

WP(C) 805/2009

BEFORE

HON'BLE THE CHIEF JUSTICE MR J CHELAMESWAR

HON'BLE MR JUSTICE BP KATAKEY

These writ petitions being relate to the election to the Urban Local Bodies in the State of Assam under the provisions of the Assam Municipal Act, 1956 (in short 1956 Act), as amended to bring in conformity with the Constitution (Seventy Fourth Amendment) Act, 1992 and relating to the appointment of persons authorized by the State Government to perform powers and duties which under the said Act may be exercised and/or performed by the Board, by invoking the power conferred under Section 26(5) read with Section 299 of the said Act, on the expiration of the tenure of the elected body or authorizing another person to discharge such powers and duties by replacing the person already authorized, all the writ petitions are taken up for hearing and disposal together.

2. Writ Petition (Civil) Nos.486/09, 744/09, 805/09, 1046/09, 1047/09, 1376/09, 1451/09, 1460/09 and 1544/09 are filed by the writ petitioners, apart from challenging the constitutional validity of sub-section (5) of Section 26 of 1956 Act, also challenging various notifications issued by the authority authorizing persons (respondents) to discharge the powers and duties of the Board, after the completion of the tenure of the elected body, of whom they were either elected 'Ward Commissioners' or 'Chairpersons' and also have prayed for holding of the election as required under the Constitution as well as the 1956 Act, except in WP(C) No.1460/09 where the person who has been authorized, was not an elected member of the earlier elected body. In WP(C) Nos.613/09 and 1386/09 the writ petitioners have not challenged the constitutional validity of sub-section (5) of Section 26 of the 1956 Act, but have challenged the notifications issued by the competent authority authorizing the Chairman and the Ward Commissioner, respectively, of the earlier elected body of two Urban Local Bodies, though they ceased to be the Ward Commissioners on expiry of their tenure. In WP(C) No.828 of 2009 a challenge has been made to the notification dated 2nd February, 2009 issued by the authority authorizing the Deputy Director, Town and Country Planning, Tezpur to discharge the powers and duties of Tezpur Municipal Board in addition to his own duties by cancelling the authorization made in favour of the writ petitioner for discharge of such duties vide order dated 22nd January, 2009.

3. The brief facts relevant for the purpose of the present batch of writ petitions are that as the duration of the elected Urban Local Bodies concerned in all the writ petitions, except the WP(C) No.1460/2009, were coming to an end between 3rd February to 23rd February, 2009, the Director of Municipal Administration on 22nd January, 2009 issued a communication to the Commissioner and Secretary to the Government of Assam, Urban Development Department, to make alternative and temporary arrangement, as provided under Section 299 of the 1956 Act and till the election to those bodies are held in accordance with the provisions of the said Act, to manage the affairs of such Urban Local Bodies, whose tenure automatically comes to an end on expiration of 5(five) years from the date fixed for holding the first meeting of the newly constituted body after a general election. The Government of Assam in Urban Development Department in view of the said communication as well in view of the fact that the tenure of the elected Commissioners have expired on expiration of the 5(five) years from the date appointed for first meeting of such bodies, authorized the private respondents in the writ petitions to discharge the powers and duties of the Board, in exercise of the power conferred under sub-section (5) of Section 26 of 1956 Act read with Section 299(b) of the said Act, on the ground that the election to those bodies cannot be held. In WP(C) No.1460 of 2009 the general election to elect the Ward Commissioners was last held on 16.06.1997 and 14.08.1997 was the date appointed for its first meeting of the Board. The term of the elected body expired on 14.08.2002 having completed the 5(five) years tenure. No general election as required under the provisions of the Constitution as well as the 1956 Act, however, has been held thereafter and the Government of Assam in Urban Development Department authoriz

ed different persons to discharge the powers and duties of the Board thereafter by issuing different notifications, the last being dated 02.03.2009 authorizing the private respondent, a member of the general public, to discharge the powers and duties of Bangaigaon Municipal Board by cancelling the earlier notification dated 26.07.2006 whereby and where under the Assistant Director, Town and Country Planning, Bangaigaon was conferred with such power.

4. The provisions of sub-section (5) of Section 26 of 1956 Act has been challenged and sought to be declared unconstitutional on the ground of it being contrary to the provisions of Article 243U(3) of the Constitution of India, which requires holding of general election to the Urban Local Bodies before expiry of the tenure of the earlier elected body, as according to the petitioners Section 26(5) of the 1956 Act has given the authority the power to do, what the Constitution has forbidden. The authorization of the private respondents to discharge the powers and duties of the Board, after the tenure of the elected bodies expire, where they were Commissioners, has been challenged on two counts, (i) that the respondent authority has in spite of expiration of the tenure of the elected bodies by virtue of the provisions contained in Article 243U and Section 26(1) of 1956 Act, has allowed such Commissioners to discharge powers and duties of the Board thereby doing something indirectly which cannot be done directly and (ii) that under Section 299 of 1956 Act the Government can authorize only Government officials to discharge the powers and duties of the Board, after its dissolution.

5. We have heard the learned counsel appearing for the writ petitioners, the learned Advocate General, Assam appearing on behalf of the State respondents and the learned counsel appearing on behalf of the private respondents, namely, persons who have been authorized by the State of Assam to discharge the powers and duties of the Board after its dissolution.

6. The learned counsel for the petitioners questioning the constitutional validity of sub-section (5) of Section 26 of 1956 Act has submitted that Chapter IXA which has been brought into the Constitution by the Constitution (Seventy Fourth Amendment) Act, 1992 (in short, Seventy Fourth Amendment), with the object of holding timely election to the Urban Local Bodies and Article 243U(1) having mandated that unless sooner dissolved under any law for the time being in force, every Municipality shall continue for 5(five) years from the date appointed for its first meeting and no longer, as well as Clause 3 of the said Article having mandated that an election to constitute a Municipality shall have to be completed before expiry of its duration specified in Clause (1), and the scheme of Chapter IXA of the Constitution being not to allow an elected body to continue beyond the period of 5(five) years, so that the Urban Local Bodies can be managed by the elected body only, any provision made in the local Acts, namely, 1956 Act, relating to the election to constitute a Municipality must conform to such constitutional requirement and the State Act cannot have a provision which has the effect of not holding the election before expiration of the duration of an elected body as required under Article 243U of the Constitution. According to the learned counsel since sub-section (5) of Section 26 of 1956 Act provides for authorizing any person to discharge the powers and duties of the Municipality after the tenure of the elected body comes to an end, which has the effect of postponing the election to an indefinite period of time as desired by the Government, the same is contrary to the constitutional provisions enshrined in Article 243U of the Constitution of India.

7. According to the learned counsel since Constitution mandates holding the election before expiry of the tenure of the elected body and the scheme of Chapter IXA of the Constitution requires management of the affairs of Urban Local Bodies by the elected body only, the State Election Commission in consultation with the State Government is under constitutional obligations to hold the election in proper time so that only elected bodies can manage the affairs of such Urban Local Bodies. No provision, therefore, can be made in the Municipal Act, after t

he Seventy Fourth Amendment of the Constitution, which has the effect of not holding the election in due time as required under the Constitution, submits the learned counsel. It has further been submitted that the State Government under the provisions of the Constitution is duty bound to do whatever is required to be done so that the State Election Commission, who has been entrusted with the responsibility of holding the general election to the Urban Local Bodies, held such election in time. It has further been submitted that non-holding of the election before expiration of the tenure of the elected body of Urban Local Bodies and not providing the requisite fund by the State, in fact, amounts to failure on the part of the State Election Commission and the State Government to discharge their constitutional obligations.

8. Challenging the notifications issued by the Government of Assam in Urban Development Department authorizing the private respondents to discharge the powers and duties of the Board, after expiration of the tenure of the elected body, it has been submitted by the learned counsel for the petitioners that even assuming that the provisions of sub-section (5) of Section 26 of the 1956 Act is not ultra vires the provisions of the Constitution, Section 299 which comes into play because of the provisions contained in Section 26(5) of the said Act empowers the State Government to authorize Government officials only to exercise the powers and duties of the Board, on its dissolution. According to the learned counsel it is evident from the proviso to Clause (b) of Section 299 that only the Government officials can be so authorize as the proviso speaks about the 'officer'. The learned counsel referring to Section 293 of the said Act further submit that the person who can be authorize under Section 299(b) can only be the Government officers such as the Commissioner of the Division, the Deputy Commissioner, Director of Municipal Administration, Sub-Divisional Officer or any other officer as by Section 293 such officers are empowered to enter into and inspect any municipal office and affairs of, or any immovable property in the occupation, of or any work in progress under, or any institution under the control and administration of the Board, apart from the power to call for and inspect any books of document in possession or under the control of the board. The learned counsel draw supports to their argument from a Single Bench decision of this court in Manoranjan Deka versus State of Assam and others.

9. According to the learned counsel in any case a Ward Commissioner or the Chairperson of an earlier elected bodies cannot be authorized by the Government to discharge the powers and duties of the Board, after the tenure of such elected bodies come to an end by virtue of the provisions contained in the Constitution as well as in the 1956 Act, as, such Commissioners/Chairmen ceased to be the Commissioners and Chairmen and if such is allowed to happen it would nothing but the fraud on the Constitution, as what cannot be done directly would then be allowed to be done indirectly. Such an action on the part of the respondent authorities is nothing but the extension of the tenure of an elected Commissioner beyond 5(five) years from the date appointed for holding the first meeting of the board, which is not recognized by the Constitution, submits the learned counsel.

10. Referring to the provisions contained in Chapter IXA of the Constitution, more particularly the provisions contained in Article 243U and 243ZA, it has been submitted by the learned counsel for the petitioners that it is the constitutional obligations of the State Election Commission as well as the State Government to hold the election before expiration of the tenure of the elected body and such constitutional obligations have to be performed by such authorities so that the constitutional mandate is not violated. But in the instant case, according to the learned counsel, though the State Election Commission has time and again written to the State Government to provide the necessary fund for the purpose of holding the election, the State Government has not made available the requisite fund for holding such election and thereby it has failed to discharge its constitutional obligation of providing necessary fund to the State Election Commission for the purpose of election and to see that such elections are held in time.

Referring to the decision of the Apex Court, in Kishansing Tomar versus Municipal Corporation of the City of Ahmedabad & Ors, it has been submitted that Part IX A has been inserted in the Constitution so that there is no delay in the constitution of the new Municipality after every 5(five) years and in order to avoid the mischief of delay in the process of election and allowing the nominated bodies to continue. According to the learned counsel, keeping in view the said objectives it is necessary for the State Government to recognize the significance of the State Election Commission and to abide by the directions of the Election Commission relating to the holding of election as the constitutional duties of holding election to the Urban Local Bodies vest on the State Election Commission. The learned counsel, therefore, submit that necessary directions may be issued to the State Government as well as to the State Election Commission to take all required steps so that elections can be held immediately and till then to manage the affairs of such bodies by authorizing Government officials to discharge the powers and duties of the Board.

11. The learned senior counsel appearing for the petitioner in WP(C) No.828 of 2009, which is on a different footing than the other writ petitions, challenging the order dated 02.02.2009 passed by the Commissioner and Secretary to the Government of Assam, Urban Development Department authorizing the Deputy Director, Town and Country Planning to discharge the powers and duties of Tezpur Municipal Board by cancelling the authorization of the petitioner to discharge such powers and duties made vide order dated 22.01.2009, has submitted that the petitioner having once been authorized to discharge such powers and duties, he cannot be divested of such power without sufficient ground, which also must be reflected in the order itself by which he has been divested for such power. According to the learned senior counsel the petitioner having once been authorized, he cannot be removed arbitrarily and since the action on the part of the State respondents is arbitrary, it strikes at the root and therefore, it cannot be sustained. Referring to the decision of the Apex Court in Commissioner of Police versus Gordhadas Bhanji it has further been submitted by the learned senior counsel that the authority cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made, entitled to know with exactness and precision the reason for which such orders are made. According to the learned senior counsel since the petitioner has been divested of the power of discharging the powers and duties of the Board without there being any reason whatsoever to revoke the authorization made in his favour on 22.01.2009, the impugned order dated 02.02.2009 authorising the Deputy Director, Town and Country Planning to exercise the powers and duties of the Board requires to be interfered with.

12. The learned Advocate General appearing for the State respondents on the contrary supporting the provisions of sub-section (5) of Section 26 of the 1956 Act has submitted that though Article 243U of the Constitution mandates holding of the election to the Urban Local Bodies prior to expiration of the tenure of such elected body so that the elected body can manage the affairs of such Urban Local Bodies, the State Legislature has thought it fit to enact the provision as contained in sub-section (5) of Section 26 of 1956 Act, in case, for good and sufficient reason the election cannot be held in time. Such provision, according to the learned Advocate General, is not ultra vires the provision of Article 243U of the Constitution as it has not extended the tenure of elected body and has dealt with only the situation that may arise for not holding the election in time, for good and sufficient reason. The learned Advocate General submits that by enacting the provisions of Section 26(5) of the said Act only the gap has been filled up, as the Constitution does not deal with such situation. According to the learned Advocate General, Section 26 of the said Act clearly stipulates that as soon as the tenure of the elected body comes to an end it stands dissolved and the administration of such Urban Local Bodies in the eventuality of not holding election is to be managed in accordance with the provisions contained in sub-section (5) of Section 26 read with Section 299 of 1956 Act. The learned Advocate General further submits that Section 299 does not debar the State Government from

authorizing any person other than the Government officials to discharge the powers and duties of the Board, after its dissolution, as it is evident from the language used in Clause (b) of Section 299 that the State Government can authorize 'such person', which cannot be interpreted to be the Government officials only, which may even include any Ward Commissioner who vacated the office due to expiry of his tenure, by virtue of the provisions contained in Article 243U of the Constitution as well as Section 26 of the 1956 Act. The learned Advocate General has, however, submitted that the State shall take all required steps so that election can be held by the State Election Commission by August, 2009.

13. In so far as the Writ Petition (C) No.828/09, it has been submitted that since under Section 299(b) of 1956 Act the Government only nominates a person to discharge the powers and duties of a Board, after its dissolution, it can cancel such nomination and nominate another person in his place for which no reason is required to be given, as, such nominated person has no right over any post to claim to be nominated. Moreover, no reason having been assigned while nominating the writ petitioner in the said writ petition to discharge the powers and duties of the Board, he cannot challenge the subsequent order nominating another person in his place on the ground that the same does not reflect any reason.

14. Mr. Pathak, the learned Senior counsel appearing for some of the private respondents supporting the submissions of the learned Advocate General has submitted that though the constitutional scheme requires holding of election before expiry of the term of an elected body, Section 26(5) of 1956 Act has been enacted to take care of the eventuality that may arise for not holding the election in time. According to the learned senior counsel a person who has been authorized to discharge the powers and duties of the Board under Section 299(b) of 1956 Act is the nominee of the State Government only and he is to discharge such powers and duties on behalf of the State Government and such nominees may even be the elected Commissioner or Chairman of the earlier Board whose term has expired and cannot be restricted to the Government officials only. Mr. Borbora, the learned senior counsel for the private respondents in another writ petition, in addition, has submitted that there is no impediment in the 1956 Act to appoint any person, which includes the earlier elected person, as Clause (b) of Section 299 specifically empowers the State Government to authorize any 'such person'. It has further been submitted that the term 'Officer' as occurring in proviso to Section 299(b) of the said Act does not refer to the Government officials only and in any case the Commissioners/Chairmen of such elected bodies being public servant within the meaning of Section 21 of the Indian Penal Code, such Commissioners/Chairmen can also be authorized to discharge the powers and duties of the Board under Section 299(b) of 1956 Act.

15. Mr. Bhattacharjee, the learned senior counsel appearing for the private respondent in WP(C) No.613 of 2009 has submitted that the discretion conferred on the Government by virtue of Section 299(b) of authorizing 'such person' to discharge the powers and duties of the Board, after its dissolution, is absolute and such discretion can be exercised by the Government in such a way so that the objectives of the Act are achieved. It has further been submitted that the Government by virtue of the power conferred by the said provision can nominate any person to discharge the powers and duties of the Board, except, however, such person against whom there are allegations. In the instant case the authorization of the respondent having not been challenged on the ground of having allegations against him, the writ petition deserves to be dismissed. Mr. A.K. Goswami and Mr. M.K. Choudhury, the learned senior counsel appearing for the private respondents in WP(C) Nos.1047 of 2009; 1544 of 2009 and WP(C) Nos.744 of 2009; 1451 of 2009, respectively, also support the contention of the learned counsel for the aforesaid respondents as noted above.

16. Mr. Dutta, the learned senior counsel appearing for the respondents in WP(C) Nos.486 of 2009 and 1460 of 2009, supporting the submissions of the learned

Advocate General has submitted that since the State Legislature inserted the provision of Section 26(5) in the statute book to deal with the extraordinary situation and the Constitution having not provide any provision to deal with such situation, it cannot be said that the said provision is unconstitutional being ultra vires Article 243U, when Section 26 specifically provides that the tenure of the elected body shall come to an end on expiry of 5(five) years from the date appointed for its first meeting. Mr. Dutta submits that a provision of law could be challenged as unconstitutional only on two counts i.e. the lack of legislative competency or being against the fundamental or other constitutional rights. According to the learned senior counsel there is no dispute that the State legislature has the legislative competency to legislate 1956 Act, therefore, only ground which left open to the petitioner is to demonstrate that such a provision of law either violative of the fundamental rights or other constitutional rights, which according to the learned senior counsel, the petitioners have miserably failed to do.

17. It has further been submitted by Mr. Dutta that a plain reading of Section 299(b) reveals that the Government is empowered to authorize any person, including an elected Commissioner whose term comes to an end, and is not restricted to the Government officials only. According to Mr. Dutta the term 'Officer' appearing in proviso to Clause (b) of Section 299 also includes the earlier elected Commissioners or Chairpersons, as the 1956 Act recognizes the Chairmen or Vice Chairmen or elected members or the elected Commissioners as the officers. Mr. Dutta submits that the word 'Officer' occurring in proviso to Section 299(b) has to be read in the context of 1956 Act. It has further been submitted that it is not within the jurisdiction of the writ court to create a class and to exclude such class of persons from being authorize by the Government to exercise the powers and duties of the Board, after its dissolution, in the absence of any such classification in the statute, in support of which the learned Senior counsel has place reliance on a decision of the Apex Court in M/S Murthy Match Works etc vs. The Assistant Collector of Central Excise etc. According to Mr. Dutta, the earlier elected persons or the members of the public being the people's representative it is always desirable that in the absence of an elected body only such persons are to be preferred while making authorization to exercise the powers and duties of the Municipal Board, after its dissolution, as 1956 Act requires rendering service to the public in general. Mr. Dutta therefore, submits that the single bench decision of this court in Manoranjan Deka (supra) needs to be overruled in so far as it relates to the declaration that the Government can only authorize Government officials to discharge the powers and duties of the Board under Section 299(b) of 1956 Act.

18. Mr. Dutta, however, has submitted that it is the constitutional obligation of the State Election Commission to hold the election in time as required under Article 243U of the Constitution of India, except in a situation beyond their control. According to the learned senior counsel it is evident from the pleadings of the Election Commission as well as of the State Government in the affidavits-in-opposition filed that the election could not be held because of not making required fund available to the Election Commission, which cannot be the ground for not holding the election as mandated by the Constitution. Referring to the decision of the Apex Court In the matter of Special Reference No.1/02 (Gujrat Assembly Election matter) more particularly to the opinion expressed in para 151 thereof, it has been submitted by the learned senior counsel that when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse, for non-performance of the formalities prescribed by the statute. Mr. Dutta, however, submits that stand taken by the Government in the instant batch of petitions cannot be termed as sufficient ground for not holding the election in time and as mandated by the Constitution. Therefore, the necessary directions may be issued to the State Government to take all required steps including making available the re

quired fund as well as to the State Election Commission to hold the election so that the constitutional obligations are fulfilled and the Urban Local Bodies are managed by elected bodies.

19. Mr. Mahmud, the learned counsel appearing for the State Election Commission, referring to the averments made in the affidavit-in-opposition filed by its Secretary as well as the annexures appended thereto, has submitted that the State Election Commission in due time has intimated the State Government to make available required fund so that the election to those Urban Local Bodies could be held in time, as required under the Constitution of India, since the Government has failed to make such fund available to the State Election Commission, the general election could not be held despite the efforts made by the Commission in that regard. According to Mr. Mahmud it is the constitutional obligation of the State to provide necessary fund to the State Election Commission to conduct the election. Mr. Mahmud further submits that at present there is no Election Commissioner as earlier incumbent has resigned and the Government is yet to appoint anyone to the said office, though Commission is ready to hold such election, as soon as the Election Commissioner is appointed.

20. We have considered the submissions of the learned counsel appearing for the parties and also perused the pleadings.

21. The following issues arise for the consideration of this court in this batch of writ petitions :-

1. The constitutional validity of Section 26(5) of the Assam Municipal Act.

2. If Section 26(5) of the Assam Municipal Act is held to be valid whether the executive action taken in exercise of the power conferred u/s 26(5) of the Act is in conformity with the legal requirements of the said Section ?

22. Section 10 of the Assam Municipal Act contemplates the establishment of a 'body of Commissioners' designated as the Municipal Board. Such a Board is declared as a body corporate with perpetual succession and a common seal. The expression Commissioners is defined under Section 3(5). Similarly the expression Board is defined under Section 3(1). The numbers of Commissioners and the various categories of the Commissioners of a Municipal Board is specified under Section 11, the details of which may not be necessary at this stage.

23. Under Section 26 of the Assam Municipal Act elections are required to be held to the Municipalities periodically. There is no express provision under the Municipal Act stipulating the time frame for the conduct of elections periodically. The normal tenure of the elected body is five years but under Section 298 the State Govt can dissolve the elected Municipalities if it is satisfied that the affairs of the municipality are not being conducted in accordance with law. Under Section 299 of the Act it is stipulated that whenever the elected Municipal Board is dissolved by the State before the expiry of its tenure the State Govt is required to make such arrangements for the conduct of the affairs of the municipality as provided under Section 299.

24. It is a notorious fact that not only in the State of Assam but in many parts of the country in the various States elections to the local bodies, entrusted with the responsibility of local self governance, not only Municipalities but also various other bodies like Village Panchayats and Zilla Parishads, were not being conducted periodically. For long spells of time the management of these bodies was entrusted to either non elected persons chosen by the State or to the officers of the State. It is in this background the Constitution was amended

ended by inserting Part IX and IXA by the Constitution (Seventy-third) Amendment Act, 1992. While Part IX deals with Panchayats, a defined expression under Article 243(d), to mean an institution of self governance constituted under Article 243B for rural areas, Part IXA deals with the Municipalities, once again a defined expression under Article 243P(e), to mean an institution of self governance constituted under Article 243Q. It is stated in the objects and reasons of the Bill by which the Constitution Seventy-third amendment was introduced in the Parliament as follows :-

Though the Panchayati Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged supersessions, insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources.

2. Article 40 of the Constitution which enshrines one of the Directive Principles of State Policy lays down that the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. In the light of the experience in the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayati Raj Institutions to impart certainty, continuity and strength to them.

3. Accordingly, it is proposed to add a new Part relating to Panchayats in the Constitution to provide for among other things, Gram Sabha in a village or group of villages; constitution of Panchayats at village and other level or levels; direct elections to all seats in Panchayats at the village and intermediate level, if any, and to the offices of Chairpersons of Panchayats at such levels; reservation of seats for the Scheduled Castes and Scheduled Tribes in proportion to their population for membership of Panchayats and office of Chairpersons in Panchayats at each level; reservation of not less than one-third of the seats for women; fixing tenure of 5 years for Panchayats and holding elections within a period of 6 months in the event of supersession of any Panchayat; disqualifications for membership of Panchayats; devolution by the State Legislature of powers and responsibilities upon the Panchayats with respect to the preparation of plans for economic developments and social justice and for the implementation of development schemes; sound finance of the Panchayats by securing authorisation from State Legislatures for grants-in-aid to the Panchayats from the Consolidated Fund of the State, as also assignment to, or appropriation by, the Panchayats of the revenues of designated taxes, duties, tolls and fees; setting up of a Finance Commission within one year of the proposed amendment and thereafter every 5 years to review the financial position of Panchayats; auditing of accounts of the Panchayats; powers of State Legislatures to make provisions with respect to elections to Panchayats under the superintendence, direction and control of the chief electoral officer of the State; application of the provisions of the said Part to Union territories; excluding certain States and areas from the application of the provisions of the said Part; continuance of existing laws and Panchayats until one year from the commencement of the proposed amendment and barring interference by courts in electoral matters relating to Panchayats.

It can be noticed from the above that the Parliament took notice of the notorious fact that there was a failure to hold regular elections to the municipal bodies apart from many other relevant facts. The object of the amendment, as can be seen from the above is 'to put on a firm footing relationship between the State Govt and the urban local bodies with reference to the various aspects of the functioning of the local bodies' and more specifically to ensure regular conduct of elections to such bodies.

25. Under Article 243Q it is mandated that there shall be constituted in every State a municipal council for a smaller urban areas and a municipal corporation for a larger urban areas. Under Article 243R each municipal area is required to be divided into territorial councils to be known as wards and persons are required to be chosen by direct election to represent each one of such territorial councils.

26. Under Article 243U(1) it is mandated that every municipality shall continue for five years from the date appointed for its first meeting. However, such continuance is subject to the dissolution of the municipality under any law for the time being in force. Article 243U(1) reads as follows :-

243U Duration of Municipalities, etc - (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;

27. Under Clause (3) it is mandated that an election to constitute the municipality should be completed before the expiry of its duration specified in Clause (1), that is in case of the tenure of the elected municipal body coming to an end by efflux of time, in the case of the dissolution of a municipal body during the subsistence of its tenure of five years it is mandated that the election shall be conducted within a period of six months from the date of its dissolution. Article 243 U reads as follows :-

243U Duration of Municipalities, etc - (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) & &

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

(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 where 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.

28. Consequent upon the amendment of the Constitution the Assam Municipal Act, 1956 came to be amended by the Legislature of Assam, obviously with the intention of bringing the provisions of the Act in consonance with the provisions of the Constitution on such amendment. Section 26 of the Assam Municipal Act reads as follows :-

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.

(2) The State Election Commission shall cause the results of the general election to be published in the Official Gazette and the date of Official Gazette containing the publication shall be deemed to be the date of completion of the general election.

Provided that where 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 section for constitution of the Municipality for such period.

(3) 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 sub-section (1) had it not been so dissolved.

(4) 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 provision of Section 299 shall apply.

It can be seen from the above under Sub-section (3) even the Legislature of Assam mandated that election to the Municipalities shall be held before the expiry of its duration specified under Sub-section (1), that is, the period of five years from the date of the first meeting of the newly constituted Municipal Board after the general election. The impugned provision, that is Section 26(5), however, enables the State to resort to power under Section 299 of the Act in those cases where the election to the Municipalities could not be held before the expiry of the tenure of the Municipalities. In other words if the elections to a municipality is not conducted before the expiry of its tenure, by a legal fiction under Section 26(5) on the expiry of the tenure of the municipality the Board is deemed to have been dissolved under Section 298.

29. Section 298 authorises the State Govt to dissolve the Board in the various contingencies enumerated under the said Section and after following the procedure prescribed therein. The consequence of the dissolution of a Municipal Board under Section 298 is provided under Section 299. Section 299 reads as follows :-

299. Consequence of dissolution.- When an order of dissolution has been passed under Section 298, the following consequences shall ensure :-

- (a) all Commissioners of the Board shall, as from the date of order of dissolution, vacate their offices as such Commissioners;
- (b) all powers and duties which under this Act may be exercised and performed by the Board whether at a meeting or otherwise shall, during the period of dissolution be exercised and performed by such person as the State Government may direct till Commissioner and Chairman are elected;

Provided that the officer so appointed after dissolution of the Board shall obtain prior approval of the Director or Municipal Administration on the matter on which but for the dissolution, the decision of the Board is necessary.

- (c) all properties vested in such Board shall during the period of dissolution vest in the State Government.

30. Relevant in the context of the present case is Clause (b) which authorises the State Govt to nominate a person to exercise all the powers and duties under the Act which are required to be performed by the Municipal Board.

In other words by enacting Section 26(5) the Assam Legislature enables the State Govt to resort to the old practice of running the affairs of the municipality through persons other than elected representatives of the people, a practice which was disapproved by the Parliament and lead to the amendment of the Constitution. The language of Article 243U Clause 3(a) is mandatory and leaves no scope for any doubt as to the point of time at which election to the Municipalities is required to be completed. The said Article, as we have already noticed, emphatically declares that an election to constitute a municipality shall be completed before the expiry of its duration. Therefore Section 26(5) is inconsistent with the constitutional mandate under Article 243U Clause 3(a).

31. However, the learned Advocate General appearing for the State and also the learned counsel appearing for the various respondents in these writ petitions, who happen to be the beneficiaries of the exercise of power by the State under Section 26(5) of the Assam Municipal Act, argued that Section 26(5) has intended to enable the State to make appropriate arrangements in those cases where the State for reasons beyond its control is not able to comply with the constitutional mandate under Article 243U (3)(a) for completing the election to the Municipalities before the expiry of the tenure of the existing elected bodies and, therefore, submitted that such an incidental power is necessary for the State to conduct the affairs of the Municipalities as according to the learned counsel there can be innumerable circumstances which may hamper the ability of the State to conduct the elections to the Municipalities before the expiry of the tenure of the elected body. It is further submitted that in the absence of the power such as the one conferred under Section 26(5) the State would simply be unable to run the administration of the Municipalities and, therefore, the said provision must be construed not to be inconsistent with the requirement of Article 243U (3).

32. Before we proceed to examine the submission we believe it is profitable to examine the scheme of the Constitution with reference to the elections to the various representative bodies brought into existence by the Constitution. These bodies are (1) the two chambers of the Parliament, that is, the Council of States, popularly known as the Rajya Sabha and the House of the People, popularly known as the Lok Sabha. Under Article 168 of the Constitution some of the States in the Union of India have a legislature consisting of two Houses and others States one House known as Legislative Council and Legislative Assembly.

33. Though the Constitution specifies the tenures of the Lok Sabha and the respective Legislative Assemblies of the various States under Article 83 and 172 for a period of 5 years from the relevant dates specified in those Articles the Rajya Sabha and the Legislative Council wherever they exist are continuing bodies. Insofar as Lok Sabha and Legislative Assemblies are concerned it is stipulated in the above mentioned Articles that they shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as dissolution of the house. Both the Articles contain a proviso each which are in pari materia, which reads as follows :-

83. Duration of Houses of Parliament.-

(1) & &

(2) & &

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

34. It can be seen from the above that the stipulation of five years

of tenure of these bodies can be extended by the Parliament by a law subject to the limitations contained in those provisos. Neither the Constitution nor any other law specifies the point of time on which elections to either the Lok Sabha or the Legislative Assemblies of the various States are to be conducted.

35. The superintendence, direction and control of the conduct of elections is entrusted to a Commission known as the Election Commission created under Art 324 and, therefore, it becomes the obligation of the Election Commission to conduct the elections to the said bodies periodically. In spite of the absence of any specific stipulation as to the point of time at which such elections are to be conducted as a matter of constitutional convention elections are always conducted by the Election Commission well within time to avoid a situation of there being a time gap between the expiration of the tenure of the body and the constitution of the successor body - either the Lok Sabha or the Legislative Assembly, as the case may be. The absence of a specific stipulation in the Constitution as to the point of time at which such elections are to be held is not because of any lack of vision on the part of makers of the Constitution. As pointed out by an American jurist Laurence H Tribe the Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices .

36. However, when the Constitution was amended by the 73rd Amendment Act inserting Part IX and IXA the Parliament thought it fit to categorically stipulate the point of time at which elections to the bodies to which the responsibility of local self government is entrusted, such as the Municipalities and the Panchayats under Art 243U and 243E respectively, mandating that such elections should be completed before the expiry of the tenure of those bodies. The fact that the said provisions are mandatory, cannot be any more in dispute in view of a decision of a Constitution Bench of the Supreme Court reported in (2006) 8SCC 352. The Supreme Court at para 13 held as follows :-

13. The effect of Article 243-U of the Constitution is to be appreciated in the above background. Under this Article, the duration of the Municipality is fixed for a term of five years and it is stated that every Municipality shall continue for five years from the date appointed for its first meeting and no longer. Clause (3) of Article 243-U states that election to constitute a Municipality shall be completed - (a) before the expiry of its duration specified in clause (1), or (b) before the expiration of a period of six months from the date of its dissolution. Therefore, the constitutional mandate is that election to a Municipality shall be completed before the expiry of the five years' period stipulated in Clause (1) of Article 243-U and in case of dissolution, the new body shall be constituted before the expiration of a period of six months and elections have to be conducted in such a manner. A Proviso is added to Sub-clause (3) Article 243-U that in case of dissolution, 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. It is also specified in Clause (4) of Article 243-U that 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.

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Even in the said case it was argued that due to multifarious reasons the State Election Commission (the body entrusted with the responsibility of conducting elections to the local bodies, such as the municipalities and Panchayats created under Art 243 ZA and 243K respectively) may not be in a position to conduct the elections in time and, therefore, provisions of Art 243U could not be complied with *stricto sensu*. Repelling the said submission at para 19 the Su

preme Court held as follows :-

19. From the opinion thus expressed by this Court, it is clear that the State Election Commission shall not put forward any excuse based on unreasonable grounds that the election could not be completed in time. The Election Commission shall try to complete the election before the expiration of the duration of five years' period as stipulated in Clause (5). Any revision of electoral rolls shall be carried out in time and if it cannot be carried out within a reasonable time, the election has to be conducted on the basis of the then existing electoral rolls. In other words, the Election Commission shall complete the election before the expiration of the duration of five years' period as stipulated in Clause (5) and not yield to situations that may be created by vested interests to postpone elections from being held within the stipulated time.

37. For all the above mentioned reasons we reject the submission of the learned Advocate General and the other learned counsel appearing for the parties that the powers such as the one conferred under Sec 26(5) of the Assam Municipal Act is an incidental power and necessary for the proper functioning of the Municipalities. The provision is plainly inconsistent with the mandate of the Constitution and is required to be declared as such.

38. Coming to the facts of the cases on hand the delay in conducting the elections to these various Municipalities is not even on account of any factor which is beyond the control of the State Government. We are distressed to notice that the State Govt simply did not cooperate with the Election Commission.

39. An affidavit dated 18-2-09 was filed by the Secretary to the Assam State Election Commission in WP(C) No.486/09. The substance of the affidavit is that the Election Commission was simply starved of funds and in spite of repeated requests by the Election Commission in writing to the State Govt on various dates commencing from 4-12-07 the State Govt did not provide the necessary funds to the Election Commission. Copies of the letters addressed by the Election Commission are annexed to the above mentioned affidavit. The State did not dispute any one of the allegations made in the affidavit dated 18-2-09 filed by the Secretary to the Election Commission. Therefore, the only inference that can be drawn from the above is that the State of Assam deliberately did not provide the necessary funds to the Election Commission thereby subverting the constitutional scheme of conducting regular elections to the Municipalities and now comes forward with a submission to this court that the provision such as the one contained under Section 26(5) is necessary for the effective implementation of the Municipal Act. We cannot imagine any more perverse submission.

40. It is worthwhile remembering that the Supreme Court in (2006) 8S CC 352 (Supra) emphatically declared that -

22. In our opinion, the entire provision in the Constitution was inserted to see that there should not be any delay in the constitution of the new Municipality every five years and in order to avoid the mischief of delaying the process of election and allowing the nominated bodies to continue, the provisions have been suitably added to the Constitution. In this direction, it is necessary for all the State governments to recognize the significance of the State Election Commission, which is a constitutional body and it shall abide by the directions of the Commission in the same manner in which it follows the directions of the Election Commission of India during the elections for the Parliament and State Legislatures. In fact, in the domain of elections to the Panchayats and the Municipal bodies under the Part IX and Part IX A for the conduct of the elections to these

e bodies they enjoy the same status as the Election Commission of India.

In spite of such a declaration by the Supreme Court in the above mentioned judgment dated 19-10-06 the State of Assam simply ignored the repeated requests of the Election Commission to provide the necessary funds.

41. In the light of our conclusion that Section 26(5) of the Assam Municipal Act is inconsistent with the mandate of Article 243U of the Constitution of India we declare the same to be ultra vires the powers of the Legislature of the State of Assam and, therefore, void.

42. In view of the above declaration we do not see any reason to examine the other submissions made by the various counsel regarding the executive action taken in exercise of the power conferred under Section 26(5) of the Assam Municipal Act.

43. We are left with a situation that while on one hand the constitutional mandate of holding the elections to the Municipalities well before the expiry of the tenure of the previous elected bodies is flouted taking advantage of the situation the Govt of Assam also initially appointed various non elected persons to run the affairs of the Municipalities in the purported exercise of the power under Section 299 of the Assam Municipal Act. By virtue of the various interim orders of this court in this batch of writ petitions in most of the cases such nominations were kept in abeyance and consequentially the State of Assam subsequently nominated its officers to run the affairs of these Municipalities.

44. We may also place on record that the learned Advocate General appearing for the State on the conclusion of hearing of this batch made a categorical statement that irrespective of the result in these writ petitions the State would provide the necessary funds to the Election Commission immediately and render all necessary cooperation to the Election Commission to conduct the elections to these various Municipalities at an early date. However, it is brought to our notice that during the pendency of these writ petitions the office of the Election Commissioner fell vacant on account of the resignation of the incumbent.

45. In the above mentioned circumstances we deem it appropriate to direct the State of Assam to forthwith take all necessary steps for appointment of the Election Commissioner, at any rate not later than four weeks from the date of this judgment and the Election Commissioner shall thereafter take expeditious steps to conduct the elections for the various Municipalities in the State of Assam whose tenure has already expired, within a period of eight weeks from the date of assumption of the office by the new Election Commissioner. We also direct the State of Assam to render all necessary cooperation to the Election Commission including the allocation of necessary funds.

46. We are also conscious of the fact that in some of the writ petitions there was no interim direction and consequentially non elected nominees are running the affairs of these Municipalities. We declare the continuance of such persons to be illegal and the State should within a period of one week from the date of this judgment appoint suitable officers of the State to be persons in charge of the said Municipalities for conducting the affairs of the Municipalities till regular elections are held.

47. The writ petitions are accordingly disposed of, as indicated above.