

SUPREME COURT OF INDIA

Municipal Corporation of Greater Mumbai, Through Commissioner

Vs.

Anil Shantaram Khoje

C.A.No.2918 of 2014

(T.S.Thakur and Vikramajit Sen JJ.)

28.02.2014

JUDGMENT

VIKRAMAJIT SEN, J.

1. Leave granted in both these petitions.

2. Although interim orders have not been granted in the appeal arising out of SLP(C) No.15868 of 2010, in the accompanying matter it had been ordered on 01.07.2011 that any promotion that may be made would be subject to the result of the petition.

3. The writ petitioners before the High Court of Bombay were working in the Mumbai Municipal Corporation of Greater Mumbai as Assistant Municipal Commissioners and had prayed that their promotion to the vacant posts of Deputy Municipal Commissioner may be effected in accordance with the Rules framed under the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as the "M.M.C. Act"). The relevant provisions are Sections 55 and 80B of the M.M.C. Act. Section 55 authorizes the Corporation to appoint Deputy Municipal Commissioner subject to confirmation by the State Government whereas sub-Section (4) of Section 80B of the M.M.C. Act requires the Corporation to frame Rules stipulating the eligibility and qualification criteria for the post of Deputy Municipal Commissioner in the Mumbai Municipal Corporation; sub-Section (5) thereafter requires the Rules so framed to be published in the Official Gazette. It appears that the previous Rules were framed in the year 1988 and were duly published in the Official Gazette on 18.08.1988, according to which the post of

Deputy Municipal Commissioner was to be filled in by way of promotion from the post of Heads of Major Department (hereinafter referred to as “HOD”) or holders of equivalent posts having administrative experience of not less than 10 years or Ward Officers on the one hand and by selection through the Maharashtra Public Service Commission on the other in the ratio of 1:1, the vacancies being filled in by promotion and selection alternatively. The Roster points indicated in the Rules were: A/C/B/C/A/C (A – promotion of Ward Officer, B – promotion from HODs and C – selection through MPSC). It was further clarified that the appointing authority will decide whether the post earmarked for promotion is to be filled in by promoting HOD or Ward Officer. Thereafter, the Corporation proposed modifications in the then existing Rules in terms of Resolution No. 531 dated 21.09.2000, which were duly submitted to the State Government for according its approval. The State Government, however, neglected to grant sanction to the said Resolution and as a consequence the Commissioner addressed a letter dated 19.08.2003 to the Corporation suggesting other modifications in the Rules relating to promotions. These suggested amendments came to be approved by the Corporation leading to the passing of Resolution No. 752 dated 20.11.2003 amending the then existing Recruitment Rules and these were then forwarded to the State Government for its approval. The State Government accorded its approval with certain modifications with respect to the chronology to be followed in the Roster and appointment by way of deputation/transfer, unfortunately almost three years later vide its letter dated 04.10.2006. The said Resolution required 75% of the said posts to be filled in by promotion from the Assistant Municipal Commissioners/Ward Officers and 25% to be filled in by promotion of HOD, direct recruitment or by deputation. The Roster fixation indicated that the first and second vacancy has to be filled in by promotion from amongst Assistant Municipal Commissioners whereas the third vacancy would be filled up by promotion of HODs or direct recruitment or by deputation and the fourth vacancy would go to the Assistant Municipal Commissioner and so on and so forth.

4. The petitioners before the High Court, namely, Shri Anil Shantaram Khoje and Shri Prakash Krishnarao Thorat who are the contesting Respondents before us, were holding the post of Assistant Municipal Commissioners. Shri Ram B. Dhus was holding the post of HOD, and has filed the present Appeal along with the Mumbai Municipal Corporation for the reason that the impugned judgment dated 07.10.2009 has allowed the writ petitions, directing the Mumbai Municipal Corporation to effect promotions to the post of Deputy Municipal Commissioner strictly in accordance with the Resolution No. 752 dated 20.11.2003, sanctioned by the State Government in terms of its letter dated 04.10.2006 and the Roster point

determined therein. We clarify that Shri Ram B. Dhus was the senior-most amongst HODs, whilst the writ petitioners are Shri Anil Shantaram Khoje and Shri Prakash Krishnarao Thorat, who belonged to the cadre of Assistant Municipal Commissioner/Ward Officer. These two respondents, we reiterate, had sought issuance of directions to the Mumbai Municipal Corporation to fill in the 16 vacant posts of Deputy Municipal Commissioner according to the modified Rules, i.e., by assigning 75% quota for Assistant Municipal Commissioners/Ward Officers and 25% to the other categories. Prior to the gazetting of the extant Rules that came to be gazetted on 28.04.2011, Corporation had promoted three persons to the post of Deputy Municipal Commissioner including Shri Anil Shantaram Khoje (Contesting Respondent No. 1) and Shri Babusaheb Pandurang Kolekar (Contesting Respondent No. 5).

5. It also requires to be elucidated that Shri Ram B. Dhus was promoted as Deputy Municipal Commissioner on 16/8/13. Under the old Rules, 10 years experience in the post of Head of Department was required as eligibility for promotion to the next higher post of Deputy Municipal Commissioner whereas in the subsequent Rules, this eligibility had been lowered by three years, now requiring only 7 years experience. When the writ petitions came to be filed before the High Court, Shri Ram B. Dhus did not possess the stipulated 10 years experience.

6. Shri Ram B. Dhus and the Corporation submit in these appeals that the modified Rules would become operative not from the date on which they were sanctioned by the State Government vide letter dated 04.10.2006, but from the date of their publication in the Official Gazette as required by law and as specifically stipulated in Section 80B(5) of the M.M.C. Act.

7. The opinion of the High Court is that the publication in the Official Gazette was not mandatory, but only desirable or directory. A plethora of precedents prevails on this vexed question which continues to exhaust judicial time. In *Harla vs State of Rajasthan*, 1952 SCR 110 [AIR 1951 SC 467], the Court's conscience appears to have been shocked by the "thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man." However, what this Court was confronted with in that case was the failure of the publication of the Jaipur Opium Act, which led to the conviction of the petitioner. It can certainly be argued that imposition of criminal liability is not akin to provisions determining

the eligibility for promotions. In *B.K. Srinivasan vs State of Karnataka* 1987 (1) SCC 658, this Court was concerned with the Outline Development Plan and Regulations pertaining to the construction of high-rise buildings in one of the residential extensions of Bangalore. This Court observed that it is necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, regardless of whether the statutes so prescribed, the subordinate legislation would then take effect only from the date of publication. However, a caveat was articulated to the effect that where subordinate legislation is concerned only with a few individuals or is confined to small local areas, publication or promulgation by other means may meet the mandates of law.

8. In *I.T.C. Bhadrachalam Paper Boards vs Mandal Revenue Officer, A.P.* 1996 (6) SCC 634, the question was whether the petitioner assessee could claim the exemption from payment of tax on non-agricultural land assessment by virtue of one GOM issued by the Government, but which had not been published or notified at the relevant point of time in the Official Gazette. This Court declined to grant the benefits of the exemption to the assessee holding that that provision would have to be implemented only when finality attached to it which would be contemporaneous to its publication in the Official Gazette; that the dissemination of the substance of the exemption in the newspapers or in other media was irrelevant. Reference was made to Section 83 of the Evidence Act. The Court did not agree that such publication was only a directory requirement and accordingly a dispensable one and reiterated the observations earlier made in *Sammbhu Nath Jha vs Kedar Prasad Sinha* 1973 Cr.L.J. 453, which is to the effect that publication in the Official Gazette “is an imperative requirement and cannot be dispensed with. This view further finds adoption in *S.K. Shukla vs State of U.P.* 2006 (1) SCC 314, wherein the Court was concerned with unauthorized possession of arms and ammunitions under the Prevention of Terrorism Act, 2002. It was observed by this Court that the notification notifying the State of U.P. as a notified area, thereby prohibiting and criminalizing possession of certain arms in the notified area under Section 4(a) of the Prevention of Terrorism Act, 2002, would become effective from the date of its publication and reasserted that publication is essential as it affects the rights of the public. *Rajendra Agricultural University vs Ashok Kumar Prasad* 2010 (1) SCC 730, is directly relevant to the conundrum before us inasmuch as it pertains to promotions in the university, in contra-distinction to criminal culpability. Even in those circumstances, this Court had opined that publication in the Official Gazette was a mandatory requirement, although the Statute in question providing for a time-bound promotion Scheme was assented to by the Chancellor, and pursuant to which a notification was also issued by the

Petitioner University. The respondents made a failed attempt to distinguish a legislation imposing obligations or creating liabilities from those intended to benefit a specific and limited class of persons inasmuch as publication would be a mandatory requirement in the former case while directory in the latter. The Court disagreeing with the proposition held that the fact that a particular Statute may not concern the general public, but may affect only a specified class of employees, is not a ground to exclude the applicability of the mandatory requirement of publication in the Official Gazette in the absence of any exception included in the Statute itself.

9. It is relevant for us to mention Section 23 of the Bombay General Clauses Act, 1904, which provides thus: “Where, in any Bombay Act (or Maharashtra Act), or in any Rule passed under such Act, it is directed that any order, notification or other matter shall be notified or published, then such notification or publication shall, unless the establishment or Rule otherwise provides, be deemed to be tailor made if it is published in Official Gazette.”

10. We are immediately reminded of the observations made in *Babu Verghese vs Bar Council of Kerala* (1999) 1 SCR 1121, when this Court was called upon to consider a case under the Advocates Act. While doing so, we applied the principles earlier enunciated in *Taylor vs Taylor* (1875)1 ChD 426 and in *Nazir Ahmad vs King Emperor* AIR 1936 PC 253. The Court observed as follows: “It is the basic principles of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all”.

11. In this conspectus we find ourselves unable to accept the position favoured by the High Court in the impugned Judgment. The extant Rules would become operative only from the date of its promulgation by publication in the Official Gazette, i.e. on 28.04.2011. Promotions made prior to 28.04.2011 under the extant Rules promoting Shri Anil Shantaram Khoje (Contesting Respondent No. 1), Shri B.P. Kolekar (Contesting Respondent No. 5) and Shri P.J. Patil to the post of Deputy Municipal Commissioner could not have been effected in the absence of publication of the extant Rules in the Official Gazette. We note that Shri Anil Shantaram Khoje and Shri B.P. Kolekar have already retired from the post of Deputy Municipal Commissioner while Shri P.J. Patil who was promoted on 05.07.2010 to the post of Deputy Municipal Commissioner, is still holding the post. Being mindful of the fact that their promotion and retiral and other consequential benefits would be adversely impacted by our Judgment, we direct

that the promotion effected prior to 28.04.2011 and consequential retiral and other benefits should not be altered to their detriment.

12. We, however, uphold the view of the High Court that, keeping the nature of the reliefs in the writ petition in perspective, the Roster has to be determined by the Mumbai Municipal Corporation in accordance with the extant Rules and all concerned officers would then be entitled to challenge the fixation, if they are aggrieved and if so advised.

13. The Appeals are allowed in the above terms, leaving all the parties to bear their respective costs.