

RAJASTHAN HIGH COURT

State of Rajasthan

Vs.

Balaji Industries

Civil Special Appeal No. 510 of 1999
(Rajesh Balia and Harbans Lal, JJ.)

20.11.2001

JUDGEMENT

Balia, J.

1. Heard learned counsel for the parties.

2. The respondent-petitioner was granted permission to construct over the land in question. The petitioner had purchased the land in question from the Receiver of M/s. Daduwala and Co. It is situated in Bhilwara. He sought permission for construction from Commissioner. The permission was granted by the Commissioner of Municipality in terms of Section 170 of the Municipalities Act, 1959. It has been brought to the notice of the Court by Notification dated 24th Nov., 1976 the Commissioner was delegated power to exercise the authority of the Board under Section 170 of the Act in the matter of granting permission and he was, therefore, duly competent to grant such permission.

3. It appears that at the relevant time, the elected body of Municipal Council, Bhilwara was superseded and its administration was put under an Administrator. The Administrator by his order dated 27-6-88 in purported exercise of his powers under Section 311 of the Act, stayed the operation of the order granting permission to the respondent-petitioner and directed the petitioner to stop further construction over the land in question. The said order dated 27-6-1988 (Annex. 9) was subjected to challenge in Writ Petition No. 2003/88. (i) The State Govt. through the Secretary, Local Self-Govt., (ii) the Administrator, Municipal Council, Bhilwara, and (iii) the Municipal Council, Bhilwara through its Commissioner were made respondents.

4. One of the contentions raised by the petitioner before the learned single Judge was that the order of permission granted under Section 170 could be subjected to appeal under sub-section (12) of Section 170 either to the Collector or before the State Govt. if the order is passed by the Board, and the Administrator could not in exercise of any authority intermeddle with the order passed by the Commissioner under Section 170.

5. At the time of hearing before the learned single Judge the learned counsel appearing for the municipality expressed his agreement on this contention, however, Mr. Joshi learned counsel for the State contended that no appeal could have been filed against that order of permission dated 25th March, 1988.

6. The learned single Judge was of the opinion that the permission granted under Section 170 could be made subject-matter of appeal and, therefore, the authority did not vest in the Administrator exercising the power of Municipality to have interfered with that order. There being no authority vesting in the Administrator to modify the order passed by himself under Section 170, the impugned order Annex. 9 dated 27-6-1988 was quashed.

7. Aggrieved with that judgment dated 18-11-1997, this appeal has been preferred on behalf of the State Govt., Municipal Council through its Chairman and the Commissioner, Municipal Council, Bhilwara. The principal contention raised on behalf of the appellants is that the order passed by the Commissioner was not an appealable order and that the Administrator had necessary authority to revise the order passed by Commissioner, who was an authority subordinate to it, and therefore, the impugned order of Administrator was not without jurisdiction which could be interfered with at that stage by the Court.

8. Learned counsel for the respondent has twofold contentions. Firstly, the Municipal Council having conceded before the learned single Judge that the order Annex. 9 could be challenged only by way of appeal under the relevant provisions of the Act and not revisable by the Administrator, the appellant Nos. 2 and 3 cannot be said to be persons aggrieved, therefore, they have no right to file this appeal. So far as State Govt. is concerned, since no order of the State Govt. or authority of the State Govt. is under challenge, the State Govt. too has no locus to file this appeal. On merit also, it was contended by learned counsel that under sub-section (12) of Section 170 specific

provision has been made for challenging the orders made thereunder by way of appeal, therefore, apart from the concession made by the learned counsel for the Municipality, learned single Judge was right in holding that an appeal lay against the order granting permission to the petitioner-respondent. As there is specific provision for challenging the orders granting permission for construction under Section 170, no other general provision of appeal or revision could be invoked. It is also urged that assuming appeal lay under Section 311 then too under that provision only appeal lay from an order passed by an officer appointed under Section 307 or 308 and no power under Section 311 could be exercised by the Administrator who himself was appellate authority under Section 311 in respect an order passed by an officer appointed under Section 307 or 308, it necessarily envisage filing of appeal by someone else who is aggrieved and not by appellate authority himself. No power has been granted to institute an appeal suo motu by the appellate authority himself and also decide the same. It has further been pointed out by the learned counsel that the only provision under which power of revision has been conferred under the Act is Section 285, under which power vest with State Govt. The State Govt. has been conferred with the supervisory jurisdiction and authority 'to revise the orders passed or purported to have been passed under the Act by or on behalf of any Board, its Chairman, Vice-Chairman, any Member or Officer or Collector or other Officer appointed by a Municipality or by the State Govt. if in its opinion the order passed by such authority is not correct, legal or proper.'

9. Mr. Joshi rejoined that the Administrator, has, at any rate, jurisdiction to make necessary orders revising any orders passed by the subordinate officer of the municipality under Section 67(e) of the Act.

10. Having given our anxious consideration to the rival contentions, we are of the opinion that this appeal must fail for the reasons to be stated hereinafter.

11. We find substance in the contention raised by the learned counsel for the respondent that technically this appeal is not maintainable. It is apparent that on behalf of petitioner Nos. 2 and 3 it was conceded before learned single Judge that appeal lay against the order passed under Section 170, and therefore, the only remedy was to get the orders corrected by way of filing an application before the State Govt. and applicability of Section 311 was excluded and the Administrator had no authority to revise or review the orders passed by the competent authority under Section 170. An

order, which has been passed on concession of a party, in our opinion, cannot be challenged by the party making such concession.

12. So far as State of Rajasthan is concerned, none of its orders or authority to be exercised by it under the Act or any such power which it can legitimately exercise is subject-matter of this writ petition. It cannot be considered as an aggrieved party. Therefore, the State Govt. too cannot be said to have locus to file this appeal.

13. However, as sufficiently detailed arguments have been addressed by the learned counsel, we deem it proper to deal the contentions raised on merit also.

14. The impugned order Ex. 9 is an order staying the operation of permission granted by the Commissioner exercising powers of Municipal Board as its delegate on the alleged ground of some defects in eliciting certain information.

The question raised is whether Administrator of a Municipal Board or the Board itself has jurisdiction to entertain an appeal against it, if so, whether suo motu authority of appeal or revision could be exercised by the Administrator for cancelling the permission granted?

15. The order challenged in the writ petition is purported to have been made under Section 311 seeking to revise an order passed under Section 170. Section 311 opens with mandate save as otherwise expressly prescribed, an appeal shall lay to the Board." Thus, the principal foundation for invoking jurisdiction under Section 311 by the Board for setting at naught an order passed by an officer appointed under Section 307 or 308 is that no appeal is prescribed elsewhere.

16. In this connection, Section 170 of the Act unfolds the scheme which governs the erection of new buildings, new erection in existing building, re-erection to make material alteration in existing building, erection or re-erection of any projected portion of a building in respect of which the Board is empowered to enforce the removal or set apart or make or enlarge a well within the municipal limits, a notice is required to be given to the concerned Municipal Board of any person's intention to carry out such construction work.

17. Sub-section (1) of Section 170 circumscribes the limit within which sub-section (1) is to operate. Sub-section (3) defines what is material alteration requiring a notice

to the municipality within the meaning of sub-section (1)(b). Sub-section (4) envisages that if so prescribed by bye-laws, in addition to the notice the requisite information and plans of the proposed construction are required to be submitted to the Municipal Board in addition to issue of a notice and sub- sec. (5) authorises the municipality to elicit such information and plans from the person giving notice under sub-section (1) where no bye-laws exist. Thus, prescribing the procedure for collecting the necessary material about the new erections within the municipal limits sub-section (6) authorises the municipality to give permission to execute any work of which notice has been given under sub-section (1) with or without condition as may be deemed necessary for the purpose and subject to conditions mentioned in that provision. Sub-section (7) requires the Municipality in the case of a city, before granting permission to issue a provisional order directing the applicant not to proceed with intended work for a period which shall not be longer than one month and demand further particulars. Sub-section (8) envisages that on failure of the Municipal Council to dispose of the notice and the application for permission to make any construction within the Municipal limits within the period stated in sub- sec. (8), it has to be deemed that permission has been granted absolutely for carrying out the proposed work. Sub-section (9) puts a restraint on the person giving notice under sub-section (1) not to commence such work after the expiry of the period of one year from the date on which he becomes entitled to proceed with the erection work whether on grant of permission explicitly or because of deemed permission under sub-section (8). Sub-section (10) authorises the Chairman, the Executive Officer or any other member, officer or servant of the Board authorised in this behalf to inspect any work in respect of which notice is required under sub-section (1) while under construction or within one month of the receipt of the report that it has been completed or in default of such report any time after the completion and if so satisfied, specify by written notice any matter in respect of which the execution of such work may be in contravention of any provisions of the Municipalities Act or Bye-laws under the Act and requiring the person executing or who has executed the work and the owner of the work to cause removal of anything done contrary to any such provision or bye-law or he may be required to do, which he has omitted to do. Sub-section (11) makes any construction carried out under the permission granted under Section 170 subject to the provisions of Section 166 of the Act.

18. Thus, dealing with in detail, the manner in which permission is to be sought, conditions subject to which the permission is to be granted, the constraints on the

grant of permission, the constraints of limitation within which such notice is to be disposed of by inviting objections thereto under sub-section (12), a specific provision of appeal has been made conferring right of appeal on any person aggrieved of an order under clauses (a), (b), (c) of sub-section (6) or clause (a) or clause (b) of sub-section (11). Such appeal lay to the Collector. The emphasis on the sanctity of the permission granted under Section 170 is expressed in no uncertain terms by clearly stating that no such order shall be liable to be called in question otherwise than such appeal. For ready reference, sub-section (12) of Section 170 is reproduced hereinbelow :-

"(12) Any person aggrieved by an order of a board under clause (a) or clause (b) or clause (c) of sub-section (6) or clause (a) or clause (b) of sub-section (11) may within thirty days from the date of such order, exclusive of the time requisite for obtaining a copy thereof, appeal to the Collector and no such order shall be liable to be called in question otherwise than by such appeal :

Provided that in relation to a corporation, this sub-section shall have effect as if for the expression the Collector", the expression the State Government or such officer as may be authorised by it in this behalf" were substituted therein."

19. Thus, it is apparent that not merely the sub-section (12) of Section 170 provides an appeal challenging any permission granted under sub-section (6) or order made under sub-section 11(b) of Section 170 but further lays emphasis that no order which can be challenged by appeal is liable to be called in question otherwise than by such appeal. Thus, sub-section (12) by necessary implication excludes the appellate jurisdiction under Section 311 in respect of orders of permission granted under Section 170.

20. Moreover, the order under Section 170 is envisaged by the Board. The Commissioner exercises such power as a delegate of the Board. When he exercises power under Section 170 for granting sanction, he exercises the authority of the Board itself and his order becomes (that) of the Board and it is not an order of that officer in his capacity as subordinate authority. It cannot be made subject-matter of challenge under Section 311 which does not provide any appeal before the Board against the order of the Board itself.

21. The principle is well settled and needs hardly elaboration that where any power vesting in any authority is exercised by someone else as his delegate, the exercise of such power by the delegate is to be deemed as if has been exercised by the authority

delegating such power himself. In the words of Prof. S.A. de Smith from his book *Judicial Review of Administrative Action*.

"..... if it has validly delegated an executive power to make decisions, it will normally be bound by a particular decision, conferring rights on individuals (and possibly one derogating from those rights), made in pursuance of the delegated power and will be incapable of rescinding or varying it; nor will it be competent to ratify" with retroactive effect a decision encroaching on individual rights made by the delegate in excess of the powers so delegated, even though the delegating authority could validly have made the decision itself in the first place."

22. In this connection, attention may be drawn to the decision of Supreme Court in *Roop Chand v. State of Punjab*,¹

23. That apart, Section 311 or Section 170(12) both confer appellate jurisdiction on the authority superior to the authority which has passed the order and can be invoked by the person aggrieved. An appellate jurisdiction cannot be invoked by the appellate authority himself suo motu. Supervising powers are over orders passed by and proceedings conducted by subordinate authorities are ordinarily conferred on a superior authority in the form of revisional jurisdiction. The revisional jurisdiction ordinarily can be exercised suo motu on the basis of any error appearing to the such revising authority from the record of the proceedings or on an application moved by the aggrieved party bringing such error to the notice of the revising authority. Section 115 of the Civil Procedure Code, Section 482 of the Criminal Procedure Code, and Secs. 263 and 264 of the Income-tax Act are a few instances of such provisions. The Rajasthan Municipalities Act too contains specific provision conferring supervisory jurisdiction. Such supervisory jurisdiction vests in the State and not in the Board or any officer of the Board. Section 285 of the Rajasthan Municipalities Act, 1959, which confers such supervisory jurisdiction, reads as under :-

"285. Powers of suspending execution of order etc. of board.- (1) If authorised by the State Government in this behalf the execution of any order or resolution of a board, or the doing of anything which is about to be done or is being done by or on behalf of a board, is causing or is likely to cause injury or annoyance to the public or a breach of the peace or is unlawful, he may, by order in writing

under his signature, suspend the execution or prohibit the doing thereof.

(2) When any such officer makes any order under this section, he shall forthwith to the State Government and to the board affected thereby a copy of the order, with a statement of the reasons for making it, and it shall be in the discretion of the State Government to rescind the order or to direct that it shall continue in force with or without modification, permanently or for such period as it thinks fit :

Provided that no order of such officer passed under this section shall be confirmed, revised or modified by the State Government without giving the board reasonable opportunity of showing cause against the said order."

24. A perusal of the aforesaid provision spells out that unlike, as the case was in *Chintapalli Agency Taluk Arrack Sales Co-operative Society Ltd. v. Secretary, Food and Agriculture, Govt. of Andhra Pradesh etc.*² before the Apex Court, no such power has been given to the Board or any authority exercising jurisdiction of the Board to revise any orders passed by its officer or its delegates. The authority to revise the orders which appear to be not in accordance with law or improper, vests in the State Govt. or any person authorised by the State Govt. to exercise such powers on its behalf.

25. In the present case, the Administrator of the Municipality was acting as the Municipality itself and could not be said to have revisional power or supervisory powers under Section 285 or any appellate jurisdiction under Section 311. He cannot be said to be an officer of the State so authorised under Section 285 as a Controlling Authority having revisional jurisdiction in the matters of orders passed affecting others. The State Govt. has not exercised or purported to have exercised its jurisdiction under Section 285. Therefore, whether the State Govt. in a given case has exercised such power validly is not a question before us. That may be examined as and when occasion for such (sic) arises.

26. In this connection, our attention has also been drawn to Section 67 with the specific reference to clause (e) of Section 67, which reads as under :-

"Section 67. It shall be the duty of the chairman of a board to exercise supervision and control over the acts and proceedings of all officers and servants of the board in matters of executive administration and in matters

concerning the accounts and records of the board, and subject to the rules for the time being in force, and to the provisions of Chapter XIII, to dispose of all questions relating to the service of the said officers and servants, and their pay, privileges and allowances."

27. This provision speaks about administrative control of the officers and servants of the Board in connection with their services. The specific power conferred under Section 67(e) is to dispose of all questions relating to service of the said officers and servants and their pay, privileges and allowances, but does not confer any administrative or judicial control in respect of orders made by them on application made by persons under various provisions of the Act and Rules which regulate their rights. Such orders unless they concern service, pay, privilege and allowances of officers and servants, do not come within the purview of exercise of authority under Section 67. It cannot be said that the Administrator of the Board has the power to overturn the order passed under Section 170 which otherwise is liable to be overturned only either under appeal under Section 170(12) or on an order passed in revision under Section 285 of the Act.

28. As a result, this appeal fails and is hereby dismissed. The ad interim order, if any, stands vacated.

Appeal dismissed.

Cases Referred.

1. AIR 1963 SC 1503
2. AIR 1977 SC 2313