

(1986) 03 MP CK 0021
In the Madhya Pradesh High Court
Case No : M.P. No. 1128 of 1985

Manohar Singh

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 14-03-1986

Acts Referred:

Constitution of India, 1950 — Article 226

Madhya Pradesh Municipalities Act, 1961 — Section 331, 38(3)

Citation : AIR 1986 MP 183 : (1986) 31 MPLJ 235

Hon'ble Judges : K.K. Verma, J;G.G.Sohani, J

Bench : Division Bench

Advocate : Chapekar, V.S. Kokje and M.K. Karpe, for the Appellant; Kulshrestha, Government Advocate and R.G. Waghmare, for the Respondent

Final Decision : Allowed

Judgement

Sohani, J.

This is a petition under Article 226 of the Constitution.

The material facts giving rise to this petition, briefly, are as follows : --

As a result of elections held in May, 1963, the petitioner was elected as a member of the Municipal Council, Neemuch, from Ward No. 18. The petitioner has averred that actuated by political considerations, a complaint was made to the Collector, district Mandsaur that the petitioner had ceased to be a councillor by virtue of the provisions of Section 38(l)(b) M. P. Municipalities Act, 1961 (hereinafter referred to as "the Act"), as he had absented himself without leave of absence for three consecutive months from the meetings of the Council. On 10-6-85, a notice was accordingly issued to the petitioner by the Collector, who is the prescribed authority u/s 38(2) of the Act, to show cause why he should not be held to have incurred disqualification as a Councillor. The petitioner showed cause and contended that he had applied for and was granted leave of absence at the meetings of the Council and that he had, therefore, not incurred any

disability, as alleged The petitioner has averred that he produced before the Collector orders granting leave of absence to the petitioner but the Collector passed an order on 23-7-85 declaring that the petitioner had incurred the disqualification on the ground specified in Section 38(1)(b) of the Act and had, therefore, ceased to be a member of the Council. Aggrieved by "he order passed by the Collector, the petitioner preferred an appeal u/s 38(3) of the Act, to the Commissioner, Revenue Division Ujjain as the State Government had delegated its powers u/s 38(3) of the Act, to the Commissioner, under the provisions of Section 345 of the Act By his order dt. 10-9-1985 the Commissioner, Ujjain Revenue Division, held that from the record, it was established that the petitioner had not remained absent at the meetings of the Council for three consecutive months. The Commissioner, therefore, allowed the petitioner's appeal and set aside the order passed by the Collector. As a result of the order passed by the Commissioner, the petitioner did not cease to be a Councillor. By the letter D/- 18-10-1985, the Collector intimated to the Councillors including the petitioner the election programme for the election of the President, Senior Vice-President and Junior Vice-President, to be held on 31-10-85. The petitioner was accordingly invited by the Chief Municipal Officer to attend the meeting of the Councillors scheduled to be held on; 31-10-1985. The petitioner had proposed the name of one Premsukhlal Jaiswal, who was one of the candidates for the office of the President, but when the petitioner went to participate in the meeting of the Council " held on 31-10-85, he was not allowed to take part in the proceedings and was informed by the Collector that the petitioner had ceased to be a Councillor, in pursuance of the directions of the State Government staying the operation of the order passed by the Commissioner, Ujjain Division allowing the appeal of the petitioner. The petitioner contends that the State Government had no jurisdiction to pass any order staying the operation of the order passed by the Commissioner and that in fact no such order was passed by the State Government. The petitioner, therefore, contends that he was unlawfully prevented from participating in the meeting of the Council held on 31-10-85. The petitioner avers" that at the meeting of the Council held on 31-10-85 not only the petitioner was not allowed to vote but the candidate proposed by him for the office of the President was also not allowed to contest as his name was proposed by the petitioner, who, it was alleged had ceased to be a Councillor. The petitioner has, therefore, prayed that the order of the State Government staying the operation of the Commissioner's order allowing the appeal preferred by the petitioner be quashed and the elections held on 31-10-1985 be set aside.

The petition is resisted by the respondents. On behalf of the respondent, it is contended that though the Commissioner had power to hear an appeal from the order passed by the Collector declaring that the petitioner had ceased to be a Councillor, the order of the Commissioner was liable to be revised by the State Government u/s 331 of the Act and that as the State Government had stayed the operation of the order passed by the Commissioner, the petitioner could not be allowed to participate in the meeting of the Council held on 31-10-1985. It was

also contended that the remedy of an election petition was available to the petitioner and that the petitioner was not entitled to any relief. It was further urged that the order passed by the Commissioner was a nullity as it was passed in violation of the principles of natural justice and that in any event, by virtue of the notification issued u/s 38(1) of the Act, notifying that the petitioner had ceased to be Councillor, the petitioner was not entitled to take part in the meeting of the council held on 31-10-85 till that notification was revoked by another notification.

Before we proceed to appreciate the contentions advanced on behalf of the parties, it would be useful to refer to the relevant provisions of the Act Under Clause (b) of Section 38(1) of the Act, if any Councillor absents himself from the meetings of the Council during three consecutive months, except with the leave of the Council, he ceases to be a Councillor subject to the provisions of Sub-section (2) of Section 38 of the Act, which reads as under :--

"38(2)-No Councillor shall cease to be Councillor under Sub-section (1) until the prescribed authority of its own motion or on application made to it by any person in this behalf, decides that such a councillor has incurred the disqualification on any of the grounds specified therein and communicates the decision in relation thereto to such Councillor,

Provided that no order shall be passed by the prescribed authority under this sub-section against any Councillor without giving him a reasonable opportunity of being heard."

Under the provisions of Sub-section (3) of Section 38 of the Act, a person aggrieved by the decision of the prescribed authority may file an appeal within 30 days to the State Government and the order passed by the prescribed authority, subject to the decision of the State Government in appeal, is final. Section 345 of the Act deals with delegation of powers by the State Government and by a notification D/- 26-12-1973, the State Government have delegated the power to hear appeal u/s 38(3) of the Act to the Divisional Commissioner. Section 331 of the Act deals with the powers of the State Government of revision and is as follows : --

"331. Power of State Government of revision (1) The State Government may, for the purpose of satisfying itself as to the correctness, legality or propriety of any order passed by a Divisional Commissioner, Collector, prescribed authority or any officer appointed or authorised by the State Government under this Act, call for the connected records and may in doing so, direct that pending the examination of the record, such order be held in abeyance.

(2) On examining the records, the State " Government may modify or reverse the order of a Divisional Commissioner, Collector prescribed authority or any other officer appointed or authorised by the State Government under this Act as it deemed fit:

Provided that no order shall be varied or reversed unless notice has been given to the parties interested to appeal and to be heard in support, of such order,"

Now, the first question that arises for consideration is whether the State Government passed any order staying the operation of the order passed by the Commissioner on 10-9-1985 allowing the appeal of the petitioner. On behalf of the State, Photostat copies of the minutes recorded by officials in respect of the revision petition preferred by one Rajendra against the order of the Commissioner, are filed. The minutes of the Under Secretary to the Government disclose that the Minister had directed that the order of the Commissioner be stayed. No order passed by the Minister was, however, placed on record. The learned counsel for the petitioner contended that no such order was passed by the Minister. From the material placed on record, it is clear that no official or the Minister has passed any order staying the operation of the Commissioner's order. Moreover, an order passed by the Commissioner u/s 38(3) of the Act, as a delegate of the State Government, could not be revised by the State Government u/s 331 of the Act. In *Bombay Municipal Corporation Vs. Dhondur Narayan Chowdhary*, the Supreme Court has held that when quasi-judicial powers are delegated, the order passed by the delegate is virtually an order passed by the authority, which delegates that function. The order passed by the Commissioner, therefore, amounted to an order passed by the State Government, u/s 331 of the Act, the State Government has no power to revise its own order. It, therefore, follows that the operation of the order passed by the Commissioner on 10-9-85 could not be stayed by the State Government as the State Government had no jurisdiction to revise that order.

It was contended by the learned counsel for the respondents that the order passed by the Commissioner was violative of the principles of natural justice. The argument put forward on behalf of the respondents was that the person, who had complained to the Collector that the petitioners had incurred the disqualification contemplated by Clause (b) of Section 38(1) of the Act, was not impleaded in the appeal and was not heard by the Commissioner before passing the order on 10-9-1985. How the scheme of the provisions of Section 38 of the Act is that the Collector, who is the prescribed authority u/s 38(2) of the Act, after giving the Councillor a reasonable opportunity of being heard, decides that, that councillor has ceased to be a Councillor under Sub-section (1) of Section 38 of the Act. While deciding this question, the only person, who has to be heard by the Collector is the Councillor himself. It may be that the show cause notice issued by the Collector in that behalf is based on the information received by the Collector from any application made to him by any person but the opportunity of hearing contemplated by Section 38(2) of the Act, is to be afforded to the Councillor, against whom action is proposed and to no other person. There is no issue between the Councillor and any other person, which the prescribed authority has to decide u/s 38(2) of the Act. Therefore, if the only person, who would be heard by the Collector before passing an order u/s 38(2) of the Act is the Councillor against whom it is proposed to take action, then it follows that in an

appeal preferred by that councillor before the Commissioner, it cannot be held that any other person is a necessary party and an order passed by the Commissioner without hearing that person is a nullity. It was urged on behalf of the respondents that the use of the clause, "any person aggrieved by the decision of the prescribed authority" occurring in Section 38(3) of the Act indicated that if the Collector declined to hold that a Councillor had ceased to hold office, then any person, who had moved the Collector, to take action u/s 38(2) of the Act could prefer an appeal. This contention cannot be upheld because the provisions of Section 38(2) of the Act do not contemplate as already observed, that in passing an order u/s 38(2) of the Act, the Collector is required to determine any lis between the Councillor and any other person. The only decision, contemplated by Section 38(2) of the Act is a decision holding that the Councillor has incurred any disqualification. The right to prefer an appeal u/s 38(3) of the Act is conferred on a person who is aggrieved by that decision. From the provisions of Section 38(2) and Section 38(3) of the Act, it cannot be spelt out that any person other than the concerned Councillor has a right to be heard by the Collector before he decides to take action under that provision. It, therefore, follows that in an appeal preferred by the Councillor to the Commissioner from the order of the Collector, it is not necessary to implead any other person as a respondent. The order passed by the Commissioner cannot, therefore, be held to be a nullity.

It was then contended that the State Government had notified that the seat of the petitioner had become vacant as the Collector had decided that the petitioner had incurred disqualification and that until that notification was revoked by the State Government the petitioner could not act as a Councillor even though his appeal was allowed by the Commissioner. The contention cannot be upheld. The order passed by the Collector was set aside by the Commissioner in appeal and consequently, the notification giving effect to the order of the Collector ceased to be operative. Therefore, the contention that till that notification was revoked by the State Government, the order passed by the Collector continued to be in force, cannot be upheld.

Lastly, it was contended that the petition should be dismissed because the remedy of an election petition was available to the petitioner. Now the relief sought by the petitioner in this petition is that the order of the State Government staying the operation of the order passed by the Commissioner on 10-9-1985 be quashed and the proceedings of the meeting of the Council held on 31-10-1985 be set aside. The petitioner was not a candidate at the election held on 31-10-1985. He was a proposer of a candidate, who was not allowed to contest the election on 31-10-85 on the ground that his proposer was not a Councillor. The remedy of an election petition provided by Section 20 of the Act, is available only to a candidate at that election. The petitioner is not entitled to file an election petition u/s 20 of the Act assailing the election held on 31-10-1985. The petition, therefore, cannot be thrown on the ground that an alternative remedy is available to the petitioner.

For all these reasons, this petition is allowed. The order communicated by the State Government to the Collector staying the operation of the order D/-10-9-85 passed by the Commissioner is quashed. As the petitioner was unlawfully prevented from taking part in the meeting of the Municipal Council, Neemuch, held on 31-10-1985 and as the candidate, whose name was proposed by the petitioner for the office of the President of the Council was not allowed to contest, the proceedings of the meeting of the Municipal Council, Neemuch, held on 31-10-1985. including the elections of respondents Nos. 5, 6 and 7 held in that meeting, are quashed. Parties shall bear their own costs of this petition. Security amount, if any, be refunded to the petitioner.