

(1981) 10 MP CK 0005

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 425 of 1979

Mohammad Adnan Khan

APPELLANT

Vs

Municipal Corporation, Bhopal and Another

RESPONDENT

Date of Decision : 13-10-1981

Acts Referred:

Bhopal State Municipalities Act, 1956 — Section 342

Citation : (1982) JLJ 482 : (1982) MPLJ 80

Hon'ble Judges : G.P. Singh, C.J.; Faizanuddin, J

Bench : Division Bench

Advocate : S. Saukat Ali, A.S. Usmani and M.A. Khan, for the Appellant; Y.S. Dharmadhikari and Anoop Choudhari, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Singh, C.J.

This order shall also dispose of Miscellaneous Petitions Nos. 752 of 1979 and 753 of 1979. The petitioners in all these petitions were Class HI employees of the Municipal Corporation, Bhopal. They were all superannuated on attaining the age of 58 years on different dates in 1979. By these petitions under Article 226 of the Constitution, the petitioners challenge the orders of their retirement.

The petitioners started their career as employees on different dates between 1946 and 1954. The petitioners contend that the age of superannuation for them continued to be sixty years in accordance with the bye-laws notified on 11th November 1947 which were made under the Bhopal State Municipalities Act, 1916.

To begin with, Bhopal City was constituted as a Municipality under the Bhopal State Municipalities Act, 1916. Section 269(1)(j) of this Act empowered the Municipality to make bye-laws relating to conditions of service of employees of the Municipality. The bye-laws made in exercise of this power were published by the Government by Notification No. 30 dated 11th November 1947 in the Bhopal

Gazette. The age of superannuation applicable to Class III employees under these bye-laws was sixty years. By another notification dated 4th February 1955, the Government of Bhopal applied fundamental rules and other rules as applicable to the Government servants to the municipal employees. There was, however, a proviso in this notification which made it clear that the application of the fundamental rules and other rules was subject to the condition that they were not inconsistent with the provisions of the Bhopal Municipalities Act and the Rules, Regulations and Bye-laws made thereunder. The application of fundamental rules and other rules had, therefore, not the effect of changing the age of superannuation which was sixty according to the bye-laws notified by Notification No. 30 dated 11th November 1947. It may here be mentioned that in *The Municipal Corporation Bhopal, M.P. Vs. Misbahul Hasan and Others*, , it is observed (page 893) that by application of the fundamental rules etc. the retirement age was brought down to 58. It means that the proviso contained in the notification dated 4th February 1955 was not brought to the notice of the Supreme Court. In fact, in that case, it was not material whether the age of superannuation was 58 or 60 as the employee concerned was retired at the age of 55. The observation made by the Supreme Court that the age of superannuation was reduced by the notification dated 4th February 1955 cannot be taken to have decided that question. As already pointed out, because of the proviso contained in the said notification the 1947 bye-laws fixing the age of superannuation at sixty continued to have effect.

The Municipalities Act of 1916 was repealed and replaced some time in 1956 by the Bhopal State Municipalities Act (Act No. 3 of 1956). Section 308 of this Act conferred power on the Municipality to make bye-laws but this section contained no power to make bye-laws on the subject of conditions of service of employees. This was in contrast to section 269(1)(j) of the 1916 Act. Section 309 of the 1956 Act, however, empowered the State Government to make rules in respect of conditions of service of employees. Section 342 of the 1956 Act continued the bye-laws made under the 1916 Act if not inconsistent with the provisions of the 1956 Act. It is a moot question whether the scheme of the new Act that service conditions could not be regulated by bye-laws and that they could be regulated by rules made by the State Government brought about such an inconsistency that the bye-laws relating to conditions of service made in 1947 under the 1916 Act could not be continued u/s 342 as bye-laws. It is not necessary to decide this question, for, in our opinion, section 342 of the 1956 Act also continued appointments made under the 1916 Act. The 1956 Act did not expressly provide for the terms and conditions on which the appointments were to continue but the necessary implication is that they were continued on existing terms and conditions. Thus, the 1947 bye-laws continued as conditions of service of the employees who were recruited before the repeal of the 1916 Act by the 1956 Act even after the repeal.

The Bhopal State Municipalities Act, 1956 was in its turn repealed and replaced by the M. P. Municipalities Act, 1961, from 1st February 1962. Section 2(2)(i) of

the 1961 Act continued all bye-laws if not inconsistent with the provisions of the 1961 Act. Section 2(2)(iv) also continued the employees on the same conditions of service until altered in accordance with the provisions of the 1961 Act. We have already noticed that the bye-laws of 1947 were continued as conditions of service u/s 342 of the 1956 Act in respect of the employees recruited before the enforcement of the 1957 Act. These employees and their conditions of service as contained in the 1947 bye-laws were continued by section 2(2)(iv) of the 1961 Act until altered in accordance with the provisions of the new Act. It may also be mentioned that under the 1961 Act the power to regulate conditions of service was conferred on the State Government by making rules u/s 95. Bye-laws could not be made regulating conditions of service.

The M. P. Municipal Corporation Act, 1956, was applied to Bhopal on 26th August 1967. It is from that date that the Bhopal Municipal Council became a Corporation. The transitory provisions are contained in Chapter XL. We are here concerned with section 442 which reads as follows:-

Sec. 442. Transitory provisions.-(1) On/and from the date this Act is made applicable to any city, the following consequences shall ensue, namely:

(a) the Municipal Council of the City existing immediately before the date aforesaid shall cease to exist and all the Councilors thereof shall vacate their offices;

(b) the administration of the Corporation shall vest in the Administrator who shall be appointed by the Government;

(c) the Administration shall be deemed to be the Corporation and shall exercise the power and perform the duties conferred or imposed by or under this Act on the Corporation, the Standing Committee, the Appeal Committee and the Commissioner;

Provided that the Administrator shall cease to exercise the powers and perform the duties conferred or imposed by or under this Act on the Commissioner with effect from the date the Commissioner is appointed in accordance with the provisions of this Act;

(d) all municipal officers and servants in the employment of the said Municipal Council shall be officers and servants employed by the Corporation under this Act, as if they had been appointed u/s 58.

(2) The Administrator appointed by the Government under sub-section (1) shall take steps in connection with the preparation of the Municipal Electoral Roll and holding general ward election in accordance with the provisions of this Act or the rules or bye-laws made thereunder.

(3) The Administrator shall cease to hold office on the dates appointed for the first general meeting of the newly constituted Corporation after such elections.

(4) Any person appointed Administrator under sub-section (1) shall receive from

the Corporation fund for his services such pay and allowances as may be fixed by the Government.

(5) Notwithstanding anything contained in this Act or any rule or bye-law made thereunder, the conditions of service, pay and allowances existing in respect of all permanent officers and servants of the said Municipal Council on the date immediately before the date referred to in subsection (1) shall be deemed to be their existing conditions of service, pay and allowances under this Act:

Provided that the service rendered by such officers and servants before the date referred to in sub-section (1) shall be deemed to be service rendered in the service of the Corporation.

Section 427 of the M. P. Municipal Corporation Act empowers the Corporation to make bye-laws. Sub-clauses (b) and (h) of clause (I-C) of section 427 empower the Corporation to make bye-laws regulating the conditions of service of Corporation officers or servants and the period of service of Corporation officers and servants. By notification dated 22nd February 1973 which was published in the Gazette dated 27th July 1973, the Corporation made the Bhopal Municipal Corporation Service Conditions (Age of Superannuation) Bye-laws, 1973. Bye-law No. 3 of these bye-laws fixed the age of superannuation of all Corporation officers and servants, other than Class IV servants, as 58 years. Bye-law No. 8 in specific terms states that all rules, regulations, orders, notification, bye-laws etc. corresponding to the new bye-laws shall stand repealed. It was under these bye-laws that the petitioners were retired on attaining the age of 58 years.

The argument of the learned counsel for the petitioners is that in view of section 442 (5) of the Corporation Act, the 1973 bye-laws could not be applied to the employees who immediately before the date of the commencement of the Corporation Act were employees of the Bhopal Municipal Council and were continued as employees of the Corporation u/s 442(1)(d). It is this argument which we have now to examine.

We have already quoted section 442 of the Corporation Act. The section occurs in a chapter which bears the title "Transitory provisions." The marginal heading of the section also is "Transitory provision." The effect of the section is to dissolve the Municipal Council and to vest the administration of the Corporation in the Administrator appointed by the Government. The Administrator so appointed is to be deemed to be the Corporation. Clause (d) of sub-section (1) says that all municipal officers and servants in the employment of the defunct Municipal Council shall be officers and servants employed by the Corporation under the Act as if they had been appointed u/s 58. The effect of this provision is to continue the Municipal officers and servants of the defunct Municipal Council as officers and servants of the Corporation from 26th August 1967 when the Corporation Act was applied to Bhopal. Sub-sections (2) to (4) empower the Administrator to take steps for preparation of the Municipal Electoral Roll and holding elections for constituting the elected Corporation. Sub-section (5) on which strong reliance is

placed by the learned counsel for the petitioners then says that "Notwithstanding anything contained in this Act or any rule or bye-law made thereunder, the conditions of service, pay and allowances existing in respect of all permanent officers and servants of the said Municipal Council on the date immediately before the date referred to in sub-section (1) shall be deemed to be their existing conditions of service, pay and allowances under this Act." The date mentioned in sub-section (1) of section 442 is the date of application of the Corporation Act to a City. In the case of Bhopal as already noticed that date is 26th August 1967. The effect of sub-section (5) is that the conditions of service of the employees of the defunct Municipal Council as on the date immediately before the application of the Corporation Act shall be deemed to be "their existing conditions of service, pay and allowances under this Act." The word "existing" has normally the implication of connoting "having existence now" (see *Corpus Juris Secundum*, Vol. 35, page 224). The word "existing" occurs twice in sub-section (5). The first expressly refers to the conditions of service as on the date immediately preceding the date when the Corporation Act is applied to a City and the second impliedly refers to the date when the Corporation Act is applied. The Corporation Act was applied on 26th August 1967 in the city of Bhopal and the words "existing conditions of service, pay and allowances under this Act" in this context refer to service conditions which are deemed to exist on that date of the municipal employees who are continued as employees of the Corporation by sub-section (1) (d). The word "existing" is very often defined to mean existing at the commencement of the Act (see *Stroud and Judicial Dictionary*, Fourth Edition page 974). Although not defined in these terms, the word "existing" occurring towards the end in sub-section (5) has the same meaning. The learned counsel for the petitioners placed reliance on the notwithstanding clause in sub-section (5) which is to the effect "Notwithstanding anything contained in this Act or any rule or bye-law made thereunder;" and argued that no bye-law or rule can be made under the Act to take away the old conditions of service continued by subsection (5). This argument proceeds upon a misconstruction of the substantive part of the sub-section. As earlier pointed out by us, the effect of the substantive part of sub-section (5) is that the conditions of service as on the date immediately preceding the date of the application of the Act become the conditions of service on the date of the application of the Act. This is the fiction created by the substantive part of sub-section (5). The operation of the notwithstanding clause is restricted to this fiction. Putting it differently, nothing in the provisions of the Act or any rule or bye-law made thereunder can have effect to mean that the conditions of service as on the date immediately before the date of the application of the Act will not be the conditions of service on the date when the Act is applied. No rule or bye-law can be made to change this legal position but there is nothing in the sub-section or in the notwithstanding clause to take away the power of the Corporation to subsequently change the conditions of service by making bye-laws in exercise of its powers under the Act. Sub-section (5) does not contain a guarantee that service conditions of the old employees will not be changed at all. This conclusion is further supported by the fact that sub-section

(5) is a part of a section which is described to be containing "Transitory provisions" as mentioned in its marginal note. Indeed it would be a very novel thing to find a guarantee of the nature contended for by the learned counsel for the petitioners spelled out of a transitory provision. We are clearly of opinion that sub-section (5) does not take away the power of the Corporation to make bye-laws u/s 427 to regulate conditions of service of employees of the defunct Municipal Council who became employees of the Corporation u/s 442. By the 1973 bye-laws the Corporation reduced the age of superannuation of all its employees. The 1973 bye-laws have superseded all previous rules, bye-laws, notification etc. There is no exception made in these bye-laws in respect of employees who were previously employees of the Bhopal Municipal Council. The new bye-laws clearly apply to the petitioners and their retirement on attaining the age of 58 years was valid.

Learned counsel for the petitioners also contended that the bye-laws published under the notification No. 30 of 1947 could not be repealed or amended u/s 427. It was argued in this connection that these bye-laws could be repealed only by the Government u/s 432. Power to make bye-laws u/s 427 on the subject of conditions of service and the period of service of officers and servants- implies a power to supersede the earlier bye-laws or the earlier conditions of service. Section 432 is an independent provision enabling the Government to modify or repeal bye-laws. Bye-laws can be modified or repealed by making new bye-laws u/s 427 by following the procedure contained in sections 429 and 430. Bye-laws may also be modified or repealed by the State Government by taking recourse to section 432 without the Corporation making new bye-laws. Both are independent powers and it cannot be said that the Corporation u/s 427 cannot make bye-laws so as to modify or supersede old bye-laws or old service conditions.

The petitions fail and are dismissed but without any order as to costs. The security amount be refunded to the petitioners.