
(2002) 08 BOM CK 0129
In the Bombay High Court
Case No : Writ Petition No. 1331 of 1988

Qazi Kutubuddin

APPELLANT

Vs

Municipal Council and Others

RESPONDENT

Date of Decision : 17-08-2002

Acts Referred:

Maharashtra Municipalities Act, 1965 — Section 308, 318

Citation : (2003) 1 ALLMR 610 : (2003) 2 BomCR 255 : (2002) 4 MhLj 815

Hon'ble Judges : V.M. Kanade, J;R.K. Batta, J

Bench : Division Bench

Advocate : B.P. Dharmadhikari, for the Appellant;

Final Decision : Allowed

Judgement

V.M. Kanade, J.—The petitioner has filed this petition under Article 226 of the Constitution of India and is seeking appropriate writ, order and directions for quashing and setting aside the Order dated 16-11-1987 passed by respondent No. 3 in Revision No. 7 of 1986-87

2. The brief facts giving rise to the present petition is as follows : The petitioner was working as Pump Operator in Municipal Council, Sindi and he filed a Revision being as revision No/ 7/1986-87 of Sindi before the respondent No. 3 u/s 318 of Maharashtra Municipalities Act. This revision was directed against the order of the Chief Officer of respondent No. 1 dated 20-3-1987 whereby the Chief Officer had passed an order promoting respondent No. 2 as cashier in the Pay Scale of Rs. 260-495/- in supersession of the claim of the petitioner. The Additional Commissioner by his order dated 16-11-1987 directed the petitioner to prefer an appeal u/s 308 of the Maharashtra Municipalities Act, 1965 before the Collector, Wardha for suspension of the resolution passed by the Municipal Council. The petitioner has challenged the said order passed by the Additional Commissioner under Article 226 of the Constitution of India. The petitioner has mainly challenged the said order on the ground that no appeal could be preferred u/s 308 of the Maharashtra Municipalities Act and Additional Collector had no

jurisdiction to decide the question regarding the order of promotion dated 20-3-1987 passed and the Chief Officer Municipal Council, Sindi.

3. We have heard the learned counsel appearing on behalf of the petitioner. We have perused the copy of the petition and the annexures thereto. The respondents have not filed any reply to the petition. The Writ Petition was admitted on 26-7-1989.

4. In our view the order passed by the Additional Commissioner cannot be sustained because the order of remand made by the Commissioner and directions given by him to refer Appeal u/s 308 of the Maharashtra Municipalities Act, 1965 are patently bad in law. Section 308 of the Maharashtra Municipalities Act, 1965 reads as under :

"If, in the opinion of the Collector, the execution of any order or resolution of a Council, or the doing of anything which is about to be done or is being done by or on behalf of a Council, is causing or is likely to cause injury or annoyance to the public or is against the public interest or to lead to a breach of the peace or is unlawful, he may by order in writing under his signature suspend the execution or prohibit the doing thereof.

The scope of provisions of Section 308 has been considered by the three Division Benches of this Court holding that the Additional Collector is not entitled to exercise powers of the Collector and discharge his duties and function and that the wording of Section 308(1) clearly shows that the Collector was empowered to suspend the execution of the Resolution passed by the council if it was likely to cause injury or annoyance to the public or is against the public interest or is likely to lead to a breach of the peace. It is only under these circumstances, the Collector could suspend the resolution passed by the Municipal Council. This Court in the case of Chandrashekhar Shankarrao Zade and Ors. v. Additional Collector, Nagpur and Anr. reported in 1984 Mh.L.J. 821 held that the order of appointment should not be set aside by the Additional Collector while exercising his power u/s 308. The Court while considering the scope of provisions of Section 308 has held as follows :

"Insofar as the second contention of Mr. Deshmukh is concerned, proper reading of Sub-section (1) of Section 308 would indicate that the Collector can suspend, (a) the execution of any order or resolution of a council, or (b) the doing of anything which is about to be done or is being done by or on behalf of a Council. The Collector can exercise this power of suspension if the order, resolution or the act stated above is (a) likely to cause injury or annoyance to the public (b) against public interest, (c) is likely to lead to breach of peace or (d) is unlawful. The words, "the execution of any order or resolution of a Council, or the doing or anything which is about to be done or is being done by or on behalf of a Council occurring in the opening part of Sub-section (1) of Section 308, suggest that the power under that sub-section is given to the Collector to prevent any imminent act on the part of the Council which is likely to give rise to one of the four

situations stated above. In this connection it may be stated that sections 308 and 309 are part of the same scheme. While Section 308 is designed to present in emergency an order, resolution or act of the Council which is likely to lead to serious consequence, Section 309 invests the Collector with the power of execution of certain works in case of emergency. It would, therefore, be seen that sections 308 and 309 are as it were, the negative and positive aspects of an action required to be taken in case of emergency or in emergent situation by an extraneous authority like the Collector, when the Council is doing something which is likely and imminently to lead to serious consequence or to do an act which must be done by the Council immediately. Having regard to the language of sections 308 and 309, therefore, it is not possible to resort to Sub-section (1) of Section 308 to suspend an order which has been already executed or the execution of which does not lead to any of the four consequences stated at the penultimate portion of this sub-section. Mr. Desai has tried to urge that the appointments of the petitioners in disregard of the rules and regulations were likely to cause injury or annoyance to the public or would be against public interest and hence the Additional Collector was within his powers to act under this sub-section. For this purpose he relies on the complaint which had been made to the Additional Collector against the appointments made by the Administrator. Now perusal of the order passed by the Additional Collector does not indicate that he resorted to exercise power under Sub-section (1) of Section 308 of the Act because he was apprehending any injury or annoyance in the public or that in his opinion it was against public interest or that it would lead to breach of the peace. As we have said above, the Additional Collector has deemed it fit to suspend the orders of appointment because in his view, these appointments were made without creating posts, without selecting candidates sponsored by the Employment Exchange and without filling the backlog. It may be that the Administrator has overlooked all these things, but it is difficult to see how these irregularities in the matter of appointments of the petitioners would lead to any of the consequence contemplated by the Sub-section (1) of Section 308. Such appointment would not be unlawful as nothing is pointed out as to against which provisions of law these appointments are made. We, therefore, find that the Additional Collector assumed that he had the power to act u/s 308 of the Act and exercised his power in a matter which did not fall within the purview of that section and hence also his order is void."

5. Similar view has been taken by the Bombay Bench in the case of Prakash Kutik Choudhary v. The Collector of Dhule and Ors. reported in Current Labour Reports, Vol. I, 1989 page 374. The Division Bench has also considered the scope of Section 308 which is as follows:

"In our judgment, the orders passed by the two authorities are wholly incorrect and unsustainable. In the first instance, the Collector is under misconception that powers u/s 308 of the Act can be exercised for dismissing the employees appointed by the Municipal Council. Section 308(1) read as under :

"If, in the opinion of the Collector, the execution of any order of resolution of a Council, or the doing of anything which is about to be done or is being done by or on behalf of a Council, is causing or is likely to cause injury or annoyance to the public or is against public interest or to lead to a breach of the peace or is unlawful, he may by order in writing under his signature suspend the execution or prohibit the doing thereof."

The plain reading of this sub-section makes it clear that the powers conferred on the Collector are to be exercised in exceptional circumstances and in emergency. The dismissal of an employee on the ground that his appointment is in violation of the Rules can by no stretch of imagination attract the powers under Sub-section (1) of Section 308 of the Act. It is difficult to appreciate how dismissing 35 employees appointed by the Municipal Council is required to prevent annoyance to the public or would lead to the breach of peace. In our judgment, the powers under Sub-section (1) of Section 308 of the Act can be exercised only in cases of grave danger or emergency where the enforcement of power is a must to prevent serious damage. The Collector had no power under Sub-section (1) of Section 308 of the Act to remove the employees on specious ground that their appointments are in violation of the rules. There is one more aspect of the matter which cannot be overlooked. Even assuming that the Collector had power to dismiss employees under Sub-section (1) of Section 308 of the Act, still as the power which results into civil consequences to the employee should not be exercised without giving any prior intimation to the employee who is likely to be adversely affected. It is also incumbent upon the Collector to give prior intimation to the Municipal Council against whom serious allegations of nepotism are made by the Collector while exercising powers. It hardly requires to be stated that the collector while exercising statutory power must comply with the requirements of principles of natural justice. Shri Jahagirdar, learned Assistant Government Pleader, submitted that Section 308 of the Act nowhere provides for giving prior notice to the affected person and, therefore, Collector is not bound to do so. We are aghast at the submission made by the learned counsel in the year 1989. We thought that it is well settled over several years that the requirement of a notice prior to the passing of the adverse order is a basic ingredient of justice and we have never heard submission that unless there is statutory requirements to give notice, the Collector is not bound to do so. We reject the submission with contempt which it deserves."

6. In our view, therefore, the Additional Commissioner had clearly erred in directing the petitioner to approach the Collector and file appeal u/s 308 of the Maharashtra Municipalities Act. 1965.

7. In the result, the petition is allowed. The impugned order passed by the Additional Commissioner dated 16th November 1987 (Annexure A) to the petition in Revision No. 7 of 1986-87 of Sindi is quashed and set aside. The respondent No. 3 Additional Commissioner is directed to decide the Revision Application on merits as expeditiously as possible and in any event within 3

months from the date of the communication of this order.