(2004) 04 BOM CK 0114

Bombay High Court

Case No: Public Interest Litigation No''s. 49 and 55 of 2004

Baba Singh		APPELLANT
	Vs	
The Chief Minister, Maharashtra State, Mantralaya and Others		RESPONDENT

Date of Decision: April 8, 2004

Acts Referred:

- All India Services Act, 1951 - Section 3
- Constitution of India, 1950 - Article 14, 16, 19, 311, 32

Citation: (2004) 4 ALLMR 506 : (2004) 106 BOMLR 439

Hon'ble Judges: C.K. Thakker, C.J; S.A. Bobde, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

C.K. Thakker, C.J.

Both these petitions have been filed as public interest litigation challenging the action of the State authorities in appointing Mr, Johnny Joseph, respondent No. 3 herein, as Municipal Commissioner, Brihan Mumbai Municipal Corporation. A writ of certiorari is sought calling for the records and proceedings and after examining legality and propriety to quash an order dated 23rd February, 2004 appointing respondent No. 3 as the Municipal Commissioner. A prayer is made to issue a writ of mandamus restraining respondent No. 3 from discharging duties and responsibilities as Municipal Commissioner. A writ of quo warranto is also prayed for quashing appointment of respondent No. 3 as he could not have been appointed as Municipal Commissioner as neither he is holding office of Chief Secretary/Additional Chief Secretary nor having requisite experience necessary for the said post.

2. The petitioner of PIL No. 49 of 2004 was born and brought up in Mumbai. He had been a Corporator of the Brihan Mumbai Municipal Corporation ("B.M.C." for short) during the period 1992-1997. He has been associated with various public activities.

Presently he is the Chairman of Jogeshwari Welfare Trust which helps poor children in their education and distributes books to the children coming from poor and down-trodden strata of the society.

3. The petitioner of PIL No. 55 of 2004 was a Civil Servant and finally retired as the Municipal Commissioner of the B.M.C. in 1990. When he was appointed as the Commissioner, he was in the rank of Additional Chief Secretary of the State Government. The petitioner has asserted that during the course of his service with the Government, he held various posts and had intimate knowledge about civic issues and problems faced by various sections of people of Maharashtra in general and Mumbai in particular. In 2001. he was appointed by the State Government to enquire into various allegations of financial irregularities and corruption in B.M.C. The report of the petitioner with action taken by the Government was tabled on the floor of Legislature.

4. Both the petitioners thus claim to be in public life and interested in proper administration and management of the B.M.C. Both of them have stated that they had approached this Court for implementation of legal provisions and as the action had been taken by the respondent authorities which is contrary to law, they were constrained to approach this Court by filing the petitions.

5. It is averred in PIL No. 49 of 2004 that a news item was published in The Times of India (Mumbai Edition) on 15th January. 2004 alleging therein that a lobby of powerful builders has been rooting for a candidate for the post of Municipal Commissioner, B.M.C., who could be amenable to their demands. Since the Municipal Commissioner wields tremendous power in sanctioning building plans and condoning stringent regulations by relaxing/waiving/modifying conditions as to compulsory open space, it would be helpful to such lobby if the Municipal Commissioner is pliable and their ''yes-man''. It may help them in getting building plans sanctioned and stringent regulations relaxed/waived/condoned by favouring builders lobby. The report also stated that some controversial decisions were taken in past including a decision to regularise more than 150 unauthorised buildings in suburbs under the pressure of builders and developers by the then Municipal Commissioner and referred to pendency of public interest litigation in this Court directing B.M.C. not to take final decision of regularising unauthorised construction of buildings. The petitioner has stated that he was shocked by the report that there were indications that respondent No. 3 might eventually be appointed as Municipal Commissioner as he had "well-wishers at 10 Janpath" tilting the balance in his favour. Respondent No. 3 belongs to 1972 batch of IAS and had an added qualification of having worked with three Chief Ministers. According to the report, certain posts had become "political" posts such as Police Commissioner, Mumbai, Municipal Commissioner, B.M.C., etc. Several illegalities and irregularities had been committed by a number of employees of B.M.C. and a Committee headed by Mr. S.S. Tinaikar (former Commissioner, B.M.C.) was appointed (Petitioner of PIL No. 55 of

2004).

6. The petitioner also stated that he had read another news report, in The Free Press Journal dated 25t.h February, 2004 in which a reference was made to a letter written by Mr. Nandlal, Additional Chief Secretary to Chief Secretary of the State, respondent No, 2 herein, registering his protest against discriminatory treatment meted out to him for appointing respondent No. 3 as the Municipal Commissioner, when the post was equivalent to the rank of Additional Chief Secretary. It was, therefore, submitted that an action taken by the State authorities was illegal, contrary to law and had been taken with a view to extend benefits in favour of respondent No. 3.

7. Both the petitioners have also contended that the action is not in consonance with the provisions of the All India Services Act, 1951; the Indian Administrative Service (Cadre) Rules, 1954 (hereinafter referred to as "Cadre Rules"), the Indian Administrative Service (Pay) Rules, 1954 (hereinafter referred to as "Pay Rules") and inconsistent with the decision of the Supreme Court in E.P. Royappa Vs. State of Tamil Nadu and Another, . The action has been taken to grant undue and undeserving benefit to respondent No. 3 depriving eligible and qualified candidates though available. The order is passed on February 23, 2004 with mala fide intention and oblique motive to extend a "helping hand" to builders and developers. The action, therefore, is illegal, arbitrary and unreasonable and deserves to be interfered with by this Court.

8. Both the petitions were filed on 1st March, 2004 and were placed for admission hearing on 17th March, 2004. The learned Counsel for the parties were heard and an affidavit filed on behalf of respondent Nos. 1 and 2 in PIL No. 49 of 2004 was taken on record. Since the petitioner of PIL No. 55 of 2004 prayed for amendment of the petition and was to file civil application, time was granted. It was observed that if the petitioner wanted to file rejoinder, he could do so within a period of two weeks. Civil applications was filed which we had granted. Affidavit in rejoinder has also been taken on record.

9. We have heard the learned Counsel for the parties.

10. Dr. Barthakur, learned Advocate for the petitioners, contended that the impugned action taken by respondent Nos. 1 and 2 is illegal, unlawful and without authority of law. He contended that respondent. No. 3 cannot be said to be "eligible" for appointment as Municipal Commissioner, B.M.C. According to him, to be appointed as Municipal Commissioner, B.M.C., a person must he holding a post of Chief Secretary/Additional Chief Secretary and not below the said rank. The Counsel also submitted that the appointment of respondent No. 3 is not in consonance with Rule 9 of the Pay Rules. It was urged that in accordance with the said rule, there must be a declaration by the Government as to equivalence of post in status and responsibility and unless the said declaration has been made, no action can be

taken by appointing an Officer holding a cadre post to an ex-cadre post. It was also submitted that the point is no longer res Integra and is directly covered by E.P. Royappa. It was further urged that the action has been taken in colourable exercise of power and is politically motivated as two considerations weighed with the authorities. Firstly, the party in power wanted to grant benefit to respondent No. 3, an ineligible Officer, ignoring claim of eligible, qualified and competent officers working with the Government. Secondly, the appointment has been made under the pressure/ influence/wishes of builders lobby, an extraneous element which could not have been taken into account. Moreover, the post of Municipal Commissioner. B.M.C. has been down-graded by the impugned order only with a view to accommodate respondent No. 3 and that action is illegal and is liable to be set aside on that additional ground as well.

11. Mr. Vahanvati. learned Advocate General, on the other hand, supported the decision of the Government submitting that it is legal, valid and in accordance with law. According to him, there is no illegality in the decision. It was the consistent practice of the State Government prior to independence in 1947 that all Municipal Commissioners were appointed from Civil Service of the State. It is quite possible that an incumbent holding the post of Chief Secretary or Additional Chief Secretary might have been appointed as Municipal Commissioner, B.M.C., but It is neither the requirement of law nor a policy decision that only an Officer of that rank was eligible and could be appointed as Municipal Commissioner, B.M.C. Section 54 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as "the Act of 1888") does not require it nor the Pay Rules make such provision. That is also not the ratio in E.P. Royappa.

12. Except general and vague allegations of political influence and/or mala fide exercise of power, no material whatsoever has been placed by the petitioners as to on what basis the action can be described mala fide. So far as petitioner of PIL No. 55 of 2004 is concerned, the learned Advocate General stated that when the petitioner himself was holding the post of Municipal Commissioner, he was aware of the requisite qualifications and requirement of law. He had not placed all the facts before the Court. In his case also, there was "up gradation" of post which was done only for the purpose of giving pay protection. The learned Advocate General, therefore, submitted that both the petitions deserve to be dismissed.

13. Mr. Iqbal Chagla, learned Senior Advocate, instructed by M/s. Federal & Rashmikant, supported the stand taken by the State authorities and adopted the arguments advanced by the learned Advocate General. In addition, he submitted that in any case, no grievance can be made by the petitioners in PIL against the appointment of respondent No. 3. If respondent No. 3 is aggrieved by any action of State Government, it is only the third respondent who can raise such objection and may take appropriate proceedings in accordance with law. Mr. Chagla also, therefore, prayed for dismissal of both the petitions.

14. Having considered that rival contentions of the parties, in the light of statutory provisions as also the law declared by the Supreme Court in E.P. Royappa, in our opinion, it cannot be said that the action of the State authorities in appointing respondent No. 3 as Municipal Commissioner, B.M.C. can be said to be illegal, unlawful or otherwise improper.

15. So far as the provisions of the Act of 1888 are concerned, nothing has been stated in Section 54 regarding eligibility, qualification, etc. of Municipal Commissioner. Sub-section (1) of Section 54 relating to appointment of Municipal Commissioner for Brihan Mumbai reads as under :

The Municipal Commissioner for Brihan Mumbai shall be from time to time appointed by the State Government. He may hold office for such period not exceeding three years as the State Government may fix and his appointment may be renewed by the State Government for a further period not exceeding three years :

Provided that, when the Commissioner holds a lien on the service of the State Government, he may be recalled to such service at any time by the State Government.

It is thus, clear that the appointment of Municipal Commissioner, B.M.C. has to be made by the State Government under Sub-section (1) of Section 54. The proviso to the said sub-section expressly states that if the Commissioner is in service of the State Government, he will hold a lien on the service of the State Government and he may be recalled to such service at any time by the State Government.

16. It is thus clear that a person who is in service of the State Government may be appointed as Municipal Commissioner. Sub-section (1) of Section 54 read with proviso, in our opinion, leaves no room for doubt that a person in State service may be appointed as Municipal Commissioner by the State Government. In that case, such Officer will hold the office as Municipal Commissioner for such period not exceeding three years as the State Government may fix. His appointment may be renewed by the State Government for a further period of not exceeding three years. The proviso to Sub-section (1) of Section 54 makes it abundantly clear that when the Municipal Commissioner is in the State service, he will hold lien in the service of the State Government and may be recalled to such service at any time by the State Government. It is, therefore, in our considered opinion, not that a person in State service cannot be appointed as Municipal Commissioner.

17. In an affidavit filed by the Principal Secretary of the General Administration Department (G.A.D.) of the Government of Maharashtra, it was specifically stated that "at all material times the State Government had taken and implemented a conscious decision to appoint civil servants as Municipal Commissioners for the City of Mumbai". The deponent further stated that the original decision to that effect was "very ancient" and he was unable to locate it. But even prior to independence, members of civil services were appointed as Municipal Commissioner. Earlier, they

were ICS Officers upto 1962 and after 1962 there had been successive IAS Officers who held the office of Municipal Commissioner.

18. From the details furnished in the affidavit in reply, the following situation has emerged;

Sr. No.	Name	Tenure
1.	Shri B.K. Patel	21/2/1946 to 20/9/1952
2.	Shri P.R. Nayak	3/9/1952 to 14/1/1957
3.	Shri V.L. Gidwani	1/7/1954 to 15/8/1954
		15/7/1957 to 29/4/1960
4.	Shri M.G. Pimputkar	30/4/1960 to 27/2/1962
5.	Dr. A.U. Sheikh	28/2/1962 to 15/4/1963
6.	Shri S. A, Sukhtankar	16/4/1963 to 15/4/1966
7.	Shri J.H. Patwardhan	16/4/1963 to 15/4/1969
8.	Shri J.B. D''Souza	7/5/1969 to 24/3/1970
9.	Dr. M.N. Desai	23/5/1970 to 18/4/1972
10.	Shri M.V. Desai	19/4/1972 to 9/8/1975
11.	Shri B.G. Deshmukh	10/8/1975 to 8/5/1978
12.	Shri B.K. Chaugule	8/5/1978 to 8/5/1981
13.	Shri D.M. Sukhtankar	9/5/1981 to 12/11/1984
14.	Shri J.G. Kanga	12/11/1984 to 24/7/1986
15.	Shri S.S. Tinaikar	24/7/1986 to 30/4/1990
16.	Shri P. Padmanabhaiyya	1/5/1990 to 16/11/1991
17.	Shri S.G. Kale	16/11/1991 to 17/5/1995
18.	Shri J.D. Jadhav-PS	17/5/1995 to 10/6/1996
19.	Shri G.V. Gokhale-PS	1/6/1996 to 18/5/2000
20.	Shri K. Nalinakshan	1/6/1999 to 18/5/2000
21.	Shri Ramanand Tiwari (Interim)	24/1/2001 to 12/2/2001

It is thus clear that the provisions of Act of 1888 have not been violated. On the contrary, the phraseology used in Sub-section (1) of Section 54 read with proviso makes it clear that such an appointment is permissible. Further, the State Government had appointed civil servants of the State as Municipal Commissioners of B.M.C. Such action, therefore, cannot be held illegal, unlawful or contrary to law.

19. We are also not impressed by the argument of the learned Counsel for the petitioner that the Government was bound and obliged to appoint an Officer holding the post of Chief Secretary or Additional Chief Secretary, as contended. In the counter, it was stated by the deponent that the decision of the Government was to appoint members of civil service and "there has never been any decision that only

those who were in the rank of Additional Chief Secretary should be appointed as Municipal Commissioner."

20. It was stated that when Mr. A.L. Bongirwar was appointed as the Chief Secretary, Mr. Rule Ranganathan and Mr. K.C. Srivastava were senior to him. Mr. V. Ranganathan was appointed as Municipal Commissioner but his appointment was not made on the basis or because of the fact that he was Additional Chief Secretary but it was in conformity with the decision of the State Government to appoint member of civil service as Municipal Commissioner. Similar was the ease of Mr. K.C. Srivastava who succeeded Mr. V. Ranganathan.

21. The dependent further stated :

I say that it has never been the decision or policy of the State Government to appoint only a person who held the post of Additional Chief Secretary as Municipal Commissioner.

22. It was also submitted on behalf of the State authorities that reliance placed on a letter dated 21st February, 2004 (Exh. D in P1L 49 of 2004) is not well founded. What was stated in paragraph 2 of the said letter was only "a statement of fact" that at the time when the letter was written, the person holding the post of Municipal Commissioner was of the rank of Additional Chief Secretary. It is, therefore, not correct to contend that there was a policy decision by the State Government that only an Additional Chief Secretary could be appointed to the post of Municipal Commissioner and the said policy decision had been reflected in the letter, Exh. D. Our attention has not been invited by the learned Counsel for the petitioners to so-called "policy decision" or any other decision that the post of Additional Chief Secretary is equivalent to the post of Municipal Commissioner, B.M.C. and a person holding the post of Chief Secretary/Additional Chief Secretary in State service alone can be appointed as Municipal Commissioner, B.M.C. That argument, therefore, does not detain us and must be negatived.

23. The contention that there is a "grade" of Municipal Commissioner in B.M.C. also has no force. There is no such grade. Section 54 of the Act of 1888 enables the State Government to appoint an Officer in State service as Municipal Commissioner, B.M.C, who will hold lien in State service and who may be recalled by the State Government at any time. The section also does not lay down any eligibility. It is, therefore, clear that if a Secretary, Principal Secretary, Additional Chief Secretary or Chief Secretary is appointed as Municipal Commissioner, he continues to draw the respective pay scales to which he is otherwise entitled. Whenever an action is taken of "upgrading" or "down-grading" the post, it is only with a view to protect "pay" drawn by the incumbent and has nothing to do with his eligibility or qualification. It also does not affect his powers, duties or responsibilities.

24. In Civil Application No. 686 of 2004 in PIL 55 of 2004, the petitioner specifically contended that the post of Municipal Commissioner, B.M.C. was downgraded. In our

opinion, in the affidavit in reply to the civil application, the State has rightly submitted that the post was not downgraded in terms of duties and responsibilities. It is unfortunate that the petitioner had made such an allegation when he himself ought to be aware of correct facts and had held that post of Municipal Commissioner, B.M.C. for about five years. The petitioner (PIL 55 of 2004) was working as Secretary (Special Grade). On 27th May, 1988, a resolution was passed by the State Government (Exh. D) to the affidavit in C.A. No. 686 of 2004) stating therein that the Government was pleased to "upgrade" temporarily the post of Municipal Commissioner, B.M.C., held by Mr. S.S. Tinaikar from the scale of Rs. 7300-100-7600 to Rs. 8000/- (fixed) with effect from 1st June, 1988. It was also stated : "This up gradation will be limited to the period Shri Tinaikar holds that post." The deponent, therefore, rightly stated that the petitioner was fully aware that the action was taken solely with a view to enable the incumbent to draw a higher pay which he was entitled to and there was no change in the status or responsibilities attached to the post. The expression "upgrading" was used only in the limited sense. It had nothing to do with powers to be exercised, functions to be performed, duties to be discharged or responsibilities to be undertaken by the incumbent as Municipal Commissioner. We are, therefore, of the view that the expression "upgrading" or "down-grading" is used to ensure that the incumbent who is appointed to the post of Municipal Commissioner, B.M.C. continues to draw such pay scale to which he is otherwise entitled to and would have drawn by him had he continued on the original post.

25. In view of the legal position as well as affidavit in reply and the explanation furnished by the respondent-State, it cannot be said that there Is "up gradation" or "down-gradation" of the post of Municipal Commissioner, B.M.C. Such actions were taken only for the purpose of pay protection of the incumbent keeping in view the post held by him in the State service when such officer was appointed as Municipal Commissioner, B.M.C.

26. The main contention of the petitioners is that there is violation and non-observance of Rule 9 of the Pay Rules. The Pay Rules were framed in exercise of the powers conferred by Sub-section (1) of Section 3 of All India Services Act, 1951. Rule 2(a) of the Pay Rules states that "Cadre" and "Cadre post" shall have the meanings respectively assigned to them in the Indian Administrative Service (Cadre) Rules, 1954". "Cadre Officer" is defined in Rule 2(a) of the Cadre Rules as "a member of the Indian Administrative Service". "Cadre post" means any of the post specified under Item 1 of each cadre in the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations. 1955 [Clause (b)]. Whereas Rules 3 and 4 provide for Constitution of Cadres and Strength of Cadres respectively, Rule 5 deals with Allocation of Members to Various Cadres. Rule 6 provides for Deputation of Cadre Officers. We will refer to that rule at an appropriate stage. Rule 9 relates to temporary appointment of non-cadre officers to cadre posts in certain cases.

27. Rule 9 of the Pay Rules on which strong reliance was placed by the petitioners reads thus;

9. Pay of members of the Service appointed to posts not included in Schedule III.- (1) No member of the service shall be appointed to a post other than a post specified in Schedule III. unless the State Government concerned in respect of posts under its control, or the Central Government In respect of posts under its control as the case may be, make a declaration that the said post is equivalent in status and responsibility to a post specified in the said Schedule.

(2) The pay of a member of the service on appointment to a post other than a post specified in Schedule III shall be the same as he would have been entitled to, had he been appointed in the post to which the said post is declared equivalent,

(3) For the purposes of this rule post other than a post specified in Schedule III includes a post under a body (incorporated or not which Is wholly or substantially owned or controlled by the Government).

(4) Notwithstanding anything contained in this rule, the State Government concerned in respect of any points under its control, may, for sufficient reasons to be recorded in writing, where equation is not possible, appoint any member of the service to any such post without making a declaration that the said post is equivalent in status and responsibility to a post specified in Schedule III.

(5) A member of the Service on appointment to a post referred to in Sub-rule (4), in respect of which to pay or scale has been prescribed, shall draw such rate of pay as the State Government, in consultation with the Central Government in the case of a post under the control of the State Government or as the Central Government in the case of a post under the control of the Central Government may, after making into account the nature of duties and responsibilities involved in the post, determine.

(6) A member of the service on appointment to a post referred to in Sub-rule (4), in respect of which any pay or scale of pay has been prescribed, shall draw where the pay has been prescribed, the prescribed pay and where scale of pay has been prescribed, such rate of pay not exceeding the maximum of the scale as may be fixed in this behalf by the State Government or as the case may be, by the Central Government :

Provided that the pay allowed to an officer under this sub-rule and Sub-rule (5) shall not at any time be less than what he would have drawn had he not been appointed to a post referred to in Sub-rule (4).

(7) At no time the number of members of the service appointed to hold posts, other than cadre posts referred to in Sub-rule (1) and Sub-rule (4), which carry pay of Rs. 8,000/- per mensem and which are reckoned against the State Deputation Reserve, shall except with the prior approval of the Central Government, exceed the number of cadre posts at that level of pay in a State Cadre or, as the case may be, in a joint

cadre.

28. Sub-rule (1) of Rule 9 of the Pay Rules enacts that no member of the Indian Administrative Service shall be appointed to a post other than a post specified in Schedule III. If the Government intends to take such action, the rule requires the Government to make declaration that such non-Cadre post is "equivalent in status and responsibility" to a post specified in the said Schedule, i.e., to a Cadre post. Sub-rule (2) protects pay of a member of civil service. Sub-rule (4) enables the State Government to appoint any Cadre Officer to a non-Cadre post without making declaration in certain circumstances.

29. The contention of the petitioners in both the petitions is that State Government is not competent to alter strength and composition of the cadre of IAS. The post of Municipal Commissioner, B.M.C., is not a post included in Schedule Ill to Rule 9 of the Pay Rules. It is thus an ex-cadre post created by the State Government. In compliance with the requirement of Rule 9(1), therefore, a declaration of equivalence by the State Government is a sine qua non. It was also stated that the post of Municipal Commissioner, B.M.C. is considered equivalent to the rank of Chief Secretary/Additional Chief Secretary. Since respondent No. 3 was only Principal Secretary and neither Chief Secretary nor Additional Chief Secretary, the post held by him cannot be said to be equivalent to the post of Municipal Commissioner, B.M.C. and he could not have been appointed to the said post. A leading decision of the Supreme Court on Rule 9 of the Pay Rules in E.P. Royappa referred to hereinabove. Both the sides in support of their submissions relied on the said decision.

30. In E.P. Royappa, the petitioner was a member of Indian Administrative Service. In November, 1969, he was holding the post of Chief Secretary. In 1971, he was appointed as Deputy Chairman of the State Planning Commission, though created temporarily for a period of one year in the grade of Chief Secretary to Government. The petitioner did not join duty and proceeded on leave. By another order dated June 27, 1972, the Government created another temporary post of Officer on Special Duty for one year in the grade of Chief Secretary to Government and the petitioner was transferred to the said post. The petitioner did not report for duty and filed a petition in the Supreme Court under Article 32 of the Constitution contending that the order was illegal and was liable to be quashed and set aside. The Constitution Bench of the Supreme Court dismissed the petition. In a concurring judgment, Bhagwati, J. (as His Lordship then was) speaking for himself, Y.V. Chandrachud, J. (as His Lordship then was) and Krishna Iyer, J. agreed with the final conclusion reached by Ray, C.J. and Palekar, J. The majority considered the provisions of Cadre Rules as well as Pay Rules and observed that the strength and composition of the cadre can be determined only by the Central Government. Central Government alone can review it. The State Government can neither add to the cadre a different category of posts than that already existing in the cadre nor can make permanent addition to

the number of posts to the particular category in the cadre. The State Government, no doubt, by virtue of relaxation granted, may make temporary addition to the cadre provided the post added carries dotes or responsibilities of a like nature to a cadre post.

31. It was also observed by the majority that no Cadre Officer can be appointed to a non-cadre post. The Court stated :

If the State Government wants to appoint a member of the Indian Administrative Service to a non-Cadre post created by it, it cannot do so unless it makes a declaration setting out which is the Cadre post to which such non-Cadre post is equivalent in status and responsibility. The making of such a declaration is a sine qua non of the exercise of power under Sub-rule (1).

(emphasis supplied)

32. The Court then proceeded to state :

It is not an idle formality which can be dispensed with at the sweet will of the Government. It has a purpose behind it and that is to ensure that a member of the Indian Administrative Service is not pushed off to a non-Cadre post which is inferior in status and responsibility to that occupied by him. So far as Cadre posts are concerned, their hierarchy would be known, but a non-Cadre post created by the Government would be stranger in the hierarchy, and that is why Sub-rule (1) requires that before appointing a member of the Indian Administrative Service to such non-Cadre post, the Government must declare which is the Cadre Post to which such non-Cadre post is equivalent in status and responsibility, so that the member of the Indian Administrative Service who is appointed to such non-Cadre post, would know what is the status and responsibility of his post in terms of Cadre posts and whether he is placed in a superior or equal post or he is brought down to an inferior post. If it is the latter, he would be entitled to protect his rights by pleading violation of Article 311 or Articles 14 and 16 of the Constitution, whichever may be applicable. That would provide him effective insulation against unjust or unequal or unlawful treatment at the hands of the Government. The object of this provision clearly is to ensure that the public services are, in the discharge of their duties, not exposed to the demoralising and depraving effects of personal or political nepotism or victimisation or the vagaries of the political machine. The determination of equivalence is, therefore, made a condition precedent before a member of the Indian Administrative Service can be appointed to a non-Cadre post under Sub-rule (1). It is a mandatory requirement which must be obeyed. The Government must apply its mind to the nature and responsibilities of the functions and duties attached to the non-Cadre post and determine the equivalence. There the pay attached to the non-Cadre post Is not material.

The Court also stated that it would be open to a member of the Indian Administrative Service to contend, notwithstanding the declaration of equivalence,

that the non-Cadre post to which he is appointed Is in truth and reality inferior in status and responsibility to that occupied by him and his appointment to such non-Cadre post is in violation of Article 311 or Articles 14 and 16. Similarly, if the Court is satisfied that the declaration of equivalence is made without application of mind to the nature and responsibilities and duties attached to the non-Cadre post or extraneous or irrelevant factors were taken into account in determining the equivalence or the nature and responsibilities of the functions and duties of the two posts are so dissimilar that no reasonable man can possibly say that they are equivalent in status and responsibility or the declaration of equivalence is mala fide or in colourable exercise of power or is a cloak for displacing a member of the Indian Administrative Service from a Cadre post which he is occupying to a non-Cadre post, the Court can and certainly would set at naught the declaration of equivalence and afford protection to the civil servant.

33. On the basis of observations In E.P. Royappa, it was contended that there must be a declaration of "equivalence" by the State Government which is a sine qua non or a condition precedent and that such declaration of "equivalence" must be made after keeping in mind duties and responsibilities of an Officer holding cadre post and corresponding duties and responsibilities to be performed by him on a non-Cadre post. There should neither be extraneous or irrelevant consideration on the part of the State Government nor by this process the State may get relieved of an unwanted Officer by transferring, deputing or displacing him. Such an action would be arbitrary, irrational, unreasonable and violative of Articles 14, 19 and 311 of the Constitution.

34. In our opinion, however, the ratio by the majority in E.P. Royappa would not apply to the facts of the case and cannot be pressed in service by the petitioners. As already observed hereinabove, there is no provision In the parent Act i.e. Act of 1888 regarding qualification or eligibility for the post of Municipal Commissioner. Section 54 of the Act of 1888 enables the Government, to appoint Municipal Commissioner who will hold the office for a period of three years which may be renewed not exceeding further three years. It also expressly provides for a situation where such Commissioner may be appointed from State service. In such situation, the proviso to Sub-section (1) of Section 54 will get attracted and the Civil Servant would hold lien in State service and may be recalled to State service at any time by the State Government.

35. From the affidavit in reply of the State Government, it is clear that since more than half a century, it is the consistent practice of the State Government to appoint Civil Servant as Municipal Commissioner, B.M.C. Upto 1962, those Officers were ICS Officers. After 1962, there had been successive IAS Officers who held the office of Municipal Commissioner, B.M.C. We have already observed that at no point of time a decision was taken by the respondent-State to appoint Chief Secretary/Additional Chief Secretary to the post of Municipal Commissioner, B.M.C. The practice of the

State Government was to appoint an Officer in State Service as Municipal Commissioner, B.M.C. and considering his pay scales at the relevant time on the basis of the post held by him, to protect his pay either by "downgrading" or by "upgrading" the post. In case of petitioner of PIL No. 55 of 2004, it was upgraded. Since respondent No. 3 was holding the post of Principal Secretary and not Chief Secretary/Additional Chief Secretary, by the impugned order dated February, 23, 2004, the post was downgraded. There was, however, no change in status, duties or responsibilities of the Municipal Commissioner, B.M.C. to be undertaken by respondent No. 3. Such action is in consonance with Rule 9(2) of the Pay Rules. The observations in E.P. Royappa, in our considered opinion, therefore, do not apply to the facts of the case on hand.

36. In our judgment, Mr. Chagla, learned Senior Advocate appearing for respondent No. 3, is also right in urging that the main stress of the judgment in E, P. Royappa is that the civil servant who is performing his functions, exercising his powers, and discharging his duties must be protected. It is keeping in view the avowed object underlying Articles 14, 16 and 311 of the Constitution that the observations have been made by the Supreme Court. If that Officer is aggrieved by a decision of the State Government as to declaration of equivalence, he can contend that considering the position occupied by him on the Cadre post, the action impugned by him is not legal, valid and according to law. It is that Officer who can argue that so-called declaration of equivalence could not be said to be legal and valid consideration his position in the post to which he was sent vis-a-vis his position as Cadre Officer. He can urge that there is non-application of mind on the part of the State Government or the exercise of power was for extraneous or irrelevant considerations or the action has been taken with mala fide intention and/or oblique motive or in colourable exercise of power. The law declared and observations made were to protect honest and upright bureaucrats and members of Civil Services. A stranger, outsider or a third party cannot raise such objection. This is clear from the following observations of the Supreme Court :

The order dated June 27, 1972 in any event did not contain any declaration as to equivalence in "responsibility". There was thus no compliance with the requirement of Rule 9, Sub-rule (1) and the appointment of the petitioner to the post of Officer on Special Duty was accordingly liable to be held invalid for contravention of that sub-rule. But we cannot in this petition under Article 32 give relief to the petitioner by striking down his appointment to the post of Officer on Special duty, as mere violation of Rule 9, Sub-rule (1) does not involve infringement of any fundamental right. We, however, hope that the State Government will not drive the petitioner to take appropriate proceedings for obtaining the necessary relief.

In our opinion, the submission is well founded. If there is dispute regarding powers to be exercised, functions to be performed, duties to be discharged or responsibilities to be carried out by respondent No. 3, it is respondent No. 3 alone

who can come forward and make a complaint that the action of the State Government is illegal, unwarranted or unreasonable. To us, therefore, the learned Advocate General as well as Mr. Chagla are right that though they did not challenge locus stand of the petitioners in both the petitions so far as their prayer of issuance of a writ of quo warranto against, respondent No. 3 is concerned and conceded that if this Court is satisfied that respondent No. 3 is not eligible, the Court can indeed issue such writ, at the instance of the petitioners. They, however, rightly contended that, regarding powers, functions, duties and responsibilities, only an "aggrieved" person may make a complaint and the grievance cannot be raised by the petitioners in the public interest litigation. In E.P. Royappa, the petitioner himself had approached the Supreme Court putting forward the grievance about his position as Cadre Officer sending to non-Cadre post, and yet the Court observed that it could not in a petition under Article 32 grant relief to the petitioner by striking out his appointment to the post of Officer on Special Duty as it did not involve infringement of any fundamental right. Obviously, in the instant case, it cannot, be said that if respondent No. 3 is appointed as Municipal Commissioner, B.M.C., fundamental right or a legal right of the petitioners had been violated. We are, therefore, of the view that the submissions made on the basis of Rule 9 of the Pay Rules cannot take the petitioners further and the contention has to be negatived.

37. The learned Advocate General is also right in relying upon Rule 6 of the Cadre Rules. The said rule provides for deputation of Cadre Officers. The relevant, part of Rule 6 which Is material and relevant may be reproduced:

6. Deputation of cadre officers.-

(1)...

(2) A cadre officer may also be deputed for service under ;-

(i) a company, association or body of individuals, whether incorporated or not, which is wholly or substantially owned or controlled by a State Government, Municipal Corporation or a Local Body by the State Government on whose cadre he is borne; and

... ... (emphasis supplied)

38. Sub-rule (2) of Rule 6 of the Cadre Rules, in no uncertain terms empowers the State Government to send on deputation a Cadre Officer to a Municipal Corporation. Such action, therefore, cannot be held illegal or unlawful. As already noticed, proviso to Section 54(1) of the Act of 1888 deals with such a situation. It protects lien of an officer in the State service and empowers the State Government to recall service of such Officer at any time when it thinks fit. Thus, an action can be taken under Rule 6(2) of the Cadre Rules read with Section 54 of the Act of 1888. Hence, even on that ground, the action of the State Government cannot be objected.

39. Regarding political influence and mala fide exercise of power by the State Government under the pressure of or with a view to oblige builders lobby, except bald assertion, no material, much less sufficient material, has been placed on record by the petitioners. It is well settled by a catena of decisions of the Supreme Court including E.P. Royappa that the burden of establishing mala fides is on the person alleging mala fides and the burden is "very heavy". Such allegations are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. In the words of Krishna Iyer, J. in Gulam Mustafa and Others Vs. The State of Maharashtra and Others, it is a "last refuge of a loosing litigant".

40. In our opinion, since no material whatsoever has been placed on record by the petitioners which even prima facie shows that the action has been taken with mala fide intention or oblique motive or in colourable exercise of power, we find no substance in the allegation of mala fide.

41. For the foregoing reasons, in our opinion, both the petitions deserve to be dismissed and are accordingly dismissed. In the facts and circumstances, however, there shall be no order as to costs.

Parties be given copies of this order duly authenticated by the Sheristedar/ Private Secretary.