

(2000) 05 MP CK 0030

In the Madhya Pradesh High Court

Case No : Writ Petition No's. 2403, 3071 and 4829/97 and 713/98

Suresh Chandra Sharma and Others

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 10-05-2000

Acts Referred:

Administrative Tribunals Act, 1985 — Section 15(1), 5
Cattle Trespass Act, 1871 — Section 12, 14, 17, 19, 4
Constitution of India, 1950 — Article 277, 309, 311, 311(2)
Madhya Pradesh General Clauses Act, 1957 — Section 16
Madhya Pradesh Municipal Employees Recruitment and Conditions of Service Rules, 1968 — Rule 2, 23
Madhya Pradesh Municipalities Act, 1961 — Section 100, 105, 123, 123(1), 124
Madhya Pradesh State Municipal Service (Executive) Rules, 1973 — Rule 11, 2(1), 22, 22A, 22B
Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 23A, 23J

Citation : (2000) ILR (MP) 645 : (2000) 2 JLJ 268 : (2000) 4 MPHT 12 : (2000) 2 MPJR 449 : (2000) 2 MPLJ 530

Hon'ble Judges : S.P. Khare, J;S.K. Kulshrestha, J;Dipak Misra, J

Bench : Full Bench

Advocate : K.K. Trivedi and P.S. Das, for the Appellant; R.S. Jha, Dy. A.G. and Ajay Mishra, for the Respondent

Judgement

S.K. Kulshrestha, J.

Whether or not a Chief Municipal Officer holds a Civil post and is an employee of the State Government is the short question referred to us in the above petitions in view of the apparent conflict between the two Division Bench decisions of this Court, viz., Jagmohanlal Bajpai v. State of M.P. and Ors. [1977 (1) SLR 746] holding that the Chief Municipal Officer does not hold a Civil post and is not an employee of the State Government and C.P. Kulshrestha (Dr.) v. Government of M.P. (1991 JLJ 198), holding to the contrary.

We need not deal in detail with the facts leading to reference of the case to the Full Bench for resolving the conflict between the two decisions. Suresh Chandra

Sharma, the petitioner in W.P. No. 4829 of 1997 has challenged the order of the State Administrative Tribunal, Bench Gwalior, by which his application before the Tribunal was dismissed on the ground that although his services were under the control of the State Government, since he was not getting salary from the State Government but from the Municipal Fund, in view of the ratio of the case in Jagmohanlal Bajpai (supra), the Tribunal had no jurisdiction. In other cases also, on account of the very controversy, the matter has been placed before this Full Bench.

The M.P. Municipalities Act, 1961 (hereinafter referred to as "the Act") was enacted to consolidate and amend the law relating to Municipalities and to make better provision for the organisation and administration of Municipalities in Madhya Pradesh. The Act has been amended from time to time right from the year 1963 to the year 1997 including the amendments necessitated by Constitution 74th (Amendment) Act, 1992. The Act in Chapter IV captioned "Chief Municipal Officer and Staff of Municipality" provides for constitution of State Municipal Services to be called : (a) State Municipal Service (Executive); (b) State Municipal Service (Health) and (c) State Municipal Service (Engineering). Section 89 of the Act makes provision for appointment to the State Municipal Service pending constitution of the same under the provisions of Sub-section (1) of Section 86 or when no member of such service is available for appointment as Chief Municipal Officer, Health Officer or Engineer. Section 87 provides that there shall be a Chief Municipal Officer to every Council who shall be the principal executive officer of the Council and all other officers and servants of the Council shall be subordinate to him. Sub-section (2) thereof lays down that the Chief Municipal Officer of a Council shall be a member of the State Municipal Service (Executive) and shall be appointed by the State Government. Since the status of the Chief Municipal Officer is directly in issue in the present case, it would be advantageous to reproduce the provisions relevant for this purpose contained in Sections 86, 87 and 89 of the Act, which read as follows :

"86. Constitution of State Municipal Service.-- (1) The State Government may, for the purpose of providing officers to the Council u/s 87 or 88, constitute in the prescribed manner, the following Municipal Services for the State to be called--

- (a) State Municipal Service (Executive);
- (b) State Municipal Service (Health); and
- (c) State Municipal Service (Engineering).

(2) The State Government may make rules in respect of recruitment, qualification, appointment, promotion, leave, scale of pay, all allowances by whatever name called, loans, pension, gratuity, annuity, compassionate fund, provident fund, dismissal, removal, conduct, departmental punishment, appeals and other service conditions of the members of the State Municipal Service.

(3) The salary, allowances, gratuity, annuity, pension and other payments

required to be made to the members of the State Municipal Service in accordance with the conditions of their service shall be a charge on the Municipal Fund :

Provided that in the event of transfer of a member of the State Municipal Service from one Council to another, the Councils concerned shall be liable to contribute towards the aforesaid payments in such proportion as the State Government may, by rules, prescribe.

(4) The State Government may transfer any member of the State Municipal Service from one Council to another Council.

(5) If, at a special meeting convened for the purpose, the Council passes a resolution by a majority of more than one-half of the elected Councillors constituting the Council of the time being requiring the transfer of a member of the State Municipal Service, the State Government may transfer such member."

"87. Chief Municipal Officer.-- (1) There shall be a Chief Municipal Officer to every Council who shall be the principal executive officer of the Council and all other officers and servants of the Council shall be subordinate to him.

(2) The Chief Municipal Officer of a Council shall be a member of the State Municipal Service (Executive) and shall be appointed by the State Government."

"89. Appointment to State Municipal Service pending constitution thereof etc.--

(1) Pending the constitution of the State Municipal Service under Sub-section (1) of Section 86 or when no member of such service is available for appointment as Chief Municipal Officer, Health Officer or Engineer, as the case may be, the State Government may depute an officer of Government or appoint any person qualified to be a member of such service to act as Chief Municipal Officer, Health Officer or Engineer, as the case may be.

(1-A) The State Government shall have powers of control over the persons appointed under Sub-section (1) and may transfer any person appointed thereunder from one council to another.

(2) The State Government may, on its own motion or if at a special meeting of the Council more than one-half of the elected Councillors vote in favour of a resolution to that effect withdraw the service of the Chief Municipal Officer, Health Officer or Engineer, as the case may be, who is an officer of the State Government and has been deputed to the Council under Sub-section (1)."

The question that arose before the Division Bench in Jagmohanlal's case was whether the fundamental rules were applicable in the case of Chief Municipal Officers appointed under Sections 86 and 89 of the Act. It was argued before the Division Bench that since the petitioner had been appointed by Government, though provisionally u/s 89 (1) of the Act, he had become Government Servant from the date of his appointment and as such fundamental rules were applicable in his case. The question arose on account of the fact that the change of the date

of birth accorded in favour of the petitioner was not approved, upon reference to the Government, by the Secretary to the Government who directed that he should be retired from 11-5-1972 and be asked to proceed on leave immediately. It was this decision to retire the petitioner w.e.f. 11-5-1972 which was challenged by the petitioner. It was observed by the Division Bench that the State Municipal Service is required to be constituted by the State and the State has control over the employees of the service so constituted but that service cannot be equated with a service "in connection with the affairs of the union or of any State" as contemplated in Article 309 of the Constitution and it still remains a Municipal Service for staffing the Municipal Councils. The fundamental rules did not, therefore, apply to the members of such a service and since Sub-section (2) of Section 86 specifically authorised the State to make rules in respect of recruitment, qualification, appointment etc. for such employees, it clearly meant that such employees were not to be treated as State Employees, and the fundamental rules were not attracted u/s 2 of the Act as well.

In *Alok Awasthy v. Shri Ram Sharma* (1987 MPRCJ 143), the decision of the Rent Controlling Authority holding the respondent who had retired as Chief Municipal Officer to be a retired Government Servant, was challenged before the Single Bench and on conspectus of the provisions of the Act, it was observed that the provisions contained in the Act and the State Municipal Service (Executive) Rules left no doubt that a Chief Municipal Officer was a servant of the State Government and was, therefore, entitled to invoke the special provisions contained in the M.P. Accommodation Control Act in Section 23-A to seek eviction of the tenant being the landlord within the meaning of Section 23-J of the M.P. Accommodation Control Act. It appears that the Division Bench decision in *Jagmohanlal's* case was not brought to the notice of the learned Judge dealing with the matter. The said judgment of the learned Single Judge was later followed in *C.P. Kulshrestha v. Govt. of M.P.* (supra) and it was observed in Paragraph 15 that since in a different context the question was decided in *Alok Awasthy's* case (supra), the petitioner Chief Municipal Officer was undoubtedly a Government Servant and was, therefore, entitled to age relaxation contemplated in the advertisement issued by the M.P. Public Service Commission for appointment to the post of Civil Judges. Along with the said petition, the case of *Omprakash Gupta v. State of M.P. and Ors.* (reported in 1992 MPLJ 145) was also decided. Even in these two decisions, the Division Bench did not notice the decision in *Jagmohanlal's* case. It was observed in Paragraph 15 of the decision as under :

"15. We have no doubt that the objections of respondents are wholly meritless. The circular letter can have no effect on the advertisement of the respondents and entitlement thereunder of the petitioner. The only point to be considered is whether the petitioner was, at the relevant time, and also today, a Government servant. In a different context, that question came to be decided in *Alok Awasthy's* case (supra). It was held in categorical terms in that case that the "Chief Municipal Officer" was a Government Servant and that view was taken

giving due consideration to the provisions of M.P. Municipalities Act, 1961. M.P. State Municipal Service (Executive) Rules, 1973 and Section 16 of the M.P. General Clauses Act, 1957. It was held that the Chief Municipal Officer was a "servant" of the State Government and was not a "servant" of the Municipal Council. His appointment, transfer, and also matters concerning disciplinary action to be taken against him, all lie within the competence of the State Government. We are in complete agreement with the view expressed in Alok Awasthy and we have no doubt that the petitioner is not an employee of the Municipal Council, but he is a Government Servant. He is accordingly not hit by the circular letter dated 21-7-1988 and he is entitled to the age relaxation contemplated under the advertisement in question."

When these two decisions were cited in the above petitions, there being apparent inconsistency between the two decisions, the Benches hearing these petitions have referred the question for resolving the conflict.

We have heard learned counsel for the parties.

It is clearly perceptible from the decision in Jagmohanlal's case that the said decision did not proceed on construction of the Madhya Pradesh State Municipal Service (Executive) Rules, 1973, and it was in the peculiar facts of the said case that the contention that the petitioner had become a Government Servant by virtue of his appointment u/s 89 of the Act, fundamental rules had become applicable in his case and he could not, therefore, be retired from service before attaining the age as prescribed in the said rules that the Division Bench was of the opinion that even if it was assumed that till constitution of the State Municipal Service he had continued to be a Municipal Employees, he could not claim advantage of the resolution of the Municipal Committee, Burhanpur as the Government in exercise of the power conferred by Sub-section (1) of Section 355 read with Section 95 of the Act, had framed M.P. Municipal Employees (Recruitment and Conditions of Service) Rules, 1968 and after these Rules had been brought in force, the petitioner had in any case ceased to be governed by the fundamental rules. It was, in particular, pointed out that Rule 23 of the 1968 Rules specifically provided that the age of superannuation for Municipal Employees other than Class IV employees shall be 55 years and in view of this provision, the petitioner was rightly retired on attaining the age of 55 years. It is, therefore, clear that the judgment in Jagmohanlal's case has proceeded on the premises that he had not become a member of the State Municipal Service and that his case was, therefore, governed by the provisions of the 1968 Rules which provided for retirement on attaining the age of 55 years. We have, therefore, to examine whether the position or status of the Chief Municipal Officer, who is a member of the State Municipal Service (Executive) as contemplated in Section 86 (1) (a), is that of a servant of the State Government or that he is a Municipal employee. As pointed out above, Sub-section (2) of Section 86 empowers the State Government to make Rules in respect of recruitment, qualification, appointment, promotion, leave, scale of pay, all allowances by whatever name

called, loans, pension, gratuity, annuity, compassionate fund, provident fund, dismissal, removal, conduct, departmental punishment, appeals and other service conditions of the members of the State Municipal Service. The State Government in exercise of the said power has made the Madhya Pradesh State Municipal Service (Executive) Rules, 1973. Rule 2 (f) defines member of the service to mean a member of the State Municipal Service (Executive) and Rule 2 (1) "service" as meaning the Municipal Service for the State constituted under Sub-section (1) of Section 86 of the Act. The mode of appointment is by direct recruitment and by promotion, both. Chapter-IV prescribes qualification and eligibility for appointment in the case of direct recruitment while Part V deals with procedure for direct recruitment. Rule 11 provides for the initial constitution of service and lays down that those Municipal Officers who were continuously working as Chief Municipal Officers at the time of commencement of the Rules, shall be deemed to have been appointed to the service. We may pause here to point out that in Jagmohanlal's case since the petitioner had retired w.e.f. 10-5-1972 much before the State Municipal Service (Executive) Rules (hereinafter referred to as the "Rules") were framed by the State Government, there was no occasion for the Division Bench in that case to consider the impact of Rule 11 by which persons appointed pending constitution of the service were also included as its members. The same is also true of the non-consideration of the specific provision contained in Rule 49 which makes the fundamental rules applicable to the Government servants of Madhya Pradesh to the members of the service in respect of regulation of pay, joining time, leave, provident fund, loan, security and travelling allowances. Since the question of considering the position of a person appointed u/s 89 of the Act pending constitution of the State Municipal Service could not have been considered in the light of the provisions contained in the Rules subsequently made by the State Government and the decision rests mainly on the position in the 1968 Rules which have specifically been excluded in the case of members of the service in the definition of Municipal Employee governed by the M.P. Municipal Employees (Recruitment and Conditions of Service) Rules, 1968, the said decision is even otherwise not of any help in construing the true position of a Chief Municipal Officer governed by 1973 Rules. We may here also point out that the definition of Municipal Employee contained in Rule 2 (e) of the 1968 Rules includes all persons appointed or taken on the cadre of Municipal Staff, other than a member of the State Municipal Service (Executive) which implies that the position of Chief Municipal Officer who is a member of the State Municipal Service (Executive) is to be examined only in the light of the provisions contained in the 1973 Rules with regard to recruitment, qualification, appointment, promotion, removal, conduct, departmental punishment etc. applicable in such cases.

Before we proceed to refer to the decision of the Single Bench in Alok Awasthy's case followed by the Division Bench in C.P. Kulshrestha (supra) and in Omprakash (supra), it is necessary to refer to a few decisions of the Apex Court having material bearing on the subject. In State of Assam and Others Vs. Shri Kanak

Chandra Dutta, , in a case where dismissal of a Mauzadar in the Assam Valley was quashed by the High Court in a writ petition on the ground that he was a holder of the Civil post under the State of Assam and was entitled to the protection of Article 311(2) of the Constitution, the question whether under the Mauzadari System of collecting revenue prevailing in the Assam Valley in which the Mauzadar was appointed to collect land revenue and other Government dues with the collection of which he was entrusted, Mauzadar was a person holding a Civil post under the State within Article 311 of the Constitution was considered by the Apex Court. It was observed that there was no formal definition of post and Civil post and the sense in which they were used in the Services. Chapter of Part XIV of the Constitution is indicated by their context and setting. It was observed that a post is a service or employment and a person holding a post under a State is a person serving or employed under the State and the existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post. It was further explained that a post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post and a post under the State means a post under the administrative control of the State which the State may create or abolish and may regulate the conditions of service of persons appointed to the post. The position of Mauzadar was examined in the context of the above principles and it was observed in Paragraphs 11 and 12 as follows :

"11. Judged in this light, a Mauzadar in the Assam Valley is the holder of a civil post under the State. The State has the power and the right to select and appoint a Mauzadar and the power to suspend and dismiss him. He is a subordinate public servant working under the supervision and control of the Deputy Commissioner. He receives by way of remuneration a commission on his collections and sometimes a salary. There is a relationship of master and servant between the State and him. He holds an office on the revenue side of the administration to which specific and onerous duties in connection with the affairs of the State are attached, an office which falls vacant on the death or removal of the incumbent and which is filled up by successive appointments. He is a responsible officer exercising delegated powers of Government. Mauzadars in the Assam Valley are appointed Revenue Officers and ex officio Assistant Settlement Officers. Originally, a Mauzadar may have been a revenue farmer and an independent contractor. But having regard to the existing system of his recruitment, employment and functions, he is a servant and a holder of a civil post under the State.

Counsel for the State stressed the fact that normally a Mauzadar does not draw a salary. But a post outside the regularly constituted services need not necessarily carry "a definite rate of pay". The post of a Mauzadar carries with it a remuneration by way of a commission on collections of Government dues. Counsel stressed the fact that a Mauzadar is not a wholtime employee. But a post outside the regularly constituted services may be a part time employment. The condition of service of a Mauzadar enable him to engage in other activities."

Again in *Superintendent of Post Office and Ors. v. P.K. Rajamma and Ors.* (1977 (2) SLR 226), the question arose whether the extra departmental agents governed by the Posts and Telegraph Extra Departmental Agents (Conduct and Service) Rules, 1964, were holders of Civil post under the Union of India whose services could not have been terminated in violation of Article 311(2), reference was made to the earlier decision in *Kanak Chandra Dutta* (supra) and it was observed that the extra departmental agents were not casual workers but were holders of post under the administrative control of the State and it was apparent from the rules that the employment of an extra departmental agent was in a post which existed "apart from" the person who happened to fill it at any particular time. Their Lordships observed that although such a post was outside the regular civil services, there was no doubt that it was a post under the State.

Again in connection with the services of persons appointed in the Panchayat Services constituted u/s 203 of the Gujarat Panchayats Act, the question arose in *State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others*, , whether the persons inducted into the services from the Municipalities as distinguished from the Government Servants who were absorbed in the services, could be denied benefit of the recommendations of the two pay commissions on the ground that they were not Government Servants. It was observed that it was neither politic nor possible to lay down any definitive test to determine when a person may be said to hold a Civil post under the Government. Reference was made to the earlier decision in *Kanak Chandra Dutta* (supra) and it was observed that several factors may indicate the relationship of master and servant and none may be conclusive. It was further observed that no single factor may be considered absolutely essential and the presence of all or some of the factors, such as, the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant and in each case, it would be a question of fact whether a person is a servant of the State or not. It was further pointed out that the duties which the members of the Gujarat Panchayat Services were required to perform were in connection with those affairs of the State which were entrusted to the Panchayat Institutions, by the statute itself or by transfer by the Government under the

statute. The expenditure towards the pay and allowance of officers and servants of the Panchayat Service, serving for the time being under any Panchayat had, no doubt, to be met by the Panchayat from its own fund, but, the fund consisted substantially of sums contributed or lent by the State Government and of the proceeds of any tax or fee imposed by or assigned to the Panchayat under the Act. The imposition of a tax or a fee in the nature of tax, was essentially a function of the State and, therefore, salary and allowances of the servants and officers of the Panchayat Service were paid out of funds contributed or lent by the Government or raised by the discharge of an essential governmental function. The discussion contained in Paragraphs 28 and 29 of the decision reads as under :

"28. We may now revert to the question whether the members of the Gujarat Panchayat Service are Government Servants. First, we see that the duties which they are required to perform are in connection with those affairs of the State which are entrusted to the Panchayat Institutions, by the statute itself or by transfer by the Government under the statute. Next, the expenditure towards the pay and allowance of officers and servants of the Panchayat Service, serving for the time being under any Panchayat has, no doubt, to be met by the Panchayat from its own fund, but, as we have seen, the fund consists substantially of sums contributed or lent by the State Government and of the proceeds of any tax or fee imposed by or assigned to the Panchayat under the Act. The imposition of a tax or a fee in the nature of a tax, as we know, is essentially a function of the State. So the salary and allowances of the servants and officers of the Panchayat Service are paid out of funds contributed or lent by the Government or raised by the discharge of an essential governmental function. Secretaries of Gram and Nagar Panchayats are to be appointed in accordance with the rules made by the Government, while the Taluqa Development Officer is to be the Secretary of the Taluqa Panchayat and the District Development Officer is to be the Secretary of the District Panchayat. Taluqa and District Development Officers are, of course, officers of the State Service. Gram and Nagar Panchayats may have other servants, as may be determined u/s 203, but they have to be appointed by such authority as may be prescribed by the Government and their conditions of service shall be such as may be prescribed by the Government. Section 203, as already noticed by us, contemplates the constitution of a single centralised Panchayat Service, the classes, cadres and posts of which have to be determined by the Government from time to time. The mode of recruitment, whether by examination or otherwise, the conditions of service, the powers in respect of appointments, transfers and promotions of officers and servants and disciplinary action which may be taken against them, are to be regulated by the rules made by the Government. The rules so made are particularly required to contain a provision entitling servants of such cadres in the Panchayat Service to promotion to such cadres in the State Service, as may be prescribed: vide Section 207 (4) (a). This is an important provision. There cannot be any question of a rule providing for promotion from the Panchayat Service to the State Service unless

the Panchayat Service is also a service under the State. Again Section 203 (5) requires that rules may provide for inter-district transfer of servants belonging to the Panchayat Service and the circumstances in which and the conditions subject to which such transfers may be made. This provision along with the provisions of Section 293 which provide for the promotion and transfer of servants belonging to the district, taluqa and local cadres within the district, taluqa and gram and nagar clearly show that the servants are not servants of the individual Panchayats but belong to a centralised service. Section 205 provides that appointments to posts in the Panchayat Service shall be made (i) by direct recruitment, (ii) by promotion or (iii) by transfer of a member of the State Service to the Panchayat Service. This provision which enables an appointment to be made to a post in the Panchayat Service by transfer of a member of the State Service necessarily implies that the Panchayat Service is also a service under the State. Sections 157 and 158 provide for the transfer of certain functions performed by the Government to Panchayat Institutions together with funds and staff. Section 325, as we have already seen, provides that Secretaries, all officers and servants in the employ of old Village Panchayats shall be Secretaries, Officers and servants of the new Gram Panchayats. It is not disputed that Talaties and Kotwals, who were Government servants, were the Secretaries and Officers of old Village Panchayats. Now, Section 206 (1) (i) provides for the allocation to the Panchayat Service of such number of officers and servants out of the staff transferred to the Panchayat under Sections 157, 158 and 325, as the Government may deem fit. Section 206 (1) (iii) further provides for the allocation to the Panchayat Service of such other officers and servants employed in the State Service as may be necessary to enable the Panchayats to discharge efficiently their functions and duties under the Act. Obviously this transfer and allocation of members of State Services to the Panchayat Service under Sections 157, 158, 325, 206 (1) (i) and 206 (1) (iii) will be impermissible unless the Panchayat Service is also a service under the State. Otherwise, there would be a patent violation of the provisions of Article 311 of the Constitution. Section 206-A authorises a review of allocation within a period of four years and reallocation to the State Service of these transfers under Sections 157 and 158. The very idea that there can be an allocation to the Panchayat Service from a State Service and a reallocation from the Panchayat Service to the State Service is only consistent with the Panchayat Service also being a service under the State. 29. Considerable stress was laid by the counsel for the State of Gujarat on the statement in Section 203 that such service (Panchayat Service) shall be distinct from the State Service. We do not think this is to be interpreted as a disclaimer by the Legislature that the Panchayat Service is a service under the State. All that it can possibly mean is that the Panchayat Service is not a service which can be identified with other State Services for the reason that while the Panchayat Service too discharges the duties connected with the affairs of the State, it does so not directly under the State but under the various Panchayat Institutions to whom are delegated or transferred certain functions of the State Government. Panchayat Service is distinct from a State Service because the Panchayat

Institutions whom it serves together constitute and almost parallel but subsidiary Government. It is only in that sense Panchayat Service is distinct from a State Service and not in the sense that members of the service are not servants of the State."

We may also refer to the decision in *R.N.A. Britto Vs. Chief Executive Officer and others*, in which the Supreme Court has held the Secretaries under the Karnataka Village Local Boards Act to be holders of Civil post under the State, following the above decision in *State of Gujarat v. Ramanlal Keshavlal*. The termination of services of the petitioner in that case was challenged by him before the Tribunal established under the provisions of the Administrative Tribunals Act, 1985, but his application was rejected on the ground that the Tribunal had no jurisdiction to decide upon the matter and on review application being filed, the Tribunal reiterated its earlier view that it had no jurisdiction to decide on the matter of his termination from the post of Secretary of Panchayat as he was not in the Civil services of the State or holding any Civil post under the State to give jurisdiction to the Tribunal under Clause (b) of Sub-section (1) of Section 15 of the Administrative Tribunals Act. In considering the question whether a Secretary of a Panchayat established under the said Act was entitled to invoke the jurisdiction of the Tribunal to decide upon the matter of termination of his services under Clause (b) of Sub-section (1) of Section 15 of the Administrative Tribunals Act, the Supreme Court observed that in view of the Judgment of the Constitution Bench in case of *Kanak Chandra Dutta (supra)* and the decision in *Ramanlal Keshavlal (supra)* since the Panchayats established u/s 5 of the Act were subject to the control of Government and under a duty to make reasonable provision within the village in regard to various matters referred to therein, such as, construction, repair and maintenance of village roads, ponds, drainsbunds, maintenance of public buildings, grazing lands and forest lands vesting in or under the control of the Panchayat and u/s 80 of the Karnataka Village Boards Act, it was required that every Panchayat shall have a Secretary who shall be appointed by the Commissioner in accordance with such rules as may be prescribed and rules were framed providing for making appointment and other matters concerning the service conditions of such Secretary, it was clear that the Panchayat Secretaries under the Act were the State Government Servants. The observations contained in Paragraphs 14 and 15 of the report which are relevant for the purpose read as under :

"14. The provisions in the Act to which we have adverted, clearly show that several functions which were required to be performed by the State are entrusted to the Panchayats. They also show that the properties vested in the Panchayats and the funds of the Panchayat are that of the Government and those collected by way of tax or fee by exercising the power of taxation vested in the Panchayat by the Government. Above all, provisions of the Act make it abundantly clear that the Panchayats have to function under the ultimate control of the State Government. When it comes to the Secretaries of the Panchayats appointed under the Act, their selection for appointment, their termination from

service, their services are as liability for transfer and all other conditions of their services are as provided for under the Rules made under the Act or other rules made under Article 309 of the Constitution in respect of services of the State Government Servants. When Sub-section (2) of Section 80 of the Act to which we have adverted states that subject to the provisions of Rules made under the proviso of Article 309 of the Constitution, the qualifications, powers, duties, remuneration and conditions of service including disciplinary matters of such Secretary shall be such as may be prescribed, it leaves no room for doubt that the Secretaries of the Panchayats are Government Servants, like other Government Servants, who are subjected to the Rules to be made under the proviso to Article 309 of the Constitution as regards their service conditions.

Thus, the provisions of the Act and the Rules, to which we have adverted to, leave no option for us except to hold that Panchayat Secretaries under the Act are the State Government Servants. If that be so, they are persons who are appointed in the civil service of the State or Civil post under the State within the meaning of Clause (b) of Sub-section (1) of Section 15 of the Tribunals Act, as would enable them to invoke the jurisdiction of the Tribunal for redressal of their grievances in relation to any service matter concerning them. Hence, the Tribunal, we hold, fell into a patent error in rejecting the review application of the appellant filed before it on the ground that it had no jurisdiction to deal with the matter relating to the termination of his service as the Panchayat Secretary."

From the several decisions that we have referred to above, it clearly transpires that in order to find out whether a person holds a Civil post under the State and is an employee of the State Government, the test to be applied is as to whether :

1. The Statutory Body in connection whereof he is appointed, is a body which performs the functions which are essentially the functions of the State such as the imposition of the tax or fee in the nature of taxes and the salary and the allowance of the servants and the officers are paid out of funds contributed or lent by the State Government or raised by discharge of such essential governmental function; and

Whether the State Government has the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action and the right to prescribe the conditions of the service and the nature of the duties performed by such employee coupled with the right to issue direction and the right to determine and the source from which wages or salary shall be paid to such employee.

We, therefore, now proceed to examine the position of the Chief Municipal Officer on the anvil of the above criteria deduced from the test prescribed by the Supreme Court.

Before a reference to the functions, it is necessary to examine the power of the Municipalities in regard to taxation. Chapter VII of the Act deals with Municipal taxation and provides for imposition of taxes in Sections 126 to 133. Section 126

deals with determination of annual letting value of land and building while Section 127 provides for imposition in the whole or in any part of the Municipal Area of the taxes enumerated therein. Section 127 reads as extracted below:

"127. Taxes to be imposed under this Act--

(1) For the purpose of this Act, the Council shall, subject to any general or special order which the State Government may make in this behalf, impose in the whole or in any part of the Municipal Area, the following taxes, namely :--

(a) a tax payable by the owners of building or lands situated within the city with reference to the gross annual letting value of the buildings or lands, called the property tax, subject to the provisions of Sections 126, 127-A and 129.

(b) a water tax, in respect of lands and buildings to which a water supply is furnished from or which are connected by means of pipe with municipal water works.

(c) a general sanitary cess, for the construction and maintenance of public latrines and for removal and disposal of refuse and general cleanliness of the city.

(d) a general lighting tax, where the lighting of public streets and places is undertaken by the Council.

(e) a general fire tax, for the conduct and management of the fire service and for the protection of life and property in the case of fire.

(f) a local body tax on the entry of such goods as may be declared by the State Government by notification in the Official Gazette into the municipal area for consumption, use or sale therein at a rate not exceeding four percent of the value of goods :

Provided that no local body tax shall be levied on the goods :

(i) brought by a person into the municipal area for his personal use or consumption, or

(ii) brought by a registered dealer within the municipal area and transmitted within 15 days thereof--

(a) to a registered dealer in any other local body; or

(b) in the course of export out of the territory of India; or

(c) in the course of inter State trade outside the State. (iii) specified in the Schedule to the Madhya Pradesh Sthaniya Kshetron Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (No. 52 of 1976).

(2) Notwithstanding anything contained in Clause (f), if in the opinion of the State Government it is expedient to do so, it may delegate the power to the Council to declare the goods on which local body tax shall be levied and the rates thereof.

(3) The mode of assessment and collection of the local body tax shall be such as may be prescribed.

(4) The water tax under Clause (b) of Sub-section (1) shall be charged,--

(a) on buildings and lands which are exempted from property tax, at a rate as shall be determined by the Council subject to a minimum rate as may be prescribed by the State Government.

(b) on buildings and lands which are not exempted from property tax, at a minimum rate as determined in Clause (a) plus such percentage of the property tax, as shall be determined by the Council.

(5) The taxes under Clauses (c), (d) and (e) of Sub- section (1) shall be levied at a consolidated rate as under :--

(a) on buildings and lands which are exempted from property tax at a rate as determined by the Council subject to a minimum and maximum rate as may be prescribed by the State Government;

(b) on buildings and lands which are not exempted from property tax at a minimum rate prescribed under Clause (a) plus such percentage of the property tax as may be determined by the Council.

(6) In addition to the taxes specified in Sub-section (1), the Council may, for the purpose of this Act, subject to any general or special order which the State Government may make in this behalf, impose any of the following taxes, namely :--

(a) a latrine or conservancy tax payable by the occupier or owner upon private latrines, privies or cesspools or open premises or compounds cleansed by Council agency;

(b) a drainage tax, where a system of drainage has been introduced;

(c) a tax on persons exercising any profession or art or carrying on any trade or calling within the city;

(d) a tax payable by the owners on all or any vehicles or animals used for riding, driving draught or burden or on dogs, where such vehicles, animals or dogs are used within the city, whether they are actually kept within the city or not;

(e) a toll on vehicles and animals used as aforesaid entering the city but not liable to taxation under Clause (d);

(f) fees on the registration of cattle sold within the city;

(g) market dues on persons exposing goods for sale in any market or in any place belonging to or under the control of the Government or of the Council;

(h) a betterment tax on properties whose value may have improved as a result of town planning scheme undertaken by the Council;

- (i) a tax on pilgrims resorting periodically to a shrine within the limits of the Council;
- (j) a tax on persons occupying houses, buildings or lands within the limits of the Council according to their circumstances and property;
- (k) a toll on new bridge constructed by the Council;
- (l) a tax on advertisements other than advertisements published in newspapers;
- (m) a tax on theatres, theatrical performances and other shows for public amusement;
- (n) a terminal tax on goods or animals exported from the limits of the council; and
- (o) any other tax which the State Government has power to impose under the Constitution of India, with the prior approval of the State Government.

(7) Subject to the provisions of Article 277 of the Constitution of India, any tax which immediately before the commencement Of this Act was being lawfully levied by the Council, may, notwithstanding that such tax is not specified in Sub-section (1) or (6), continue to be levied by the Council.

(8) The imposition of any tax under this Section shall be subject to the provisions of this Act and of any other enactment for the time being in force.

(9) The State Government may, by notification, in the Official Gazette, prescribe the maximum and minimum rate of any tax specified in this Section, subject to which the Council shall determine the rate of such tax.

(10) Notwithstanding anything contained in this Chapter, the Council may impose upon properties specified in Clause (a) of Section 136, all or any of the taxes specified in Clauses (b), (c) and (d) of Sub-section (1) and Clause (b) of Sub-section (6) at a rate, in excess of the rate at which such tax is imposed, on other properties under the respective Clauses, as the State Government may, by notification, specify.

Section 129 provides for imposition of taxes and fees. It is, therefore, clear that the Municipalities have been statutorily transferred the powers of imposition of taxes and fees which essentially is the function of the State.

At this stage we also consider it appropriate to examine certain other provisions contained in the Municipalities Act. Section 100 of the Act provides for vesting of the property in the Council under which all public town-walls, gates, markets, slaughter-houses, manure and night-soil depots and public buildings, all public streams, tanks reservoirs etc., all public sewers and drains, tunnels, culverts etc., all dust, dirt, dung, ashes, refuse, animal matter etc., all public lamps, lamp posts and apparatus, all public streets and the pavement as also all lands and/or other property transferred to the Council by the State Government vests in the Council. Municipality also is in management of the Nazul lands transferred to the

Council by the State Government. All moneys received or recovered by the Municipalities are required to be credited to the Municipal Fund which is held by the Council in trust for the purpose of the Act. Section 105 of the Act providing for credit of moneys to Municipal Fund, reads as under :

"105. Credit of moneys to Municipal Fund.-- (1) There shall be credited to the Municipal Fund--

- (a) all moneys received by or on behalf of the Council under the provisions of this Act or of any other law for the time being in force or under any contract;
- (b) the balance, if any, standing at the commencement of this Act at the credit of the Municipal Fund;
- (c) all proceeds of the disposal of property by, or on behalf of, the Council;
- (d) all rents accruing from any property of the Council;
- (e) all moneys raised by the tax levied for the purpose of this Act;
- (f) all fees payable and levied under this Act;
- (g) all moneys received by way of compensation or for compounding offences under the provisions of this Act;
- (h) all moneys received by, or on behalf of, the Council from the State Government or private individuals by way of grant or gift or deposits; and
- (i) all interest and profits arising from any investment of, or from any transaction in connection with, any money belonging to the Council.

(2) Nothing in this section or in this Act shall affect any obligation of a Council arising from a trust legally imposed upon or accepted by the Council.

(3) A Council may, for the purpose of efficient discharge of any of the duties imposed upon it under Clauses (d), (j) and (1) of Section 123, by a resolution passed in that behalf, earmark for each purpose a specified portion of its income every year for a specified number of years for being credited to a Fund called the Police Utility Schemes Fund. The amount so credited shall be expended for the purposes for which it has been earmarked."

The duties of the Council are enumerated in Section 123 and the Council also has the discretionary power as enumerated in Section 124 of the Act. Section 123 reads as follows :

"123. Duties of Council.-- (1) In addition to the duties imposed upon it by or under this Act or any other enactment for the time being in force, it shall be the duty of a Council to undertake and make reasonable and adequate provision for the following matters within the limits of the Municipality, namely :--

- (a) lighting public streets, places and buildings;

- (b) cleaning public streets, places and sewers, and all places, not being private property, which are open to the enjoyment of the public whether such places are vested in the Council or not; removing noxious vegetation, and abating all public nuisances;
- (c) disposing of night-soil and rubbish and preparation of compost manure from night-soil and rubbish;
- (d) extinguishing fire and protecting life and property when fire occurs;
- (e) regulating or abating offensive or dangerous trades or practices;
- (f) removing obstructions and projections in public streets or places and in spaces not being private property, which are open to the enjoyment of public, whether such spaces are vested in the Council or in the State Government;
- (g) acquiring, maintaining, changing and regulating places for the disposal of the dead;
- (h) taking special measure as may be required by the prescribed authority or any other authority empowered to issue a direction in this behalf under any law for the time being in force for disposal of dead bodies during epidemics and other unforeseen emergencies;
- (i) securing or removing dangerous building or places, and reclaiming unhealthy localities;
- (j) constructing, altering and maintaining public streets, culverts, Municipal boundary marks, markets, hats, slaughter-houses, latrines, privies, urinals, drains, sewers, drainage works, sewerage works, baths, washing places, drinking fountains, tanks, wells, dams and the like;
- (k) establishing and managing cattle pounds, including where the Cattle Trespass Act, 1871 (1 of 1871), is in operation, all the function of the State Government and the Magistrate of the district under Sections 4, 5, 6, 7, 12, 14, 17 and 19 of that Act;
- (l) obtaining a supply or an additional supply of water, proper and sufficient, for preventing danger to the health of the inhabitants and domestic cattle on account of insufficiency or unwholesomeness of the current supply when such supply or additional supply can be obtained at a reasonable cost and having such water analysed periodically;
- (m) naming streets and parks and numbering houses;
- (n) registering births, marriages and deaths;
- (o) public vaccination;
- (p) providing suitable accommodation for any calves, cows or buffaloes required within the Municipal limits for the supply of animal lymph;

- (q) registration of cattle and carrying out the census of agricultural cattle at such intervals as may be prescribed;
- (r) taking such measures as may be required to prevent the outbreak or spread or recurrence of infectious disease;
- (s) preparing such annual reports on the Municipal Administration as the State Government may by general or special orders, require the Council to submit;
- (t) erecting substantial boundary marks of such position as shall be approved by the Collector defining the limits or any alteration in the limits of the Municipality;
- (u) constructing and maintaining residential quarters for the conservancy staff of the Council;
- (v) establishing and maintaining primary schools :

Provided that the State Government may, by notification and subject to such conditions as it may like to impose, exempt any of the provisions of this Section.

(2) In addition to the duties imposed under Sub-section (1) a council shall, in times of distress such as outbreak of an epidemic or famine or other natural calamity, render such assistance and co-operation as the State Government may require for the following matters, namely:--

- (a) providing special medical aid and accommodation for the sick;
- (b) giving relief to and establishing and maintaining relief works for, destitute persons within the limits of Municipality.

(3) No suit for damage or for specific performance shall be maintainable against any Council or any Officer or Councillor thereof, on the ground that any of the duties specified in this Section has not been performed."

Not only that the Council has income from the taxes that are imposed in accordance with Section 127 of the Act, the Council is also entitled to duties imposed by the Indian Stamp Act, 1899 on instruments of sale, gift, usufructory mortgage of immovable property situate within the limits of the Municipality at the rate specified in Section 161 of the Act. The State Government is also empowered u/s 162 to direct the Council to impose any tax which it is empowered to impose u/s 127 or to enhance any existing tax in such manner or to such extent as the State Government considers fit and the Council in such a case is obliged to impose or enhance, as the case may be, the tax in accordance with the requisition. The power of the Council of imposition and recovery of taxes and fee in the nature of tax is essentially a function of the State. The Municipal Fund includes all the money raised by the taxes levied by the Municipality under the provisions of the Act as also all fees payable and levied under the Act. The income from the property which vests in the Council which is otherwise the property of the State, is also credited to this fund. The Municipalities, therefore, function as a subsidiary Government, similar to Gujarat Panchayats before the

Supreme Court in Ramanlal Keshavlal (supra) and the Panchayats constituted under the Karnataka Village Local Boards Act in R.N.A. Britto (supra). The functions of the Municipalities, the power to levy taxes and collection thereof, the power to charge fees in the nature of taxes, the essential duties performed, all in the nature of the essential functions of the State, thus answer the first text in the affirmative.

This takes us to the second question as to whether the post of C.M.O. can be said to be a Civil post under the Government on the basis of the indicia laid down by the Supreme Court in Kanak Chandra 's case (supra) and followed in Ramanlal Keshavlal and R.N.A. Britto (supra). We have, therefore, to examine the provisions of the Act and the M.P. State Municipal Service (Executive) Rules, 1973 (in short the "Rules") made u/s 86 (1) of the Act. Section 86 of the Act provides for Constitution of State Municipal Service for the purpose of providing officers to the Council u/s 87 or 88. Sub-section (2) of Section 86 empowers the State Government to make rules in respect of recruitment, qualification, appointment, promotion, leave, scale of pay, all allowances by whatever name called, loans, pension, gratuity, annuity, compassionate fund, provident fund, dismissal, removal, conduct, departmental punishment, appeals and other service conditions of the members of the State Municipal Service. Section 87 provides that there shall be a Chief Municipal Officer to every Council who shall be the principal executive officer to the Council and all other officers and servants of the Council shall be subordinate to him and the Chief Municipal Officer shall be a member of the State Municipal Service (Executive) and shall be appointed by the State Government. Section 89 provides for appointment to State Municipal Service pending constitution thereof. Sub-section (1-A) of Section 89 empowers the State Government to transfer even a person appointed u/s 89 (1) from one Council to another. Only the State Government is empowered to grant leave of absence to the Chief Municipal Officer and during his absence, to appoint a person to act as the Chief Municipal Officer. As distinguished from the provisions contained in Sections 86, 87, 89 and 90, Section 94 provides for appointment of staff in a Municipal Council and such appointments are to be made by the Council and in the case of Revenue Officer, Accounts Officer, Sanitary Inspector, Revenue Inspector and Accountant, only conformation by the State Government is required. Such Officers and servants of the Municipality appointed u/s 94 of the Act are governed by rules called M.P. Municipal Employees (Recruitment and Conditions of Service) Rules, 1968. Rule 2 (e) specifically excludes the members of the State Municipal Service (Executive) from the definition of Municipal Employee to whom the rules apply. It is, therefore, clear that the service conditions of the Chief Municipal Officer are regulated and governed by the specific provisions of the Act referred to above and the rules framed u/s 86 thereof and the provisions applicable in the case of other employees of the Municipalities do not apply to the members of the State Municipal Service.

Under Rule 2 (b) of the M.P. State Municipal Service (Executive) Rules, 1973, the

Appointing Authority is the State Government in relation to the member of the State Municipal Service (Executive). The method of recruitment as prescribed by Rule 5 is by direct recruitment and by promotion. Chapter IV of the Rules lays down qualification for appointment with reference to age, academic qualification and eligibility for the appointment. Rule 11 speaks of initial constitution of service and includes Municipal Officers working as Chief Municipal Officers at the time of the commencement of the rules in service. The direct recruitment is to be made by selection by the State Public Service Commission through competitive examination and for the purpose of promotion, the selection is required to be made on the basis of the recommendation of a Committee comprising Chairman, State Public Service Commission or his nominee as Chairman, Secretary to Government, Local Government Department, as a member and Director of the Directorate of Urban Administration as its Member Secretary. In both cases, the appointing authority is the State Government only.

Not only that the appointments of the members of the State Municipal Service are to be made by State Government, Rule 22 provides for maintenance of seniority of such members of the service at the State level. The determination of initial pay is required to be made in accordance with Fundamental Rules 22-A and 22-B applicable to the servants of the State Government. Chapter-VIII deals with termination, superannuation and retirement of the employees governed by the said Rules. While the temporary appointment of persons under Sub-section (1) of Section 89 pending constitution of the service is terminable at any time by a month's notice, in other cases a notice of three months is essential. The age of superannuation is 58 years as per Rule 29 but the proviso empowers the State Government to allow a member of the service to continue till he attains the age of 60 years. Rule 30 empowers the State Government to suo motu retire a member of the service at any time or after completion of 25 years of service by such member even if he has not attained the age of superannuation.

Chapter IX deals with discipline and appeals. Rule 31 enumerates the penalties that can be imposed on a member of the service. As per Rule 32, a penalty of reduction in rank, removal from service and dismissal from service can be imposed only by the appointing authority in consultation with the Public Service Commission while the penalties such as censure and withholding of increment or promotion can be imposed by the Director who is again a Government Servant. A member of the service can be placed under suspension only by the appointing authority. Rule 46 requires that confidential reports in case of such a member shall be initiated by the President of the Council and it shall be scrutinised by the Collector of the concerned district through the Dy. Director, Local Institutions and then Director, Local Institution who shall after writing his opinion send his report to the State Government and that it shall be kept in the custody of the State Government. As per Rule 48, personal files of the members of the service are required to be maintained in the State Government Secretariat and the copies thereof in the Council concerned. Rule 49 makes the provisions of the Fundamental Rules applicable in respect of regulation of pay, joining time, leave,

provident fund, loan, seniority and travelling allowance.

From the rules referred to above, it is clear that the right to select for appointment, the right to appoint, the right to terminate the employment and the right to take other disciplinary action coupled with the right to prescribe conditions of service in case of Chief Municipal Officer entirely vest in the State Government. While it is true that u/s 86 (3) of the Act the salary, allowances, gratuity, annuity, pension and other payments required to be made to the members of the State Municipal Service in accordance with the conditions of their service are a charge on the Municipal Fund, but as observed by us above, the Municipal Fund itself in substantial part contains income derived from taxes and fees. The charge continues in a particular Municipal Council only till such a member is posted in the Municipal Council and in the event of his transfer from one Council to another the Councils concerned are liable to contribute towards these payments in such proportion as prescribed by the State Government by Rules. As observed by the Supreme Court in *Ramanlal Keshavlal* (supra), it is not necessary that all the factors should be present to infer the relationship of master and servant and the presence of some of the factors such as the right to select for appointment, the right to appoint, the right to terminate the employment are some of the factors which can be determinative of the existence of relationship of master and servant. The relationship of master and servant in the case of the members of service is in no way adversely affected merely on account of the fact that the salary and allowances of such members are a charge on Municipal Fund as the Municipal Fund is itself constituted of moneys received from taxes and fees in the nature of the taxes which would have gone to the State Coffer had the right been not transferred by statute. We may reiterate that insofar as the decision of the Division Bench in *Jagmohanlal* (supra) is concerned, there was no occasion for the Division Bench to consider the existence of relationship in the light of the 1973 Rules as the matter related to the period prior thereto and that too in respect of a person who had been appointed under the provisions of Section 89 of the Act pending constitution of the State Municipal Service (Executive). Rule 11 of the Rules brought into force subsequently obviates any doubt that may have been harboured with regard to the status of the Chief Municipal Officer at the time of the commencement of the said Rule as the said Rule by a deeming provision includes them as members of the service. In this view of the matter, we find that the view expressed by the learned Single Judge in *Alok Awasthy*'s case and followed subsequently by the Division Bench in *C.P. Kulshrestha* (supra) and *Omprakash* (supra) is correct exposition of law on the subject and we, therefore, have no difficulty in holding that the Chief Municipal Officer is "servant" of the State Government and answer the reference accordingly.

Let the above cases be now placed before the appropriate Bench for disposal in accordance with law.