

(2000) 07 BOM CK 0072
In the Bombay High Court
Case No : Writ Petition No. 807 of 2000

Balakdas Modkuji Chicholikar	Vs	APPELLANT
State of Maharashtra and others		RESPONDENT

Date of Decision : 10-07-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Penal Code, 1860 (IPC) — Section 309, 323

Citation : (2000) 07 BOM CK 0072

Hon'ble Judges : S.K. Shah, J;J.N. Patel, J

Bench : Division Bench

Advocate : C.S. Kaptan, for the Appellant; P. Janardhanan, Additional Advocate General, for the Respondent

Final Decision : Dismissed

Judgement

J.N. Patel, J.—Heard the learned Counsel for the Petitioner and the Additional Advocate General for the Respondents.

2. The Petitioner was elected to the Municipal Council, Paoni, from ward No. 3 on 1-12-1996 for a term of five years. Thereafter, there was election to the post of President as required u/s 51 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (hereinafter referred to as the "said Act"). The President of the Municipal Council, in exercise of his powers u/s 51A of the said Act, appointed the Petitioner as Vice-President of the Municipal Council. The intimation of such appointment was sent to the State Government through the Collector, Bhandara, for approval as required under Sub-section (2) of Section 51A of the said Act on 21-12-1999. In the meantime, the Petitioner took over charge of the post of Vice-President of the Municipal Council, Paoni. On 15-2-2000 the Government issued orders refusing approval to the appointment of the Petitioner which is impugned by the Petitioner by invoking the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. The Petitioner has also sought a writ to declare the provisions of Sub-section (2)

of Section 51A as ultra vires, in addition to seeking a mandamus against the State Government to grant approval to the appointment of the Petitioner.

3. The Respondent-State Government did not file any affidavit-in-reply. The Respondent-Municipal Council through its Chief Officer filed an affidavit-in-reply contending that as the appointment of the Petitioner to the post of Vice-President is cancelled, the Petitioner has been duly informed on 28-2-2000 and in his place, the President, Municipal Council, Paoni, has appointed Mr. Durjan Sajjan Chausare as Vice-President, who has taken over charge on 1-3-2000. An intervention application has also been filed by the said newly appointed Vice-President seeking that as the petition has become infructuous, it deserves to be dismissed.

4. Mr. Kaptan, learned Counsel appearing for the Petitioner, submitted that the refusal to grant approval to the appointment of the Petitioner as Vice-President suffers from non-application of mind as no reasons are given by the State Government as to why it has refused to grant approval and further it is nothing but arbitrary exercise of the power vested in the State Government under the statute. It is submitted by Mr. Kaptan that the Petitioner does not suffer from any disqualification on the basis of which the State Government could have refused to grant approval. According to Mr. Kaptan, the State Government could have refused approval only if it was satisfied that the Petitioner has incurred disqualification akin to Section 55A of the said Act which provides for removal of President and Vice-President by the Government and that is only if he commits misconduct in discharge of his duties, or for neglect of, or incapacity to perform his duties or for being guilty of any disgraceful conduct. Therefore, in the absence of any such ground and the fact that the Petitioner was not suffering from any disqualification, the Government ought to have granted approval to the appointment of the Petitioner which was merely a formality required to be done.

5. Mr. Kaptan, learned Counsel for the Petitioner, submitted that there are two cases which are pending against the Petitioner in the Court of Judicial Magistrate at Paoni i.e. one u/s 309 of the Indian Penal Code which came to be registered because the Petitioner had joined hunger strike in the cause of the employees of Municipal Council and the other case is in respect of an offence registered u/s 323 of the Indian Penal Code initiated on the basis of a false complaint by a tax evader. It is, therefore, submitted that the nature of cases registered against the Petitioner is such that it does not disqualify him from holding the post of Vice-President of the Municipal Council. Mr. Kaptan submitted that even the police report which was sent along with the intimation of appointment of the Petitioner as Vice-President for the purpose of approval by the State Government was a favourable report by the police station officer, Paoni police station, and therefore, there was no sufficient reason on the basis of which the State Government could have refused approval to his appointment.

6. Mr. Kaptan submitted that the action of the Respondent-State is not only arbitrary and contrary to law, but the decision has been taken without giving a

reasonable opportunity of hearing or at least notice of the same to the Petitioner. It is submitted that as the Petitioner was appointed to the high office of Vice-President, it has enhanced his prestige in the society and disapproval of such appointment has affected the reputation of the Petitioner and such decision cannot be taken on the whims or caprice of the authority and it is violative of the principles of natural justice enshrined in Article 14 of the Constitution of India.

7. Mr. Kaptan submitted that the powers conferred on the State Government under Sub-section (2) of Section 51A does not provide any guideline nor it provides to record and communicate the reasons for non-approval of the appointment, thereby conferring unguided and arbitrary power in the Executive which is not only bad in law, but the provisions are ultra vires and liable to be struck down. It is, therefore, submitted that the petition be allowed with costs.

8. Mr. Janardhanan, learned Additional Advocate General appeared in the matter on behalf of Respondents Nos. 1 and 3 and submitted that the said Act is a statute which vests in the State Government power either to approve or cancel the appointment of Vice-President made by the President and to send an intimation to the President accordingly. It nowhere provides that the State Government should give reasons for refusing to approve the appointment or that the Petitioner is entitled for any opportunity of hearing. It is submitted that as the powers are to be exercised by the State Government as vested in the statute and if the State Government has exercised the powers in accordance with the statute, the State is not bound to give any reason at all and if it gives no reason, refusal to grant approval cannot be questioned. Mr. Janardhanan submitted that though it is not obligatory on the part of the State Government to give reasons, still he can make a statement that the confidential report received from the Superintendent of Police, Paoni, on 7-1-2000 was before the State Government while considering the case of the Petitioner for grant of approval to the appointment of the Petitioner as Vice-President of the Municipal Council, Paoni, and as the report intimated that there were two criminal cases pending against the Petitioner, which is not in dispute, the State Government decided not to accord approval to the appointment of the Petitioner.

9. The learned Additional Advocate General submitted that sufficiency of reason is a different matter and cannot be agitated as a ground in the petition, but this is not the case where there was no reason available for the State Government to reject the approval and pendency of two criminal cases against the Petitioner, according to him, was enough to pass the impugned order as the office of the Vice-President is an important office as in the absence of the President, by virtue of Section 59 of the said Act, the Vice-President is entitled to exercise the powers and perform the duties of the President and also to preside over the meetings of the Council and, therefore, the person who is appointed to hold such a high office should have good credentials and clean record and, therefore, the State Government was justified in refusing to grant approval to the appointment of the Petitioner to the post of Vice-President.

10. Sub-section (2) of Section 51A of the said Act, inter alia, provides as under:

(2) The appointment of the Vice-President by the President shall be subject to the approval of the State Government, within a period of sixty days from the date of receipt of the intimation under Sub-section (1), the State Government may by order either approve or disapprove and cancel the appointment of the Vice-President made by the President and send an intimation to the President accordingly. If, within the said period, no intimation is sent to the President by the State Government, the appointment shall be deemed to be approved by it.

Section 51-A provides for appointment of Vice-President by the President from amongst the elected Councillors, but the said appointment is subject to approval of the State Government. The State Government may by order either approve or disapprove and cancel the appointment of the Vice-President made by the President and send an intimation to the President accordingly.

But this has to be done within a period of 60 days from the date of receipt of intimation under Sub-section (1). If no intimation is sent to the President by the State Government, the appointment shall be deemed to be approved by it.

So one thing is clear that the President of Municipal Council is not vested with absolute power to appoint Vice-President of the Council under the said Act and it is subject to the approval of the State Government. Further the State Government is vested with the discretion either to approve or disapprove and cancel the appointment of the Vice-President and so it is not merely a formality required to be completed by the State Government when the intimation is received for the purpose of approval. We are of the opinion that once the statute vests in the State Government the power of approval of certain act done by any authority such as appointment of Vice-President of Municipal Council, the act of approving, though discretionary, is a decision making process and, therefore, cannot be exercised without recording the reasons for such decision. In the absence of any reason given in the letter of disapproval, the impugned order cannot be tested on the touchstone that the State acted fairly in refusing to grant approval to the appointment of the Petitioner. We, therefore, hold that while considering the question of grant of approval in exercise of the power vested with the State Government under Sub-section (2) of Section 51-A of the said Act, if the State Government decides to accord approval, it is not incumbent upon it to assign reasons, but in the case where it has decided to reject approval or refuse to grant approval, then it is incumbent upon the State Government to give reasons for such rejection or disapproval. The principles of natural justice would always demand that the person whose appointment has been made but approval has been rejected thereto, must know the reasons as to why approval has been denied to his appointment. This principle is necessarily implicit in Section 51-A of the said Act.

11. In order that exercise of discretion should appear to be reasonable, it is necessary that reasons should be given for decision though they might not

always be communicated. In a decision rendered in *Union of India and others Vs. E.G. Nambudiri*, the Supreme Court said:

Order of an administrative authority which has no statutory or implied duty to state reasons or the grounds of its decision is not rendered illegal merely on account of absence of reasons. It has never been a principle of natural justice that reasons should be given for decisions. See: *Ragina v. Gaming Board for Great Britain*, *ex p. Benaim and Khaida*. Though the principles of natural justice do not require reasons for decision, there is necessity for giving reasons in view of the expanding law of judicial review to enable the citizens to discover the reasoning behind the decision. Right to reasons is an indispensable part of a sound system of Judicial review. Under our Constitution an administrative decision is subject to judicial review if it affects the right of a citizen, it is therefore desirable that reasons should be stated.

Giving reasons subserves, two purposes, viz., it will facilitate judicial review and it will enable the person concerned to know why a decision was not taken in his favour. The second aspect is right to information. Further, the requirement of giving reasons could also minimise the chances of abuse of power.

12. As rightly submitted by the learned Additional Advocate General, sufficiency of reason is a different matter, although the Court will not go into the adequacy of reasons but it will go into the relevance and appropriateness.

13. In the circumstances, we find that the decision of the State Government not to give approval to the appointment of the Petitioner as Vice-President of the Municipal Council as proposed by the President of the Municipal Council, and communicated to the Petitioner by the State Government by order dated 15-2-2000 was justified for the reason that there were two criminal cases pending against the Petitioner. The Respondent-State having placed before the Court reasons for not giving approval to the appointment of the Petitioner, the impugned order does not call for interference.

14. Let us examine whether the challenge of the Petitioner to Sub-section (2) of Section 51A of the said Act as ultra vires as it confers unguided and arbitrary powers in the Executive and, therefore, violative of the guarantee as enshrined in Article 14 of the Constitution of India can be sustained. No doubt a statute can be struck down on the ground that it had conferred arbitrary and uncontrolled power on the State Government. While arbitrary power is repugnant to the rule of law, discretionary power, unless exercised improperly, is not, as a modern welfare State cannot function without discretionary power. Its functions are highly complex and varied and hence its actions cannot be anticipated. The State in order to discharge its constitutional and statutory functions has to be vested with discretionary authority and it is not contrary to rule of law. Whether the State exercises its discretion properly and in accordance with the rule of law is subject to judicial review.

15. It is not for the first time that powers vested in the State, under Sub-section

(2) of Section 51-A has been challenged to be arbitrary and, therefore, violative of Article 14 of the Constitution of India. In the case of *Hukumsing v. State of Maharashtra* reported in 1986 Mh.LJ 18, this Court had occasion to examine the provision relating to the appointment of Vice-President of the Municipal Council. Though in a different context, this Court, held:

5. Now the attack on validity of Section 51-A. Legislative history of the provisions regarding appointment of a Vice-President may be noticed in short. The Act as it originally stood provided for election of a President and Vice-President from amongst the Councillors (Section-51). By Maharashtra Act No. 41 of 1973, the section was amended and the election of the President was made direct by the voters of all the wards. Sub-Section 51(7) empowered the President to have a Vice-President of his choice from amongst the elected Councillors without any fetters or control by the State Government. By Maharashtra Act No. 19 of 1981, Section 51 was subjected to further changes. Election of the President was made indirect again and Section 51A was introduced. Submission is that there is no rationale whatsoever in introducing a control of the State Government over the appointment of a Vice-President specially when it did not exist before. Now, this again is a policy matter. The President who is elected by the Councillors is given an extraordinary power to make a choice of the Vice-President who in a given set of circumstances can perform functions of the President. If such appointment to an important post under the circumstances, is subjected to some control by the State it is difficult to see any vice of arbitrariness. After all control of the State over functioning of the Municipal Council at various levels and stages very much exists.

6. Next facet of the submission is that control is unguided and, therefore, bad. We do not agree. In this connection, the following observations in the case of *TV. N. Khubchandani v. The State of Maharashtra* may be noticed:

Whatever that be, we find that the statute does not contain any guidelines regarding the appointment to be made by the President except that the Vice-President should be one of the Councillors which the Petitioner undoubtedly is or pertaining to the action to be taken by the Government on receipt of necessary intimation from the President. This, however, cannot be taken to imply that either the President or the Government exercising their powers under Sub-section (1) or Sub-section (2) respectively can act arbitrarily, capriciously or whimsically.....It is possible to hold that there is no scope for a hearing or for passing a speaking Order. This, however, cannot imply that it is absolutely in the discretion of the Government to approve or disapprove of the appointment of the Vice-President and that disapproval can be made without the slightest basis of the same or on a basis which is totally irrational or capricious. If there was any material against the Petitioner available either in the return or reflected to the slightest degree in the file, which we have perused, then we would have been very reluctant to embark on a judicial review or appraisal of that material or to suggest that some hearing is required to be given to the Petitioner on that

material.

16. Therefore, as regards, the challenge to the constitutional validity of Section 51A of the said Act is concerned, we have already held that it is incumbent upon the State Government not only to record its reasons for refusing to grant approval but also to apprise the person of the reasons for not according approval to his appointment as Vice-President, of the Municipal Council, in exercise of the powers vested in it by Sub-section (2) of Section 51A of the said Act holding that such a principle is necessarily implicit in Section 51A. Therefore it cannot be said that Section 51A and particularly Sub-section (2) vests arbitrary and unguided power in the State and, therefore, prayer of the Petitioner to strike down this provision stands rejected.

17. Before we conclude, there is one more aspect which requires consideration. Mr. Kaptan, learned Counsel for the Petitioner, has submitted that the State Government could not have refused to grant approval to the appointment of the Petitioner unless he suffers from any disqualification like the one envisaged u/s 55A of the said Act. We have no hesitation to record that this submission of the learned Counsel for the Petitioner is misconstrued as Section 51A operates in the field of appointment of Vice-President of the Municipal Council whereas Section 55A provides for removal of President and Vice-President. The Petitioner's appointment made by the President was subject to approval of the State Government and was not approved, it cannot be said that the Petitioner was duly appointed as Vice-President of the Municipal Council in accordance with Section 51A of the said Act and unless the Petitioner was duly appointed as Vice-President, the question of his removal from the post of Vice-President of the Municipal Council does not arise. It is only after a person has been appointed as Vice-President and if the Government decides to remove him, Section 55A would come into play. In case of such removal, the proviso to Sub-Section 55A provides that no such President or Vice-President shall be removed from office unless he has been given a reasonable opportunity to furnish an explanation and rightly so, an opportunity of hearing is required in the administrative actions which jeopardise somebody of his right or cause prejudice to his interests which are required to be taken quasi-judicially. The Legislature thought it fit not to provide any such safeguard, in case where the State Government is required to take a decision in the matter of grant of approval to the appointment of Vice-President in terms of Sub-section (2) of Section 51 and the State can very well dispense with such hearing where it finds that it is impractical, unnecessary or contrary to public interest and, therefore, merely because the statute vests discretionary power in the State, it is not necessary that the State should give an opportunity of hearing to the person whose appointment is required to be approved.

18. We, therefore, do not find any merit in the petition and the same is dismissed. The rule is discharged with no order as to costs.