

(1989) 08 OHC CK 0052
In the Orissa High Court
Case No : O.J.C. No. 100 of 1989

Shri Chaitanya Kumar Biswal and Another	APPELLANT
Vs	
State of Orissa and Others	RESPONDENT

Date of Decision : 02-08-1989

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa Municipal Act, 1950 — Section 74, 74(1), 85, 85(4)

Citation : (1989) 68 CLT 632

Hon'ble Judges : Das, J;D.P. Mohapatra, J

Bench : Division Bench

Advocate : C.V. Murty, for the Appellant; P.K. Mohanty, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—The core question that arises for consideration in this case is whether the procedure laid down in Section 85(4) of the Orissa Municipal Act (hereinafter referred to as "the Act") is a mandatory condition to be complied before the State Govt. decides to withdraw an Executive Officer of the Municipality appointed by it u/s 74(1) of the Act.

2. Two members of, Sunabeda Notified Area Council (for short the N.A.C. filed this writ application under Articles 226 and 227 of the Constitution of India challenging the order passed by the State Govt. in the Housing and Urban, Development Department on 1st of January, 1987 replacing the services of opp. party No. 4. Shri Natabar Mohanty, Executive Officer of the Sunabeda N.A.C. at the disposal of the Directorate of Health Services as per Annexure-4 and the telegraphic instruction issued by the under Secretary of the said Department to the Collector. Koraput on 28th of December, 1988 to relieve Shri Mohanty from the post of Executive Officer of the Council immediately and placing the Executive Officer of Koraput N.A.C. as part-time Executive Officer of the Sunabeda N.A.C. as per Annexure-12. The main ground of challenge to the

orders is that the procedure laid down in Section 85(4) of the Act requiring prior consultation with the N.A.C. before withdrawing the Executive Officer was not followed by the State Govt. and therefore the orders/directions were vitiated. As stated in the writ application, the Petitioners are keen on continuance of opp. party No. 4 as Executive Officer of the N.A.C. Since his performance has been excellent and the N.A.C. has on commendations for its performance and development activities during his tenure.

3. Since the scope of the writ petition lies within a narrow compass it is not necessary to discuss the facts in great detail. Suffice it to state for the present purpose that the opp. party No. 4 is an officer of the State Govt. in its Health Department. He was sent on deputation in 1981 as Executive Officer of the N.A.C. at Junagarh and from there he was transferred and posted as the Executive Officer, Sunabeda N.A.C. by order of the Housing and Urban Development Department dated 30-12-1985 as per Annexure-3. On 1-1-1987 the State Govt. passed the order replacing the services of opp. party No. 4 at the disposal of his parent Department. Thereafter the said opp. party challenged the said order of the State Govt. withdrawing him from deputation in O.A. 3 of 1987 before the State Administrative Tribunal and the said application was dismissed by the Tribunal on 7-10-1988. Thereafter the writ application was filed on 9-1-1989 by members of the N.A.C. seeking the selfsame relief. It is the contention of the Petitioners that since the opp. party No. 4 was an employee of the N.A.C. when the impugned order directing his withdrawal from N.A.C. to the State Govt. was passed it was incumbent on the part of the State Govt. to consult the N.A.C. before passing the order of his withdrawal as provided u/s 85(4) of the Act and the said mandatory condition precedent having not been followed the order and the subsequent follow up actions by the State Govt. are null and void. The State Govt. in the Urban Development Department, the Notified Area Council, Sunabeda, the Executive Officer of the N.A.C. and Shri Natabar Mohanty are impleaded as opp. parties in the writ application.

4. The opp. party No. 1 in its counter affidavit refuted the stand of the Petitioners that the procedure regarding prior consultation with the Municipality/N.A.C. as laid down in Section 85(4) of the Act was required to be followed in the present case. The stand of the said opp. party is that since the Executive Officer is to be appointed by the State Govt. as provided u/s 74(1) of the Act the procedure in that section is to be followed in the present case and not the procedure provided in Section 85(4) of the Act. In other words, the contention of the opp. party is that Section 74 being a special provision dealing with three specified posts in the Municipality, N.A.C., that is. Executive Officer, Health Officer and Municipal Engineer, their appointment, posting etc. are to be governed by the provisions in that section only and the provisions u/s 85 which are of a general character will have no application to the officers mentioned in Section 74 of the Act. The opp. party further contended that in the meanwhile by Orissa Act No. 5 of 1988 the requirement of consultation with the Municipality/N.A.C. has been selected both in Section 74 as well as in Section 85(4) of the Act. Therefore, viewed from any

angle, the Petitioners are not entitled" to the relief sought in the writ application.

5. Since the answer to the core question formulated earlier depends on interpretation of the provisions in Sections 74 and 85 of the Act, it would be convenient to quote the provisions of the said sections:

74. Executive Officer, Engineer and Health Officer

(I) Every municipal council shall have

(a) an Executive Officer.

(b) an Engineer, and

(c) a Health Officer.

who shall be servants of the State Government, appointed by the State Government to the Municipality, on such conditions as may be prescribed; and their work shall be subject to the general powers of supervision of the Chairman:

Provided that the State Government may appoint a member of the Orissa Local Fund Service constituted under the Orissa Local Fund Service Rules, 1975 as an Executive Officer or as an Engineer on such conditions as may be prescribed:

Provided further that if any Municipal Council is unable to maintain a whole time Health Officer, any officer of the Public Works or Public Health Engineering Department or the Health Department, as the case may be, may be appointed by the State Government as part-time Engineer or part-time Health Officer of the Municipality on such terms as may be prescribed;

(1-a) The State Govt. may on the recommendation of the Municipal council, appoint an additional or Asst. Executive Officer and an Additional Engineer.

(I-b) In the matter of appointment of an Executive Officer of any Municipality or an officer to assist him the State Govt., having regard to the requirements of the Municipality and in consultation with the municipal council concerned may determine

(a) whether such officer is to be appointed on whole time or part-time basis; and

(b) the rank from which such officer is to be selected. (2) The State Govt. may, in case of emergency direct

(i) that the municipal council shall appoint such number of additional subordinate staff, as State Govt. consider necessary, and if the Municipal council fails to appoint such additional staff within a period to be fixed by the State Govt., the State Government may appoint such number of staff to realise the cost thereof; either whole or in part, from the municipal council; and

(ii) that the municipal council shall pay such travelling allowance to such officers, as admissible under the rules for the time being in force.

85. Conditions of service of State Govt. servants employed by municipal council-
(1) The State Govt. may, on the application of any municipal council, place at its disposal the services of any Government servant employed in connection with the affairs of the State, to be employed by it for the purposes of this Act. Such officer shall be on foreign service conditions and the municipal council shall bear the salary, which such officer may be entitled to receive under the rules of the branch of the Government service to which he belongs and shall also make any contribution towards the pension and leave allowances of such servant which may be required by service under the State Govt. to be on his behalf.

(2) The municipal council shall also pay such special allowance or fixed travelling allowances to such officers as may be determined by the State Government.

(3) If such officer does any work for the State Govt. or for any public or private body the State Govt. or the public or private body as the case may be, shall contribute to the municipal council so much of the salary and allowances of such officer or servant as the State Govt. may consider to be an equivalent for such work.

(4) No Govt. servant employed by a municipal council shall, except in case of emergency, be withdrawn from the service of the municipal council without its consent, unless and until the State Govt. shall have given notice of at least six weeks in writing to the effect to the municipal council and unless some other Govt. servant has been deputed to replace the one withdrawn.

(5) Govt. servants employed by municipal council shall be entitled to leave and other privileges in accordance with the rules applicable to the department to which they belong.

On perusal of the provisions quoted above it is clear that under Sub-section (1) of Section 74 it is categorically laid down that every municipal council shall have an Executive Officer, an Engineer and a Health Officer who shall be servants of the State Government, appointed by the State Government to the Municipality on such conditions as may be prescribed. Under the second proviso in the said section, the State Govt. is vested with the power to appoint an Engineer or a Health Officer on part time basis. Sub-section (I-b) which has since been deleted specifically provided that in the matter of appointment of an conditions of his made by him or Executive Officer of any Municipality or an officer to assist him the State Govt. having regard to the requirements of the Municipality and in consultation with the municipal council concerned may determine whether such officer is to be appointed on whole time or part-time basis and the rank from which such officer is to be selected.

Section 85 deals with conditions of service of State Govt. servants employed by Municipal council. From the language of the provisions in Sub-section (1) of the said section, it is clear that the State Govt. may on the application of any municipal council place at its disposal the services of any Govt. servant employs in connection with the affairs of the State, to be employed by it for the purposes

of the Act; such officer shall be on foreign service conditions and the municipal council shall bear the salary, which such officer may be" entitled to receive under the rules of the branch of the Govt. service to which he belongs etc. Under Sub-section (4) of Section 85 which has been deleted in the meanwhile it was provided that no Govt. servant employed by a municipal council shall, except in case of emergency, be withdrawn from the service of the municipal council without its consent, unless and, until the State Govt. shall have given notice of at least six weeks in writing to the effect to the municipal council and unless some other Govt. servant has been deputed to replace the one withdrawn. The Govt. servant covered under Sub-section (4) of Section 85 obviously refers to the officer appointed under Sub-section (1) of the section. In other words, the services of the said officer must have been placed at the disposal of the municipal council by the State Govt. at the request of the municipal Council to be employed by the council. The position is therefore manifest that u/s 85 discretion lies with the municipal council whether to request for services of an officer of the State Govt. on deputation or not to do so.

Before an officer so appointed is withdrawn from the municipal council, consultation with the council and giving at least six weeks" notice were required to be followed under Sub-section (4). But the case of officers speciating Section 74 stands on a completely different footing. The statute makes it mandatory for every municipal council to have an Executive Officer, an Engineer and a Health Officer from the State Govt. There appears to be no discretion left with the municipal council in the matter. The said officers are to be appointed by the State Govt. and posted by the Municipality. However, their work in the Municipality shall be subject to the general powers of supervision of the Chairman. Of these officers, the case of the Executive Officer was dealt with in Sub-section (I-b) of Section 74, where under the State Govt. having regard to the requirement of the Municipality and in consultation with the municipal council concerned was to determine whether such officer is to be appointed on whole time or part-time basis and the rank from which such officer is to be selected. It is significant to note that Sub-section (i.b) of Section 74 makes 110 provision for consultation before withdrawal of the Executive Officer. The intention of the legislature appears to be clear that the appointment of the Executive Officer, selection of person for posting and withdrawal of the person from the Municipality were to be decided by the State Govt. and no consultation with the Municipal council was mandatorily required before taking actions in these matters; That is not to say that the State Govt. in no case should consult the municipal council in the matter; Indeed for the sake of good administration and to safeguard the interest of the Municipality concerned the State Govt. would do well to consult the municipal council in the matter, particularly when it concerns the incumbent of an important post like the Executive Officer of the Municipality. In view of the clear statutory provisions and the distinction between the two sections as discussed above, we are unable to persuade ourselves to accept the contention raised on behalf of the Petitioner, that the action taken by the State Govt. to withdraw the

opposite party No. 4 from the service of the N.A.C. to his parent Department in the State Government was vitiated on account of non-compliance with the procedure of consultation with the municipal council u/s 85(4) of the Act. Before parting with the case, we would like to notice that though the challenge to the order in Annexure-4 by the opposite party No. 4 Was negated by the State Administrative Tribunal by order passed on 1-1-1987, the said opposite party No. 4 has continued as Executive Officer of the N.A.C for about two and half years.

6. In the result, the writ application being devoid of merit is dismissed. Both parties will bear their respective costs of this proceeding.

J. Das, J.

I agree.

Writ application dismissed.