, rather than the content or substance of their stricturesâ??.â??

15. The case of Bimalendu Roy (supra), has been referred inasmuch as, the same has found mention in the affidavit filed by the State respondents. A

Division Bench of this Court by the aforesaid judgment had declared the provision of Section 26(5) of the Act to be ultra vires. Further, the State

Government was directed to appoint Executive Officers to run the Municipalities till an elected Body takes over charge. As stated above, the

submission of the learned Senior Counsel is that such direction was given in the context of the facts wherein an option had to be exercised between a

private nominated individual and an Executive Officer of the State and, therefore, it cannot be taken to be a mandate or direction of this Court.

16. Ms. M Bhattacharjee, learned Addl. Senior Government Advocate, Assam has

vehemently opposed the writ petition. Referring to the affidavit-in-opposition, filed on 06.06.2020 by the State respondents, it is submitted that under Article 243U of the Constitution of India, the term of a Municipality has been fixed as five years. Therefore, there is no constitutional mandate to extend the term beyond five years. It is further submitted that due to the outbreak of COVID 19 pandemic, the elections for the Municipalities could not be held which had necessitated the issuance of the WT Message dated 31.03.2020 directing the Deputy Commissioner and SDO (C) to take over charge of the Municipal Boards whose term had expired. The same was done to overcome the prevailing situation and to prevent any constitutional breakdown. The learned Addl. Senior Government Advocate has also drawn the attention of this Court to the pleadings made in paragraph 7 of the affidavit wherein reference to the case of Bimalendu Roy (supra) has been made whereby the Division Bench had directed for appointment of suitable officers of the State to run the Municipalities till regular elections are held. Further, Article 162 of the Constitution empowers the State to take such action to discharge the normal functions and activities of the State. She further submits that under Article 243U, the tenure of a Municipality is five years and no longer (emphasis given) coupled with the fact that there is no provision for extension. Ms. Bhattacharjee has referred to Chapter VIII of the Act starting from Section 293 which deals with control over the Municipalities by the Commissioner etc. It is submitted that when the statute itself provides for such control, there would be hardly any scope for the petitioners to maintain the present challenge. She further submits that in the instant cases, the charges have already been handed over and the cases cited are all prior to expiry of the terms. As a matter of fact, so far as North Lakhimpur is concerned, the charge was handed over on 31.03.2020 and so far as Hailakandi is concerned, the charge was handed over on 02.04.2020. It is accordingly submitted that everything has been done taking into consideration the prevailing situation and there is no mala fide or arbitrariness which would require interference of this Court.

17. The Assam State Election Commission which has been arrayed as respondent no.5 in the writ petitions has opposed the prayer of the petitioners by filing an affidavit-in-opposition in WP(C) No.2151/2020. Referring to the pleadings in paragraph 5 of the affidavit-in-opposition, Shri N Borah,

learned Standing Counsel, Assam State Election Commission (for short Election Commission) has submitted that out of 81 numbers of Municipal

Boards, the term of 79 Municipal Boards were coming to an end in April, 2020. However, due to various reasons, including preparation of electoral

rolls for the various Municipalities as well as the elections of the Bodoland Territorial Council, there were certain delay. Further, there was change in

the office of the State Election Commissioner and the present Commissioner had taken charge on 01.01.2020. At that time, the agitation relating to

Citizenship Amendment Act (CAA) was on full swing in the State which led to further delay and, in the meantime, the pandemic which was already

prevailing was officially notified. For the aforesaid reasons, the elections could not be held in time and under the Act and the Rules, there is no

provision for extension of the tenure of a Municipal Body.

18. Shri D Saikia, learned Senior Counsel has assisted the Court as an Amicus Curiae. In this regard, reference may be made to an order dated

08.05.2020 by which this Court had directed the Registry to show the name of Shri D Saikia, learned Senior Counsel as the Amicus Curiae. Shri

Saikia, the learned Amicus Curiae has drawn the attention to the prayers made in the writ petition, being WP(C) No.2151/2020 which are, firstly, to

set aside the communication dated 31.03.2020 and secondly, to allow the petitioner to resume as Chairman of the concerned Municipal Board.

According to the learned Amicus Curiae, the notification dated 31.03.2020 is without any statutory backing inasmuch as, Section 26(5) of the Act has

been struck down. At the same time, the direction to allow resumption of office of the Chairman by the petitioner will be against the mandate of

Section 26(1) of the Act and Article 243U of the Constitution of India. Reference has also been drawn to the provisions of the Sixth Schedule to the

Constitution of India, more particularly, Paragraph 2(6A). It is submitted that the proviso empowers the Governor to extend the tenure of the Council

under certain exceptional circumstances. Specifically dealing with the provision of Article 243U, it is submitted that there is no scope for extension of

the term of the Municipality and in the present case, the elections could not be held because of the outbreak of the present pandemic of COVID 19. It

has also been submitted that so far as North Lakhimpur is concerned, a notification was already published regarding holding of elections in five phases,

out of which two phases were already done. By citing the case of Kishansingh Tomar (*supra*), the learned Amicus Curiae has submitted that upon

expiry of the tenure, the petitioners become *functus officio* and, therefore, the question of extension does not arise. He submits that to come over the

present situation, there may be requirement of bringing out of an Ordinance.

19. Shri Pathak, learned Senior Counsel for the petitioners in his rejoinder has submitted that under Article 243ZA of the Constitution, the responsibility

to conduct elections in the Municipalities has been vested on the Election Commission. The reasons cited by the Election Commission for not being able

to initiate the process of election being vague, by applying the Doctrine of Silence, the concept of local self-government which is a part of the

Preamble to the Constitution can be upheld by allowing the elected representatives to continue in the office. He further submits that no action of the petitioners is cited as a reason for not being able to hold the election in time.

20. The rival submissions made by the learned counsel have been carefully considered and the materials before this Court have been duly scrutinized.

21. For better understanding of the issue at hand, the provisions of law connected to this *lis* are quoted hereinbelow.

First let us examine the relevant provisions of the Assam Municipal Act and the Rules. Section 26. General election and terms of office of

Commissioners

(1) Every Municipality unless sooner dissolved under Section 298, shall continue for five years from the date of first meeting of newly constituted

Board after a general election at which quorum is present.

(5) If the term of the office of the Commissioner expires and for any reason the election cannot be held, the Board shall be deemed to have been

dissolved under Section 298 with effect from the date of expiry of the term and thereafter the provisions of Section 299 shall apply.

The Constitution of India:

Article 243K. Elections to the Panchayats

(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be

vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election

Commissioner shall be such as the Governor may by rule determine:

Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like ground as a Judge of a High

Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff

as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1).

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provisions with respect to all matters relating to, or in

connection with, elections to the Panchayats.

Article 243U. Duration of Municipalities, etc. â?

(1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its

first meeting and no longer:

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

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning

immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed, â?

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that whether the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be

necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the

period for which the dissolved Municipality would have continued under clause (1) had it not been so dissolved.

Article 243ZA. Elections to the Municipalities â?

(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in Article 243K.

(2) Subject to provisions of this Constitution, the Legislature of a State may, by law, make provisions with respect to all matters relating to, or in connection with, elections to the Municipalities.

22. Section 26(1) of the Act mandates the term of an elected Body of a Municipality to be five years and in this case, there is no doubt that the tenure of five years had expired on 31.03.2020 (North Lakhimpur) and 02.04.2020 (Hailakandi). The struck down provisions of Section 26(5) of the Act was

in connection with dissolution of a Body on expiry of the term under the deemed provisions of Sections 298 and 299. The Division Bench of this

Honâ??ble Court in the case of Bimalendu Roy (supra) had struck down the said provision due to the fact that deeming Section 298 was in

connection with incompetence, default or abuse of powers which cannot be brought in for not being able to hold the election on expiry of the term.

23. Article 243U of the Constitution which is with regard to duration of Municipalities clearly lays down the same to be five years and no longer.

Article 243ZA is with regard to the powers vested with the State Election Commission to conduct the elections to the Municipalities.

24. On perusal of the two issues formulated from the side of the petitioners, though it appears that there has been some default in initiating the process

to hold the elections, whether such elections could have been able to be completed prior to the expiry of the term which were on 31.03.2020 and

02.04.2020 are matters of speculation. This Court is conscious of the fact that though a formal notification for COVID 19 was issued on 25.03.2020,

the fear psychosis as well as pre-cautionary measures were seen to be taken from the early part of March, 2020. In any case, in the event of not

holding the elections in time whether the tenure of the elected representatives can be extended is the primary issue which needs to be answered.

25. Though the learned Senior Counsel for the petitioners has tried to invoke the Doctrine of Silence, in the face of the express provision of Article

243U, the said doctrine would not have any application. The objective of the Constitution to have a federal structure and decentralization of powers

will not be eroded by a temporary measure to run the Municipalities through an Executive Officer till the present pandemic is over and elections are

held. It is not a case where the Municipalities have ceased to function and rather the functioning of the Municipalities is even more in view of the

present need. In view of the same, the case of Bhanumati (supra) will not be helpful to the petitioners.

The other case laws cited would also not come to the aid of the petitioners. So far as the case relating to the Presidential Reference is concerned, the

Constitution itself mandates continuation of the President notwithstanding expiry of the term until his successor enters upon the office. For ready

reference, Article 56 (1) (c) is extracted here in below: -

â??56. Terms of office of President â??

(1) The President shall hold office for a term of five years from the date on which he enters upon his office:

(a) the President may, by writing under his hand addressed to the Vice-President, resign his office;

(b) the President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in Article 61;

(c) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.â??

26. The Honâ??ble Supreme Court in the case of Kishansingh Tomar (supra) has clearly laid down that the tenure of the Municipalities is 5 years.

27. On the other hand, this Court finds force in the argument of the learned Addl. Senior Government Advocate that in absence of any provision for

extension of the term, the prayer of the petitioners are not tenable. Further, when the statute itself vests the power to control over the Municipalities

upon the State, the impugned notification cannot be said to be fret with illegality. This Court also finds force with the submission that in the instant

cases, the charges were already handed over by the petitioners and therefore, the writ petitions are actually infructuous. The submission of the learned

Amicus Curiae that unlike there being a provision for extension for a term of a Council under the Sixth Schedule of the Constitution of India, there is

no such provision so far as Municipalities are concerned and rather, a contrary

provision exists, is also a relevant consideration for adjudication of this case.

28. This Court is also of the view that the source of power to sit in the office of a Municipality is the mandate given by the people as voters and that mandate is only for the period prescribed in the statute holding the field. This fact is fortified by the expression used by the Constitution makers in inserting the word and no longer in Article 243U. In absence of such mandate after expiry of the term prescribed by law, in the opinion of this Court, the petitioners would not have any enforceable right to maintain the present challenge. In fact, the very locus of the petitioners to maintain the present challenge would be questionable. The elections to the Municipalities being a part of the Constitution which is the corner stone of democracy, the authority bestowed by the electors upon the petitioners who are elected representatives had ceased immediately upon expiry of the term. Further, both the writ petitions being filed respectively on 30.04.2020 and 23.04.2020 by which time the charge of the Municipalities admittedly being handed over on 31.03.2020 and 02.04.2020 respectively, the question of allowing resumption of charge cannot arise.

29. This Court has also taken note of the pleadings made in the writ petitions wherein the principal concern of the petitioners is apprehended denial of basic amenities to the residents of the respective Municipal Boards in absence of an elected body. However, it is seen that such amenities being presently provided by the Municipalities run through the Administrators which is more pronounced because of the on-going pandemic, the apprehension of the petitioners are also speculative in nature and without any basis.

30. As regards the suggestion made by the Amicus Curiae regarding passing of any Ordinance to meet the present situation, this Court would not like to enter into that aspect of the matter as the same is not a subject matter of the lis before this Court.

31. In view of the aforesaid facts and circumstances, this Court is of the opinion that no enforceable rights, much less, any fundamental rights of the petitioners have been infringed. Accordingly, both the writ petitions are held to be devoid of any merits and dismissed.

32. Before parting, this Court would like to place on record the appreciation for

the valuable assistance of Shri D Saikia, learned Senior Counsel as the Amicus Curiae.