
(2015) 04 GAU CK 0024

In the Gauhati High Court

Case No : Writ Petition (C) Nos. 5293, 5298 and 5641 of 2013

Uttam Bhowmick and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 07-04-2015

Acts Referred:

Constitution of India, 1950 — Article 136, 243ZJ, 243ZJ(2), 243ZT

Citation : (2015) 2 GLT 1089

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : S.S. Dey, Senior Advocate, for the Appellant; S.K. Sinha, Advocates for the Respondent

Judgement

Arup Kumar Goswami, J.—I have heard Mr. S.S. Dey, learned Senior Counsel appearing for the petitioners in WP(C) No. 5293/2013 and WP(C) No. 5298/2013; Mr. S. Chakraborty, learned counsel appearing for the petitioners in WP(C) No. 5641/2014. I have also heard Mr. S.K. Sinha, learned counsel appearing for the private respondents in WP(C) No. 5293/2013 and WP(C) No. 5298/2013 and Md. Gias Uddin, learned counsel appearing for the private respondents in WP(C) No. 5641/2014 as well as Dr. B. Ahmed, learned Standing Counsel, Co-operation Department.

2. All the aforesaid three writ petitions fundamentally raise similar questions of law based on similar facts. As agreed to by the learned counsel for the parties, they were taken up together for consideration for disposal at the admission stage and they are now being disposed of by this common judgment and order.

3. Under Section 2(g) of the Assam Co-operative Societies Act, 2007, for short, Act of 2007, "Board" means the Governing body of a Co-operative Society to which the management of the affairs of the Co-operative Society is entrusted under the bye-laws and includes managing committee of a Co-operative Society. Under Section 31 of the Act of 2007, term of the Board of the Co-operative Society was fixed for three years. Part IXB, dealing with Co-operative societies,

containing Articles 243ZH to 243ZT was inserted by the Constitution (Ninety-Seventh Amendment) Act, 2011 with effect from 15.02.2012. Article 243ZJ prescribes the number and term of members of Board of Directors of the Co-operative Society and its office bearers. Article 243ZJ(2) provides that the term of office of the elected members of the Board and its office bearers shall be 5 years from the date of election and the term of office bearers shall be co-terminus with the term of the Board. Article 243ZT provides for continuance of existing laws. Article 243ZT lays down that notwithstanding anything contained in Part IXB, any provision of any law relating to Co-operative Societies in force in a State immediately before the commencement of the Constitution (Ninety-Seventh Amendment) Act, 2011, which is inconsistent with the provisions of Part IXB, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is less. Subsequently, Section 31 of the Act of 2007 was amended on 05.02.2013 and presently the said Section reads as follows:-

"31. Term of the Board - The term of the Board shall be five Co-operative years."

4. The controversy in the three writ petitions centers around on the question, as to whether in the attending facts and circumstances of the case, the Boards of the three Co-operative Societies involved, which were, admittedly, holding office as on 05.02.2013, would be entitled to continue for the term of five Cooperative years. A Division Bench of this Court in W.A. No. 172/2013 (Nagen Deka Vs. State of Assam and Ors.), by a judgment dated 26.07.2013, had held that the term of office of the elected members is five years and is applicable to all such elected members who were holding office as on 05.02.2013. But for the intervening developments, which will be narrated herein below by way of presentation, in brief, of the relevant factual matrix of the writ petitions, this Court could have straightway held that the issue raised is no longer res-integra in view of the judgment of the Division Bench of this Court in Nagen Deka (Supra).

5. Basic facts of the individual writ petitions may, now, be briefly noticed:

A. WP(C) No. 5293/2013: (i) Annual General Meeting of Dakhin Hojai Kumarakata Samabay Samity Ltd., (for short, Samity) was held on 18.04.2010 and vide resolution No. 2, the petitioner No. 1 was unanimously elected as Chairman of the Managing Committee. Petitioner No. 2 was elected as Vice-Chairman and petitioner Nos. 3 to 11 as Members of the Managing Committee. Proceeding of the Annual General Meeting was approved on 30.04.2010 and first meeting of the new Managing Committee was held on 16.05.2010. On 06.04.2013, the Zonal Joint Registrar, Cooperative Societies (respondent No. 3) addressed a letter to all Chairmen/Secretaries of Co-operative Societies including the Society of the writ petitioners to hold Annual General Meeting for the year 2013-14 as per Act of 2007 and the Rules framed there under. Petitioner No. 1 received an order dated 13.05.2013 from the respondent No. 3 informing him about appointment of officials to assist the Returning Officer in conducting the election in the Annual General Meeting to be held on 18.05.2013. Another letter

dated 18.05.2013 was issued by the respondent No. 3 under Section 41(2) of the Act of 2007 to all Chairman/Secretaries of Co-operative Societies directing that election of Directors shall be conducted before expiry of term of the Board so as to ensure that newly elected Members can assume office immediately on expiry of the term of the Members of the outgoing Board. In view of the repeated directions, election of the Society was held on 18.05.2013 and the results of the election of the Board of Directors were declared on 19.05.2013 and in such election, the petitioner Nos. 1, 2, 5, 8 and 11 and the respondent Nos. 7 to 15 were elected. By an order dated 21.05.2013, the respondent No. 3 accorded approval to the proceedings of the Annual General Meeting held on 18.05.2013. The respondent Nos. 7 and 10 were elected as Chairman and Vice- Chairman, respectively, on 04.06.2013.

The writ petitioners pray for setting aside and quashing of (a) resolution No. 2 of the Annual General Meeting held on 18.05.2013, (b) grant of approval to the said resolution dated 21.05.2013, (c) the election of respondent Nos. 7 and 10 as Chairman and Vice-Chairman, respectively, and for (d) a direction to restore/reinstate the Managing Committee constituted on 18.04.2010.

(ii) In the affidavit filed by the respondent No. 7, he has stated that on 18.05.2013, the petitioner No. 1 had convened the Annual General Meeting and with the resignation of the members of the Committee on that date, Managing Committee of the Society was dissolved and election of the new Board of Management of the Society was held on the same day. The first meeting of the new Board of Management of the Society was held on 12.06.2013.

B. WP(C) No. 5298/2013: (i) On 28.06.2010, the Annual General Meeting of Dakhin Jugijan Samabay Samity Ltd. was held and vide resolution No. 1, a Managing Committee was constituted with the petitioner No. 1 as Chairman and one Md. Abdul Matin as Vice-Chairman. 9(nine) other persons were elected as Members of the Managing Committee and subsequently one person was co-opted as Member of the said Society. Proceeding of the aforesaid Annual General Meeting was approved by the Assistant Registrar, Co-operative Societies (respondent No. 4) on 10.07.2010. On 06.04.2013, the Zonal Joint Registrar, Co-operative Societies (respondent No. 3) addressed a letter to all Chairmen/Secretaries of Co-operative Societies including the Society of the writ petitioners to hold Annual General Meeting for the year 2013-14 as per Act of 2007 and the Rules framed there under. Another letter dated 18.05.2013 was issued by the respondent No. 3 under Section 41(2) of the Act of 2007 to all Chairmen/Secretaries of Co-operative Societies directing that election of Directors shall be conducted before expiry of term of the Board so as to ensure that newly elected Members can assume office immediately on expiry of the term of the Members of the outgoing Board. In view of the repeated directions, election of the Society was held on 27.06.2013 and the results of the election of the Board of Directors were declared on 28.06.2013 and in such election the petitioner Nos. 1, 2, 3 and 4 as well as the respondent Nos. 5 to 15 were elected. By an order dated

08.07.2013, the respondent No. 3 accorded approval to the proceedings of the Annual General Meeting held on 27.06.2013. In the meeting held on 15.07.2013, vide resolution No. 1, the respondent Nos. 5 and 6 were elected as Chairman and Vice-Chairman, respectively.

(i) The writ petitioners pray for setting aside and quashing (a) resolution No. 2 of the Annual General Meeting held on 27.06.2013, (b) grant of approval of the said resolution dated 08.07.2013, (c) the election of respondent Nos. 5 and 6 as Chairman and Vice-Chairman, respectively, and for (d) a direction to restore/reinstate the Managing Committee constituted on 28.06.2010 and approved on 10.07.2010.

(ii) In the affidavit filed by the respondent No. 5, he has stated that on 27.06.2013, the petitioner No. 1 had convened the Annual General Meeting and with the resignation of the members of the Committee on that date, Managing Committee of the Society was dissolved and election of the new Board of Management of the Society was held on the same day. The first meeting of the new Board of Management of the Society was held on 31.07.2013.

C. WP(C) No. 5641/2014 : (i) A Board of Directors of Nagaon Wholesale Consumers Co-operative Society Stores Limited had taken charge of the office on 20.04.2010 and while the respondent No. 4 was the Chairman of the Board, the respondent Nos. 5 to 18 were the Directors of the Board. On 12.07.2013, the respondent No. 4 issued a notice for holding Annual General Meeting on 29.07.2013 along with an Agenda item of "election" for electing the members of the Board of Directors. On 29.07.2013, the respondent Nos. 4 to 18 resigned and a new Board of Directors were elected. On 12.08.2013, one Kartick Saha was elected as President of the Board of Directors. The proceedings were duly approved by the Assistant Registrar, Co-operative Societies, Nagaon, (respondent No. 3). The first meeting of the Board of Directors was held on 12.08.2013 and since then, the Board, which was elected on 29.07.2013 continued to function. A notice was issued from the Office of Registrar of Co-operative Societies, (respondent No. 2) asking them to appear on 19.06.2014 and the Secretary In-charge was sent accordingly. On appearance, he came to learn that the respondent No. 4 and three others, who laid down their office on 29.07.2013, had contended that they are entitled to continue till 20.04.2015 in view of the prevailing law. Copy of the petition being asked for, same was not furnished to him. However, the respondent No. 2 had indicated that further hearing would take place. That was not to be as an order dated 12.09.2014 was passed setting aside the approval accorded to the proceedings of the Annual General Meeting/Election held on 29.07.2013 and allowing the Board of Directors headed by the respondent No. 4, who were elected in the year 2010, to continue till 5 years" term is completed. No notice was served though it was indicated that on the petition filed on 30.11.2013 by the respondent No. 4, 27.05.2014 and 05.06.2014 were fixed for hearing. The said order dated 12.09.2014 was challenged by filing a writ petition which was numbered as W.P.(C) No.

4765/2014 and by an order dated 16.09.2014, this Court remitted the matter to the Registrar of Co-operative Societies for reviewing the order dated 12.09.2014 and to take a fresh decision on merit in accordance with law, providing further that order dated 12.09.2014 shall not be enforced till fresh decision was taken. Subsequent to the said direction, a representation dated 23.09.2014 was submitted before the Registrar of Co-operative Societies. However, the respondent No. 2 passed an order dated 01.11.2014 holding that there was no ground for review of the earlier order dated 12.09.2014.

6. Mr. S.S. Dey, learned Senior Counsel has submitted that the Elections held on completion of three years term is against the mandate of the Constitution as embodied in Article 243ZJ(2) and Section 31 of the Act of 2007 and the earlier Boards which were holding office on 05.02.2013 are entitled to continue for complete term of five years from the date of Election held in the year 2010. He also submits that only because of pressure exerted by the State respondents, Annual General Meeting and Elections were notified and held. He further submits that holding of such Annual General Meeting and Elections as well as the fact that the newly elected Boards started functioning will not make any difference. In essence, his submission is that notwithstanding the fact that such earlier Boards had ceased to function after the Elections were held against the mandate of law, in order to effectuate the provisions of the Constitution and the law in force to-day, writ petitioners in W.P.(C) No. 5293/2013 and W.P.(C) No. 5298/2013 are entitled to relief as prayed for. He has cited the judgment of the Apex Court in the case of P.R. Deshpande Vs. Maruti Balaram Haibatti, (1998) 6 AD 325 : AIR 1998 SC 2979 : (1998) 5 JT 390 : (1999) 121 PLR 421 : (1998) 4 SCALE 426 : (1998) 6 SCC 507 : (1998) 3 SCR 1079 : (1998) AIRSCW 2830 : (1998) 6 Supreme 303 to contend that principle of estoppel cannot impede constitutional remedy.

7. Mr. S.K. Sinha, learned counsel appearing for the private respondents, has opposed the submissions of Mr. Dey. It is submitted by him that if the holding of the Annual General Meeting and Elections were forced upon the writ petitioners by the authorities, they could have challenged such action. He has also submitted that the petitioners had also contested the Elections and they have waived their rights, if any. Some of them were also elected and now it is too late in the day for the petitioners to contend that they should be allowed to continue for a period of five years. He submits that the writ petitioners are estopped from making an assertion that the Boards are illegally constituted. In support of his contention, he has cited the following decisions: (i) Jadunandan Puri Vs. The President, Board of Secondary Education and Others, AIR 1976 Patna 58 ; (ii) Ram Nath Vs. Ramesh and Others, AIR 1975 P&H 33 : (1975) 2 ILR (P&H) 387 ; (iii) Sri Basavanyappa Vs. The Chief Executive Officer and Ors, judgment of High Court of Karnataka, Circuit Bench at Dharwad dated 23.07.2012; (iv) Balram Singh Yadav Vs. State of Bihar and Others ; (v) Maksudan Raut and Others Vs. State of Bihar and Others, AIR 1983 Patna 186 .

8. Mr. S. Chakraborty, learned counsel, appearing for the petitioners in W.P.(C) No. 5641/2014 submits that the impugned order dated 01.11.2014 passed by the Registrar of Co-operative Societies is illegal and arbitrary. It is submitted that the same had been passed on irrelevant and extraneous consideration and omitting to take into account relevant consideration that the newly elected Board was continuing for more than 14 months. Furthermore, the impugned order is a non-speaking order with no reasons, and therefore, on that ground as well as on the ground that relevant documents were not furnished to the petitioners, the said order dated 01.11.2014 and the earlier order to the same effect passed on 12.09.2014, were stayed by this Court with the result that Board which was elected in the Annual General Meeting on 29.07.2013 is still functioning. He has also articulated the submissions made by Mr. S.K. Sinha.

9. Mr. G. Uddin, learned counsel appearing for the respondents in W.P.(C) No. 5641/2014, has adopted the arguments of Mr. S.S. Dey.

10. Dr. B. Ahmed, learned Standing Counsel, Co-operative Department, submits that earlier there was some confusion as to whether a Board which was continuing will get the benefit of the term of five years by virtue of Article 243ZJ(2) of the Constitution and the amendment effected in Section 31 of the Act of 2007 or such provisions would be applicable only to a Board which has come into being subsequent to Constitution (Ninety-Seventh Amendment) Act, 2011 or the amendment effected to Section 31 of the Act of 2007. He has submitted that after the judgment of the Division Bench of this Court in Nagen Deka (Supra) on 26.07.2013, law has been crystallized. Only thereafter, rights are sought to be asserted by the members of the erstwhile Boards contending that elections held before completion of the term of five years is illegal. He also submits by placing reliance of the judgment of the Apex Court rendered in Civil Appeal Nos. 10051 - 10052 dated 07.11.2014 in the case of Abdul Razzaque Vs. Moniruddin Ahmed and Ors, that term of five years is to be counted from the date of election.

11. I have considered the submissions of the learned counsel for the parties and perused the materials available on records.

12. From the facts narrated above, it is seen that the Annual General Meeting and Election of Dakhin Hojai Kumarakata Samabai Samity Limited and Dakhin Jugijan Samabai Samity Limited were earlier held on 18.04.2010 and 28.06.2010, respectively. So far as Nagaon Wholesale Consumers Co-operative Society Stores Limited is concerned, the specific date is not available but it is on record that the Board had taken charge on 20.04.2010. Subsequently, in respect of Dakhin Hojai Kumarakata Samabai Samity Limited, Dakhin Jugijan Samabai Samity Limited and Nagaon Wholesale Consumers Co-operative Society Stores Limited, Annual General Meeting and Elections were held on 18.05.2013, 27.06.2013 and on 29.07.2013, respectively and after the proceedings of the Annual General Meeting were approved, newly elected Boards started functioning. Notice for holding Annual General Meeting and Election for Nagaon

Wholesale Consumers Co-operative Stores Limited was issued on 12.07.2014 by the earlier Chairman, who is respondent No. 4 in W.P.(C) No. 5641/2014 and in case of W.P.(C) No. 5293/2013 and W.P.(C) No. 5298/2013 by the earlier Chairman, namely, the petitioner No. 1 of both the petitions.

13. The common thread that has emerged in the three writ petitions is that Boards had held Elections after completion of the term of three years and new Boards had taken over charge.

14. In P.R. Despande (supra), the Appeal by Special Leave was directed against an order of the High Court dismissing the revision petition challenging the order of eviction passed against the appellant. While dismissing the revision petition, the High Court granted six months' time to the appellant-tenant for vacating the premises in question and directed him to file an undertaking within four weeks. The appellant-tenant, pursuant to the said direction, filed an undertaking that he would vacate the premises within six months. Preliminary objection was raised by the land landlord that the tenant is precluded from approaching the Court under Article 136 of the Constitution of India after giving the undertaking before the High Court. It is in the backdrop of the aforesaid facts, the Apex Court held that the doctrine of election, which is based on the rule of estoppel, has no application when statutory rights and liabilities are involved and that it cannot impede right of appeal and, particularly, the Constitutional remedy. The principle that one cannot approbate and reprobate is inherent in the doctrine of election, which is one of the species of estoppel in pais. It is laid down that the same is a rule in equity and it may preclude a person from asserting a right, which he, otherwise, could have had, by his actions or conduct or silence, when it is his duty to speak. It was also noted that there is no estoppel against a statute.

15. In Jadunandan Kuri (supra), the petitioner having participated in the election of a Managing Committee, the Patna High Court had held that he was estopped from challenging appointment of the Headmaster of the school by the Managing Committee on the ground that it was not properly constituted. Similarly, in Ramnath (supra), the petitioner having contested the election to the office of the President of Municipal Committee and having been defeated, the Punjab and Haryana High Court held that the petitioner cannot be permitted to question the election by way of a writ petition. Basavanyappa (supra) and Makasudan Rout (supra) are also cases on principles of acquiescence and estoppel.

16. In Stroud's Judicial Dictionary of Words And Phrases, "waiver" is explained as "passing by of a thing, or a declining or refusal to accept it", i.e., abandonment or renunciation. Waiver is express or implied; express, when the person entitled to anything expressly and in terms gives it up; implied, when the person entitled to anything does or acquiesces in something else which is inconsistent with that to which he is so entitled.

17. In Words and Phrases (Permanent Edition) of West Publishing Co., many situations are taken note of on the concept of waiver by referring to various

judgments. Amongst others, it is noted that waiver is the voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect and implies knowledge of all material facts of one's rights, together with a willingness to refrain from enforcing those rights. The terms "acquiescence" has also been defined as a specie of waiver.

18. In *Millar Vs. Diction*, reported in (2002) 1 WLR, Privy Council held as follows:-

"In most litigious situations, the expression "waiver" is to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise objection, which is open to that party to claim or raise."

19. Though very often, the words "waiver" and "estoppel" are used synonymously, they are not necessarily same in their consequences. In waiver, there is intentional and voluntary relinquishment of a known right. By such relinquishment, no person is misled to his prejudice. But, in estoppel, the element of somebody being misled to his prejudice or to alter his position is inherent.

20. Estoppel in pais may also arise from an involuntary and unintentional act. Waiver depends upon what one himself intends to do; whereas estoppel is what one causes his adversary to do. Estoppel arises when the purpose or natural consequences of a person's representations or conduct is to induce another person to do or omit to do some act, the doing or omission of which would turn out to his detriment and to the inducing party's benefit, if the latter were permitted to take advantage of it. While there is no estoppel against a statute, there cannot be any waiver of any fundamental rights.

21. Even if a provision is mandatory, as held in *GM, Sri Siddeshwara Co-operative Bank Ltd. and Another Vs. Sri Ikbali and Others*, (2013) 116 CLA 110 : (2013) 5 CTC 200 : (2013) 11 JT 573 : (2013) 10 SCALE 396 : (2013) 10 SCC 83 , it can always be waived by a party or parties for whose benefit such provision has been made.

22. By virtue of Article 243ZJ(2), elected members of the Board has a term of five years from the date of election. Section 31 of the Act of 2007, as amended, has also provided that the term of the Board shall be five Co-operative years. When there was direction to hold election by the State authorities before the expiry of five years after completion of only three years of the term, the same was not challenged by the existing Boards and fresh elections were held with their active participation. In *Nagen Deka (Supra)*, the appellant had challenged a notice for holding fresh election contending that in view of Article 243ZJ(2) of the Constitution and amendment of Section 31 of the act of 2007, the term of the Board is five years and not three years. The incumbent Boards, in the instant cases, did not assert their rights which amount to voluntary relinquishment of a known right. In the facts and circumstances of the case, because of intervening developments as noticed hereinabove, this court is of the considered opinion that the Boards which were elected in the year 2010 cannot now stake their claim to

continue for the period of five years on the basis of the judgment rendered in Nagen Deka (Supra).

23. The factual matrix of the writ petitions, thus, demonstrate that the petitioners in WP(C) 5293/2013 and WP(C) 5298/2013 had waived their right to continue for a period of five years. Same is the case with the respondent Nos. 4 to 18 in WP(C) 5641/2014. Apart from it, the impugned orders in WP(C) No. 5641/2014 cannot be sustained for the reason that they are devoid of any reason.

24. In view of the above discussions, the writ petitions, namely, WP(C) 5293/2013 and WP(C) 5298/2013 are dismissed. The writ petition, namely, WP(C) 5641/2014 is allowed by setting aside and quashing the orders dated 12.09.2014 and 01.11.2014. No cost.