
(2008) 11 GAU CK 0037

In the Gauhati High Court

Case No : Writ Petition (C) No"s. 77 (K) , 115 (K) and 116 (K) of 2008

ITO

APPELLANT

Vs

State of Nagaland

RESPONDENT

Date of Decision : 28-11-2008

Acts Referred:

Municipal Council Act, 2001 — Section 76

Nagaland Municipal Council Act, 2001 — Section 118, 118(1), 118(2), 12, 57C

Citation : (2010) 1 GLR 149

Hon'ble Judges : Maibam B.K. Singh, J

Bench : Single Bench

Advocate : N.K. Luikham, Meyatoba, Ellen Aye and Tokali, for the Appellant;
L.S. Jamir, A. Zhimomi, I. Longjem, N. Mozhui, S.M. Ozukum, Avika, Kiloho, K.
Zheino, E.Y. Renthunge, N.C. Marry, C.M. Merry and R. Vgullie, for the
Respondent

Final Decision : Dismissed

Judgement

Mutum B.K. Singh, J.—These 3(three) writ petitions are taken up jointly for disposal by this common judgment as these writ petitions have been filed questioning the legality of the same order dated 9.5.2008.

2. Heard Mr. N.K. Luikham, Learned Counsel appearing for the petitioners and Mr. L.S. Jamir, learned Additional Senior Government Advocate for the State-respondents as well as Mr. A. Zhimomi, Learned Counsel for the respondent No. 5. None appears for the respondent No. 6.

3. The petitioners herein were the tenants of shop stalls in New Market area, Dimapur, inducted by the Dimapur Municipal Council (for short "DMC") as per allotment orders dated 26.3.2008 issued under the signature of the respondent No. 6. The petitioners deposited allotment fees on the same day, i.e., 26.3.2008, and monthly rents were to be paid from the date of occupation of the shop stalls by the petitioners. The petitioners had not occupied any of the shop stalls so allotted as the shop complex was under construction. On 27.3.2008, the Deputy

Commissioner, Dimapur (respondent No. 3) issued an order directing the Chairperson or the councillors of the DMC not to take up any major decision until further direction in view of pendency of a no confidence motion against the then chairperson (respondent No. 6), which was to be tabled on 29.3.2008. It was also indicated that any decision taken within the said period would be subject to annulment by the Government. When the no confidence motion was tabled on 29.3.2008, the same was passed by majority of the members of the DMC and thus, the respondent No. 6 was removed or he was deemed to have been vacated of his office. Thereafter, the respondent No. 5 was elected as chairperson of the DMC, who on 2.4.2008 issued an order to the effect that all the decisions taken up by the DMC within the period from 19.3.2008 to 29.3.2008 shall stand cancelled, which was challenged by some of the petitioners in WP(C) No. 39(K)/2008; but the same was disposed of vide order dated 13.6.2008 as infructuous. On 28.4.2008, the Additional Deputy Commissioner, Dimapur (respondent No. 4) issued a notice u/s 76(3) of the Nagaland Municipal Act, 2001 (for short "the Act") to the respondent No. 6 and the petitioners (allottees), by publishing the same through a daily newspaper, "NAGALAND POST", directing them to submit show cause within 10 days from the date of issue of the notice as to why the allotment orders for all the shop stalls issued by the respondent No. 6 shall not be cancelled. In response to the said notice, the respondent No. 6 alone submitted a written explanation. Thereafter, on 9.5.2008, the respondent No. 2, in exercise of power conferred u/s 76(1) of the Act issued an order annulling the orders of DMC regarding allotment of shop stalls in the New Market complex, Dimapur issued from 19.3.2008 to 29.3.2008, which is impugned in these writ petitions.

4. The respondent Nos. 1 to 5 filed their affidavit-in-opposition stating, inter alia, that on 19.3.2008 a no confidence motion against the respondent No. 6 from 12 DMC councillors was received by the respondent No. 3 and the same was to be tabled on 29.3.2008. The allotment orders were issued in total violation of the provisions of the Act, no advertisement was made inviting applications from the intending applicants for public auction of the stalls and the said allotment orders were issued without any application from the side of the petitioners. On 18.4.2008, a DMC meeting was convened, in which a thorough discussion was held respecting the allotment of shop stalls. In the said meeting it was resolved by a majority decision of the members present to submit a report to the Government in terms of Section 76 of the Act for annulment of the orders allotting shop stalls in the New Market complex, Dimapur. The said resolution is not under challenge by any of the petitioners.

5. The respondent No. 6, in his affidavit-in-opposition, averred that the allotment orders were issued as per recommendation made by the convener. Planning and Development Committee of DMC and the members of the Planning and Building Committee prior to the issuance of the Government's order. Therefore, the question of total deviation of the norms or violation of the Government's order does not arise. It was also averred that the respondent No. 6 issued the

allotment orders on the recommendation of the Committee and also in the interest of the general public.

6. Mr. N.K. Luikham, Learned Counsel appearing for the petitioners vehemently argued that the petitioners have acquired legal rights in respect of the shop stalls allotted in their favour as the petitioners have already deposited the allotment fees on the same day. The order dated 9.5.2008 was issued arbitrarily, without giving reasonable opportunity of being heard to the petitioners and in violation of the provision of Section 77 of the Act and as such the order dated 9.5.2008 is bad in law. The learned Counsels appearing for the respondent Nos. 1 to 5, reacting to the above arguments advanced by the petitioners" learned Counsel, submit that the allotment orders dated 26.3.2008 were issued in violation of provision of the Act and without following the procedure prescribed under the law. The Government has every authority u/s 76 of the Act to annul such order and, accordingly, the Government after giving reasonable opportunity of being heard to the respondent No. 6 and the petitioners and considering the facts and circumstances of the case, issued the annulment order on 9.5.2008. It was also contended that mere payment of allotment fees by the petitioners does not confer any enforceable right on the petitioners since the allotment orders were illegal and contrary to the law. According to the Learned Counsel appearing for the respondent Nos. 1 to 5, the petitioners have no enforceable right under such illegal orders.

7. Having heard the submissions of the learned Counsels appearing for the parties and in the facts and circumstances of the case, it requires to examine as to whether the annulment order dated 9.5.2008 is sustainable in law.

8. The DMC is a body constituted u/s 8 of the Act by the elected councillors from the Municipal Council area. The respondent No. 6 was the chairman of the DMC, elected u/s 12 of the Act. Chapter-V of the Act deals with the conduct of business of the Municipal Council. Section 62 of Chapter-VI of the Act deals with the general power of the Chairperson, which runs as follows:

62. General power of Chairperson. - (1) The Chairperson of Municipal Council or Town Council shall exercise such powers and perform such functions, as are conferred upon him by or under this Act and the rules and regulation made thereunder.

(2) The Chairperson shall preside over the meetings of the Municipal Council or Town Council.

(3) The Chairperson shall exercise general supervision and control over the functioning of Municipal Council or Town Council.

(4) The Chairperson shall have access to the records of the Municipal Council or Town Council and may issue directions to the Executive Officer and call for reports and information from the Executive Officer with a view to ensuring proper implementation of the decisions of the Municipal Council or Town Council.

Section 63 of Chapter-VI of the Act provides the power of the Chairperson, which can be exercised in the case of emergency. What has emerged from a conjoint reading of the above provisions is that the chairperson of the Municipal Council shall exercise such power and function as are conferred upon him under the Act or regulation and shall exercise general supervision and control over the functioning of the Council and in case of emergency, the Chairperson may direct the execution of such work but the same shall be reported to the Municipal Council at the following meeting for such actions taken by him with reasons for ex-post facto approval. In the case at hand, there was no emergency for issuance of the said allotment orders as the shop stalls were under construction. Section 57C of Chapter-V of the Act provides that every Municipal shall meet for transaction of business at least once in every month on such day and at such time as may, from time to time, be fixed by regulations. It appears that every Municipal shall meet for transaction of business at least once or more in every month and the Chairperson of the Municipal shall preside over the meetings. The Chairperson shall exercise general supervision and control over the functioning of the Municipal.

9. Sections 74, 75 and 76 of Chapter-VIII of the Act deal with the power of the Government wherein and whereunder it has been provided that the Government may, at any point of time, ask for production of documents and submission of reports, depute officer or officers to make inspection or examination & report and annul or suspend any proceedings, resolution or order of Municipality or of municipal authority. Section 77 of the Act provides the general powers of the Government over its officers. The relevant provisions in the context of the present case are Sections 76 and 77, which are reproduced below:

76. Power to annul or suspend any proceedings, resolution or order of Municipality or of municipal authority. - (1) The Government may, by order in writing, stating the reasons therefore, annul any proceedings, or resolution or order of, -

(a) The Municipality; or

(b) Any other municipal authority; or

(c) Any officer of the municipality, If the Government considers that such proceedings or resolution or order, as the case may be, -

(i) Is in excess of the power conferred by this Act or the rules made thereunder, or against any direction of the Government; or

(ii) Is likely to cause waste or damage of any property of the Municipality or loss of municipal fund; or

(iii) Is likely to lead to a breach of peace or encourage lawlessness, by causing injury or annoyance to any class of persons.

receipt thereof from the Municipality or a Committee thereof, as the case may be;

(b) In the case of a proceedings or resolution or order of any other municipal authority or any officer of the Municipality, within fifteen days from the date of receipt of a report u/s 74 or from the date, the Government comes to know of such proceedings or resolution or order in any other manner, whichever is earlier.

(3) Notwithstanding anything contained in Sub-section (1) or Sub-section (2) no such order of annulment shall be passed by the Government unless a period of ten days has been given to the Municipality or the Municipal authority or the officer of the Municipality to show cause and the causes shown are considered by the Government.

(4) _____

(a) _____

(b) _____

Provided that the order of suspension shall cease to operate on the expiry of a period of thirty days from the date referred to in Clause (a) or Clause (b) of Sub-section (2).

77. General powers of Government over officers. - Notwithstanding anything contained in this Act, the Government, -

(a) may reverse or modify any order of any officer of the Government, passed or purporting to have been passed under this Act, if the Government considers such order to be,-

(i) not in accordance with the provisions of this Act or the rules made thereunder; or

(ii) for any reason, to be recorded in writing, inexpedient; and

(b) shall for the purpose of carrying out the provisions of this Act, exercise over its officers all powers of....

(ii) for any reason, to be recorded in writing, inexpedient; and

(b) shall for the purpose of carrying out the provisions of this Act, exercise over its officers all powers of superintendence, direction and control; Provided that where such revision or modification affects or is likely to affect any person adversely, such revision or modification shall not be made without giving the person a reasonable opportunity of being heard.

10. Under the provisions of Section 76 of the Act, the Government has every power to annul any order of the Municipality if the Government considers that such order was passed in excess of the power conferred by this Act or made thereunder or likely to cause waste or damage of any property of the Municipality or loss of municipal fund or likely to lead to a breach of peace or encourage lawlessness to any class of persons, but the power of the Government u/s 76 of the Act shall be exercised within forty five days of passing the order in question.

u/s 77 of the Act, the Government has also power to reverse or modify any order of any officer of the Government if the Government considers that such order was not in accordance with the provisions of the Act and Rules made thereunder or for any reason, to be recorded in writing. However, such power u/s 77 of the Act shall not be exercised if it is likely to affect any person adversely without giving a reasonable opportunity of being heard to such person.

11. Coming to the facts of the present case, there is no dispute that the respondent No. 6 was the Chairman of the DMC when the allotment orders dated 26.3.2008 of the shop stalls were issued in favour of 225 petitioners and on the same day the petitioners deposited the allotment fees, It is also an admitted fact that a no confidence motion was made on 19.3.2008 against the respondent No. 6 and the same was tabled and passed on 29.3.2008. As per provision of Section 57C of the Act, the DMC was required to meet for transaction of business at least once or more in every month. There is no material on record to say that the power for grant of lease of any shop stall was given to the respondent No. 6 without prior approval of the Government by the DMC in any of its earlier meeting. Section 118 of the Act provides the procedure to be followed regarding the disposal of property, both movable and immovable belonging to the Municipality. Section 118 of the Act, for easy reference, is reproduced below:

118. Disposal of property, - (1) With respect to the disposal of property, moveable and immovable belonging to the Municipality, the provisions of Sub-section (2) and Sub-section (3) shall have effect,

(2) The Municipality may, -

(a) dispose of, by sale or otherwise, any movable property belonging to the Municipality and

(b) with the prior approval of the Government, sell, mortgage, gift or grant a lease of any immovable property belonging to the Municipality; Provided that no such prior approval of the Government shall be necessary in the case of a lease by public auction of any immovable property for a period of five years.

(3) The procedure for sale, mortgage or gift, the procedure for granting any lease and the terms and conditions of lease under this section, shall be such as may be prescribed.

12. A bare perusal of the above provision, it is crystal clear that the DMC may with the prior approval of the Government, sell, mortgage, gift or grant a lease of any immovable property belonging to the Municipality for any period as approved by the Government. On the other hand, the DMC has also got the power for grant of lease of any immovable property belonging to the DMC by public auction for a period not exceeding five years without prior approval of the Government. It means, any immovable property belonging to Municipality may be given an lease for any period with the prior approval of the Government without public auction. And that, prior approval of the Government would not also be necessary

if the lease is to be granted after public auction and for a period not exceeding five years. The allotment orders issued in favour of the petitioners appear to be for an indefinite period as the period of lease has not been mentioned in any of the allotment orders. In such case, prior approval of the Government is a must as per provision of Section 118(2)(b) of the Act. The respondent No. 6 or any of the petitioners could not produce the approval of the Government for grant of lease in favour of the petitioners. The contention of the Learned Counsel appearing for the petitioners that the period of lease is/was from month to month, appears to be misconceived and misplaced. Even in that case, prior approval of the Government is lacking as no public auction was done before issuance of the said orders. Interestingly, no address of any of the allottees has been given in any of the allotment orders and one of the term and conditions of the said order is that in case of any dispute arise during the pendency period, the decision of the DMC shall be final and binding. It may be mentioned here that on 18.4.2008, a discussion on the allotment of stalls at the New Market complex was held. In the said meeting it was resolved by majority decision of the members present, which runs as follows:

Resolution: Resolved to submit a report to the Government in terms of Section 76 of the Municipal Council Act, 2001 seeking appropriate action in terms of the said section for the annulment of the orders allotting stalls in the New Market made by the former chairperson Mr. Y. Vikheho Awomi. The said allotments having been made in excess of the powers conferred by the Municipal Council Act, 2001, the same also being likely to cause waste or damage to the property of the Municipality as well as loss of municipal funds and likely to lead to a breach of peace and encourage lawlessness and cause injury to the general public. The Chairperson shall take appropriate action in the matter.

The said resolution has not been challenged by any of the petitioners or the respondent No. 6 in any appropriate forum and as such the said resolution is still in force.

13. Taking into consideration the above facts and circumstances of the case, this Court is of the view that the said allotment orders were issued not in accordance with the provision of the Act or in excess of power conferred by the Act. It appears that the allotment orders were issued haphazardly on coming to know that a no confidence motion was made against the respondent No. 6, without following the prescribed procedure under the law. Such pick and choose method for the purpose of allotment of shop stalls belonging to the DMC is highly deprecated and such action definitely goes against the larger interest of the public.

14. The Learned Counsel appearing for the petitioners vehemently argued that since the petitioners have already deposited the allotment fees they have acquired legal rights, which cannot be deprived of without due process of law and the Government has no authority to issue the annulment order dated 9.5.2008. The Learned Counsel drew the attention of this Court to the proviso to Section

77(b) of the Act, wherein it is provided that where such revision or modification affects or is likely to affect any person adversely, such revision or modification shall not be made without giving the person a reasonable opportunity of being heard. I am unable to accept the above contentions made by the Learned Counsel appearing for the petitioners for the simple reason that the provision of Section 77 of the Act is applicable only in case of revision or modification made by the Government in respect of the orders passed by any officer of the Government. In the case at hand, the Government issued the order dated 9.5.2008 in exercise of the power conferred u/s 76(1) of the Act annulling the orders dated 26.3.2008 issued by the DMC and not the order/orders passed by any officer of the Government. The impugned order was issued well within the prescribed period giving detailed reasons therein. Hence, the contention of the Learned Counsel appearing for the petitioners holds no field. Besides, it may be mentioned that the respondent No. 3 had issued notice dated 28th April, 2008 to the respondent No. 6 as well as the allottees of the shop stalls inviting explanations to the show cause as to why the allotment orders of all stalls shall not be cancelled. None of the allottees submitted any explanation pursuant to the said notice. On the contrary, it has been clearly mentioned in the notice dated 28th April, 2008 as well as in the order dated 9th May, 2008 that the Government after careful examination of the reply submitted by the respondent No. 6 as well as the resolution adopted in the meeting of the DMC held on 18th April, 2008, arrived at the conclusion that the action of the former Chairperson, DMC in allotment of the stalls in the New Market Complex was in violation of the norms and in excess of the power of the Nagaland Municipal Act, 2001. In view of the above factual matrix, I am unable to accept the contention of the petitioners' Learned Counsel that the impugned order dated 9.5.2008 was issued without giving reasonable opportunity of being heard to the petitioners and in violation of the provision of Section 77(b) of the Act. On overall assessment of the facts and circumstances of the case, this Court has no hesitation in holding that the respondent No. 6 acted against the rule of fair action in the matter of allotment of shop stalls, the allotment orders dated 26.3.2008 were illegal and the petitioners did not acquire any enforceable right under such illegal orders and that mere payment of premium/allotment fee pursuant to such illegal orders does not confer any right on the petitioners.

15. During the course of hearing, the Learned Counsel appearing for the respondent No. 5 fairly admitted that the allotment fees paid by the petitioners are lying in the coffer of the DMC and the DMC is under the active consideration to refund the same to the allottees.

16. Having regard to the above discussions and for the reasons given hereinabove, I don't find any ground to interfere with the impugned order dated 9.5.2008 passed by the Government. Consequently, these writ petitions are dismissed being devoid of merit, and no order as to costs.

17. Before parting with this judgment, it would be in the interest of justice in

directing the respondent No. 5 to refund the allotment fees to the petitioners within a period of 2(two) months from the date of passing of this order, failing which, the respondent No. 5 shall pay an interest @ 16% per annum till the payments are made. Accordingly, I do. Interim order, if any, stands vacated.