

(1972) 03 MP CK 0018
In the Madhya Pradesh High Court
Case No : M.P. No. 103 of 1971

Bala Prasad Naik

APPELLANT

Vs

Additional Commissioner, Jabalpur Division, Jabalpur and
others

RESPONDENT

Date of Decision : 23-03-1972

Acts Referred:

Madhya Pradesh Municipalities Act, 1961 — Section 94, 94(4)

Citation : (1972) MPLJ 694

Hon'ble Judges : Bishambhar Dayal, C.J.; A.P. Sen, J

Bench : Division Bench

Advocate : R.K. Tankha, for the Appellant; M.V. Tamaskar, Dy. Govt Advocate for Respondent No. 1, K.K. Adhikari for Respondents Nos. 2, 5 and 6 and R.C. Mishra, for the Respondent

Final Decision : Allowed

Judgement

Bishambhar Dayal, C.J.

Bala Prasad Naik was appointed a Lecturer in the Higher Secondary School maintained by the Municipal Council of Murwa's Katni) by resolution dated 11th December 1958 and he was later confirmed in that post by resolution dated 14th June 1959. The post of the Principal of that institution got vacant and after advertisement several persons applied for the post of Principal including the petitioner and respondent no. 4 Bansgopal Dubey. The selection committee appointed for the purpose selected the petitioner as the best candidate and placed him at no. 1, Respondent No. 4 was placed at no. 2. This report was considered by the standing committee which also accepted the recommendations of the selection committee. Consequently by Annexure "6" the Chief Municipal Officer appointed the petitioner as Principal for one year from 1st July 1970 subject to the approval of the State Government. This order is dated 23rd June 1970 and is based on the standing committee's resolution no. 114 dated 2nd June 1970. The President of the Municipal Council by order Annexure "C" dated

29th June 1970 directed that as this post was one of the posts covered by section 94(4) of the M. P. Municipalities Act by virtue of a notification of the Government dated 5th May 1967, the order of appointment would remain in abeyance pending receipt of approval from the State Government.

Against this order appointing the petitioner as the Principal, respondent no. 4 filed an appeal before the Commissioner and the petitioner also filed an appeal before the Commissioner against the order of the President placing the order of appointment in abeyance as stated above. The Additional Commissioner, who heard both the appeals, allowed the appeal of respondent no. 4. A preliminary objection had been taken by the petitioner before the Additional Commissioner that no appeal lay against the order of appointment; but it was not accepted by the Additional Commissioner on the ground that the present respondent no. 4 was competent to file an appeal as he had not been promoted and his non-appointment amounted to withholding of promotion. On merits the Additional Commissioner held that a wrong procedure for recruitment had been adopted because no appointment could be made in anticipation of the Government approval and also because the promotion had not been made in accordance with the rules, which according to the Additional Commissioner, provided that the senior most lecturer should be selected as Principal unless he is found unfit and that he should be superseded only for sufficient reasons. On those grounds the appeal of respondent no. 4 was allowed and the case was remanded to the Municipal Council for fresh disposal. Consequently, the appeal filed by the petitioner was dismissed.

This writ petition has been filed also against the order of the Additional Commissioner on the ground that no appeal lay to the Commissioner and that the decision of the Additional Commissioner" on merits also is based entirely on a misconception of the rules. In this petition the order of the President of the Municipal Council keeping in abeyance the appointment of the petitioner is also challenged as without jurisdiction.

We will first deal with the order of the President directing the order of appointment to remain in abeyance till the approval of the State Government is received. This direction has been given on the basis that the post of the principal of the Institution is a specified post within the meaning of section 94(4) of the Municipalities Act. This sub-section is as follows:--

The appointment of Revenue Officer, Accounts Officer, Sanitary Inspector, Overseer, Revenue Inspector and Accountant shall be subject to confirmation by the State Government and no such post or the post of any other officer as may be specified by the State Government in this behalf shall be created or abolished and no alteration in the emoluments thereof shall be made without the previous approval of the State Government, and every appointment to, and dismissal from, such post, shall be subject to a like approval.

Under the power of specifying ""the post of any other officer" as a specified post,

the State Government has issued Notification No 2956/XVIII-V-II dated 5th May 1967 under which all officers getting a salary of Rs. 250/- or more are deemed to be specified officers within the meaning of section 94(4). It is not disputed that the Principal of the Institution gets a salary of more than Rs. 250/- per month and it cannot also be denied that the Principal is an officer who has a large staff under him over which he has control. He is, therefore, an officer and is fully covered by the notification. The direction of the President of the Municipal Council that the order of appointment be kept in abeyance pending receipt of the approval of the State Government was, therefore, fully justified.

In this connection, however, there is another matter which, though not raised by any of the parties, may be noted here since it has come to the notice of this Court. From the order of the Chief Municipal Officer (Annexure "B") it appears that the appointment of the petitioner to the post of Principal was made by the standing committee as per its resolution no. 114 dated 22nd June 1970. A copy of that resolution has also been filed as Annexure "G". By this resolution the standing committee accepted the recommendation of the selection committee and was of opinion that the petitioner should be appointed as Principal for one year after obtaining the approval of the Government. But this matter does not appear to have been considered by the Municipal Council and the Council has not made an order of appointment in favour of the petitioner. Sub-section (6) of section 94 provides :-

Unless the State Government otherwise directs the power of appointing Municipal officers and servants other than those mentioned in or specified under sub-section (4) shall vest in the Standing Committee.

According to this sub-section, the appointment of officers and servants other than those mentioned in or specified under sub-section (4) can be made by the standing committee. Therefore, the power of appointing officers mentioned in sub-section (4) vests in the Municipal Council as provided by sub-sections (1) and (2) of section 94. But since the final appointment has to be made after approval of the State Government has been obtained, it may be that the Municipal Council will pass the necessary orders after the approval of the Government is obtained. But this is merely to point out that the resolution of the standing committee is not sufficient to make the appointment to the post.

As against this, the contention of learned counsel for the petitioner was that the resolution of the standing committee is sufficient because under sub-section (6) of section 94 the State Government castigate otherwise directions and according to him the rules framed by the State Government called the M. P. Municipal Employees (Recruitment and Conditions of Service) Rules, 1968, are an otherwise provision. We are notable to appreciate this argument. There is nothing in these Rules to indicate that the appointment of specified officers shall be made by the standing committee. Learned counsel relied upon sub-rule (4) of rule 12 of the Rules. Under this sub-rule there is no power to make an order of appointment. All that this sub-rule provides is that the Chief Municipal Officer or

the District Selection Committee, as the case may be, will select candidates and will arrange their names in order of preference-It then provides that where the Chief Municipal Officer is the competent authority for making appointments, orders will be issued by him. In other cases, the District Selection Committee shall recommend the names of the candidates found suitable for promotion to the standing committee and the standing committee will then make a final selection. The rule stops there and it does not authorize the standing committee to pass an order of appointment. Therefore, the power of appointment is governed by the provisions of section 94 as discussed above. The power of the Council to make an appointment u/s 94 (1) and (2) comes into operation and after approval of the Government has been received in the case of officers covered by sub-section (4) of section 94, it is the Council which will make the final order of appointment. This observation, however, does not affect the relief"s claimed by the petitioner in this writ petition.

Coming to the appellate order of the Additional Commissioner on the appeal filed by respondent no. 4, the first point for consideration is whether any appeal was competent. The Additional Commissioner was of opinion that respondent no. 4 could file an appeal because the non-appointment of the respondent as Principal amounted to withholding of promotion within the meaning of rule 49 (ii) in Part XII of the aforesaid Rules. We are unable to agree with this contention as rule 49 deals with punishments. A penalty of withholding promotion is imposed on a servant by directing that he will not be promoted on account of some misconduct. No such question was relevant in the present case, where several persons applied for appointment as Principal and it was a matter of selection from among those applicants and not a mere matter of promotion as of right. Even the ruling of the Board of Revenue relied upon by the Additional Commissioner himself Municipal Committee, Durg v. Thakur Neelamsingh Gaur 1962 M.P.L.J. 893 clearly lays down :-

If, however, appointment to the higher post is not a direct consequence of the service but is a result of the selection, non-appointment to such higher post cannot be regarded as withholding of promotion by way of punishment and the remedy of an aggrieved person is not by way of appeal.

The learned Additional Commissioner did not pay sufficient attention to this part of the observation of the Board of Revenue in the passage quoted by the Additional Commissioner himself. There being, therefore, no punishment imposed upon respondent no. 4, there was no question of appealing against that order and no appeal lay against a mere order of selection

On merits also, the observation of the Additional Commissioner that the proper way of selection was to arrange all the candidates in order of seniority and then to eliminate one by one from the too if the seniormost was found unfit for sufficient reasons, is not supported by the Rules. Rule 12, as quoted by the learned Additional Commissioner himself, provides that recruitment by promotion "shall be made on consideration of merits, seniority being taken into account

where merits are equal." Thus, the primary consideration for recruitment by promotion is merit and seniority is only a secondary consideration to be taken into account. Sub-rule (2) of rule 12 specifically provides the elements which have to be taken into consideration and goes to indicate the merit of the candidate. The decision of the Additional Commissioner, therefore, that the selection committee did not proceed according to the rules in making the selection is also not justified by the rules. We are, therefore, of opinion that the order of the Additional Commissioner being wholly without jurisdiction must be quashed.

The result is that this petition is partly allowed and the order of the Additional Commissioner (Annexure "K") dated 14th December 1970) is quashed. Parties will bear their own costs. The outstanding amount of the security deposit shall be refunded to the petitioner.