

(1985) 01 GAU CK 0001
In the Gauhati High Court
Case No : Civil Rule No. 246 of 1984

Tuahkhopao Changsan

APPELLANT

Vs

Enjalien Lengthang and Others

RESPONDENT

Date of Decision : 21-01-1985

Acts Referred:

Assam Autonomous Districts (Constitution of District Councils) Rules, 1951 — Rule 133(6)

Citation : AIR 1986 Guw 46

Hon'ble Judges : K. Lahiri, Acting C.J.; R.K. Manisana Singh, J

Bench : Division Bench

Advocate : N.M. Lahiri, General, B.M. Mahanta and M.Z. Ahmed, for the Appellant; S.N. Bhuyan, General, D.P. Chaliha, L. Ali and N.S. Deka, for the Respondent

Final Decision : Allowed

Judgement

Lahiri, Actg. C.J.

1. In exercise of the powers conferred under Rule 190(1) of the Assam Autonomous District (Constitution of District Council) Rules, 1951, for short "the Rules" the Commissioner for Elections in the North Cachar Hills District Council, declared the election of the petitioner from 3 Barail Constituency to the North Cachar Hills District Council as void, in Election Case No. 2 of 1981. He submitted a report to the Governor of Assam as required under "the Rules" and the latter, by his order dt. 4-4-1984, declared the election of the petitioner void, under Rule 191(3) of "the Rules" and published the declaration in the Official Gazette. By this application under Article 226 of the Constitution the petitioner has questioned the validity of the judgment and report of the Commissioner as well as the follow-up order of the Governor.

2. The up-shot of the impugned order is far reaching as the returned candidate has been un-seated, his election has been declared void and there is no right of appeal. As the petitioner had no other remedy provided for in the Rules, he

questioned the validity of the impugned orders under Article 226 of the Constitution. However, the impugned orders can be quashed if the Commissioner has committed error apparent on the face of the record or he has made patent error based on clear disregard of law or the decision rendered by him is based on wrong interpretation of the statutory provision, so much so that no person instructed in law could have reached the findings arrived at by the Commissioner.

3. The Backdrop and Relevant Facts:

The North Cachar Hills District is "an autonomous district" falling within "the Tribal areas" of Assam under para 20 of the Sixth Schedule to the Constitution. The Tribal Area is "an autonomous district" under para I of the Sixth Schedule. There is a District Council or the autonomous District and the members are elected on the basis of adult suffrage. The district council has powers to make laws and also various other powers. In short, it has administrative, legislative and judicative powers and functions. In exercise of the powers conferred by Sub-para (6) of Para 2 of the Sixth Schedule to the Constitution, the Governor of Assam made the Assam Autonomous Districts (Constitution of District Council) Rules, 1951, for short "the Rules", for the constitution of District councils for various autonomous districts comprising in the tribal areas falling in Part-I of the Table appended to para 20 of the Sixth Schedule "The Rules" are directly applicable to the North Cachar Hills Autonomous District for short "the District Council". "The District Council" was constituted in 1952 in accordance with the provisions of "the Rules". "The Rules", inter alia, provide for the constitution, composition and election of members to "the District Council". The North Cachar Hills District Council has 23 constituencies including No. 3 Barail constituency, for short "the constituency". The provisions for general election to the district councils have been provided in Part-IV of "the Rules". Twenty three members are elected to the District council on the basis of adult suffrage. As such, the petitioner who was elected on the basis of adult suffrage has been un-seated by the decision rendered by the Commissioner for election. The provisions of General election to the District Councils have been provided in Part-IV of "the Rules". The procedure for submission of nomination paper including the allotment of symbols are provided in Rule 133(6) of "the Rules", which shall be dealt with in due course after the relevant facts leading upto the present petition are set out.

4. The Relevant Facts Necessary for the Disposal of the Writ Petition :

In the last general election to the District Council the petitioner and Respondent 1 were the candidates for election to "the constituency". The petitioner obtained the highest number of votes and the Returning Officer duly declared him elected. Respondent 1 challenged the validity of the election by filing an election petition under "the Rules." It was presented to the Governor of Assam who appointed a Commissioner for entertaining and disposing of the election petition.

5. Precisely on one ground the election of the petitioner has been declared void.

The other grounds taken up by the election petitioner have been turned down by the Commissioner. The decision was rendered after the parties had adduced evidence and upon hearing both the parties. Learned Commissioner held that the Returning Officer allotted to the petitioner the symbol, "Haladhar within wheel," in breach of the provisions contained in proviso to Sub-rule (6) of Rule 133 of the Rules. In consequence whereof, the result of the election was materially affected. There is no wrangle at the bar that the petitioner selected "Haladhar within wheel" as his symbol. Learned Commissioner held that at all relevant time the symbol was reserved by the Election Commission of India in notification No. 56/73-1 dt. 29th Mar 1973 as published in the Assam Gazette Extraordinary dt. April 5, 1973. Learned Commissioner further held that the Returning Officer allotted the symbol "Haladhar within wheel", which was a reserved symbol of the Janata Party, a national Party, but the petitioner had failed to comply with the terms of Clause (a) to (c) of the proviso to Rule 133(6) of the Rules. Although Respondent No. 1 had objected to the allotment of the symbol to the petitioner the Returning Officer wrongly overruled the objection and allotted the symbol to the petitioner. Learned Commissioner held that the petitioner could secure the highest number of votes in the election as the symbol which was the reserved symbol of the Janata Party, had influenced the voters to cast their votes in favour of the petitioner. Learned Commissioner further held that wrong allotment of the symbol by the Returning Officer was made by him in furtherance of the prospect of the petitioner in the election. On these grounds learned Commissioner declared the election of the petitioner as void.

6. In our opinion three questions come up for consideration. First, whether the Returning Officer allotted the symbol "Haladhar within wheel" to the petitioner in breach of the proviso to Sub-rule (6) of Rule 133 of the Rules. Secondly, whether the allotment of the symbol by the Returning Officer amounted to "furtherance of the prospect of the returned candidate in the election by the Returning Officer." Thirdly, whether in the absence of any pleading, evidence or material the Commissioner was justified in holding that the election had been materially affected by the alleged non-compliance of the provisions of Rule 133 (6) of "the Rules."

7. Let us turn to the question as to whether the Returning Officer acted illegally and in breach of Rule 133(6) in allotting the symbol, "Haladhar within wheel," to the petitioner. It is necessary to extract the provisions of Sub-rule (6) of Rule 133 of the Rules to adjudicate upon the question. We extract Rule 133(6):

"133(6). Every nomination paper shall also contain a declaration in writing subscribed by the candidate that he has selected a particular symbol from the list specified in Appendix VII to these rules and no candidate shall be deemed to be duly nominated unless such declaration is made on the nomination paper.

Provided that the symbols reserved by the Election Commission of India for Seven Multi State parties or various single State parties recognised by it in the Notification No. 56/73-1 dt. 29th Mar. 1973 as published in the Assam Gazette

(Extraordinary) dt. 5th April, 1973, shall not be allotted to a candidate unless he is set up by such a party in elections to the District Council, on fulfilment of the following conditions :

(a) The candidate has made a declaration to that effect in his nomination paper.

(b) A notice in writing to that effect has been delivered to the Returning Officer.

(c) The said notice is signed by the President, the Secretary or any other office bearer of the party and the President, Secretary or such other office bearer as authorised by the party to send such notice and the name and specimen signature of the President, the Secretary or such other office-bearer are communicated in advance to the Returning Officer."

8. The admitted position is that a list of symbols is specified in Appendix-VII to "the Rules." Under the main Sub-rule (6) to Rule 133 any candidate may select any of the symbols specified in Appendix-VII but he must give a declaration in writing on the nomination paper that he has selected such a symbol. The learned counsel for the parties admitted that the symbol "Haladhar within wheel" is one of the symbols specified in Appendix-VII to the Rules. We have perused Appendix-VII and find that item No. 16 of the list do contain the symbol "Haladhar within wheel". As such, the symbol "Haladhar within wheel" is a specified symbol which may be taken by any candidate. However, he must give a declaration in writing subscribed by him on the nomination paper that he has selected the symbol. There is no wrangle at the bar that the petitioner made a declaration on the nomination paper that he selected the said symbol as his election symbol. As such, there was sufficient compliance of the main provision of "the Rules". However, this was not the contest between the parties, nor did the Commissioner decide the issue on this ground. According to the Commissioner, the petitioner had been allotted the symbol in breach of the proviso to Rule 133(6) of "the Rules".

9. A bare perusal of the proviso to Rule 133(6) of "the Rules" makes it clear that the proviso attracts the symbols reserved by the Election Commission in its Notification of March 29, 1973, for short "the Notification" No such symbol, reserved by the Election Commission in "the Notification" can be allotted to a candidate unless he complies with the terms of the proviso, namely, making the declaration and furnishing the requisites set out in Clauses (a) to (c) of the proviso. We have perused the aforesaid "Notification" published in the official Gazette. We do not find the symbol "Haladhar within wheel" as a reserved symbol made by the Election Commission. The "Notification" also does not contain the name of the Janata Party. In Table II of the said Notification, no State party of Assam has been recognised or listed. On a perusal of "the Notification" we reach the conclusion that the symbol "Haladhar within wheel" was not reserved by the Election Commission for any of the 7-multi-State parties or for any single State party recognised by it in "the Notification" dt. Mar. 29, 1973. As such, the question of breach of proviso to Rule 133(6) of the Rules did not arise

in the instant case. In Table-II of "the Notification", the name of the Janata Party does not appear. Similarly, the symbol has not been shown as a "reserved symbol" for any national party or any other party. The proviso restricts allotment of a symbol reserved by the Election Commission in a particular Notification and in no other Notification. It is not possible for us to read the words "other notifications issued by the Election Commission from time to time" after the words and figures "29th Mar. 1973". We are afraid, we cannot add words in the proviso to change its entire structure. The proviso is a mandatory provision and accordingly the question of adding to or subtracting from the said proviso is not permissible. We find that in "the Notification" only 7-multi-State parties have been shown and the Janata Party was not included in the list. We cannot increase the number of national parties or multi-State parties. It would amount to adding of words in "the Notification" of 1973 which is impermissible. We are also to re-write the proviso to Sub-rule (6) of Rule 133 of the Rules if we add these words. We cannot add the words "and other notifications issued by the Election Commission from time to time". The Governor of Assam in exercise of its powers conferred by Sub-para (6) of Para 2 of the Sixth Schedule to the Constitution has made the "Rules". We cannot increase the number of the National parties referred in the proviso, nor Can we add words in the said proviso to un-make the Rule and make a new rule in place of "the Rules" framed by "the Rule-making authority." acting under the Constitution. In "the Rules", the expressions "from time to time" have been referred at various places, vide, Rule 129(2) of "the Rules". It is thus seen that when the rule-making authority desired to use the expression "from time to time" it used that at appropriate place. However, while framing the proviso to Rule 133(6), the expressions have not been used in the proviso. It is, therefore, hardly possible OH our part to add the words "or any other notification issued "by the Election Commission from time to time" in the proviso. We do not find any inaccuracy, ambiguity or inconsistency in the proviso to Sub-rule (6) of Rule 133. As such, the proviso should be interpreted as bearing its plain and natural meaning. The proviso commands the parties to do certain positive acts and carry them out to get the allotment of symbol. Accordingly, the construction of the words used in the proviso must be strict and bear its plain and natural meaning.

10. To discern the intention of the Rule-making authority the proviso is to be understood by looking at the subject matter and the object sought to be achieved by the Rule-making authority. Where the words are unambiguous, the intention of the Rule-making authority is best declared by the words incorporated in the Rules. What the Rule-making authority, while making the Rules, intended or did not intend could only be legitimately ascertained from what it had chosen to represent, either in the express words or by reasonable and necessary implication. The words which have been used in the setting, sensibly and clearly, create certain restrictions or embargo on the candidates. As such, unless the Rules are ambiguous, we cannot subtract from it or insert anything in it. The basic Rule is that the Courts should not take upon itself the duty to supply

omissions as it amounts to assuming the function of legislators. We cannot re-write the proviso when its language is plain and unambiguous. It is not open to us to read into words which are not in it. In a Court of law what is unexpressed has the same value as what is unintended. This Rule of constructions is enunciated by the Supreme Court, in *The Corporation of the City of Nagpur Vs. Its Employees*, and *Mahadeolal Kanodia Vs. The Administrator-general of West Bengal*, In *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, the Supreme Court has ruled that the duty of the Court is to give effect to words used without scanning the wisdom or policy of legislature and without engrafting, adding or implying anything which is not congenial to or consistent with such express intent of the law-giver. Even if there be "casus omissus" the defect can only be remedied by the Rule-making authority.

11. For the reasons set-forth above, we cannot increase the number of the multi-State parties or add any symbol to the symbols reserved by the Election Commission in his notification dt. Mar. 29, 1973. We hold that the symbol "Haladhar within wheel" was not reserved by the Election Commission in its notification dt. Mar. 29, 1973, nor did the Election Commission declare Janata Party as one of the seven Multi-State parties in the said Notification. We hold that the Commissioner has committed error apparent on the face of record in assuming that "Haladhar within wheel" was a symbol reserved by the Election Commission in its notification dt. Mar. 29, 1973. He has made a patent error based on clear disregard of law and the decision that the allotment of the symbol "Haladhar within wheel" to the petitioner was illegally made by the Returning Officer must be set aside, which we hereby do.

12. In *Narendra Kamgrai v. G. C. Langthasa* (Civil Rule No. 795 of 1983 decided on 11-5-1984) we reached the same conclusion Mr. S. N. Bhuyan, learned Advocate General, Assam, has very fairly stated that the matter was taken to the Supreme Court and their Lordships have rejected the Special Leave Application.

13. Further, another subsequent event confirmed that the view taken by us in *Narendra Kamprai* (supra) was correctly decided. After, the said decision has been rendered, "the Rule-making authority" found it just and appropriate to amend the proviso and amended "the Rules". The words "as amended from time to time" have been inserted after the words "as published in the Assam Gazette Extraordinary 5t 5th April, 1973". This clearly indicates that the view taken by us in *Narendra* (supra) was accepted by the Rule-making authority, who made the amendment in April 19, 1984. However, the amended rules did not govern the rights and obligations of the parties to this action.

14. Further, the decision of the Commissioner is based on wrong interpretation of the statutory provisions which has resulted in failure of justice. The Commissioner held that in allotting the symbol "Haladhar within wheel" the Returning Officer furthered the cause of the petitioner in the election. In other words, he has held that by wrongly allotting the symbol to the petitioner, allegedly in breach of Rule 133(6) of "the Rules," the Returning Officer did so in

the interest of the petitioner, the returned candidate. In our opinion, wrong allotment of symbol by the Returning Officer per se does not establish that he did so to further the cause of the returned candidate in the election. The expression "in the interest of returned candidate" or "in furtherance of the returned candidate" means that the Returning Officer had something in his mind for the purpose of furthering, helping forward the prospect of the returned candidate in the election. "Furtherance" means the fact or state of being helped forward; the action of helping forward, aid or advancement". The fact that the Returning Officer had committed mere procedural error did not ipso facto implied that he did so to further the prospect of the petitioner. Some material is necessary to show the existence of the state of mind, or some material to indicate that the Returning Officer did allot the symbol for the purpose of furthering cause of the returned candidate. In the instant case, there is no pleading nor any evidence to show that the Returning Officer was interested in the petitioner or the petitioner's prospect in the election in any manner whatsoever. Learned Commissioner assumed that all wrong allotments of symbol ipso facto establish that the Returning Officer committed the wrong to further the cause of the returned candidate or in the interest of the returned candidate. We are afraid this is not the correct view of the law. In absence of any material to show that the error was committed purposely or intentionally to serve the cause of the returned candidate, the act of wrong allotment of symbol by itself does not amount to furtherance of the cause of the petitioner.

15. Be that as it may, in view of the foregoing discussions, we hold that the Commissioner committed an error apparent on the face of the record in setting aside the election of the petitioner. Learned Commissioner has committed patent error based on clear disregard of the election law and his decision is based on wrong interpretation of proviso to Rule 133(6) of the "Rules". In the result, the petition is accepted and the impugned orders are set aside.

16. Before parting, we would observe that the election was held in 1980 and in 1984 the election was declared to be void. In the process of litigation, the entire term of the office is going to be over soon. The next election is round the corner.