

(2016) 02 AHC CK 0151
In the Allahabad High Court
Case No : Service Bench No. 550 of 2015

Amit Kumar Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 25-02-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 16
Uttar Pradesh Muncipal Corporations Adhiniyam, 1959 — Section 112-A, Section 540,
Section 540 (2)
Uttar Pradesh Municipalities Act, 1916 — Section 69-B

Citation : (2016) 02 AHC CK 0151

Hon'ble Judges : Narayan Shukla and Ashok Pal Singh, JJ.

Bench : Division Bench

Advocate : Vidhu Bhushan Kalia and Rajat Rajan Singh, for the Appellant;
C.S.C., Gopal Pandey, Laltaprasad Misra and Ram Dayal Sharma, for the
Respondent

Final Decision : Allowed

Judgement

Narayan Shukla, J.—1. Heard Mr. S.K. Kalia, learned Senior Counsel assisted by Mr. Vidhu Bhushan Kalia, learned counsel for the petitioner and Mr. Sanjay Bhasin, learned Additional Chief Standing Counsel as well as Mr. R.D. Sharma, learned counsel for the opposite party No. 4.

2. The petitioner has assailed the Notification dated 10 November 2014 issued by the Secretary Urban Development Department, Government of U.P. rescinding the Government Notification dated 21 September 2010 ab-initio as also the consequential order dated 22 December 2014 issued by the Government, whereby the office memorandum dated 5 October 2010 was revoked. By means of Government Order dated 5 October 2010 the petitioner was merged with the post of Assistant Municipal Commissioner under the Uttar Pradesh Palika Centralized Service Rules, 2010.

3. The facts of the case in brief as exposited by the petitioner are as under:--

"On 3.8.2007 the post of Development Coordinating Officer was advertised to be fulfilled. In all ten candidates had participated in the said selection, out of whom the petitioner was appointed on the post of Development Coordinating Officer till 29 February 2008 which was extended till 28 February 2009. The post of Development Coordinating Officer was created temporarily vide order dated 18.8.2008 and the petitioner was absorbed on the said post vide order dated 30.1.2009 by the Municipal Commissioner, Kanpur Municipality, Kanpur. Subsequently the said post was made permanent vide order dated 19.5.2010 issued by the State Government and the petitioner was appointed permanently vide order dated 22.5.2010. Thereafter the petitioner through representation dated 25.6.2010 requested for his absorption against the vacant post of Assistant Municipal Commissioner bearing the same pay scale as he fulfilled all the requisite qualifications. The State Government amended the Uttar Pradesh Palika (Centralized) Services (Twenty Fourth Amendment) Rules, 2010 and added third proviso in Rule 6(1) (iii), which is extracted below:--

"Provided also that the State Government may absorb in consultation with the Public Service Commission, any person who is appointed and confirmed to a post (other than a cadre post in the Corporation) in the pay scale Rs. 15600-39100 (Grade pay 5400) to the post of Assistant Municipal Commissioner."

4. The petitioner was absorbed on the post of Assistant Municipal Commissioner vide order dated 5.10.2010 of the State Government in Kanpur Municipality, Kanpur, which has been annulled by the notification impugned.

5. The learned Senior Counsel Mr. S.K. Kalia appearing for the petitioner has submitted that in exercise of powers conferred under Section 112-A of Uttar Pradesh Municipal Corporation Act, 1959 (in short Corporation Act) and Section 69-B of the U.P. Municipalities Act, 1916 the State Government has framed U.P. Palika (Centralized) Service Rules, 1966, which govern the service conditions of the employees of Municipal Corporations. He further submitted that Section 540 of U.P. Municipal Corporation Act, 1959 confers powers on the State Government to make Rules to carry out the purposes of the Act. Section 540 of the Corporation Act is extracted below:--

"540. Making of rules by State Government.- (1) In addition to the power conferred upon the State Government under the preceding Chapters of this Act to make rules the State Government may make rules to carry out the purposes of the Act and may also make model rules for the guidance of a Corporation in any matter connected with the carrying out of the provisions of this or any other enactment.

Explanation.- The power conferred by this sub-section includes the power to make rules regulating the holding of meetings of the Corporation and its Committees and the conduct of business at such meetings till bye-laws are framed under the Act for the purpose.

(2) The power of the State Government to make rules under this Act shall be

subject to the condition of the rules being made after previous publication and of not taking effect until they have been published in the official Gazette.

(3) Any rule made by the State Government may be general for all Corporations or may be special for any one or more Corporations to be specified.

(4) Omitted by U.P. Act No. 12 of 1994 (w.e.f. 30.5.1994)."

6. The learned Senior counsel has asserted that in view of the aforesaid provisions of the Act it is obvious that the State Government has power to frame the Rules and to amend the Rules, but it does not have power and jurisdiction to amend, alter, rescind or declare null and void any amendment or Rule of U.P. Palika (Centralized) Service Rules 1966 with retrospective effect. He further submitted that the petitioner had accrued vested right being appointed on the post of Assistant Municipal Commissioner, which could not be taken away by subsequent amendment that too with retrospective effect. Thus, he has claimed the action of the State Government as violative of Article 14 and 16 of the Constitution of India.

7. The learned counsel for the petitioner has cited some cases, which are discussed as under:--

"In Mahabir Vegetable Oils (P) Ltd. and another versus State of Haryana and others , (2006) 3 SCC 620 the Hon"ble Supreme Court held that it is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

In Vice-Chancellor, M.D. University, Rohtak versus Jahan Singh, reported in , (2007) 5 SCC 77 the Hon"ble Supreme Court following its earlier judgment of Mahabir Vegetable Oils (P) Ltd. (Supra) held that no retrospective operation could be given having regard to the fact that thereby the rights of other employees of the University could not have been taken away.

The learned Senior Counsel appearing for the petitioner further contended that before revocation of the petitioner's absorption from the post of Assistant Municipal Commissioner he was not provided opportunity of hearing, therefore, the order issued by the State Government being in violation of Article 14 of the Constitution of India is unsustainable. In support of this submission he cited a decision of the Supreme Court i.e. Shridhar S/o Ram Dular versus Nagar Palika, Jaunpur and others reported in , 1990 (Supp) SCC 157. In this case the Hon"ble Supreme Court held that the High Court committed serious error in upholding the order of the government dated February 13, 1980 in setting aside the appellant's appointment without giving any notice or opportunity to him. It is an

elementary principle of natural justice that no person should be condemned without hearing. The order of appointment conferred a vested right in the appellant to hold the post of Tax Inspector, that right could not be taken away without affording opportunity of hearing to him. Any order passed in violation of principles of natural justice is rendered void.

In *Basudeo Tiwary versus Sido Kanhu University and others*, (1998) 8 SCC 194 the Hon"ble Supreme Court held that in the sphere of public employment, it is well settled that any action taken by the employer against an employee must be fair, just and reasonable which are the components of fair treatment. The conferment of absolute power to terminate the services of an employee is an antithesis to fair, just and reasonable treatment.

The learned Senior Counsel has also placed reliance upon the Black"s Law Dictionary which defines the term "Absorption" and "Merger" as under:--

"Absorption". Act or process of absorbing. Term used in collective bargaining agreements to provide seniority for union members if employer"s business is merged with another. *Humphrey v. Moore*, Ky., 375 U.S. 335, 84 S.Ct. 363, 369. Partial or complete payment of freight charges by seller or freight carrier. Costs not passed on to customer."

"Merger". The fusion or absorption of one thing or right into another; generally spoken of a case where one of the subjects is of less dignity or importance than the other. Here the less important ceases to have an independent existence. Contract law. The extinguishment of one contract absorption into another, and is largely a matter intention of the parties. *Caranas v. Jones*, Tex.Civ. 437 S.W.2d 905, 910."

8. In the aforesaid backdrop Mr. Kalia, learned Senior Counsel appearing for the petitioner has submitted that the State Government made the impugned amendment in the Uttar Pradesh Palika Centralized Service Rules 2010 called as the Uttar Pradesh Palika Centralized Service (24th Amendment) Rules 2010 in exercise of powers provided under Section 540 (2) of the Corporation Act, whereby all actions taken under the said Rule has been deemed to be null and void. This amendment impugned was notified on 10 November 2014. Sub Section (2) of Section 540 of the Corporations Act provides that the Rules made by the State Government shall not take effect until it has been published in the official Gazette. Accordingly, it shall come into force only on or after 10 November 2014 not prior to it.

9. In view of the aforesaid backdrop he has asserted that the amendment impugned is unsustainable in the eye of law. Consequently the order dated 22 December 2014 passed by the State Government revoking the petitioner"s merger on the post of Assistant Municipal Commissioner deserves to be quashed.

10. The respondents have filed counter affidavit. They have doubted over the procedure of selection adopted to select the petitioner on the post of

Development Coordinating Officer as well as Assistant Municipal Commissioner with the following submissions:--

"The petitioner has suppressed the material facts that an advertisement was issued by the Nagar Nigam Kanpur for appointment on the post of Anushravan Evam Samanvaya Adhikari (Vikas) on 16.1.2009, which was cancelled subsequently on his request. The post of Anushravan Evam Samanvaya Adhikari (Vikas) was created temporarily by Government Order dated 18.8.2008 only just to accommodate the petitioner and secure for him permanent post without adopting the due process of law. Though there was no need of consultation of Public Service Commission, but it was consulted just to make a strong case in his favour. The Public Service Commission had accorded its consent. The respondents have narrated some dates and events to indicate that the things which had happened within a short span of time could not have happened unless those were managed by the petitioner. They have tried to distinguish the expressions "Absorption" and "Merger" as according to them both the "words" have two different connotations. It is stated that under the proviso of Rule 6(1) (iii) the proviso was made for absorption not merger. It is stated that amending the Rules retrospectively was not illegal as has been held by the Supreme Court in the case of S.S. Bola versus B.D. Sardana, reported in , 1997 (8) SCC 522. In the case of Mahabir Vegetable Oils Pvt. Ltd. Versus State of Haryana, reported in , 2006 (3) SCC 620 the Supreme Court has held that the rules can be amended/rescinded with retrospective effect utilizing the power available under the General Clauses Act 1904."

11. The Kanpur Nagar Nigam has also come forward to file counter affidavit, in which it is stated that one ex-cadre temporary post of Development Coordinating Officer was created by the State Government, which was sanctioned till 29 February 2008. Later on it was extended till 28 February, 2009. Though there was a request made to the State Government to create one permanent post of Development Coordinating Officer (Development) in place of Development Coordinating Officer in the pay scale of Rs. 8000-13500, yet the State Government created the said post on temporary basis vide Government Order dated 18.8.2008. They have questioned the petitioner's absorption on the post of Development Coordinating Officer (Development) being not in accordance with the provisions of law as this post was to be fulfilled by direct recruitment and not by deputation or absorption from any other source. It is stated that absorption is always made from temporary post to permanent post and not from temporary post to temporary post. It has further been stated that the petitioner's absorption on the post of Development Coordinating Officer (Development) being illegal the subsequent absorption on the post of Assistant Municipal Commissioner was also illegal and as such it deserves to be quashed.

12. Regard being had to the aforesaid submissions, we found that the State Government had amended the Uttar Pradesh Palika Centralized Service Rules 2010 called as the Uttar Pradesh Palika Centralized Service (24th Amendment)

Rules 2010 and added third proviso in Rule 6(1)(iii), which provided the absorption of any person appointed on the post other than the cadre post in a Corporation. Indisputably, the petitioner had been working on the post of Development Coordinating Officer, which was an ex-cadre post. Since the amended rule had permitted the absorption of ex-cadre employee, the petitioner was absorbed on the post of Assistant Municipal Commissioner. By means of impugned notification the said amended Rule has been rescinded ab-initio and all the actions taken under the said rule have been deemed to be null and void. Sub-Section (2) of Section 540 of the Corporation Act enforces the Rules framed by the State Government only from the date of its publication in the official Gazette. The impugned Rule was notified in the official Gazette on 10 November 2014, therefore, in view of Sub Section (2) of Section 540 of the Corporation Act it will come into force on 10th November 2014. The provisions of Section 540 of the Corporation Act does not permit the State Government to frame the rules with retrospective effect. The Hon"ble Supreme Court had held in the cases discussed above that the subordinate legislation cannot be given retrospective effect unless it is permitted by the substantive legislation.

13. Therefore, we are of the view that the State Government has no jurisdiction to amend such rule so as to undo the actions taken under the earlier Rules. Since issuance of the office memorandum dated 22 December 2014 is only the consequential action of the Rules, we are of the view that once the Notification impugned goes, this office memorandum dated 22 December 2014 deserves to be quashed. It is also not in dispute that before issuing the office memorandum dated 22 December 2014 the petitioner was not provided any opportunity of hearing. Thus, the action of the State Government in issuing the office memorandum is also in violation of principles of natural justice.

14. Therefore, we hereby quash the Notification dated 10 November 2014 issued by the Secretary, Urban Development Department, Government of U.P. rescinding the Government Notification dated 21 September 2010 ab-initio as also the consequential order dated 22 December 2014 issued by the Government, whereby the office memorandum dated 5 October 2010 was revoked.

15. The writ petition stands allowed.