
(1974) 08 BOM CK 0014

In the Bombay High Court

Case No : Spl. C. Applns. No's. 811, 812, 813, 817 and 1053 of 1974

N.J. Katakwar

APPELLANT

Vs

Municipal Council, Tumsar and others

RESPONDENT

Date of Decision : 09-08-1974

Acts Referred:

Maharashtra Municipalities Act, 1965 — Section 80

Citation : (1975) MhLj 298

Hon'ble Judges : U.R. Lalit, J; D.B. Padhye, J

Bench : Division Bench

Advocate : C.G. Madkholkar, for the Appellant; S.G. Kukdey, For respondent No. 1, M.M. Qazi, Addl. Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

D.B. Padhye, J.—These are the five petitions of a similar nature involving the same point by employees of the same Municipal Council and can be disposed of by a common judgment.

2. The petitioner Katakwar in Special Civil Application No. 811 of 1974 was appointed on 11-8-1942 and was confirmed later as a High School teacher on 2-7-1953. The petitioner Bawankar in Special Civil Application No. 812 of 1974 was appointed on 2-7-1945 and was confirmed as High School Teacher on 22-6-1961. The petitioner Sonkusare in Special Civil Application No. 813 of 1974 was appointed on 18-7-1949 and was confirmed as High School Teacher on 1-1-1950. The petitioner Nimje in Special Civil Application No. 817 of 1974 was appointed on 30-6-1948 and was confirmed as a High School Teacher on 1-1-1950 and the petitioner Rangari in Special Civil Application No. 1053 of 1974 was appointed on 19-7-1951 and confirmed as High School Teacher on 1-4-1958. All these petitioners were in the employment of the Tumsar Municipal Council as teachers and all of them were served with notices on 1-4-1974 requiring the petitioners in the first four cases to retire from 1-5 1974 and the petitioner in the last case from 2-7-1974 on attaining their ages of 58 years. The petitioners are

challenging these termination notices contending that their age of superannuation is 60 and not 58 as contended by the respondent Municipal Council and that they should be held to be continuing in service.

3. The petitioners were appointed at the time when the C. P. and Berar Municipalities Act was in force. Under the said Municipalities Act rules have been framed u/s 25 (9) of the Act, but these are recruitment rules and there are no rules framed under the Municipalities Act giving the age of superannuation of its employees. It is not disputed that the Tumsar Municipal Council had not framed any byelaws excepting the one that have now been framed in 1969 providing, amongst other things, for the age of superannuation of its employees. Though the C. P. and Berar Municipalities Act had given the power to frame byelaws, no byelaws were framed and the power of making the byelaws by this Municipal Council has been exercised for the first time after the Maharashtra Municipalities Act came into force with effect from 31-12-1965. The power to frame the byelaws under the Maharashtra Municipalities Act is to be found in section 322 which provides that without prejudice to any power to make bylaws contained elsewhere in this Act, a Council may make bylaws consistent with this Act and the rules made thereunder for the administration of its affairs and for the guidance of its Committees, officers and servants. We may note at this stage that the Act also gives powers to the Municipal Council under sections 75, 76 and 80 of the Act to frame byelaws with respect to particular purposes mentioned therein. In exercise of these powers to frame byelaws, the Municipal Council, Tumsar framed the Bylaws in general terms with the approval of the Collector on 24th May 1969. The said bylaws have been published in the Maharashtra Government Gazette dated 26th June 1969. These bylaws purport to have been made in exercise of the powers conferred under clause (e) (ii) of subsection (3) of section 322 and the Collector has accorded sanction to the said bylaws u/s 80 of the Maharashtra Municipalities Act. These bye-laws are for regulating certain conditions of service of Officers and servants employed by the Municipal Council excepting sweepers and coolies of Public Health Department and other officers referred to in sub-section (1) and (2) of section 75 of the said Act. The byelaws which are relevant for our purposes are as under:

"BYELAWS

All the provisions of Bombay Civil Service Rules and Standing Orders therein, as they are amended from time to time shall mutatis mutandis be applicable to all officers and servants employed by Municipal Council, Tumsar, excepting sweepers and coolies of Public Health Department and Officers referred to in sub-sections (1) and (2) of section 75 of the Maharashtra Municipalities Act, 1965, in respect of all matters u/s 80 of the Act abide .

Bhandara:

Sd /- O. S. Khorgade,

24th May 1969.

Collector. Bhandara."

It is in pursuance of these bylaws that the respondent Municipal Council purports to act in retiring the petitioners on their attaining the age of 58 years.

4. According to the petitioners, the age of superannuation is 60 years and the superannuation of these petitioners teachers before the completion of the age of 60 years is illegal and has to be struck down. The petitioners placed reliance on the provision of the Madhya Pradesh Secondary Education Act and the Regulations framed therein as also the School Code which is a part of these Regulations. They also relied upon the provisions of the Maharashtra Secondary Education Boards Act 1965 as also the Secondary School Code framed by the Maharashtra Government which came into effect from the year 1963-64. On the basis of these School Codes, the Acts and Regulations, the petitioners contend that their age of superannuation cannot be less than 60 years and as such the impugned notices are illegal and are liable to be set aside.

5. We may refer to the contentions raised by the rival parties in order to find out whether the age of superannuation in the case of the teachers of the Tumsar Municipal Council is 60 years, as contended by the petitioners or 58 years as contended on behalf of the Municipal Council. It is undoubtedly true that when the petitioners were appointed and till the Maharashtra Secondary Education Boards Act was passed in the year 1965, the petitioners-teachers were governed by the Madhya Pradesh Secondary Education Act, 1951 and the Regulations framed therein. Section 19 of the M. Pt Secondary Education Act, 1951 gives the power to the Board to make Regulations. Section 20 Provides that the first Regulations of the Board shall be made by the State Government after previous publication, and they shall be deemed to have been made by the Board and continue in force or modified by the Board. Accordingly the State Government framed Regulations for the Board of the Secondary Education, Madhya Pradesh and published the same in the M. P. Gazette Extraordinary dated 18th of February 1953 and it appears that after these Regulations were framed, no further regulations were framed by the Board nor any alterations or modifications were made to the same by the Board. These Regulations, therefore, would be the regulations which would be governing the matters relating to the Board of Secondary Education.

6. Chapter XII of these Regulations is what is known as "the School Code" and it is part of the Regulations. Clause 11 of Chapter XI provides that every recognised school shall comply with the provisions of the School Code as laid down in Chapter XII of the Regulations, provided that the Board may with the previous approval of the State Government permit such relaxations of the provisions of the said School Code as may be deemed necessary in exceptional cases. Thus it appears from this Regulation that it has been obligatory on the recognised school to comply with the provisions of the School Code as laid down in Chapter XII of the Regulations. The statement of the objects and reasons for framing the School Code is given in Chapter XII itself of the Regulations and the

three objects of the Code are: (1) minimum standard of uniform efficient management, (2) minimum scales of salaries for teachers and satisfactory service conditions for them, and (3) minimum financial stability. Clause 7 of Chapter XII provides for the conditions of service of teachers and it reads :

"(1) All headmasters and teachers, except those appointed temporarily for a period of not less than one year, shall be on probation for a term of one year which may be extended to two years. It after two years of service, any headmaster or teacher is continued in his appointment, he shall, unless the appointing authority, for reasons to be recorded in writing otherwise directs, be deemed to have been confirmed in that appointment. On confirmation, the headmaster or the teacher, as the case may be, shall sign a contract of service in the form prescribed in Form III or IV appended to this Code, as the case may be, as soon as practicable. ..."

The Regulations also prescribed the Forms III and IV, Form III being the form of agreement between the Headmaster and the Governing Body and the Form IV being one of agreement between the Governing Body and the teacher. The forms are more or less the same and the material clause of this agreement is clause 4 in Form III and clause 9 in Form IV. Clause 4 in Form III reads like this:

"The party of the first part (i. e. Headmaster) shall retire from service on attaining the age of 60 years, and the exact time for such retirement shall be the last day of the academic year in which he attains that age."

Clause 9 in Form IV reads like this:

"The party of the first part (the teacher) shall retire from service on attaining the age of 60 years and the exact time for such retirement shall be the last day of the academic year in which he attains that age."

As per Regulation No. 7 of Chapter XII, the teacher or the Headmaster has to sign a contract of service in Form III or IV on his confirmation. The forms show that the agreement is to be signed both by the Headmaster or the teacher and the Governing Body and it is only when the agreement in the said form is signed by both the parties, namely, either the Headmaster or the teacher and the Governing Body that the agreement becomes complete. It is only then that the conditions given in the said agreement will be binding on the parties.

7. It is contended on behalf of the petitioners that these two agreements as per Forms III and IV are also parts of that Regulations and as soon as the teacher is confirmed, his age of retirement becomes 60 as per the respective clauses of these forms of agreement and it is an implied term of the agreement between the teacher and the employer. In four out of the five cases no such agreement has been entered into between the teacher and the Municipal Council, nor has any of these teachers on their part signed any such agreement on their being confirmed. In one case, it is urged that the teacher concerned fulfilled his part by signing the agreement, but it is not the case of the petitioners that in any of

these five cases the Municipal Council has also signed the said agreement. In our view, in the absence of the agreement being signed by the Municipal Council, it does not make any difference whether the agreement is signed or not signed by any of the teachers. Mr. Madkholkar goes to the length of saying that even if the teacher on being confirmed does not sign the contract, the age of superannuation is automatically 60 years and it had got a statutory and binding force and he acquires a status of a permanent teacher continuing till the age of 60 years, because in his view the forms of agreement being part of the School Code, which in its turn, is a part of the Regulation, the forms also acquire a statutory binding force. We are unable to accept this contention of Mr. Madkholkar. It is no doubt true that the Regulations which have been framed u/s 20 are Statutory Regulations and would have the force of law and we may assume also that the School Code which is in Chapter XII of these Regulations also forms part of the Regulations and has, therefore, statutory force, but the forms which have been prescribed in Chapter XII do not by themselves have any statutory force and the agreements entered into become a part of the contract between the employer and the employee and by that contract which has been entered into by both the parties the age of superannuation at 60 years becomes a condition of the service. In these cases, there is no completed agreement in respect of any of these petitioners, even in the case of the lone petitioner who is said to have signed the agreement on his part and, therefore, it cannot be said that the conditions of service of these petitioners are governed by the agreements in Forms III and IV or that on that count their age of superannuation could be taken as 60 years.

8. On the other hand, it was urged at the hearing on behalf of the respondents that the age of superannuation of these Municipal teachers was only 55 years because the Municipal Council was following the Fundamental Rules in respect of its employees and the Fundamental Rules provide the age of superannuation at 55. This was also alleged in the return by saying that though the Municipal Council had not made any byelaws, the Municipal Council used to follow the Fundamental Rules for governing the service conditions of all its employees including teachers wherein the age of retirement prescribed was 55 years. However the Fundamental Rules do not apply of their own force to the Municipal Committees or Councils. The Fundamental Rules govern the service conditions between the Central Government and its employees and if any State Government or local authority wants also to be governed by the said Fundamental Rules, they have to adopt the same by a proper resolution and then only the service conditions between the Municipal Council and its employees would be governed by the Fundamental Rules. We have not been shown any such resolution by the respondent Municipal Council to the effect that it had adopted the Fundamental Rules for governing the service conditions of its employees. We are, therefore, unable to agree with the Municipal Council that the age of superannuation of the petitioners-teachers is to be governed by the age prescribed by the Fundamental Rules. It, therefore, appears that at the time the petitioners were employed and

continued in service, at least till the year 1969 when the Municipal Council adopted the Bombay Civil Services Rules, there was no age of superannuation fixed and the State of affairs continued till for the first time the Municipal Council framed the byelaws by which it adopted the Bombay Civil Services Rules.

9. The next stage then is the Secondary Schools Code framed by the Maharashtra Government which came into force with effect from 1963-64. It is not disputed that the Municipal Council is getting the grant-in-aid for running its schools and the recognition to the schools is also under this Schools Code. Rule 82 of the Secondary Schools Code provides for the superannuation of the teaching staff. Rule 82(1) provides that a teacher or a headmaster shall compulsorily retire on the date on which he attains the age of 58 years and under no circumstances he should be granted extension in service beyond the age of 58 years. Exception to rule 82 (1) reads thus :

"Exception: The age of compulsory retirement of a permanent teacher or headmaster in service in a recognised Non-Government secondary school in Vidarbha, on 31st December 1965 shall be 60 years."

Rule 82 (2) provides that if a management desires to retain in service a teacher or a headmaster beyond the age of 58 years, it may do so; provided the teacher or the headmaster concerned is physically and mentally fit and his continuance is clearly necessary in the interest of the school. It further provides that such a teacher or headmaster should, however, be reemployed in service, and re-employment should not be granted as a matter of routine or merely on compassionate grounds. Rule 82 (3) further provides that if a management, for reasons to be recorded in writing, desires to extend the period of re-employment of a teacher or headmaster even after he has attained the age of 60 years, it should approach the appropriate authority well in advance, for his previous permission to do so. The said authority should grant permission for such further re-employment after satisfying himself that the conditions mentioned in sub-rule (2) above have been fulfilled, but for a period not exceeding one year at a time. It also provides that a teacher or headmaster, who has attained the age of 65 years should not, however, be continued in service under any circumstances,

10. We may note here, and it is not disputed, that all these petitioners had been made permanent prior to the 31st of December 1965, It is the contention of the petitioners that in any case under this Schools Code the age of superannuation for these petitioners, who were permanent teachers or head master on 31st of December 1965, could be 60 years and the contention that since the Municipal Council receives grants for running the school in which the petitioners are employed and are also recognised under the Schools Code, this constitutes an implied contract between the management and the teachers. This rule 82 of the Secondary Schools Code is binding on the Municipal Council in the matter of retirement of teachers. It is, however, urged on behalf of the Municipal Council that this Schools Code has no statutory force and its rules are merely administrative instructions issued by the Government, and therefore, they are

not binding on the educational institutions nor could they govern the conditions of service between the management and their employees.

11. The Maharashtra Secondary Education Boards Act, 1965 was enacted by the State of Maharashtra and it came into force with effect from 1st of January 1966. Section 36 gives the power to the said Board to make the Regulations which shall continue to be in force until the new Regulations are made and sanctioned u/s 36. In pursuance of this power, u/s 37 read with sections 7, 21 and 36 the State Government has framed what are known as the first Regulations. Regulation No. 19 prescribes the procedure for recognition of institutions by Divisional Board, and Sub-Regulation No. 7 of that Regulation provides for recognition of the secondary school which shall be recognised or continued to be recognised by the Divisional Board, unless it fulfils the requirements mentioned therein. Clause (XVI) of this sub-Regulation 7 provides that the School shall comply with the provisions of the Secondary Schools Code of the State Government in so far as they are not inconsistent with the provisions of the Act and the Regulations. It is contended that there is an obligation on the Municipal Council by virtue of this clause to comply with the provisions of the Secondary Schools Code and the Municipal Council which runs the schools in which the petitioners are employed cannot escape this obligation under the Schools Code. However, according to the Municipal Council, the School Code not having any statutory binding force being only the administrative instructions of the Government is not binding as between the Municipal Council and its teachers, but it may affect only the question of recognition or its continuance for a secondary school run by the Municipal Council and as such, the petitioners cannot avail themselves of sub-clause (16) of sub Regulation 7 of Regulation 19 of the Regulations. If the contention of the petitioners is correct, then in that case the age of superannuation of these petitioners-teachers would be 60 since they had all been permanent on 31st of December 1965. We shall consider this aspect a little later after we note the further contentions on behalf of the petitioners with respect to the byelaws which have been framed by the Municipal Council in the year 1969,

12. We were referred by the learned counsel for the petitioners to section 76 of the Maharashtra Municipalities Act, 1965. Chapter V of the Maharashtra Municipalities Act deals with the officers and servants. We are not here concerned with the officers and servants named in section 75. Section 76 reads as under:

"76 (1) A Council may, with the sanction of the Director, create such posts of officers and servants other than those specified in sub-sections (1) and (2) of section 75 as it shall deem necessary for efficient execution of its duties under this Act.

(2) The qualifications, pay, allowances and other conditions of service and the method of recruitment of any such officers and servants-

(a) if the minimum salary (exclusive of allowances) of the post is less than Rs. 75

per month shall be determined by byelaws made by the Council in this behalf; and

(b) if the minimum salary (exclusive of allowances) of the post is Rs. 75 or more shall be determined by general or special order made by the Director in this behalf."

An argument is based on behalf of the petitioners on these provisions that the byelaws which have been framed by the Municipal Council in 1969 adopting the Bombay Civil Services Rules have no bearing on the age of retirement of the petitioners and these byelaws cannot be made use of by the Municipal Council for retiring the petitioners at the age of 58 years. According to the petitioners, the minimum salary exclusive of allowances of the posts held by the petitioners is more than Rs. 75 per month and the conditions of service of the teachers like the petitioners must be determined by general or special order made by the Director in this behalf. It is contended that the Municipal Council is authorised to frame byelaws only with respect to those servants whose minimum salary exclusive of allowances is less than Rs 75 per month.

13. At this stage we may also refer to section 80 which also provides for making of the bye-laws regulating certain conditions of service. Relevant portion of section 80 reads as under:

"Every Council shall, in respect of the officers and servants of the Council, other than those referred to in sub-sections (X) and (2) of section 75, make bye-laws on the following matters, namely: -

X X X X X

(e) regulating the period of service of all employees

X X X X X

(i) generally prescribing any other conditions of service of the employees".

We may also refer to section 322 which also gives the power to the Council to frame the bye-laws. It provides:

"322(1). The power to make all byelaws under this Act shall be exercisable by each Council, subject to the previous sanction of the Collector or the State Government as hereinafter provided.

(2) Without prejudice to any power to make byelaws contained elsewhere in this Act, a Council may make bye-laws consistent with this Act and the rules made thereunder for the administration of its affairs and for the guidance of its Committees, officers and servants."

The subsequent provision then gives the procedure how the bye-laws are to be made and subsequently approved. Section 322 provides that generally all the bye-laws framed by the Municipal Council u/s 322 are subject to the previous sanction of the Collector. However, clause (f) of sub-section (3) of section 322

excludes some subjects from the purview of the sanction of the Collector and in the cases mentioned in clause (f), the bye laws are required to have the sanction of the State Government in place of the Collector. These bye-laws which require the sanction of the State Government are the bye-laws relating to imposition, abolition, remission, alteration or regulation of any tax and bye-laws in respect of these subjects have to be forwarded to the State Government by the Collector for sanction. Section 322 gives the general power to make the bye-laws. The power under sections 76 and 80 is a special power relating to certain matters mentioned therein, namely, relating to the officers and servants of the Municipal Council and it is these two sections which are material for our purposes.

14 Section 76 deals with the cases of the officers and servants who are not covered by sub-sections (1) and (2) of section 75. Similarly section 80 also deals with officers and servants of the Council other than those referred to in sub-sections (1) and (2) of section 75. It would thus appear that both these sections deal with the same class of employees of the Municipal Council. It is the contention on behalf of the petitioners that it is only section 76 and section 76 alone which gives the powers to frame the bye-laws in respect of the conditions of service of a servant like a teacher to fix the age of superannuation. From the marginal note to section 76, it would appear that the bye-laws which are to be framed by the Council are in the matter of appointment of officers and servants. Sub-section (2) of section 76 would make it clear that the byelaws which are to be made by the Council are for the purposes of determining the qualifications, pay, allowances and other conditions of service and the method of recruitment of any such officers and servants. It would thus appear from the opening words of sub-section (2) of section 76 that this relates to the recruitment of the officers and servants and not to the other conditions of service which are many more besides the pay and allowances. This sub section (2) deals with laying down the conditions for eligibility for appointment to that post and the manner in which the posts are to be filled in and the pay and allowances which these posts would carry. Besides these there are several other matters like leave, gratuity, pension, age of retirement and similar other matters which are not covered by sub-section (2) of section 76. It will further be found from section 76 (2) that these provisions are applicable when a Council creates posts as it shall deem necessary for efficient execution of its duties under this Act and then such creation of posts has to be with the sanction of the Director. Evidently the creation of the posts with the sanction of the Director could only be after the coming into force of this Act, i.e. after 1-1-1966 and it would not apply in case of the servants who have already been in service of the Municipal Council prior to 1-1-1966. Apart from this, section 76 will come into operation only when the posts of officers and servants are created with the sanction of the Director and which posts are necessary for efficient execution of its duties under the Act.

15. We may refer to section 49 of the Act in Chapter III, which relates to duties and functions of the Municipal Council and the Executive. Subsection (2) of section 49 gives the duties of the Municipal Council in clauses (a) to (v) thereof

in addition to the duties imposed upon it by or under this Act or any other law for the time being in force. Clause (p) gives establishing and maintaining primary schools as one of the duties of the Municipal Council. Establishment of secondary education does not fall within sub-section (2) of section 49 which relates to the duties of the Municipal Council. Besides these duties, the Municipal Council may at its discretion provide, either wholly or partly, out of the municipal property and funds for the several matters which have been given in sub-section (3) of section 49, clauses (a) to (x). One of the matters mentioned in clause (b) of sub-section (3) of section 49 is establishing institutions for secondary education. This is one of the functions of the Municipal Council which the Municipal Council in its discretion undertakes and is not a duty as contemplated by sub-section (2) of section 49.

16. Section 76, therefore, would not apply to such posts which are created in respect of establishment of the secondary education and in fact the provision regarding the making of the bye-laws by the Council would not, in the first place, apply to the servants of the secondary schools since the posts must be for the efficient execution of its duties under the Act and secondly, section 76 (2) only deals with such conditions of service as are necessary for the initial recruitment to the post. It may be noted that excepting the general words used in section 76 (2), namely, "other conditions of service", all other matters relate to the recruitment of the officers and servants, such as, qualifications pay, and allowances and the method of recruitment. The words "other conditions of service" have to be read ejusdem generis with the preceding words, namely, "qualifications, pay and allowances" and the subsequent words "method of recruitment". These words will take their colour from the preceding and the subsequent terms used and the term "other conditions of service" must, therefore, relate only to such conditions of service as are necessary to be satisfied or determined in the matter of appointment to the posts which have been created with sanction of the Director.

17. On the other hand, section 80, which also gives the power to the Municipal Council to make the bye-laws in respect of officers and servants, specifically deals with regulating the conditions of service of the officers and servants. The marginal note will show that the bye-laws to be made u/s 80 are for the purposes of regulating certain conditions of service and clause (e) of section 80 deals specifically with the power to make byelaws in the matter of regulating the period of service of all employees. "Regulating the period of service of the employees" will cover the age of retirement of the employees and a bye-law can be framed u/s 80 with respect to the age of superannuation under clause (e) of section 80. When such a specific power to fix the age of superannuation is given u/s 80, we cannot read into the general words "other conditions of service" given in section 76(2) the power to make the bye-laws in respect of regulating the period of service or the age of superannuation of the employees. The specific power which is given in section 80 would necessarily exclude the general power, if any, said to be contained in sub-section (2) of section 76.

18. It would appear from the scheme both of sections 76 and 80 that all the conditions of service of the officers and servants excepting those referred to in sub-sections (1) and (2) of section 75 are to be governed by the bye-laws to be framed u/s 80. They would cover all the employees who are referred to in section 76. Section 76 appears to carve an exception in cases of those officers and servants who occupy posts which have been created by the Council with the sanction of the Director for efficient execution of its duties under the Act and in respect of such officers and servants, whose minimum salary is less than Rs. 75/-, the bye-laws can be made by the Council and in respect of officers and servants whose salary is Rs. 75/- or more, the conditions have to be determined by general or special order made by the Director in this behalf, and that too, with respect to the qualifications, pay, allowances and other conditions of service and the method of recruitment of such officers or servants for the purposes of their appointment to those posts. There is, therefore, no force in the contention of the learned counsel for the petitioners that in respect of the petitioners bye-laws could not be framed by the Municipal Council and "the other conditions of service" including the condition regarding their retirement age must be only by a general or special order made by the Director in that behalf.

19. The position, therefore, that emerges is that till 1969 there are no bye-laws of this Municipal Council. There is nothing to show that the fundamental rules governing the service conditions of the employees like the teachers were made applicable. The petitioners cannot claim their age of superannuation as 60 under the M.P. Secondary Education Act and the Regulations framed thereunder as there is not a concluded contract or agreement between the Municipal Council and the teachers as contemplated by rule 7 of Chapter XII (School Code) of the Regulations. Then there is the Maharashtra Secondary Schools Code, which fixes the age of 60 as the age of retirement in respect of teachers who were permanent as on 31st of December 1965.

20. The effect of the Secondary Schools Code which came into force with effect from 1963-64, as framed by the State of Maharashtra, has been considered by this Court in *Smt. Suman Shankirrao Dhekekar v. Smt. Wasundharabai Wasudeorao Dhumale* Special Civil Application No. 865 of 1973, decided on 17th January 1974, where there were no byelaws made by the Municipal Council. We may also mention here that there was an earlier decision of this Court in which the age of retirement of a teacher figured and that was *Babulal Dalchand Maloniya v. Director of Municipal Administration Bombay* 1974 Mh. L J 451. This was a case in which byelaws were made by the Municipal Council and it was held that the byelaws framed by the Municipal Council would prevail over the School Code. The case of *Suman Dhekekar* (supra) however was a case in which byelaws were not framed. There was, however, only a resolution of the Municipal Council by which the Municipal Council resolved as long back as on 10th November 1929 that the age limit of the candidates entering into the Municipal service will be 25 years complete and pension will be granted after completion of 55 years of age. This resolution remained at the resolution stage and was not

made into a byelaw. The decision in Babulal's case (supra) was distinguished and it was held that since the Municipal Council had not framed any byelaws laying down the terms and conditions of service of its employees, there was no statutory provision which governed the conditions of service of the teachers serving in the secondary schools of the Municipal Council. However, the effect of the Secondary Schools Code was further considered.

21. After dealing with the provisions of rule 82 of the Secondary Schools Code, it was observed that the teacher could claim a right to continue in service till she attained the age of 60 years in view of the provisions of Secondary Schools Code as well as the Maharashtra Secondary Education Boards Act, 1965 and the Regulations framed therein and section 90 (2) of the Maharashtra Municipalities Act. As in the present case, the letter of the Director of Municipal Administration dated 17th March 1973 to the Administrator, Municipal Council was relied upon by which letter it was stated by the Director that the Government has informed that the age of superannuation of the secondary school teachers who were permanent on 31st of December 1965 would be 60 years as per the provisions of the Madhya Pradesh Secondary Education Act, 1951 and in other cases it would be as per orders applicable to other Municipal employees. Perhaps the reference is to the exception to sub-rule (1) of rule 82 of the Secondary Schools Code, which gives the age of a superannuation for the teachers who were permanent on 31st December 1965 at 60 years. Nothing, however, turns upon this letter. It was, however, observed in the case of Suman Dhekekar (supra) that in fixing the retirement age generally so far as the employees working in the Municipal Council are concerned, the provisions of the Secondary Schools Code will prevail over the mere resolution of the Municipal Council in view of the specific terms and conditions on which grants are paid by the State Government and are accepted by the Municipal Council. In the instant case also the concerned schools run by the Municipal Council are recognised under the Secondary Schools Code and continue to be recognised and also are receiving grants paid by the State Government. The Municipal Council has, therefore, to accept the conditions laid down in rule 82, namely, the age of superannuation being 60 years for the teachers who were permanent as on 31-12-1965.

22. Having come to this stage, it will now be necessary to consider the effect of the byelaws made by the Municipal Council on 24-5-1969 which have been approved by the Collector. By section 343 of the Maharashtra Municipalities Act, the Central Provinces and Berar Municipalities Act, 1922 as being in force in the Vidarbha Region of the State has been repealed on the appointed day. Within the meaning of section 344, a Municipal Council, such as the present respondent No. 1, established under the Central Provinces and Berar Municipalities Act, 1922 is an "existing Council." "Successor Council" in relation to any local area means the Council having jurisdiction over such area on and from the appointed day. u/s 345, the term or extended term of the office of the Councillors or members of any existing Council which is due to expire after the 31st day of December 1965, shall expire at 12 midnight on the 31st day of December 1967 or such earlier

date as may be specified in this behalf by the State Government by notification in the Official Gazette. u/s 345A if the State Government specifies a date earlier than the 31st day of December 1967 u/s 345, then with effect from the day immediately following such earlier date, in place of every existing Council the first successor Council shall be deemed to be established under this Act for the respective municipal area.

23. Consequences of the replacement of the existing Councils have been given in section 346. We are concerned with clause (1) of section 346 which provides;

"(i) any appointment, notification, notice, tax. order, scheme, licence, permission, rule, byelaw, regulation or form held, made, issued, imposed or granted by or in respect of an existing Council under any of the repealed laws or any other law for the time being in force in the area of such existing Council, and in force immediately before the appointed day, shall, in so far as it is not inconsistent with the provisions of this Act, continue to be in force as if made, issued, imposed or granted in respect of the corresponding area of the successor Council until superseded by an authority competent so to do."

Then section 347 makes provision relating to officers and servants. It says :

"347(1). All officers and servants in the employment of an existing Council immediately before the appointed day, shall be deemed to be transferred to The service of the successor Council and shall, Until other provision is made by a competent authority, receive such salaries and allowances, pension, provident fund, gratuity and other retirement benefits and be subject to such other conditions of service, to which they were entitled immediately before the 26th day of March 1965."

Ordinarily, therefore, if the petitioners can be said to be governed by the Secondary Schools Code, their retirement age would be 60 years and after the appointed day that service condition will continue to govern their cases. However, under the first proviso to sub section (1) of section 347, the conditions of service applicable to the case of any officer or servant so transferred to the service of the successor Council could be varied, but it could not be varied to his disadvantage except with the previous approval of the State Government. The proviso runs:

"Provided that, the conditions of service applicable immediately before that date to the case of any officer or servant so transferred to the service of the successor Council shall not be varied to his disadvantage except with the previous approval of the State Government."

In this context, the effect of the byelaws made on 24-5 1969 has to be seen.

24. If prior to the making of the byelaw or prior to the 26th of March 1965 the age of superannuation of the petitioners was 60 years, then it could be made 58 years only with the previous approval of the State Government under this proviso We cannot accept that the age of superannuation previously was 55

years, as contended on behalf of the respondents because of the practice of following the fundamental rules in the absence of any resolution or byelaws adopting the said fundamental rules. Therefore, varying the age of superannuation from 60 to 58 years, as has been done by the byelaws is question is certainly varying the condition, of service of the petitioners to their disadvantage and this could only be done with the previous approval of the State Government. We have not been shown any such previous approval of the Government. for bringing down the age of superannuation from 60 to 58 years. The only thing that has been shown is the bye-laws made on 24-5-1969. These bye-laws have got the approval of the Collector as required by section 322(1) of the Maharashtra Municipalities Act. This cannot be construed to mean a, a previous approval of the State Government as contemplated by the proviso to sub-section (1) of section 347. The sanction given by the Collector to the bye-laws is not and cannot be said to be given on behalf of the State Government nor could the Collector act on behalf of the state Government in the matter of giving the previous approval, as contemplated by the proviso to sub-section (1) of section 347. The section which has been given by the Collector in no case can be a sanction or approval u/s 347 (1) proviso, but is one u/s 322 (1). These two sanctions or approvals are quite distinct and independent of each other and the sanction in the instant case given by the Collector to the making of the bye-laws on 24-5-1969 Cannot be said to be a previous approval of the State Government. Thus the result is that there is no previous approval of the State Government to the bringing down of age of superannuation from 60 to 58 years which is varying the condition of service to the disadvantage of the employee The bye laws, therefore, could not have the effect of determining the age of superannuation of the petitioners as 58 years and their age of superannuation will continue to be 60, as has been done.

25. The Municipal Council, however, while retiring the petitioners at the age of 58 years by its notice dated 1-4-1974 has acted on the letter of the Director of Municipal Administration dated 28th March 1974. The letter of the Director of Municipal Administration has stated that this Court has stayed the operation of the orders issued under his office letter No. MCN-2973-9155, dated 6-7-1973 till the further orders of the Court in Special Civil Application No. 299 of 1974, and in view of this position, the operation of the instructions contained in the office letters dated 17-3-1973 and 6-7-1973 should be stayed until further instructions. On the basis of this letter the respondent-Municipal Council issued letters to the petitioners on 1-4-1974 pointing out that though by the letter of the Director of Municipal Administration dated 17-3-1973 the retirement age of the teachers in the Municipal Council Middle schools had been fixed at 60 years, the age of superannuation, however, would be 58 years, since this Court had granted stay to the operation of the order dated 17-3-1973 in some other case i. e. Special Civil Application No. 299 of 1974 and because of this one month's notice was given to four of these petitioners and a longer notice to the petitioner in the last case to superannuate them from the service of the Municipal Council.

26. We are constrained to say that there has been some misconception in the mind of the Director, Municipal Administration when he issued the letter dated 28th March 1974 staying the operation of the order dated 17-3-1973 only. In Special Civil Application No. 299 of 1974 the petition is not finally disposed of. It was only an interim stay order that was given staying the operation of the notice dated 31-1-1974 by the Pulgaon Municipal Council to the petitioner and the letter dated 6-7-1973 of the Director, Municipal Administration addressed to the Municipal Council. This was in connection with the retirement of the teachers of the Pulgaon Municipal Council. It was only an interim arrangement till the final disposal of the writ petition and related to that matter only. It could not have a general application and was dependent upon the facts of that case. In that case it was contended that there were bye-laws of the Municipal Council governing the service conditions of the teacher. On the basis of this interim stay was granted by this Court in Special Civil Application No. 299 of 1974. A general order could not have been issued by the Director of the Municipal Administration to all Municipal Councils that in the case of every teacher employed by every Municipal Council the age of superannuation would be 58 years and not 60 years. Such a direction by the Director, Municipal Administration, as has been given in the letter dated 28th March 1974 was, therefore, uncalled for, the notice of retirement given to the petitioners by the Administrator, Municipal Council, Tumsar on the basis of this letter of the Director of Municipal Administration, was equally uncalled for. The cases of the petitioners have to be dealt with on the facts obtaining in those cases and not on the basis of the letter of the Director of Municipal Administration. The Municipal Council, therefore, was in error in issuing the notice of retirement on the basis of the letter dated 28th March 1974 by the Director, Municipal Administration, who, in turn, was in error in taking this view only on the basis of the interim stay granted by this Court in Special Civil Application No. 299 of 1974. The correspondence which we have referred to above would show that before passing of the interim stay in Special Civil Application No. 299 of 1974, the Director of Municipal Administration as well as the Municipal Council were consistently of the view that the superannuation age of the teachers, like the petitioners, was 60 years and not 58 years. That means the Municipal Council had accepted the retirement age of these petitioners to be 60 years but for the bye-laws which were made in 1969.

27. In view of this position, the notices issued by the Municipal Council, respondent No 1 to the petitioners in these five cases are illegal and would not have the effect of retiring these petitioners before they attain the age of 60 years. Accordingly these notices have to be quashed. We accordingly quash these notices. All these 5 petitions are allowed.

28. It, however, appears that the respondent No. 2 the Director, Municipal Administration took the view that the interim order passed in Special Civil Application No. 299 of 1974 was of general application to all Municipal Councils and had the effect of staying wholesale the operation of the letter dated 6-7-1973 as well as 17-3-1974 and seems to have issued the instructions to all

the Municipal Councils including the present Municipal Council, respondent No. 1. That could be a bona fide mistake on the part of the Director not knowing fully the implications of that interim order. Accordingly we do not think this to be a fit case for awarding costs. We accordingly order that the parties will bear their own costs.