

D. Uphing Maslai and Another Vs State of Assam and Another

Court: Gauhati High Court

Date of Decision: July 20, 2001

Acts Referred: Assam Autonomous Districts (Constitution of District Councils) Rules, 1951 " Rule 32, 32(1), 4 Constitution (Seventy-Seventh Amendment) Act, 1995 " Section 2 Constitution of India, 1950 " Article 124, 127, 163, 163(2), 164

Citation: AIR 2002 Guw 64 : (2001) 2 GLT 299

Hon'ble Judges: D. Biswas, J

Bench: Single Bench

Advocate: D.K. Misra, A. Dutta and R. Agarwal, for the Appellant; P.G. Barua, A.K. Phukan, D. Das and G.A. Assam, for the Respondent

Judgement

1. The notification dated 15.3.2001 issued by the Commissioner and Secretary to the Government of Assam, Hill Areas Department which

provides for assumption of all the functions and powers vested in and exercisable by the Karbi Anglong Autonomous Council by the Governor is in

challenge. The notification reads as follows:-

GOVERNMENT OF ASSAM

HILL AREAS DEPARTMENT

ORDERS BY THE GOVERNOR

NOTIFICATION Dated Dispur, the 15th March, 2001

No. HAD.6/2001/151 : Whereas the Karbi Anglong Autonomous Council is at present a house of 29 Members including the Chairman, Deputy

Chairman and a memorandum was submitted by 15 Members of the Council on 11/01/2001 for formation of a new Executive Committee,

whereas in consequence of further memorandum the Governor of Assam vide his order No. HAD.6/ 2001/29, dated 02/02/2001 directed that

resolution for the removal of the Chairman, Deputy Chairman and the motion of no-confidence against the Executive Committee headed by the

Chief Executive Members Shri Mojari Hanse be taken up, and,

2. Whereas the resolutions/motions were taken up on 6th February, 2001 and soon thereafter a memorandum dated 07/ 02/2001 was submitted

by 15 MACs of Karbi Anglong Autonomous Council, Diphu, complaining of irregularities in the procedure followed by the Deputy Chairman,

Karbi Anglong Autonomous Council on 06/02/2001 in counting of votes on the resolution for removal of the Chairman.

3. Whereas, after considering the entire issue and also considering the reports forwarded by the Karbi Anglong Autonomous Council on the

meeting held on 3rd, 5th and 6th February, 2001, and by the Deputy Commissioner. Karbi Anglong District, who was requested to furnish a

detailed report of that session, who had been detailed as observer, it appears to the Governor of Assam that the resolution for the removal of the

Chairman was not resolved fully in accordance with relevant rules and that the subsequent proceedings relating to the motion of no-confidence

against the Executive Committee headed by Shri Mojari Hanse also appear to have suffered from procedural infirmities, and,

4. Whereas certain clarifications were sought on or before 22/02/ 2001 from the Deputy Chairman of the Karbi Anglong Autonomous Council

when he considered the motion against the Chairman on 06/02/2001, whereas the view of the Karbi Anglong Autonomous Council were also

sought for on the memorandum dated 07/02/ 2001 which were also to be submitted on or before 22/02/2001 and whereas the clarifications as

well as the views had not been furnished by the stipulated date nor a specific time sought for by them for submission of the same, the Governor had

ordered vide HAD. 6/2001/108, dated 26/02/2001, that Shri Mojari Hanse. Chief Executive Member, Karbi Anglong Autonomous Council shall

seek a vote of confidence in the first meeting of the Council summoned from 05/03/2001 before taking up any other business, and had specified

requirements of relevant rules and the need for maintenance of full transparency including all opportunity to the opposing groups to participate and

verify the process of counting.

5. Whereas the clarifications of the Deputy Chairman and the Karbi Anglong Autonomous Council on the session of 06/02/2001 have since been

received and considered and whereas the session for seeking vote of confidence by the Chief Executive Member was held on 05/03/2001 and

whereas again a memorandum has been submitted by 15 Members of the Karbi Anglong Autonomous Council, dated 05/03/2001 alleging

irregularities in the conduct of the session and whereas the proceedings of the Karbi Anglong Autonomous Council and report of the observer Shri

S.C. Das, Commissioner, Hills and Barak Valley have been considered, it is found that both the Chairman and Deputy Chairman have not

conducted the Karbi Anglong Autonomous Council (KAAC) session fully in accordance with rules, have not acted impartially, nor fully carried out

lawful directions, specially when the crucial issues of resolutions for removal of the Chairman and the Deputy Chairman or the motion of no

confidence in the Chief Executive Member or the seeking of vote of confidence by the Chief Executive Member were before the Council, and that

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The present Chief Executive Member and his Executive Committee do not appear to enjoy the confidence of the Karbi Anglong Autonomous

Council, and,

6. Whereas, in view of the aforesaid, the Governor is satisfied that a situation has arisen in which the administration of the Karbi Anglong

Autonomous Council cannot be carried on in accordance with the provisions of the Sixth Schedule of the Constitution of India and therefore, in

exercise of the powers under Para 16(2) of the Sixth Schedule of the Constitution, all the functions and powers vested in and exercisable by the

Karbi Anglong Autonomous Council, including those of the Chairman and Deputy Chairman and Executive Committee headed by the Chief

Executive Member as assumed by the Governor with immediate effect and make all such powers and functions exercisable by the Deputy

Commissioner, Karbi Anglong District, on behalf of the Governor, provided that; the Chairman, Deputy Chairman and the other elected/nominated

members of the Council shall continue to remain members of the Council, and thereafter, with a view to resorting the functions and powers to the

duly elected Chairman, Deputy Chairman and Chief Executive Member as prescribed hereinafter, the Governor of Assam is further pleased to

direct, in exercise of powers under Para 16(2) of the Sixth Schedule of the Constitution of India read with Rule (4) of the Assam Autonomous

Districts (Constitution of District Councils) Rules, 1951, as amended, that,

The Deputy Commissioner, Karbi Anglong District shall, conduct an election for electing the Chairman of the Council on 19.3.2001 as he does at

the beginning of a new Council on 19.3.2001 as he does at the beginning of a new Council under Rule 32 of the Assam Autonomous District

(Constitution of District Council) Rules, 1951, as amended, and relevant rules thereunder. After the election of the Chairman, the Chairman shall fix

and conduct election for the Deputy Chairman and the Chief Executive Member within two days (excluding holidays if any) after his election, as at

the beginning of a new Council. The Deputy Commissioner shall relinquish his powers of concerned offices as soon as the Chairman, Deputy

Chairman and the Chief Executive Members are elected.

7. The Deputy Commissioner, Karbi Anglong District shall observe the proceedings of the elections of the Deputy Chairman and the Chief

Executive Members and submit a detailed report.

Sd/-

15.3.2001 (H.S. DAS)

Commissioner & Secretary to the

Government of Assam,

Hill Areas Department

Dispur, Guwahati - 781 006."".

2. The writ petitioners, namely, Mr. D. Uphing Maslai and Mr. Sarsing Timung, represent the Autonomous State Demand Committee, a political

party. They are elected members of the Council. The Autonomous State Demand Committee won 21 seats out of 26 in the election held in the

year 1996 and elected Mr. Babu Rongpi and Mr. Jotson Bey as the Chairman and the Chief Executive Member. The Autonomous State Demand

Committee took a resolution in the month of June, 2000 demanding that the Chairman and the Chief Executive Member should step down. On

refusal, majority of the members of the Council moved a resolution for removal of the Chairman on 25.7.2000. The resolution was not included in

the agenda and, therefore, majority of the members of the Council submitted memoranda before the Government of Assam. The Government by

W.T. Message dated 24.7.2000 fixed 25.7.2000 for consideration of the resolution for removal of the Chairman. The resolution was carried out

on 25.7.2000. The State Government had to ignore the same in view of two contrary proceedings of the House. The Government thereafter fixed

29.7.2000 for consideration of the resolution in presence of the Deputy Commissioner, Karbi Anglong District. Accordingly, the resolution for

removal of the Chairman was moved and carried out. Mr. Daniel Terang and Moran Hanse were elected as the Chairman and the Chief Executive

Member in the election held on 31.7.2000 and 1.8.2000, respectively. But the matter did not end there. The Government, on consideration of the

memorandum submitted by some of the members of the Council, again fixed 3.1.2001 for taking up a resolution for removal of the Chairman and

the Chief Executive Member. Motions were moved on 6.2.2001 for their removal. But the motion could not be carried out for want of majority.

Two votes were invalidated. The Government then sought further information from the Deputy Chairman of the Council. The Principal Secretary,

by the message dated 24.2.2001 provided the information/clarification sought by the Government. The Government, thereafter, directed the Chief

Executive Member to seek vote of confidence in the House. The Chief Executive Member won the confidence of the House in the session held on

5.3.2001. Despite that, the impugned notification dated 15.3.2001 was issued.

3. The notification describe the reasons for which the Governor had to intervene in exercise of powers conferred on the Governor under sub-para

(2) of paragraph 16 of the Sixth Schedule, In para-5 of the notification it has been mentioned that the Chief Executive Member has lost confidence

of the Council (House).

4. On the above background, the two sitting members filed this petition for quashing the aforesaid notification . According to them, the notification

was not published in the Official Gazette as required and that the allegation of corruption referred to in the notification is baseless. The notification,

they averred, has been issued because of political realignment between Asom Gana Parishad led Government and the rival group of the

Autonomous State Demand Committee to get political mileage..

5. While issuing the notice of motion, this Court directed that no election be held on 19.3.2001 and 21.3.2001 as directed. Neither the State of

Assam nor the Council filed any affidavit in this petition.

6. Mr. Mishra, learned senior counsel, assailed the notification primarily on the ground that the powers vested on the Governor under para 16(2) of

the Sixth Schedule to the Constitution are to be exercised by the Governor in his discretion and not in aid and advice of the Council of Ministers.

Referring to various circumstances, Mr. Mishra tried to show that the Governor did not act in his discretion and the decisions were taken at the

behest of the State Government. Mr. Mishra pointed out that the Council was not consulted and the notification was not published in the Official

Gazette. Mr. Mishra further pointed out that the house, being in suspended animation, could not be directed to hold election.

7. Mr. P.G. Barua, learned Advocate General argued that the provisions of the Sixth Schedule provide for consultation with the State Government

and the concerned Council before the discretionary powers are exercised. Mr. Baruah, further submitted that consultation by the Governor with

any person, authority or the State Government will not ipso facto invalidate the decision unless it is shown that the Governor did not apply his mind

to form an opinion of his own. Moreover, Mr. Baruah pointed out, there is no allegation of mala fide and arbitrariness and, as such, the action

taken by the Governor in exercise of discretionary powers cannot be called in question in any Court. Mr. Baruah further submitted that in a case

where arbitrariness or mala fide are taken as grounds, the authority or the person indicted should be named and made parties. Mr. A.K. Phukan,

learned senior counsel raised the question of locus standi and argued that the notification in no way adversely affected the right of the writ

petitioners as Member of the Council. The taking over of the Council is a fait accompli and that there is no option now but to go for election as

directed. According to Mr. Phukan, learned senior counsel, the powers under paragraph 16(2) of the Sixth Schedule are not comparable with that

of Article 356 and, as such, cannot be termed as unguided.

8. Article 163 of the Constitution speaks of the Governor "acting in his discretion". It provides that Council of Ministers with the Chief Minister at

the head is to aid and advise the Governor in exercise of his function save and except where the Governor is required by or under the Constitution

to act in his discretion. Clause (2) of Article 163 empowers the Governor to decide whether any matter is or is not within the ambit of the

discretionary powers of the Governor, and the decision thereon taken by the Governor shall be final. It further provides that the validity of anything

done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. The provisions in this

clause provide for finality of the orders passed by the Governor in his discretion. The provisions in the Sixth Schedule of the Constitution will,

therefore, have to be read in the context of the provisions of Article 163 and the scheme behind the Schedule.

9. We may now refer to the amendments of the Sixth Schedule made by the Constitution (Amendment) Act, 1995 (42 of 1995). Para 20BA was

inserted by the amendment made in 1995. It reads as follows:-

1. After paragraph 20B, the following paragraph has been inserted in its application to the State of Assam by the Schedule to the Constitution

(Amendment) Act, 1995 (42 of 1995), Section 2, namely :-

20BA. Exercise of discretionary powers by the Governor in the discharge of his functions - The Governor in the discharge of his functions under

sub-paragraphs (2) and (3) of paragraph 1, sub-paragraphs (1), (6), sub-paragraph (6A) excluding the first two proviso and sub-paragraph (7) of

paragraph 2, sub-paragraph (3) of paragraph 3, sub-paragraph (4) of paragraph 4, paragraph 5, sub-paragraph (1) of paragraph 6, sub-

paragraph (2) of paragraph 7, sub-paragraph (4) of paragraph 8, sub-paragraph (3) of paragraph 9, sub-paragraph (3) of paragraph 10, sub-

paragraphs (1) of paragraph 14, sub-paragraph (1) of paragraph 15 and sub-paragraph (1) and (2) of paragraph 16 of this Schedule, shall after

consulting the Council of Ministers and the North Cachar Hills Autonomous Council or the Karbi Anglong Autonomous Council, as the case may

be, take such action as he considers necessary in his discretion.".

10. It may be noted that the aforesaid paragraph has been inserted in its application to the State of Assam. It inter alia provides that the Governor

in the discharge of his functions under sub-paragraphs (1) and (2) of paragraph 16 of the Schedule, shall, after consulting the Council of Ministers

and the Karbi Anglong Autonomous Council, as the case is here, take such action as he considers necessary in his discretion. It is, therefore, clear

that the powers of the Governor under sub-paras (1) and (2) of the Paragraph 16 are discretionary and can be invoked only after consultation with

the State Government and the concerned Council. This position has been made clear in paragraph 20BA inserted by the Constitution

(Amendment) Act of 1995.

11. Sub-Paragraph (2) of paragraph 16 of the Constitution provides for assumption of all or any of the functions or powers of the District Council

by the Governor in the event he is satisfied that a situation has arisen in which the administration of an Autonomous District cannot be carried on in

accordance with the provisions of the Schedule. The provisions of sub-paragraph (2) of paragraph 16 read with the provisions of para 20BA

clearly indicate that the Governor is to act in his discretion after consulting the Council of Ministers and the concerned Autonomous Council. The

element of consultation has been introduced by the Constitution (Amendment) Act of 1995. Therefore, consultation is a pre-condition on the part

of the Governor as and when the powers under sub-paragraph (2) of paragraph 16 are sought to be invoked. The words ""shall"" incorporated in

Para 20BA denotes prior consultation even though the matter pertains to the discretionary powers of the Governor.

12. Question would necessarily arise whether the element of consultation as envisaged in paragraph 20BA will in any way curtail or abridge the

discretionary nature of the powers of the Governor under Para 16(1) and (2) of the Sixth Schedule? Whether the Governor is bound by the

advice, opinion or view of the Council of Ministers and the concerned District Council while exercising his discretionary powers under the Sixth

Schedule? Whether the State Government has any superior role to play in this matter?

13. In Supreme Court Advocates-on-Record Association and another Vs. Union of India, the word "consultation" came in for interpretation with

reference to its placement in Article 124 and 217. The meaning attributed to the phrase in the said case is in the context of appointment of the

Supreme Court and High Courts Judges. The majority view is in favour of the primacy of the Chief Justice of India, even though under the

Constitution the President is required to make appointment after consultation with the judicial functionaries mentioned in Articles 124 and 217. This

interpretation does not fit in with the Constitutional Scheme behind the Sixth Schedule. The "consultation" envisaged in Para 20BA has to be read

in the context it is used. The Constitutional Scheme is having separate provisions for tribal areas has been conceived to ensure autonomy to the

backward and exploited people of these areas. The whole of the Sixth Schedule nowhere provide for any role to be played by the State

Government. Duty has been cast upon the Governor to deal with the affairs of the Autonomous Council independent of the control of the State

Government. The Council of Ministers of a State have not been assigned any supervisory role as it would mean disappearance of the autonomous

status of the Tribal areas. Thus, it would be logical to say that "consultation" as provided in paragraph 20BA has to be confined to its ordinary

lexical meaning. It cannot carry with it any obligation to accept or to act on the advice given by the Council of Ministers. The views, advice or

opinion tendered by the Council of Ministers during consultation process may be reckoned in the decision making. Such views, opinion or advice

cannot bind the Governor as this would mean a total surrender of the autonomy of the Tribal Areas to the State Government. It is for this reason,

no superior role by the State Government has been conceived under the Sixth Schedule. The Governor is, therefore, not bound by the advice,

opinion or views of the Council of Ministers and the concerned Council tendered during the process of consultation. The Governor, while invoking

powers under paragraph 16, acts in his discretion and not in aid and advice of the Council of Ministers or the concerned council. This conclusion is

inevitable if we go by the Constitutional Scheme of the Sixth Schedule.

14. Justice M. Hidayatullah, Former Chief Justice of India while delivering the Anundoram Barooah Law Lectures (Second Series) observed as

follows: -

"The main problem which is likely to be faced by the Governments of the States and/or the Governor is how is the Governor to act in discharging

his functions under the Schedule that is to say whether as a Constitutional Governor bound to act only on the aid and advice of his Council of

Ministers or independently of the Council. The Schedule does not answer this question directly. What it does is to make the Governor the final

decision making authority in relation to the Autonomous District Councils and Autonomous Regions. If one examines the whole of the Schedule, no

duty appears to be cast on the State Governments as such, although a Minister in charge of Tribal Areas is to function. Every matter goes to the

Governor himself and the only matter in which the State Government comes into the picture is with regard to "Mines and Minerals" which vest in

the States of Assam and Meghalaya respectively and in dealing with the financial statement of expenditure. These two matters apart, the

appointment of a Minister with a portfolio concerning the Tribal Areas is the only indication of the part the State Government or the Minister is

expected to play. As the Sixth Schedule is outside the rest of the constitution one cannot drag in the provisions therein or rely on the conventions

which have been built up."".

These two Schedules are not in pari materia and on close inspection will be found to be different. Insofar as Schedule 5 is concerned the Ministers

have a say but not where Schedule 6 is concerned."".

A supplementary question arises and it is this. Is this power of the Governor to be regulated by the Rules of Executive Business and is not that

power to be confined to executive matters. The Rules of Business have to be approved by the Governor and he must satisfy himself that executive

authorities of the State must be confined to situations in which the safety of India is involved or a problem of law and order arises. In other matters

the executive authority of Autonomous Districts must be independently exercised by the District Council, the same is also true of Regional Council

in Autonomous Regions. The executive power will rest with the Governor and not the Council of Ministers. The Council of Ministers of the

Government of Assam or Meghalaya cannot Intervene as another supervisory Government. If this were true, the autonomous character of these

Districts and Regions will disappear completely and the Governor will become a sort of referee between the Autonomous Districts and Regions on

the one hand and the State Governments on the other. This is clearly not intended. Therefore, the Rules of Business must be carefully seen by the

Governor so that his own powers and responsibilities are not impaired."".

It would appear from the above speech of Justice Hidayatullah that the Sixth Schedule is outside the rest of the Constitution and one cannot drag in

the provisions of the Constitution or rely on the convention which has been built up in interpreting the provisions of the Sixth Schedule unless it is in

keeping with the provisions of the Sixth Schedule. From this point of view, it would be safe to say that the discretionary powers of the Governor

under paragraph 16, has not been curtailed in any manner by the Constitution (Amendment) Act, 1995 by providing for consultation with the

Council of Ministers and the concerned District Council. Therefore, prior "consultation" as provided in para 20BA does not include within its fold

the concept of "primary" of the Council of Ministers and the concerned District Council during consultation process.

15. The next question arises for consideration is whether an action by the Governor in exercise of his discretionary powers is amenable to judicial

review? The Bombay High Court in Shri Pratapsing Raojirao Rane and others Vs. The Governor of Goa and others, dealt with Constitutional

position of the Governor in the matter of appointment of the Chief Minister and dismissal of the Government under Article 164. The Bombay High

Court held that the Governor in exercise of his powers of Article 164 acts in his sole discretion and enjoys Immunity under Article 361. The

discretion exercised by the Governor is final in terms of Article 163(2) and the decision taken cannot be subject to judicial scrutiny. It was so held

because Article 164(1) provides that the Ministers hold office during the pleasure of the Governor and the exercise of the pleasure has not been

fettered by any condition or constriction.

16. The above view of Bombay High Court speaks of finality of the decision of the Governor taken in his discretion in the matter of appointment of

the Chief Minister and dismissal of the State Government under Article 164. According to Bombay High Court, the action taken by the Governor,

therefore, is not amenable to the writ jurisdiction. This view is likely to sound a note of discord if taken in the matter of exercise of discretionary

powers under the Sixth Schedule since there is a marked difference in the Constitutional scheme relating to the appointment of the Chief Minister,

and constitution of the District Council and election of the Chairman. Article 164 provides for appointment of the Chief Minister by the Governor

and other Ministers on the advice of the Chief Ministers. The Ministers hold office during the pleasure of the Governor and the exercise of the

pleasure has not been in any way fettered by any condition *Jogendra Nath Hazarika Vs. State of Assam and Others*, In the instant case the

Chairman is not required to be appointed by the Governor. Chapter-II of the Assam Autonomous Districts (Constitution of District Councils)

Rules, 1951 provide for election of the Chairman and Deputy Chairman to the Council at the beginning of the new District Council after election or

as and when the office of the Chairman or Vice Chairman is vacant. The provisions do not vest any power with the Governor to appoint the

Chairman or Vice-chairman. The Rules have been framed in exercise of powers under Para - 2(6A) of the Sixth Schedule. Para 2 (6A) reads as

follows:-

2(6A) The elected members of the District Council shall hold office for a term of five years from the date appointed for the first meeting of the

Council after the general elections to the Council, unless the District Council is sooner dissolved under paragraph 16 and a nominated member shall

hold office at the pleasure of the Governor:

Provided that the said period of five years may, while a Proclamation of Emergency is in operation or if circumstances exist which, in the opinion of

the Governor, render the holding of elections impracticable, be extended by the Governor for a period not exceeding one year at a time and in any

case where a Proclamation of Emergency is in operation not extending beyond a period of six months after the Proclamation has ceased to operate

:

Provided further that a member elected to fill a casual vacancy shall hold office only for the remainder of the term of office of the member whom he

replaces."".

17. It would appear from the above provisions that the elected members of the Council are to continue for a period of five years unless the District

Council is sooner dissolved under paragraph 16. It is only the nominated members who are to hold office at the pleasure of the Governor. So far

the elected members of the council are convened, they are to continue in office till expiry of five years from the appointed date or till the District

Council is dissolved under paragraph - 16. The Chairman and Deputy Chairman are required by law to be elected and not appointed by the

Governor as in the case with the Chief Minister of a State. The concept of "pleasure doctrine" in my opinion, is repugnant to the office of the

Chairman and the Deputy Chairman. It is, therefore, clear that there is a difference in the constitutional status of the Chief Minister of a State and

the Chairman or Deputy Chairman of the District Council. This distinct position will naturally have its spell over the scope and extent of the

discretionary powers of the Governor and the role of the State Government. For this reason, the finality clause under Article 163(2) has to be

moulded to suit the object of the Sixth Schedule.

18. We may now refer to a few decision on the subject. The decision of this court in Satyeswar Daolagupu and Ors. v. The Secretary to the Govt.

of Assam and Ors. AIR 1974 Gau 20 and Holiram Terang v. State of Assam and Ors. (1994) 2 GLR 462 postulate that the powers of the

Governor under para-16(2) of the Sixth Schedule are not unguided. In Ram Singh Ronghang and Anr. v. Karbi Anglong Autonomous Council and

Ors. 2000 (3) GLT 611, a Learned Single Judge of the Court had the occasion to deal with the matter although on a different context. The

observation relevant for the purpose at hand are as follows:-

10. The preliminary point raised by Mr. P.G. Baruah, learned Advocate General, Assam, that in view of the protection given to the Governor

under Article 361 of the Constitution the Court cannot examine and interfere into the matter will have to be decided first. In the case of Nabin

Chandra Kalita v. State of Assam (supra) cited by Mr. Barua, the Division Bench of this Court quoted the views of H.M. Seervai in his book

Constitutional Law of India, Fourth Edition, Volume-2, that if the Court can decide a matter without the Governor being called upon to justify his

action, the Governor's action can be examined by the Court on the basis of the objective facts placed before the court, but where a matter cannot

be decided without requiring the Governor personally to account to the Court for his action, as where he is alleged to have acted mala fide and he

along can deal with such allegation of mala fide, the Court will not require the Governor to answer personally the allegation against him. In the said

case of Nabin Chandra Kalita, the Division Bench of this Court also quoted the observations of the Full Bench of Bombay High Court in State of

Bombay v. K.M. Nanavati, 1960 Bombay Law Reporter, Vol. LXII-383, to the effect that Article 361 of the Constitution only gives personal

protection to the Governor and that where there is no proceedings in the Court against the Governor and that the Governor is not being asked to

answer for anything done by him, the legality of his order can be examined only in order to determine whether there is a valid return to the writ

issued by the Court. Thus, it has been held by the Division Bench of this Court in Nabin Chandra Kalita (supra), so long as the Governor is not a

party in a case before the Court or is not required personally, to appear before the Court and answer the personal allegation against him such as

allegation of mala fide, the Court can always examine the legality of any order and any action or inaction on the part of the Governor on the basis

of objective facts placed before the Court by the State Government or by the Secretary to the Governor. In the present case, the Governor of

Assam has not been impleaded as a party-respondent, and no allegation has been made against the Governor personally such as allegation of

personal mala fide. Hence, the Governor is not required to appear before the Court in person and answer any allegation in personal mala fide. The

action or inaction of the Governor with regard to removal of a Member of the Executive Committee of the Council or appointment of a Member of

the Executive Committee of the Council has to be examined on the basis of objective facts which have been placed before the Court in the

affidavits-in-opposition filed by the State Government and in the light of the provisions of law. In my considered opinion, therefore, the preliminary

objection raised by Mr. P.G. Barual, learned Advocate General of Assam, that the Court cannot examine and interfere in the matter in the present

two cases has no merit."

19. The powers of judicial review and its extent in the matter of discretionary powers of the Governor has crystallized in the above judgment of this

court, though the conclusion was on a different context. In the instant case there are averments that the action of the Governor is contrary to the

provisions embodied in the Sixth Schedule of the Constitution inasmuch as he did not act in his discretion. The Governor in the instant case has not

been made a party. Therefore, going by the ratio available in para 10 of the judgment in Ram Singh Ronghang (supra), it would be apposite to say

that in a given case, where the Governor is required by or under the Constitution to act in his discretion and the action is challenged on the ground

that the Governor has not acted in his discretion, the Court must have the powers to examine the records for the purpose of ascertaining whether

the Governor has acted in his discretion or not. Once it is found that the Governor has acted in his discretion, the exercise should cease forthwith

and the Court must stop. The Court cannot go for a search for adequacy of reasons. If, on the other hand, it is found that the Governor has acted

at the behest of the State Government or other authority without forming any independent decision of his own, such action would be contrary to the

provisions of the Constitution. No repository of power can act in deviation of the manner in which he is required by law to act. Where a power is

given to do certain thing in certain way, the thing must be done in that way or not at all [ratio in AIR 1936 253 (Privy Council) Para 20BA of the

Constitution requires the Governor to act in his discretion. Deviation is impermissible. When considered in the context of the Scheme of the Sixth

Schedule, contrary view will in all probability be in derogation of the autonomy guaranteed to the tribal areas. It would, therefore, be conducive to

conclude that actions taken by the Governor in exercise of discretionary powers under para 16(2) of the Sixth Schedule of the Constitution are

amenable to limited judicial review for the purpose of ascertaining whether the actions have been taken in exercise of the discretionary powers of

the Governor or not.

20. Shri A.K. Phukan, learned senior counsel argued that the writ petitioners have no locus standi to file the petition as they are not the "persons

aggrieved". The learned counsel further argued that the taking-over of the Council is a fait accompli and, hence, the election as ordered by the

Governor is the only course left open to be followed. In the instant case, the writ petitioners are the members of the Executive Council and there is

no room for doubt that their right to participate in the administration of the Council stood curtailed by the impugned notification whereby the

Governor assumed to himself all the functions of the Council. In my opinion, the writ petition cannot be thrown out for want of locus standi, as

alleged. For ratio, we may refer to M.S. Jayaraj Vs. Commissioner of Excise, Kerala and Others,

21. Shri D.K. Mishra, learned senior counsel for the writ petitioners argued that sub-para (3) of Para-16 requires every order made under sub-

paragraph (2) of paragraph 16 to be laid before the Legislature of the State with reasons and the same shall cease to operate on the expiration of

30 days from the date on which the State Legislature first sits after the issue of the order. Shri Mishra submitted that in the instant case, the

impugned notification has not been placed before the legislature and, as such, it lapsed immediate after expiration of thirty days when the State

Legislature met last. In view of the specific provisions made in Clause (3), the notification impugned in this writ petition indeed ceased to operate

after expiration of thirty days when the legislature sat first after the notification was issued and, undoubtedly it was long back. The provisions of this

clause If interpreted with the ratio available in M/s Atlas Cycle Industries Limited and Ors. v. State of Haryana (1997) 2 SCC 196 would show

that the requirement of laying every order passed under this paragraph is mandatory as the State Legislature has been given the powers either to

approve or to reject the same. Since the impugned notification has not been claimed to have been laid before the State Legislature, there cannot be

any second opinion that at least it ceased to exist on expiration of the period prescribed.

22. Shri D.K. Mishra, learned senior counsel further argued that assumption of all the functions or powers vested in and exercisable by the District

Council by the Governor would mean that the Council was placed in suspended animation. It was defunct and, as such, the Members could not be

directed by the Governor to elect the Chairman. With reference to the provisions of Rule 32(1) of the Assam Autonomous Districts (Constitution

of District Council) Rules, 1951 Mr. Mishra argued that election to the office of the Chairman or Vice Chairman is permissible only at the

beginning of the new District Council or when there is vacancy in the office of the Chairman or Deputy Chairman. According to him, since the no-

confidence motion could not be carried out, there was no vacancy and, as such, direction for holding election is glaringly in violation of the

provisions of Rule 32.

Rule 32(1) reads as follows:-

32.(1) When at the beginning of the new District Council or owing to the vacancy in the office of the Chairman the election of a Chairman is

necessary, the Governor shall fix a date for the holding of the election and the Deputy Commissioner or the Secretary of the District Council, as the

case may be, shall send to every member notice of the date so fixed."".

The provisions as above clearly show that Mr. Mishra, learned senior counsel rightly indicted the notification giving direction for holding election as

the Council is in suspended animation as no vacancy existed in the office of the Chairman. This is apparent from the proceedings of the District

Council and the relevant records.

23. The proceedings of the District Council were held on different dates. Mr. Daniel Terang and Mr. Moran Hanse were elected as Chairman and

Chief Executive Member of the Council in the election held on 31.7.2000 and 1.8.2000 respectively. On receipt of the memorandum submitted by

some of the members of the Council, directions were issued for taking up a resolution for removal of the Chairman and Chief Executive Member.

Motions were moved on 6.2.2001 for their removal but the same could not be carried out for want of majority. There were some aberrations in

the procedure adopted by the Council. To mitigate the grievances of the aggrieved members of the Council, fresh direction was given to the Chief

Executive Member to seek vote of confidence on 5.3.2001. The Chief Executive Member won the confidence of the house. If for any reason the

proceeding of the sessions held on 5.3.2001 was vitiated, the Governor could have directed the Chief Executive Member to seek vote of

confidence afresh in the floor of the Council under supervision of any Commission under his control. Instead, the Governor was satisfied to assume

the powers of the Council by the impugned notification. A cursory glance of the proceedings of the Council and the pleadings on record would

show that there existed no vacancy in the office of the Chairman at the time when the notification was issued placing the Council in suspended

animation and for election of a new Chairman. The Council in suspended animation could not be directed to hold election without being revived.

The direction given by the Supreme Court in *Jadadambika Paul v. Union of India* 1998 SC 998 for election of the Chief Minister was intended to

test the strength on the floor of the House. The Assembly was not under President's Rule at the relevant time and, therefore, very much alive.

Similar direction was not permissible in the instant case since the Council was in suspended animation. The direction given by the Governor to the

Deputy Commissioner of Karbi Anglong District to conduct the election to the office of the Chairman was, therefore, illegal per se.

24. I may, therefore, summarise the conclusions in the following order:-

(i) Powers of the Governor in sub-paragraphs (1) and (2) of paragraph 16 of the Sixth Schedule of the Constitution are discretionary powers of

the Governor and the Governor is not required to act in aid and advice of the Council of Ministers while exercising such powers;

(ii) Actions taken or orders passed under the aforesaid sub-paragraphs are amenable to limited judicial review for the purpose of ascertaining as to

whether the Governor has acted in exercise of his discretion. Once the Court is satisfied that the Governor has exercised his discretion, the court

should not embark upon a search for adequacy of reasons;

(iii) the challenge to the orders passed by the Governor as ultra vires of the Constitutional provisions is maintainable without the Governor being

made a party in the writ petition;

(iv) Consultation with the State Government and the concerned District Council before the powers of sub-paragraph (1) and (2) of paragraph 16

are invoked is a must, but the Governor is not bound to act on such advice, opinion or the views tendered by the Council of Ministers and the

concerned District Council;

(v) the provisions in sub-para (3) of paragraph 16 for laying every order made under sub-paragraphs (2)(ii) before the State Legislature is

mandatory and not directory;

(vi) the notification issued under the aforesaid sub-paragraphs are required to be published in the Official Gazette;

(vii) the election to the office of the Chairman or the Deputy Chairman of the Council cannot be held when the Council is in the suspended

animation or when no vacancy exists in the office of the Chairman or Deputy Chairman;

25. It may be mentioned here that the impugned notification lapsed long back as it was not laid before the Legislature of the State and, by now, the

term of the Council has also expired, in view of this, it is concerned redundant to refer to the materials on record for the purpose of ascertaining as

to whether the Governor had acted in his discretion or not. The writ petition accordingly stands disposed of.