

(1996) 06 CAL CK 0031

Calcutta High Court

Case No: No. 3315 of 1992

Diamond Harbour Municipality
and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: June 5, 1996

Acts Referred:

- Bengal Municipal Act, 1932 - Section 66, 75, 76
- Constitution of India, 1950 - Article 12, 14, 16

Citation: 100 CWN 861

Hon'ble Judges: S.N. Chakraborty, J; S.B. Sinha, J

Bench: Division Bench

Advocate: A.P. Sircar, Debranjana Basu Mallick and Shyama Prasad Purkait, for the Appellant; A.P. Chatterjee and Pradip Kumar Mondal, for the Respondent

Final Decision: Allowed

Judgement

Satyabrata Sinha, J.

Although this appeal was directed against a judgment and order dated 24.9.93, being an interim order which was subsequently extended by orders dated 30.9.93 and 1.10.93 passed by a learned single Judge of this court in C.O. No. 15891 (W) of 1993, whereby and whereunder the interim order was directed to continue, on the request of the learned counsel for the parties, the entire writ petition was heard. The writ petitioners who are 6 in number filed the aforementioned writ application, inter alia, for issuance of a Writ of or in the nature of Mandamus directing the respondents to rescind the resolution dated 22.9.93 whereby and whereunder the services of the writ petitioners were terminated by the Commissioners of Diamond Harbour Municipality as-also the order of the same date passed by the Chairman of the Board of Commissioners of the said Municipality which is contained in Annexure "FT to the writ application.

2. The basic fact of the matter is not in dispute.

The erstwhile Board of Commissioners allegedly keeping in view the exigency of circumstances issued a notice in the notice board, for appointment of some persons for essential service of the Municipality and in public interest, pursuant whereunto the writ petitioners along with others applied for different posts. It is also not in dispute that the Commissioners of the Municipality had applied before the State of West Bengal for grant of prior approval but no such approval having been granted, the Commissioners by a resolution dated 4.3.93 purported to be in view of the exigency of the situation considered the applications of 10 persons who had been named therein and took an unanimous decision to appoint them on a monthly salary of Rs. 240/- and a sum of Rs. 7/- towards T.A. and other allowances. Out of the 10 persons, Mihir Mondal, writ petitioner No. 1, Bapi Mondal, writ petitioner No. 2. Ayed all Shaik, writ petitioner No. 3 were appointed for the cycle stand, whereas, Bibek De, Biswajit Dey. Asit Baran Chatterjee and Narayan Bhattacharya (writ petitioner No. 4) were appointed as Ticket Collectors in the Ferry Service and Arun Dalui was appointed as an electric mistri. The writ petitioner No. 6 was allegedly appointed as experienced person as a tubewell mistri assistant. It is not in dispute that the election of the Municipality had taken place in the year 1988. The notification for the election which was to be held was published on 24.2.93 which reached the hands of the members of the Board on 4.3.93. Evidently, on the same day, the aforementioned resolution was adopted by the Commissioners. Pursuant to the said purported resolution, the writ petitioners. Pursuant to the said purported resolution, the writ petitioners were appointed by the then Chairman of the respondent No. 1 Municipality. After the aforementioned election was held, the present incumbents of the posts of Board of Commissioners held a meeting on 22.9.93 and upon discussing the validity of appointment made by the previous commissioners it was decided by 2/3rd majority that such appointments pursuant to the resolution dated 4.3.93 were not proper and valid and contrary to the decision and direction of the State Government and accordingly all such appointments were decided to be cancelled by terminating their services. It has not been disputed that despite the fact that in terms of the provisions of the Bengal Municipal Act, 1932 (hereinafter called and referred to for the sake of brevity as the said Act) the salary of the employees are required to be paid by the Municipality, the State Government had undertaken the said liability. The State Government had issued circular letters banning employment and further issued a direction not to create any post whatsoever in the Municipality. It appears that in terms of the aforementioned direction of the State of West Bengal, the erstwhile Board of commissioner prayed for approval of the State appointment of the writ petitioners and other persons.

3. Mr. Chatterji appearing on behalf of the writ petitioners had raised a short question in support of this application. Learned counsel submits that the power of the State Government to accord approval being confined to the proviso appended to Subsection (1) of Section 66 of the said Act, such approval being not needed, as it

has not shown that the appointment of 10 persons by the Commissioners of the Municipality was above 1% of the sanctioned strength. Subsection (4) of Section 66 of the said Act shall come into force and in that view of the matter, the writ petitioners who had derived a legal right by reason of such appointments were entitled to continue in service. Learned counsel contends that only because there has been a change in the Board of Commissioners, the services of the writ petitioners could not be terminated without assigning any reason and without complying with the principles of natural justice. Learned counsel contends that in the instant case, the salary payable to the writ petitioners being less than Rs. 250/- even no approval was required.

4. Mr. Sircar, learned counsel appearing on behalf of the respondents Municipality, on the other hand, has drawn our attention to the resolution dated 4.3.93 and has submitted that the very fact that the Board of Commissioners sought to obtain the approval of the State goes to show that obtaining such prior approval was mandatory in nature. In this connection, our attention has been drawn to a letter dated 25.9.92, issued to the Chairman of the Municipality, whereby and whereunder in reply to the letter dated 22.2.92 it was stated that an embargo has been imposed by the Government on creation of new posts, and the proposal would be considered after withdrawal of the said embargo. Learned counsel submits that the very fact that the notice of election was issued on 24.2.93 which reached the hands of all concerned persons on 4.3.93, the resolution dated 4.3.93 adopted by the Board of Commissioners must be held to be malafide. Learned counsel contends that as the financial burden is on the State, it can impose certain conditions. There appears to be some controversy as to whether the posts were existing posts, or were created for the first time. Section 66 of the said Act deals with establishment. Subsection (1) of Section 66 of the said Act, empowers the Commissioners to determine and create posts as to what officers and employees of the Commissioners are necessary for the municipality and fix the salaries and allowances to be paid and granted to such officers and employees in a meeting subject to the provisions of the said Act and the Rules made thereunder. The proviso appended to the said provision, however, gives out an exception to the effect that no post of an officer or employees shall be created without the prior sanction of the State Government if the number of posts to be so created in a year for a municipality is more than one per cent of the total number of posts of officers and employees as existed in the year immediately preceding. Subsection (4) of Section 66 of the said Act reads thus:

(4) Subject to the scale of establishment determined by the Commissioners under Sub-Section (1), the Chairman shall have power to select persons for appointment to the posts created under that Sub-section:

(i) a person shall not be appointed to a post carrying a monthly salary of more than two hundred and fifty rupees or a salary rising by periodical increments to more than two hundred and fifty rupees without the sanction of the Commissioners at a

meeting.

(ii) a person shall not be appointed to a post carrying a monthly salary of more than seven hundred and fifty rupees or salary rising by periodical increments to more than one thousand rupees without the prior approval of the State Government.

5. Section 75 of the said Act empowers the Commissioners to make rules subject to the sanction of the State Government, inter alia, as regards duties, appointment and leave of municipal officers etc. Section 76 of the said Act empowers the State Government to make rules in respect of certain categories of officers named therein. Nothing has been placed before us to show that any rule has been made by the Commissioners in terms of Section 75 of the said Act. The writ petitioners have contended that a notice was issued in the notice board for appointment of some persons for essential service. The said statements have been made in paragraph 4 of the writ application. The said statements have been verified by the petitioner No. 1 who has affirmed the affidavit in support of the said application as true to his information and not true to his knowledge. The respondents Nos. 6, 7, 9, 14, 16 and 18 to 24 to his knowledge, The respondents Nos. 6, 7, 9, 14 and 18 to 24 in their affidavit in opposition affirmed by the respondent No. 6, who is the Chairman of the Municipality, denied and disputed the said ascertain in paragraph 5 of the said affidavit stating that in fact as per his knowledge goes no notice was issued in notice board for appointments by then Commissioners and post was not created for essential service or public interest. The notice if any given, the same is also illegal and not maintainable. It was further stated in paragraph 7 therein that there was no need to appoint them at that time for the purpose of public interest and for essential service. It has also been contended that appointments had not been made as per Sub-section (4) of Section 66 of the said Act. The deponent of the said affidavit in opposition has stated that the writ petitioners were temporary employees who had worked only for a few months and their services had been terminated on and from 23.9.93. The respondent No. 1 being a municipality is a local authority, and thus is a State within the meaning of Articles 12 of the Constitution of India. Before making appointments, therefore, it was incumbent upon the Board of Commissioners to follow the rules framed and/or the provisions of Articles 14 and 16 of the constitutions of India. The Supreme Court recently in [Ashok Kumar and Others Vs. Chairman, Banking Service Recruitment Board and Others](#), categorically held that Articles 14 and 16 of the Constitution enshrine fundamental right to every citizen to claim consideration for appointment to a post under the State. The writ petitioners, upon whom the burden of proof rests did not make any ascertain that prior to making the said appointments. Employment Exchange was notified or any advertisement was issued. As noticed hereinbefore, even statements made in paragraph 4 of the writ application have not been properly verified and thus, no credence thereto can be placed. In any event, the said statements have also been denied and disputed by the respondents, and thus, we have no other option but to arrive at a conclusion that even no notice was issued in the notice board. Although

Mr. Chatterji appears to be correct in so far as the interpretation of Subsection (1) of Section 66 of the said Act is concerned, in as much as, there cannot be any doubt that the commissioners of the municipality have every right to determine the requirements of the officers and other employees and create posts, proviso appended to Subsection (1) of Section 66 of the said Act is merely by way of an exception. In [S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others](#), the Apex Court inter alia, held that a proviso may have three separate functions. It also held that normally a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. Thus, there cannot be any doubt whatsoever that the proviso appended to Subsection (1) of Section 66 of the said Act, would have application only in case where posts are required to be created and the number of such posts would be more than 1% of the total number of posts of officers and employees as existed in the year immediately preceding. There is nothing on record to show that the requirements of the aforementioned proviso were not satisfied. However, as Mr. Chatterji himself has argued that once Sub-section (1) of Section 66 of the said Act goes out of the way of the petitioners, Subsection (4) thereof would come into play. In terms of Subsection (4) of Section 66 of the Act, the Chairman of the Board of Commissioners being a statutory authority has been empowered to select persons for appointment to the posts created under subsection (1). In the instant case, it is evident from the resolution dated 4.3.93 that the Chairman abdicated his statutory power in favour of the Board. Resolution dated 4.3.93 being an instrument has to be read as a whole. The said resolution categorically states that although letters for obtaining sanction for the posts had been sent to the State of West Bengal from time to time, but as no action had been taken by it and as the works of the municipality are being hampered in the absence of conductor of ferry service and ticket collectors in the cycle stand, tubewell mistri and electric mistri, the applications filed by the persons named therein were read and it was decided that they should be appointed on a monthly salary of Rs. 240/- with T.A. and dearness allowance of Rs. 7/-. The chairman was merely authorised to issue appointment letters in the interest of the public so as to prevent hampering of essential services. Only in terms of the said resolution, the writ petitioners were appointed as would appear from Annexure "D" series, thus, it is clear that the Chairman did not exercise his power to select persons for appointment to the posts created under Subsection (1). The words "the chairman shall have power to select persons for appointment to the posts created under that Sub-section", are very significant. By reason of the said provision, the Chairman becomes the appointing authority and he is to exercise his statutory power by selection of the persons, that is selection of proper persons from amongst the candidates. In the instant case, as noticed hereinbefore. Employment Exchange was not notified, nor any advertisement had been issued, and thus, the question of the citizens of India getting an opportunity to file applications for the posts in question did not arise, and thus, there could be no scope for selection of persons for appointment to the posts.

In that view of the matter, we have no other option but to hold that the appointments of the writ petitioners were made in flagrant violation of Articles 14 and 16 of the Constitution of India. Furthermore, in terms of Subsection (4) of Section 66 of the said Act, the Chairman exercises a statutory function. Such a statutory function cannot be delegated even to a higher authority. The resolution dated 4.3.93 of the Board of Commissioners leaves Section 66 of the said Act was exercised by it and the Chairman was merely authorised to issue appointment letters. The Chairman had no statutory authority to delegate his powers in favour of the Board of Commissioners. It is now well known that a statutory authority must exercise his powers in terms of the provisions of the statute or not at all. There exists a distinction between a natural person and a statutory authority, whereas a natural person is free to do anything he likes, a statutory authority must act within the four-comers of the statute. Similarly an authority who had no jurisdiction to make any appointment could not usurp the said power. Reference in this connection may be made to the case of *Howrah Bus Syndicate v. R.T.A. Howrah*, reported in 1996(1) CLJ 397 . In [M. Pentiah and Others Vs. Muddala Veeramallappa and Others](#), the Supreme Court observed:

In this context learned counsel for the appellants Invoked the doctrine of law that an action of a statutory corporation may be ultra vires its powers without being illegal and also the principle that when a statute confers an express power, a power inconsistent with that expressly given cannot be implied.

6. Similar view has been taken in [Hukam Chand Shyam Lal Vs. Union of India \(UOI\) and Others](#), Reference in this connection may also be made to *Maniuddin Bepari v. The Chairman of the Municipal Commissioners, Dacca* reported in 40 CWN 17 wherein it has been held:

It is a fundamental principle of law that a natural person has the capacity to do all lawful things unless his capacity has been curtailed by some rule of law. It is equally a fundamental principle that in the case of a statutory corporation it is just the other way. The Corporation has no power to do anything unless those powers are conferred on it by the statute which creates it.

7. The aforementioned decision has been followed by this court in [Scotts \(P\) Ltd. and Others Vs. Corporation of Calcutta and Others](#), and the said principle was reiterated by a Division Bench of this court in [Sasanka Sekhar Panda Vs. State of West Bengal and Others](#), in the following terms:-

The most serious objection to the settlement by auction of the aforesaid ferry in favour of Sabhapati Sagar Panchayat Samity was that under the provisions of West Bengal Panchayat Act, 1993, the said body was not authorised to offer bids in auction for settlement of a ferry under the management of the Zilla Parishad. It is settled law that a statutory, corporation or authority like the Panchayat Samity has no power to do anything unless such power has been conferred upon it by the

statute creating it."

It was observed :-

We respectfully agree with the view expressed by D.N. Sinha, J. in the case of Narendra Nath Chakraborty v. Corporation of Calcutta (supra), that where the statute does not expressly or impliedly authorise the doing of a particular thing, it must be taken to have been prohibited. A statutory corporation cannot be beyond the ambit and extent of the powers which by law are given to the corporation

8. In [Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others](#), the Supreme Court observed:

An excess of statutory power cannot be validated by acquiescence in or by the operation of an estoppel. The court declines to interfere for the assistance of persons who seek its aid to relieve them against express statutory provision. Lord Selborne in Maddison v. Aberson, (1883) 8 App Cas 467 said that courts of equity would not permit the statute to be made an instrument of fraud. The impeached resolution of the Municipality has no legal foundation. The High Court was wrong in not quashing the resolution on the surmise that money might have been spent. Illegality is incurable.

9. The Supreme Court in the case of [State of Punjab and Others Vs. Gurdev Singh](#), observed:

Apropos to this principle. Prof. Wade states the principle must be equally true even where the "brand of invalidity" is plainly visible for there also the order can effectively be resisted in law only by obtaining the decision of the Court. Prof. Wade sums up these principles:

The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiffs lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights or for some other legal reasons. In any such case the "void" order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another and that it may be void against one person but valid against another.

10. For the reasons aforementioned, we are of the opinion that the appointments of the writ petitioners made pursuant to the resolution dated 4.3.93 was ultra vires Subsection (4) of Section 66 of the said Act, and thus, they were ex facie illegal, invalid in law and without jurisdiction.

11. In view of our findings aforementioned, it is not necessary for us to go into the other questions, namely, as to whether the action on the part of the Board of Commissioners was malafide or not. However, we may observe that such a hasty

action on the part of the Board to appoint the writ petitioners on the day on which the notice of election was served on them does not appear to be reasonable, in as much as, it is expected that the Board of Commissioners being statutory authority and being a part of the State within the meaning of Article 12 of the Constitution of India should act fairly and reasonably and not arbitrarily and whimsically. We are also not pronouncing finally as to whether the State had the power to impose any ban on appointments, in as much as, nothing has been placed before us to show as to under what circumstances State had been paying the salary of the employees of the municipality despite the fact that in terms of the provisions of the said Act a municipal fund is to be created. For the reasons aforementioned, there is no merit in the writ application, which is accordingly dismissed, and consequently, the appeal is allowed, but in the facts and circumstances of this case, there will be no order as to costs.

S.N. Chakraborty, J.

I agree