(1973) 01 MP CK 0005

In the Madhya Pradesh High Court

Case No : M.P. No. 59 of 1970

Moolchand and Another APPELLANT

Vs

Indore Municipal Corporation and Another RESPONDENT

Date of Decision : 30-01-1973

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Madhya Pradesh Municipal Corporation Act, 1956 — Section 295, 403, 403(2), 421, 421(1)

Citation : AIR 1973 MP 245 : (1973) JLJ 922 : (1973) 18 MPLJ 596

Hon'ble Judges : G.L. Oza, J;A.P. Sen, J

Bench : Division Bench

Advocate : C.M. Chaphekar, for the Appellant; B.P. Jhanjaria, for Opponent Nos. 1 and 2, S.S. Sharma and Present Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Oza, J.

This is a petition filed by the petitioner against an order passed by the State Government u/s 421 of the Madhya Pradesh Municipal Corporation Act, 1956, (hereinafter called the Act) setting aside the order passed by the appeal committee of the Indore Municipal Corporation granting permission for Construction of a overhanging balcony which initially was refused by the Commissioner of the Corporation.

According to the petitioners, they are the owners of House No. 3 on Street No. 2, in Murai Mohalla, Sanyogitaganj, Indore within the limits of the Indore Municipal Corporation. The petitioner decided to reconstruct the house, and consequently on 30th June, 1967, they submitted an application for permission to build in accordance with the plan submitted along with that application. They also submitted along with this application what was required u/s 294 of the Act. In the proposed plan, the petitioners had shown galleries projecting to the extent of

3 feet on the lane in the eastern side and on the road on north side of the proposed building. By his Dakhla No. 744 dated the 4th August 1967 the Commissioner of the Corporation granted sanction for construction of the building but refused permission for the proposed gallery in the east and in the north of the building on the ground that construction of these galleries was contrary to the bye-laws. Against this order of the Commissioner the petitioners preferred an appeal to the Appeal Committee of the Corporation u/s 403 of the Act. The Appeal Committee after hearing the parties and inspecting the site by its order, dated 13th March, 1968, allowed the appeal and granted permission for construction of the galleries as prayed for. The Appeal Committee directed the Commissioner of the Corporation to grant sanction accordingly. Thereafter the Commissioner filed a review petition on 13th March, 1968, u/s 403 (7) of the Act before the Appeal Committee for reconsideration of its order. The Appeal Committee, after hearing the parties, dismissed the review petition by its order dated the 22nd March 1969. According to the petitioners, after this order they again submitted plans for the construction of the galleries on 26th April, 1969, to the Commissioner for sanction in accordance with the directions of the Appeal Committee. According to the petitioners, after these plans were submitted the Commissioner was bound to grant sanction to the petitioners. But when they did not receive any communication from the Commissioner for a period of sixty days from the date of submission of the plans afresh after the decision of the Appeal Committee, they commenced the work and completed the galleries as shown in the plan. This, according to the petitioners, was completed in the middle of August, 1969. According to the petitioners, on 1st September, 1969, they received a letter from the Commissioner, bearing No. 1271, dated the 30th August, 1969, stating that after the order of the Appeal Committee the Commissioner had made a reference to the Government and he had now received orders from the Government that the order of the Appeal Committee may not be carried out They submitted a reply to the Commissioner stating that as they had received no communication from him for a period of sixty days and they presumed the sanction as indicated in Section 295 of the Act, and therefore, they completed the construction of the galleries. Thereafter the petitioners received a notice from the Commissioner (No. 847, D/- 28-4-1970) stating that the State Government, by its letter No. 3542 dated the 18th March, 1970, had accepted the reference made by him. The Commissioner, therefore, asked the petitioners to remove the construction of the galleries within one week; otherwise a gang would be sent to pull down the galleries constructed by the petitioners. Aggrieved by this notice, the petitioners have filed this petition before this Court.

It was contended on behalf of the petitioners that u/s 421 of the Act no reference could be made to the State Government in a matter pertaining to sanction for building construction. It was also contended that alternatively that even if the Government had jurisdiction u/s 421 of the Act, it was incumbent upon the Government to give hearing to the petitioners before an order could be passed against them. According to the petitioners, no opportunity of hearing was at all given to them when the Government set aside the order of the Appeal Committee. It was further contended that the provisions contained in Section 403 (6) of the Act clearly lay down that the decision of the Appeal Committee shall be final and consequently no reference could be considered by the State Government. Learned Counsel for the petitioners contended that the language of Section 421 of the Act clearly goes to show that it would apply only to resolutions or orders of the Corporation or officers subordinate thereto which have to be carried out by the Corporation or its authorities themselves; but in the present case nothing remained to be carried out by the authorities of the Corporation. It is apparent that no reference could be entertained by the State Government pertaining to orders passed in connection with the building control. It was also contended that the provisions contained in Sub-section (3) of Section 421 go to show that the Corporation is entitled to make representation in a reference being considered by the State Government and Sub-section (4) of Section 421 clearly lays down that the Government can pass any order only after considering the representation made by the Corporation. It was contended for the petitioner that in view of these provisions contained in Section 421, it would be applicable only to cases where Corporation in discharge of its functions either passes a resolution or decides to do a particular act and the Government, while considering the matter u/s 421, if finds that it is contrary to law, rules or bye-laws, it can suspend the operation of the resolution or order and stop its execution; but the Government could do this only after hearing the Corporation and giving it an opportunity to represent. It was further contended that even if it is found that Section 421 of the Act confers jurisdiction on the State Government even in matters like the present one, where it is a third party which is involved and is expected to do something in accordance with the orders of the Corporation authorities, still the State Government before passing an order against such party is expected to give it an opportunity of hearing. According to the petitioners, this being a matter pertaining to the rights of the citizens the State Government exercising powers u/s 421 of the Act is expected to follow the principles of natural justice; and consequently as the petitioners were not given any opportunity to represent or an opportunity of hearing, the order passed by the State Government could not be maintained.

Shri Thanjaria, appearing for Corporation, contended that Section 421 of the Act clearly confers jurisdiction on the State Government to consider any order of the Corporation, and to suspend and set it aside if it found to be contrary to law, by-laws or rules. He contended that Section 421 (1) is in two parts -- the first refers to a resolution or order of the Corporation or of any authority or officer subordinate thereto, and the other part refers to the doing of an act which is about to be done or is being done by or on behalf of the Corporation. Learned counsel contended that the case in hand could clearly be covered by the first part of this sub-section which refers to a resolution or order of the Corporation, as the present matter concerns the resolution of the Appeal Committee, which is only a sub-committee of the Corporation itself. He contended that Section 295 of the Act is a provision under which the Commissioner had jurisdiction to refuse sanction for erection or re-erection of a building, and the proviso to this section itself states that an order granting or refusing sanction passed by the Commissioner may be suspended u/s 421 of the Act. According to the learned counsel, this goes to show that u/s 421 the State Government has jurisdiction to consider and modify an order pertaining to erection or re-erection of a building passed by the Commissioner and modified by the Appeal Committee. He also contended that in fact the appeal to the Appeal Committee itself was without jurisdiction as the provisions contained in Section 293 (3) refer to an appeal to the District Court. According to the learned counsel, the provisions contained in Section 421 do not talk of any opportunity of hearing.

Shri Sharma, Government Advocate for the State, contended that on a perusal of Section 421 and the proviso to Section 295 of the Act it cannot be doubted that the State Government has jurisdiction to consider a reference as in the present case. As regards the opportunity of hearing, Shri Sharma contended there is nothing in the provisions of Section 421 to indicate that there is any right with the petitioners to get an opportunity of hearing. In the alternative, he contended that the order passed is only about the suspension of the order of the Appeal Committee, and the Government may grant an opportunity of hearing to the petitioners before a final order is passed in the case.

Shri Chaphekar for the petitioners contended that as regards the jurisdiction of the Appeal Committee, Section 403 of the Act clearly provides that against an order of the Commissioner about granting or refusing a licence or permission an appeal would lie to the Appeal Committee, and in Sub-section (2) (a) of this Section the orders shown to be appealable Include orders u/s 295 of the Act. According to the learned counsel, the order of the Commissioner refusing sanction for the galleries in the present case is apparently an order u/s 295, and consequently the Appeal Committee or the Corporation had jurisdiction to entertain the appeal. As regards the question about opportunity of hearing, learned counsel contended that although it is not specifically provided for, when the Government considers a reference which involves a right of a citizen to build, it is bound to act in accordance with the principle of natural justice and consequently the order could not be justified at the back of the petitioners without affording any opportunity to them.

The order passed by the Commissioner refusing sanction for the galleries is apparently an order u/s 295 of the Act. This order Is clearly appealable u/s 403. Sub-section 2 (a) of Section 403 provides that any person aggrieved by any notice or order issued or other action taken by the Commissioner under the Sections specified in the provisions including Section 295 of the Act may appeal to the Corporation. It cannot, therefore, be doubted that the Appeal Committee had jurisdiction to hear the appeal, and the order passed by the Appeal Committee allowing the appeal and refusing the review as prayed for by the

Commissioner is within the jurisdiction of the Appeal Committee.

Sub-section (1) of Section 421 provides as under-

"421 (1). If the Government is of opinion that the execution of any resolution or order of the Corporation or of any other authority or officer subordinate thereto or the doing of any act which is about to be done or is being done by or on behalf of the Corporation, is not in conformity with law or with the rules or bye-laws made thereunder, or is likely to lead to a breach of the peace or to cause injury or annoyance to the public or to any class or body of persons or is likely to cause waste of or damage to Municipal Funds, the Government may by order in writing, suspend the execution of such resolution or order or prohibit the doing of any such act."

Apparently this Sub-section is in two parts. The first part refers to the execution of any resolution or order of the Corporation or of any other authority or officer subordinate thereto. The second part, which has been joined with the first by the word ''or'' refers to the doing of any act which is about to be done or is being done. The second part has been further limited to ''being done by or on behalf of the Corporation''. Consequently the contention that where the appeal Committee has granted sanction nothing remains to be done by or on behalf of the Corporation and so this section would not be applicable, cannot be accepted. The present case would clearly fall within the ambit of the first part of the section which talks of the execution of any resolution or order and where it is not provided that the execution has to be by the Corporation or any authority on its behalf. Consequently this part of the section will cover cases where the Commissioner or the Appeal Committee, by a resolution or order, sanctions or refuses sanction for erection or re-erection of a building. This conclusion is also supported by the proviso to Section 295 of the Act That proviso reads thus-

"Provided that if an order granting or refusing such sanction is suspended u/s 421 the period prescribed by this Sub-section shall commence to run afresh from the date of communication of final order under the said sanction by the Government."

This proviso, therefore, clearly contemplates the suspension of an order u/s 295 by the Government exercising jurisdiction u/s 421 of the Act It cannot, therefore, be doubted that a reference made to the Government u/s 421 of the Act can be considered by the Government, and it will be within the jurisdiction of the State Government to suspend or modify an order or resolution passed by the Commissioner or the Corporation (Appeal Committee) pertaining to sanction or refusal of sanction to the construction or reconstruction of a building. In this view of the matter, therefore, when aggrieved by the order of the Appeal Committee the Commissioner made a reference to the State Government and the State Government entertained that reference, it was within its jurisdiction to do so, and, therefore, the order of the State Government cannot be struck down in a petition under Articles 226 and 227 of the Constitution.

The order passed by the state Government u/s 421 of the Act is not before us. The Commissioner has only informed the petitioners about the order, and this was followed up by a notice to the petitioners to demolish the alleged galleries which have been constructed. In these circumstances, therefore, the contention that a final order is not yet passed by the State Government does not appear to be justified and cannot be accepted, It cannot also be doubted that the Commissioner''s action in issuing a notice calling upon the petitioners to pull down the galleries, which have been constructed in between, clearly goes to show that the State Government by its order u/s 421 of the Act has set aside the order passed by the Appeal Committee. It is not in dispute that this order was passed by the State Government without affording any opportunity to the petitioner.

The scheme of Section 421 of the Act indicates that on reference or otherwise if the State Government forms an opinion that the execution of any resolution or order is not in conformity with law or rules or bye-laws, it can suspend the execution of such a resolution, and a copy of such an order of the Government will be sent to the Corporation by the Government as provided for in Sub-section (2) of Section 421 of the Act. Sub-section (3) contemplates that after the receipt of this order if the Corporation wants to represent, it can submit a representation to the Government against such an order, Sub-section (4) provides that it is only after the consideration of such representation that the Government may either cancel, modify or confirm the order already passed under Sub-section (1) or take such action in the matter as may be considered fit in circumstances of the case. The scheme of Section 421 clearly indicates that in the first place the Government can only pass an order suspending the execution of an order or resolution. Thereafter it can pass a final order only after affording an opportunity to the Corporation to file a representation. This clearly goes to show that no order against the Corportion can be passed by the State Government without affording an opportunity to the Corporation. Apparently, therefore, when the State Government acts u/s 421 of the Act, it is expected to follow the principles of natural justice. In view of this scheme of the section, it cannot be contended that when the matter refers to a private individual whose rights are involved, the Government is expected to act u/s 421 of the Act without affording him any opportunity of representation or hearing. In that case as well, the State Government is expected to follow the principles of natural justice. Consequently when the Government exercises jurisdiction u/s 421 of the Act, it is bound to act in accordance with the provisions of natural justice, and therefore, before passing a final order it is expected to afford an opportunity to the person concerned to make a representation and also the opportunity of hearing. Admittedly, in the present case, before passing the final order setting aside the order of the Appeal Committee giving sanction to the petitioners for construction of galleries, the State Government had afforded no opportunity to the petitioners either of hearing or of making a representation. Consequently the order passed by the State Government setting aside order of the Appeal Committee cannot be maintained and so the order of the Commissioner dated the 30th August, 1969, informing the petitioner that the order of the Appeal Committee cannot be complied with, cannot also be allowed to stand. Similarly the notice dated 28th April, 1970, saying that the reference made to the Government has been accepted, and, therefore, calling upon the petitioner to remove the galleries cannot also be allowed to stand.

Consequently the petition is allowed. The order in question of the Government, the order of the Commissioner dated the 30th August, 1969, and the notice issued by the Commissioner, dated the 28th April, 1970, are all quashed. The petitioners shall be entitled to costs of this petition. Counsel''s fee Rs. 100/- if certified. Security amount deposited by the petitioners shall be refunded to them.

