

(2004) 03 BOM CK 0060

In the Bombay High Court

Case No : Writ Petition No. 3853 of 1999

Shri. Pandit Balkrishna Chavan

APPELLANT

Vs

The State of Maharashtra, The Commissioner/Transport
Manager, Municipal Corporation and The Kolhapur Municipal
Corporation

RESPONDENT

Date of Decision : 25-03-2004

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 2(69), 341, 342, 346,
346(1)

Citation : (2004) 4 ALLMR 82 : (2004) 3 MhLj 25

Hon'ble Judges : S.R. Sathe, J; F.I. Rebello, J

Bench : Division Bench

Advocate : R.R. Salvi, for the Appellant; M.B. Solkar, A.G.P. for Respondent No.
1 and D.S. Sawant, for the Respondent

Judgement

F.I. Rebello, J.—The Petitioner joined services of Respondent No. 3 as Works Manager. On 30.10.1992 petitioner was appointed to the post of Additional Transport Manager. That order came to be challenged before this Court in Writ Petition No. 4791 of 1992. Various interim applications were also moved in that petition. Record would show that they were rejected. The Petition itself came to be thereafter dismissed as withdrawn. The State Government thereafter in exercise of its powers u/s 451 of the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as "Act") by Resolution No. KMC-3094/209/Sub No. 50/94/OD-25 dated 16th June, 1999 set aside the resolution of the Corporation appointing petitioner as Additional Transport Manager. That and an other resolution of Respondent No. 3 is the subject matter of the present petition.

2. At the hearing of this petition, on behalf of the Petitioner various grounds have been raised to challenge the said order of the first respondent. Some of the grounds urged and which would be relevant would be grounds (3), (6) (7) and (9) of the petition. The grounds may be summarised as under:

(1) The action of Respondent No. 1 in setting aside the resolution of general body of the Kolhapur Municipal Corporation and of the Transport Committee by taking recourse to Section 451 of the Act on the face of the record is illegal, null and void.

(2) A reading of Section 451 of the Act would clearly show that the provisions of Section 451 are not at all applicable as in the present case and consequently the action of Respondent is arbitrary and or a colourable exercise of power, and

(3) The reasons given for setting aside the resolution would be clearly contrary to Section 451 itself as there was no violation of the provisions of the At and or the rules by Respondent No. 3. On that count also the impugned order is liable to be set aside.

3. On behalf of the Respondent No. 1 an affidavit has been filed by Mr. B.S. Gujare, Deputy Secretary, Government of Maharashtra, Urban Development Department. It is set out that the post of Additional Transport Manager is statutory post and hence, sanction to the appointment of the said post is required as per the provisions of Section 40(1) of the Act. It is further set out that right from the creation of the said post, it has been filled in by deputation after approval of the State Government. It is further set out that the Kolhapur Municipal Corporation by resolution dated 18.6.1988 had requested the State Government to fill in the said post of Additional Transport Manager by deputation. At this state itself it may be pointed out that by Resolution No. 229 dated 14.10.1993 the Transport Committee has noted that the General Body had resolved to cancel the demand (Exh. E). The qualification for appointment to the post of Additional Transport Manager it is submitted is a degree. The Petitioner is holding diploma and therefore, not eligible to be appointed to the said post. It is then pointed out that Kolhapur Municipal Corporation by resolution No. 109 dated 14.5.1991 relaxed the qualifications required for appointment to the post of Additional Transport Manager. The resolution was approved by the General Body by passing further resolution No. 35 dated 20.7.1991. It is then pointed out that the Municipal Corporation also passed resolution No. 229 dated 14.10.1993 whereby it cancelled the earlier resolution with a request to the Government to fill in the post of Additional Transport Manager by deputation. The resolution is approved by the General body by passing another resolution No. 1189. It is also set out by resolution No. (SIC) Respondent No. 3 had recommended name of the Petitioner for appointment to the post of Additional Transport Manager. Considering that post is statutory post, in exercise of the powers u/s 451 it was decided to cancel aforesaid resolution as it pertains to a statutory post and as the decision of the Respondent No. 3 to relax educational qualifications without any basis and cannot be sustained without the approval from the State Government. It is then set out that reliance is wrongly placed by the petitioner on resolution dated 16.4.1974. For the aforesaid reasons and as according to Respondent No. 1 the department has not received representations from Respondent No. 3 and as subsequently they have passed further resolution,

letter received from the Transport committee was not acted upon by the Government.

4. From the above, following questions will be required to be decided:

(1) Whether the appointment of the petitioner to the post of Additional Transport Manager requires approval of Respondent No. 1.

(2) Was it open to Respondent No. 1 to exercise its powers u/s 451 of the Act and if so whether the reasons given for setting aside the resolution of Respondent No. 3 (both of Transport committee and general body) are legal and lawful.

(3) Considering the fact that the Transport committee based on the rules as amended had exercised discretion in favour of the petitioner and recommended him for appointment to the post and as the Petitioner was in fact appointed, is the subsequent resolution of Respondent No. 3 calling upon Respondent No. 1 to fill in the post on deputation, sustainable.

5. We may now decide the controversy considering the provisions of the Act and the facts on record. The post of Additional Transport Manager was sanctioned by Respondent No. 1 by its resolution dated 1.3.1973. The said resolution reads as under:

"In exercise of the powers conferred by Section 51(4) of the Bombay Provincial Municipal Corporation Act, 1948, Government is pleased to sanction the proposal of the Administrator, Kolhapur Municipal Corporation, to create a post of Additional Transport Manager, in the scale of Rs. 410-30-650-EB-45-1100-1200, plus admissible allowances with retrospective effect from 18th December, 1972."

The other parts of the resolution need not be adverted to. It is therefore, clear that the post of Additional Transport Manager was created by Respondent No. 3 and had the sanction of Respondent No. 1. With this background it will be necessary to examine the provisions of the Act in the matter of exercise of powers for creation of posts, framing of rules and appointment to the post. At this juncture, itself it may be noted that there is an existence of the post of Transport Manager.

6. Section 2(69) of the Act defines the Transport Manager to mean the Transport Manager of the Transport Undertaking appointed u/s 40 and includes an acting Transport Manager appointed u/s 41. The definition therefore, includes only transport Manager. u/s 40 of the Act in the event of the Corporation acquiring or establishing a Transport Undertaking the Corporation shall, subject to the approval of the State Government appoint a fit person to be the Transport Manager of the Transport Undertaking. Sub-section (2) of Section 40 deals with the monthly salary and allowances of the Transport Manager and it provides that the Corporation shall from time to time with the approval of the State Government determine the same. Factually there is a post of Transport Manager created by Statute in the office of Respondent No. 3 when there is a transport

undertaking run by it. The post of Additional Transport Manager is an additional post created by Respondent No. 3 and sanctioned by Respondent No. 1 as set out earlier on 1.3.1973. On instructions, the learned counsel for the Corporation Respondent No. 3 points out that the Municipal Commissioner functions as Transport Manager. We then come to Chapter IV. u/s 45(1) it is provided that the Corporation shall from time to time appoint a fit persons to be City Engineer, Medical Officer of Health, Municipal Chief Auditor and Municipal Secretary. Sub-section (2) then provides that the Corporation may from time to time with the approval of the State Government create an appointment of Deputy Municipal Commissioner or an appointment of Assistant Municipal Commissioner or so many such appointments as it considers necessary and may appoint a fit person or fit persons to such appointments. Sub-section (3) provides that an Officer appointed under this Section shall have such qualifications as may be prescribed under the rules and shall receive such monthly salary and allowances as the Corporation may with the approval of the State Government from time to time fix. It can thus be seen on reading of Section 45 that the creation of posts mentioned therein require prior approval of the State Government. Similarly under Sub-section (3), the qualification and the pay can be fixed by rules with the approval of the State Government from time to time. Under Sub-section (4), every appointment made u/s 45 is subject to confirmation by the State Government.

We then have section 51 pertaining to other officers and servants. That section provides that subject to the provisions of Sub-section (4), the Standing Committee shall from time to time determine the number, designations, grades, salaries fees and allowances of auditors, assistant auditors, officers, clerks and servants to be immediately subordinate to the Municipal Chief Auditor and the Municipal Secretary respectively. Sub-section (4) reads as under:

"No new permanent office with a minimum monthly salary, exclusive of allowances, of one hundred rupees or more shall be created without the sanction of the Corporation and no new office with a minimum monthly salary exclusive of allowances of five hundred rupees or more with a maximum monthly salary exclusive of allowances, of eight hundred rupees or more shall be created without the sanction of the State Government."

It is thus clear that u/s 51 posts having salary of Rs. Five Hundred can be created with the sanction of the Government. We have already adverted to Resolution of 1.3.1973 which had clearly set out that the sanction for the creation to the post of Additional Transport Manager is given by Respondent No. 1 in exercise of its powers u/s 51(4). It is clear therefore, the post which is created u/s 51(4) of the Act and not u/s 45(2) of the Act.

Under Section 52 there is restriction on Respondent No. 3 to make any appointment unless the officer has been appointed u/s 40 or 45 or his office and emoluments are covered by Sub-section (1) of Section 51 or are included in the statement sanctioned under Sub-section (3) of Section 51 and for the time being

in force. u/s 53 it is provided that the power of appointment municipal officers, whether temporary or permanent, whose minimum monthly salary exclusive of allowances is or exceeds four hundred rupees shall vest in the Corporation, Proviso is not material. It is therefore, clear that power of appointment of officers whose minimum monthly salary exceeds Rs. 400 vests in the Corporation. Section 54 provides for the manner of making appointments. Sub-section 4 of Section 54 further sets out that with reference to officers and servants appointed under Chapter XX the provisions of this section shall apply as if for the word "Commissioner" the words "Transport Manager" had been substituted. That reference to Commissioner has to be read u/s 54(1) which sets out that there shall be a staff selection Committee consisting of the Commissioner or any other officer designated by him in this behalf, the Municipal Chief Auditor, the Head of the Department concerned and not more than one other officer nominated by the Commissioner. Section 55 sets out that nothing in Sections 51, 52 and 53 shall apply to officers and servants appointed under the provisions of Chapter XX.

Chapter XX deals with the transport undertakings. Section 341 sets out that the provisions of this Chapter shall apply in the event of Corporation acquiring or establishing a Transport Undertaking.

7. Section 342 provides that subject to the superintendence of the Transport Committee and of the Corporation, the Transport Manager shall manage the Transport Undertaking and perform all acts necessary for the economical and efficient maintenance, operation, administration and development of the Undertaking. Section 346 deals with the officers and servants of the transport undertaking. Section 346(1) provides that the Transport Manager shall, from time to time, prepare and bring before the Transport Committee a statement setting forth the designations and grades of the officers and servants, who should, in his opinion, be permanently maintained for the purpose of the Transport Undertaking, and the amount and nature of the salaries, fees and allowances, which he proposes should be paid to each. Sub Section (2)(a) provides that no new permanent office of which the minimum monthly salary exclusive of allowances exceeds two hundred rupees shall be created without the sanction of the Corporation and no new office with a minimum monthly salary, exclusive of allowances, of five hundred rupees or more or with a maximum monthly salary exclusive of allowances of eight hundred rupees or more shall be created without the sanction of the State Government. It is therefore, clear that the Act itself contemplates appointment of officers in the office of Respondent No. 3 and sanction for creation of posts in so far as Transport Undertaking is as provided u/s 346(a). Considering that the post of Additional Transport Manager is a post in the Transport Undertaking sanction of the State Government was obtained in terms of resolution of 1.3.1973. Resolution states that sanction is granted u/s 51(4). That really ought to be in terms of the Section 346(2)(a). Section 347 provides that no permanent officer or servant shall be appointed in any department of the Transport Undertaking unless his office and emoluments are included in the statement for the time being in force prepared and sanctioned

u/s 346. Section 349 provides that subject to provisions of Sections 347 and 348, the power of appointing municipal officers and servants for the purposes of the Transport Undertaking shall vest in the Transport Manager if the minimum monthly salary, exclusive of allowances is less than two hundred rupees and in the Transport Committee in all other cases. Therefore, in so far as Transport Undertaking is concerned, the Appointing Authority is either the Transport Manager or Transport Committee. All that section 346(2)(a) requires is sanction of the State Government for creation of the post as set out therein. The Competent authority for appointment however, would be transport Manager or Transport Committee.

8. Section 465(1) provides that the Standing Committee shall from time to time frame regulations not inconsistent with the Act and the rules but in consonance with any resolution that may be passed by the Corporation. Section 465(1)(a) confers the power to prescribe the qualification required for appointments to posts in municipal service other than those specified in Sub clause (a) of Clause (3) of Section 457. u/s 457, rules can be made providing for on regulating for all or any of the purposes set out therein. Section 457(3)(a) provides for providing for qualifications which are necessary for and the method of appointment to posts the power of appointment which vests in the Corporation. Therefore, u/s 457 rules can be made by the Corporation provided for in the method of appointment to the posts which vests in the Corporation. u/s 465(1) the Standing Committee shall from time to time frame regulations not inconsistent with the Act and the rules but in consonance with any resolution that may be passed by the Corporation. It is therefore clear that the rules for recruitment rests within the domain either of the Corporation or the Standing Committee. There is no provision under which the Respondent No. 1 can so exercise any powers in the matter of framing recruitment rules. The learned counsel for the Respondent No. 1 was unable to show any provision in the Act under which in respect of posts in the Transport Undertaking apart from the statutory post of Transport Manager approval of the Respondent State is required while framing rules for appointment to posts in the Transport Undertaking.

9. On summing up, all this would indicate firstly that in so far as Transport Undertaking is concerned, the post had to be created u/s 346. Sanction of the State Government is required for creation of the post u/s 346(2)(a). The power to appoint vests either in the Transport Manager in Case where the minimum monthly salary exclusive of allowances is less than Rs. two hundred and in the Transport Committee in other cases. The power to frame rules as noted earlier is either with the Corporation u/s 465 or the Standing Committee as contemplated u/s 457(2)(a). We do not find any provision requiring the sanction of Respondent No. 1 for the framing of rules of recruitment to post governed u/s 346 or for making appointment to posts in the Transport Undertaking. The only permission required is while sanctioning the post. After having clarified the legal position, we may now proceed to examine the issue involved.

10. In the instant case, we find that on 14.5.1991 the Transport Committee of Kolhapur municipal corporation passed a Resolution No. 119 and added Rule 17 in the rules which were earlier framed. By the virtue of the new rule, a power was conferred to relax the educational qualification in exceptional cases. This resolution of the Transport Committee came up for consideration before the General body which by Resolution No. 356 gave assent to Resolution No. 119. In other words, the rules of recruitment were given assent by the Corporation on 20.7.1991. Then on 30.10.1992 the Transport Committee passed a resolution No. 216 and recommended appointment of the Petitioner to the post of Additional Transport Manager relaxing educational qualification required for the said post. The Competent authority in the case of Additional Transport Manager would be Transport Committee as noted earlier considering the pay of the post. While granting relaxation to the appointment of the Petitioner herein, the Transport Committee has passed Resolution which is at Exh. B to the petition. Various reasons therein have been given and after giving reasons and nothing that the petitioner does not fulfill the qualifications and considering his overall performance recommended that the petitioner be promoted to the post of Additional Transport Manager. The Transport Committee found that the note put up by the office appears to be appropriate and reasonable. It is in these circumstances that the rule was relaxed. We are really not called upon to go into that issue as to whether the rules can be relaxed as before us what is impugned is decision of Respondent No. 1 Earlier petition had been filed before this court challenging the appointment. That challenge was dismissed as withdrawn. As noted earlier, by amending Rule 17 power was conferred to relax the rules. The Transport committee had powers to relax the rules which they have done.

11. We may now examine the action of the Government in the purported exercise of its powers u/s 451. u/s 451 if the State Government is of the opinion that execution of any resolution or order of the Corporation or any other authority or the doing of any act which is about to be done or is being done by or on behalf of the Corporation or such authority is in contravention of in excess of the powers conferred by or under this Act or any other law for the time being in force, it is likely to lead to a breach of the peace or to cause injury or annoyance to the public or any class or body of persons, or is likely to led to abuse, or misuse of or to cause waste of municipal funds against the interests of the public, the State Government may, by order in writing, suspend the execution of such resolution or order or prohibit the doing of any such act, for which period or periods as it may specify therein.

12. The Resolution of the Transport Committee is dated 16.6.1999. That resolution sets out that the petitioner who was working as working as Works Manager is appointed to the post of Additional Transport Manager. The Government Resolution notes that the promotion given to the Petitioner was not in accordance with the rules. In other words, while exercising the powers u/s 451 the Government has solely proceeded on the footing that the appointment of the petitioner was not in accordance with the rules. We will therefore, examine

whether the reason given for making the order can be sustained. It may also be pointed out that this is the only reason given by the Respondent No. 1 for calling on Respondent No. 3 to cancel the resolution passed by it. In the earlier part of the discussions, we have noted that the power to appoint is with the Corporation. In the instant case, the appointment has been done by the Corporation. The further requirement is that the appointment had to be done by considering rules of recruitment. The rules of recruitment have been framed by the corporation including Rule 17 which confers power to relax. The power to relax has been exercised by the Transport Committee which was competent authority. Post itself was sanctioned by the State Government. The contention of the State Government that it is a statutory posts is not sustainable. The post of Transport Manager is defined u/s 2(69) of the Act. The post of Transport Manager is u/s 40. We have noted earlier that there exists post of Transport Manager and we are dealing with a post of Additional Transport Manager. The Government itself sanctioned the post u/s 51(4) and not u/s 45. As noted earlier mere wrong reference to a powers is of no consequence as admittedly the power was u/s 346(2). The only reason given therefore, is clearly unsustainable in as much as the Corporation had fulfilled all the requirements for appointing the petitioner to the post of additional Transport Manager. We are not called upon in this case to consider whether on the material available, the exercise was properly done. That cannot be gone into by this court as that was not considered by Respondent No. 1. At any rate, Respondent No. 1 has not proceeded on that footing. The only reason given therefore, for suspending/canceling the appointment of petitioner was not available to Respondent No. 1. The resolution of Respondent No. 1 dated 16.6.1999 will therefore, have to be quashed and set aside.

13. We may now also deal with the other contention that the Respondent No. 3 has thereafter passed a resolution calling on the Government to full in the post on deputation. The Petitioner aggrieved by the said resolution had approached this court. This court had granted interim relief staying the said resolution by its order of 14.7.1999 and also directed the Petitioner make representation. That representation was made. It was rejected and thereafter on 21.1.1999 interim relief was granted by admitting the petition in terms of Prayer Clause (a). The Petitioner continues to hold the post of Additional Transport Manager till date. In our opinion, once the resolution of the Government is set aside the subsequent resolution even of Respondent No. 3 will have to be set aside as admittedly the resolution of respondent No. 3 to appoint petitioner has been held to be legal and valid.

Before parting with, we may mention that on behalf of respondent No. 1 the learned A.G.P. has placed reliance in the judgment in the case of Vasant Narayan Satam v. The Municipal Corporation of Kolhapur and Ors. in Writ Petition No. 2930 of 1984 decided on 26th April, 1988. We have considered the facts of that case and we find that the ratio of that judgment would not be applicable to the facts of this case. The power to relax in that case was in respect of post upto Superintendent. What the Corporation had proceeded to do so was to relax

qualification for higher post. The court held that there was no such power to relax for such higher posts. Next reliance was placed on Government Resolution. The court found that there was a need to consult M.P.S.C. which had not been done. In these circumstances, the Court held that there was no power in the Corporation to relax the qualification.

In the instant case, we have recorded a finding that there was power to relax. That power has been exercised. The judgment therefore, is clearly distinguishable.

14. For the reasons aforesaid, rule is made absolute in terms of Prayer Clause (a) and (aa).

In the circumstances of the case, there shall be no order as to costs.

P.A. to issue authenticated copy of this order.