
(2013) 09 MP CK 0124
In the Madhya Pradesh High Court
Case No : Writ Petition No. 5577 of 2013

Anil Kumar Jain

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 10-09-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Madhya Pradesh Municipalities Act, 1961 — Section 180(1), 183(5)(a), 184, 185, 187

Citation : (2014) 1 MPLJ 225

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

Advocate : N.K. Gupta, for the Appellant; Vivek Khedkar, Dy. Advocate General for Respondents No. 1 to 3 and None, for the Respondent

Final Decision : Allowed

Judgement

Sujoy Paul, J.—By filing this petition under Article 226 of the Constitution the petitioner has called in question the legality, validity and propriety of the order Annexure P/1 dated 24.07.2013 and order dated 03.08.2013, Annexure P/3. This is second visit of the petitioner to this Court. Earlier he filed WP No. 1174/2013 before this Court. In the said case he called in question the order dated 15.02.2013 passed by Sub Divisional Magistrate (respondent No. 2 therein). This Court decided the said matter on 21st February, 2013 and opined that the Sub Divisional Magistrate (SDM) has no authority and competence to exercise the power u/s 187(A) of M.P. Municipalities Act, 1961. Accordingly, the impugned order therein was set aside and liberty was reserved to the competent authority to proceed against the petitioner in accordance with law. Thereafter, by the impugned orders Annexure P/1 and P/3 the petitioner is directed to pay Rs. 24,96,420/- as fine by taking assistance of the resolution of the President-in-Council No. 440 dated 03.05.2013. By Annexure P/3 dated 03.08.2013 reliance is placed on the resolution of President-in-Council No. 1087 dated 27.05.2013 and same amount, as aforesaid, is imposed as fine against the petitioner.

2. Shri N.K. Gupta, learned counsel for the petitioner, by relying on section 187(A) of the Act, submits that the orders Annexure P/1 and P/3 are not passed in consonance with the statutory requirement of the said provision. He submits that these orders are passed by incompetent authority and therefore, needs interference by this Court. To elaborate, learned counsel for the petitioner drew attention of this Court on Annexure P/2 dated 03.05.2013 which shows that the matter was placed before President-in-Council by resolution No. 440. President-in-Council directed to place this matter before Municipal Council. In turn, communication dated 27.05.2013 (Annexure P/4) is passed (resolution No. 1087) by Municipal Council on 27.05.2013. This resolution states that SDM, Dabra in his letter No. 1073 dated 28.02.2013 directed the Municipality to take action as per section 187 of the Municipalities Act, 1961 and therefore, the President and CMO are being authorised to take action in accordance with law. By reading Annexure P/5 dated 28.02.2013 written by SDM, it is contended that the said authority directed the Municipality to act in a particular manner and inform about the outcome of the action taken.

3. Shri N.K. Gupta submits that as per section 187(A), second proviso, it is clear that permission for compounding can be given only by the President-in-Council. When statute gives power to particular authority the decision regarding permission and regarding compounding has to be taken by the said authority only. The said power cannot be exercised by any other authority. It is contended that SDM has no authority to direct the statutory authority of Municipal Council to act in a particular manner and report compliance. It is further contended that the petitioner completed his construction in the year 2000-01 which is prior to amendment and insertion of section 187(A) with effect from 25.08.2013. This penal provision cannot be applied with retrospective effect. The bone of contention of the petitioner is that the orders passed are without authority of law and liable to be set aside.

4. Per Contra, Shri Vivek Khedkar, Dy. Advocate General for respondents No. 1 to 3 submits that the orders are in accordance with provision of section 187(A) M.P. Municipalities Act, 1961. He submits that resolution Annexure P/2 makes it clear that it was placed before the competent authority i.e. "President-in-Council". President-in-Council decided unanimously to keep the matter in the meeting of Municipal Council. In turn, the matter was taken up by way of resolution of Municipal Council on 27.05.2013. The Municipal council delegated the power to take action to CMO and the President and therefore, it is as per section 187(A). The basic decision was taken by President-in-Council vide Annexure P/2. He submits that the petitioner, for the first time, informed the authority about the illegal construction by Annexure R2(5) on 26.10.2012 and from this only the respondents came to know that there is an illegal construction and on this date, section 187(A) of the Act was already there in the statute book and therefore, there is no question of applying the said provision with retrospective effect.

5. Lastly, it is contended that there exists a remedy of appeal u/s 307 of the

Municipalities Act and therefore this petition may not be entertained. He relied on The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, in this aspect. By placing reliance on Rule 10 of Municipalities Act (Mayor-in-Council/President-in-Council) Rules 1998 it is contended that the action taken is in consonance with section 187(A) read with Rule 11 of the said Rule.

6. I have bestowed my anxious consideration on the rival contentions advanced by the parties at bar.

7. I deem it proper to first deal with the question of power/competence of the authorities who have passed the orders Annexure P/1 and P/3. It is apt to quote 2nd proviso of section 187(A) of Municipalities Act which reads as under:--

Provided further that the compounding shall be made in case of residential construction by the Chief Municipal Officer and in case of non-residential construction with the permission of President-in-Council.

8. A bare perusal of this provision makes it clear that the compounding can be made in case of non-residential construction with the permission of President-in-Council. On specific query from the Bench, learned counsel for the parties submit that the construction in question is non-residential construction. Thus, as per the said proviso it is only the President-in-Council which can grant permission. This is settled in law that if the statute provides that a thing is to be done in a particular manner, it has to be done in the same manner or not at all. In catena of judgments the Court has followed this ratio. See Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, and Satyanjay Tripathi and Another Vs. Banarsi Devi,

9. This is also settled in law that when power is vested with a particular competent authority, even higher authority is not permitted to exercise the said powers. Therefore, in the opinion of this Court, if the power is specifically given by the statute to the President-in-Council, the said authority was not justified in not exercising the said power. Apart from this, the decision of council (Annexure P/4) shows that there is no independent application of mind. It merely relied on the letter of SDM (Annexure P/5) and in turn, authorized the President and CMO to take action. Thus, there is further delegation of powers which runs contrary to the scheme, objection and mandate of section 187(A) of the Act.

10. So, far as Rule 11 of Madhya Pradesh Municipalities (the Conduct of Business of the Mayor-in-Council/President-in-Council and the Powers and Functions of the Authorities) Rules, 1998 is concerned, before dealing with it, it is apt to quote Rule 11 of 1998:--

11. Conduct of Business--(1) Every such case which is beyond the jurisdiction of the Chief Executive Officer shall be submitted to the Member Incharge of the department concerned. If the case comes within the jurisdiction of the Member Incharge, the decision shall be taken by the Member Incharge, otherwise it shall

be submitted along with his comments, if any, to the Mayor or the President as the case may be.

(2) On the receipt of the case under sub-rule (1) the Mayor or the President as the case may be, if the case comes within his jurisdiction, shall take decision on it, otherwise it shall be submitted alongwith his comments, if any, in the meeting of the Mayor-in-Council or the President-in-Council as the case may be, and if the case is such which is beyond the jurisdiction of the Mayor-in-Council or the President-in-Council, it shall be submitted in the meeting of the Council along with the opinion of the Mayor-in-Council or the President-in-Council, as the case may be.

(3) In this rule, every case shall be submitted along with a self-explanatory precise duly signed by the Head of the department concerned.

A bare perusal of this Rule shows that there is no power with the President-in-Council to refer the matter for decision to the Council. The scheme of this Rule shows that the matter can be referred to higher body only when the lower body does not have jurisdiction or authority to deal with it. Thus, Rule 11 has no application and is of no assistance to Municipal Council.

11. So far as objection regarding alternative remedy is concerned, it is trite in law that the writ petition can be entertained despite availability of alternative remedy. It is a question of policy and discretion and not of compulsion. In Catena of judgments, it has been held that when principle of natural justice are violated or order is passed by authority having no jurisdiction, interference can be made. In the opinion of this court Annexure P/1 and P/3 are passed by the authority other than President-in-Council and therefore these orders are without authority of law and therefore, interference can be directly made by this Court in the writ petition. This may be examined from yet another angle. Shri Khedkar relied on section 307 of the Municipalities Act, 1961, which reads as under:--

307. Appeal Against order of President and Chief Municipal Officer:--(1) In case of Municipal Council any person aggrieved by-

(a) a notice or order issued or other action taken by the President under sections 183(5)(a) and (b), 184, [xx] 190, 203, 205, 206, 207, 209, 210, 211, 213, 229 and 283 or any rules or bye laws made for the purposes of the said sections for any order made appealable by such rules or bye-law or any order granting or refusing to grant a license or permission, may appeal to the Council within thirty days from the date of such order and such appeal shall be heard and disposed of by the Council in the prescribed manner.

(b) any notice or order issued or other action taken by the Chief Municipal Officer u/s 180(1) and (2), 185, 187, 191, 192, 194, 208, 220, 221, 223, 227, 242, 251 and 285 or any rules or bye laws made for the purposes of the said sections or any order made for the purpose of the said sections or any order made appealable by such rules or bye-laws or any order granting or refusing to grant a

license or permission, may appeal to the Appeal Committee within thirty days from the date of such order and such appeal shall be heard and disposed of by the Appeal Committee in the prescribed manner.

A bare perusal of this provision shows that appeal is provided when order is issued or action is taken under certain provisions of the Act or the Rules or order is made for the purpose of the said sections, section 187(A) is not included in section 307(1)(a) and (b). Thus, even otherwise, appellate remedy is not available to the petitioner against Annexure P/1 and P/3.

12. In view of the finding that the orders impugned are passed contrary to mandate of section 187(A), I am not inclined to enter into the third question whether section 187(A) can be made applicable with retrospective effect. This question will remain open. On the basis of aforesaid analysis, Annexure P/1 and P/3 are set aside. Petition is allowed. Liberty is reserved to the respondents to take action in accordance with law. No Costs.