Municipal Corporation, Bhopal, M.P vs Misbahul Hasan & Ors on 12 February, 1972

Equivalent citations: 1972 AIR 892, 1972 SCR (3) 363

Author: M. Hameedullah Beg

Bench: M. Hameedullah Beg, S.M. Sikri, A.N. Ray

PETITIONER:
MUNICIPAL CORPORATION, BHOPAL, M.P.

Vs.

RESPONDENT:
MISBAHUL HASAN & ORS.

DATE OF JUDGMENT12/02/1972

BENCH:
BEG, M. HAMEEDULLAH
BENCH:
BEG, M. HAMEEDULLAH
SIKRI, S.M. (CJ)
RAY, A.N.

CITATION:
1972 AIR 892 1972 SCR (3) 363
1972 SCC (1) 696
CITATOR INFO :
D 1986 SC1518 (8)

ACT:
Madhya Pradesh Municipal Corporation Act, 1956-Ss. 432 and 433 Whether the State Government can change the service conditions of the Corporation employees by framing rules with-out following the procedure laid down under the Act.

HEADNOTE:
The respondent employee was appointed a Lower Division Clerk and after 5 years of service, the Administrator of the Municipal Corporation, purporting to carry out the orders of the St-ate Government, passed a general order dated 21st December 1967, stating that the age of compulsory retirement of all servants of the Corporation (other than Class IV servants) should be 55 years.
The respondent had entered into service of the Municipal

Board of Bhopal long ago. in 1967, the Board became a Corporation under the Madhya Pradesh Municipal Corporation Act, 1956. As a result of the continuance of the service conditions of the employees of the former Municipal Board, the petitioner was to retire at the age of 60 (by notification dated 11th November, 1947), but in 1955, the Government of Bhopal by a Notification, applying the service regulations of Central Government employees, reduced the retiring age of the Respondent to 58. Under the Corporation Act of 1956, question relating to service conditions of the employees of the Corporation were to be regulated by bye-laws under S. 427 (I C) (b) of the Act and not by rules to be made by Government. The State Government by a Notification in 1967 further reduced the retirement age of all employees (except IV Grade employees) to 55 years. The validity of the Order dated 21st December 1967 of the Administrator was challenged by the respondent on the ground that the procedure laid down by the Act for amending a bye-law was not followed, and the High Court accepting this contention quashed the Government Notification dated 22nd December 1967 as well as the general order reducing the age of retirement. On appeal, it was contended that the procedure laid down in S. 432 of the Corporation Act was not mandatory but was merely meant to give the Corporation concerned an opportunity of putting forward its views by means of a representation it may like to make with regard to any proposal to the Government to modify or repeal any bye-law so that the administrator, acting on behalf of the Corporation, could forego the right of the Corporation to make any representation,. The State, in its appeal contended that the rule making powers of the Government under S. 433 are very wide and the Government can make a rule if the Corporation failed to make a bye-law. The view of the High Court that the matter did not fall under S. 433 of the Act was assailed. Dismissing the appeals,

HELD : (1) The procedure laid down in S. 432 of the Act is only applicable where there is an existing bye-law which appears to the Government to stand in need of modification or repeal wholly or in part. Therefore, the impugned notification does not fall under S. 432 of the Act. [358 G] 354

(2) Assuming that the impugned notification purported to publish a rule made under S. 433 of the Act, the condition precedent of previous publication in the Gazette for an amendment of a rule, laid down by S. 24 of the Madhya Pradesh General clauses Act 1957 had not been followed in the present case. Therefore no valid alteration in the age of retirement of the employee-respondent was made in accordance with law. The impugned notification is bad and quashed. [359 C, 360 D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : C.A. Nos. 2004 of 1970 and 319 of 1971.

Appeals by Special Leave from the judgment and order dated the August 26, 1970 of the Madhya Pradesh High Court in Mis- cellaneous Petition No. 302 of 1968.

C. K. Daphtary and Rameshwar Nath, for the Appellant (in C.A. No. 2004 of 1970).

I. N. Shroff, for the Appellant (in C.A. No. 319 of 1971). S. K. Gambhir, for Respondent No. 1 (in both the Appeals). Rameshwar Nath, for Respondent No. 2 (in C.A. No. 319 of 1971).

The Judgment of the Court was delivered by Beg, J. There are two appeals by Special Leave before us, one by the Municipal-Corporation, Bhopal, and another by the State of Madhya Pradesh, against the Judgment and order of a Division Bench of the Madhya Pradesh High Court allowing a Writ Petition filed by the Respondent employee of the Bhopal Municipal Corporation (hereinafter called the 'Corporation').

The employee's case was : He was born on 1st July, 1912, appointed a Lower Division Clerk in April, 1962, promoted as a Upper Division Clerk in February, 1964. A general order dated 21 December, 1967, (Annexure 'A') had been passed by the Administrator, Municipal Corporation, purporting to carry out the orders of the Government of Madhya Pradesh which had decided that the age of compulsory retirement of all servants of the Corporation, other than Class IV servants, should be 55 years. The employee was informed of it by a communication dated 22nd December, 1967, (Annexure B). The Municipal Corporation of Bhopal, which was formerly only a Municipal Council, became a Corporation when provisions of the Madhya Pradesh Municipal Corporation Act, 1956 (hereinafter referred to as 'the Act') were applied to it from 25th August, 1967, by an ordinance the provisions of which were then embodied in an Act. Although the Petitioner had entered service of the Municipal Board of Bhopal as a result of the continuance of the service conditions of the employees of the former Municipal Board, which had thus be- come a Corporation, the petitioning employee was to retire at the age of 60 as laid down in Notification No. 30 of 11th November 1947 (Annexure C). But, in 1955, when Bhopal was a Part 'C', State, the Government of Bhopal had issued a notification dated 4th February 1955 applying the service regulations of Central Government employees in Part 'C' States. In this way, the petitioning employee's correct age of retirement was 58. Under the Act of 1956, questions relating to service conditions of the employees of the Corporation were to be regulated by bye-laws under Section 427(1-C)(b) of the Act and not by rules to be made by the Government. The Government of Madhya Pradesh had, however, issued a Notification in the Gazette of 22nd December, 1967, purporting to reduce the age ,of retirement of first and second and third grade employees from 60 years to 55 years by amending the Government Notification No. 30 dated 11th November 1947. It was not clear to the petitioning employee whether the orders of 21st December,' 1967, were in pursuance of any Gazette Notification or whether they have been passed after a proper amendment of their bye-laws in accordance with the procedure laid down in Section 432 of the Act. In any case, the validity of the order of 21st December, 1967, was challenged.

The Judgment under appeal shows that it was argued on behal f of the petitioning employee that the procedure laid down :by the Act for amending a bye-law was not followed. The Madhya Pradesh High Court had accepted this contention and rejected the argument, put forward on behalf of the Corporation and its Administrator, that the amendment in quest-ion was governed by the provisions of Section 433 of the Act. It had, therefore, quashed the Notification dated 22nd December, 1967, which purported to have been made in exercise of powers vested in the Government under Section 432 of the Act, as well as an order dated 30th December, 1967, (Annexure R-1), the relevant part of which reads as follows :-

> "In pursuance of the Notification No. 10678/ 4251/'XVIII-U-11, dated the 22/12/67, Shri Misbahul Hasan, UDC Account Section, who has attained the age of compulsory retirement, is hereby sanctioned 120 days Earned Leave w.e.f. 1/1/1968 as leave Preparatory to retirement. He will stand retired w.e.f. 1/5/1968 on expiry of the leave sanctioned to him, stated above".

Mr. Daphtary, appearing on behalf of the Corporation Appel- lant, has contended that the procedure laid down in Section of the Act was merely meant to give the Corporation concerned an opportunity of putting forward its views by means of any representation it may like to make with regard to any proposal of the Government to modify or repeal any bye-law. The learned Counsel submitted that, as the Corporation had no objection whatsoever to the amendment of the age of retirement of Class I and II and III employees, it was not open to the petitioning employee to raise any objection on the ground that the prescribed procedure had not been followed. This argument proceeds on the assumption that there was already a bye-law regulating the age of retirement of employees of Classes I, II, and III of the Corporation, and that the Government was purporting to follow the procedure laid down by Section 432 of the Act in amending that bye--law.

We may here reproduce the provisions of Section 432 of the Act which run as follows :

> "432. Government may modify or repeal bye- laws.-
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> (1) If it shall at any time appear to the Government that any bylaw should be modified or repealed either wholly or in part, it shall cause its reasons for such opinion to be communicated to the Corporation and prescribe a reasonable period within which the Corporation may make any representation with regard thereto which it shall think fit. (2) After receipt and consideration of any such representation or, if in the meantime no such representation is received, after the expiry of the prescribed period, the Government may at any time by notification in the Gazette, modify or repeal such bye-law either wholly or in part.
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> (3) The modification or repeal of a bye-law under sub-section (2) shall take effect from such date as the Government shall in the said notification direct or, if no such date is specified, from the date of the publication of the said notification in the Gazette, except as to anything done or suffered or om itted to be done before such date".

It is admitted by both sides that, at the relevant time, them powers of the Corporation were vested in the Administrator under the provisions of Section 432 sub-s (1) of the Act. The only question, according to the Corporation, is whether the Administrator, acting as the Corporation, should not forego the right of Corporation to make any representation with regard to a proposal of the Government to amend a bye-law. in other words, the modification or amendment of a bye-law under Section 432 of the Act was a matter of concern only to the Government and to the Corporation and to nobody else. If, therefore, there was any infringement of its technical procedural requirements, it was only for the Corporation and nobody else, according to this contention, to raise the objection. The broad proposition put forward before us is that the requirements of a procedure intended for the benefit of a party could be dispensed with if that party itself chooses that this should be done. It is pointed out that the only object of the procedure provided by Section 432 was that the proposals of the Government may be duly considered by the Corporation so as to enable it to represent its views. There was no obligation upon the Corporation to make a representation.' If the Corporation did not choose to make a representation, after the Government had sent its reasons for its opinion to the Corporation and had asked for the representation within a prescribed period, the failure of the Corporation to make any representation would, far from depriving the Government of the power to issue a notification modifying or repealing a bye-law wholly or in part in accordance with its opinion, enable it to do so. The mere order in which a proposal is made and assent to it is given by the Corporation, it was urged, should not make any difference as there was substantial compliance with prescribed procedure. In the appeal filed on behalf of the State of Madhya Pradesh, the main contention is that the rule making powers of the Government under Section 433 of the Act are very wide so that the State could make rule "for the purpose of carrying into effect the provisions of the Act". It is urged that the Act imposed a duty and conferred a power upon the Corporation to frame bye-laws relating to conditions of service of its employees as laid down in Section 427 (1-C)

(b) of the Act. The Government could make a rule if the Corporation failed to make bye-law on a subject. The correctness of the view of the High Court, that the matter did not fall within the purview of Section 433 of the Act, was assailed.

Another contention put forward on behalf of the State of Madhya Pradesh was that the petitioning employee had not im- pleaded either the State, or the Government of the Madhya Pradesh, so that a Notification of the State Government could not observe here that this ground is not taken in the Special Leave Petition of the State of Madhya Pradesh by means of which its appeal has come up before us. No such objection was taken on behalf of the Corporation in the Special Leave Petition filed by it. Nor was any such argument advanced on behalf of the Corporation before the High Court. Paragraph 12 of the Special Leave Petition filed on behalf of the Corporation discloses that the High Court had itself considered it necessary to hear the State Government. It had, therefore, given time to the State Counsel, by an order dated 16th April, 1970, to file a return to the petition of the employees. But, the State Counsel had neither filed any return nor put in any appearance. Thus, the State had obtained due opportunity to oppose the petition, but it had not chosen to do so. Therefore, we are unable to entertain any such objection at this stage.

Another question attempted to be raised before us, by the learned Counsel for the State of Madhya Pradesh, was based on assertions which were neither made in the High Court by any party nor in

this Court in the two Special Leave Petitions. The submission rests on materials said to exist on the records of the State Government which, it was stated, show that the proposal had actually come from the Administrator himself, that the particular amendment sought be made by the Government. If this was the correct position, the State Counsel should have appeared before the High Court and placed the whole record before the Court so that the facts which had a material bearing on the question, whether the procedure laid down by Section 432 of the Act had been followed in substance or spirit or not, may be gone into and decided.

The High Court had proceeded on the assumption that the procedure laid down in Section 432 of the Act was applicable. Learned Counsel for the Corporation also made his submission primarily on that assumption. If that procedure had been really applicable, we think that the question whether the object of that procedure had been served and whether the Corporation could forego its right to make a representation or not would have deserved serious consideration provided it was supported by evidence which disclosed that there was substantial compliance with Section 432 of the Act.

After having heard Counsel for both sides, we are unable to hold that this is a case governed by the procedure laid down in Section 432 of the Act at all. That procedure is only applicable where there is an existing bye-law which appears to the Government to stand in need of modification or repeal wholly or in part. It is only then that the Government had to cause its reasons for entertaining the opinion that the bye-law in question should be modified or repealed, to be communicated to the Corporation. We are not at all satisfied about the exact position of the Ailan No. 30 of 1947. It has not been shown to us, by references to the relevant records and provisions, that this Ailan could be deemed to be a bye-law as contemplated by the Act. It seems that the Corporation was aware of this defect because the main argument on behalf of the Corporation itself before the High Court was that it was a rule made by the Government and not that Section 432 was applicable and substantially complied with. And, the main argument on behalf of the State Government before us now also is that the impugned notification is covered by Section 433 of the Act. In view of Section 427 (1-C) (b) of the Act, the High Court had held that, having regard to the specific provisions on the subject, the general rule making power under Section 433 of the Act was inapplicable to the subject-matter. Assuming, however, that the modification of the age of retirement could be made by a rule made under Section 433 of the Act and not merely by a bye-law, as contemplated by the Act, we find that a condition precedent for an amendment of a rule has not been followed here. Section 433 of the Act enacts : "The State Government may after previous publication in the Gazette make rules for the purpose of carrying into effect the provisions of this Act". Section 24 of the Madhya Pradesh General Clauses Act, 1957, lays down :

> "24. Provisions applicable to making of rules or bye-laws, etc., after previous publication.-Where, by any Madhya Pradesh Act, a power to make rules or bye-laws is expressed to be given subject to the condition of the rules or bye-laws being made after previous publication, then the following provisions shall apply, namely :-
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> (a) 'the authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-

laws for the information of persons likely to be affected thereby;

(b) the publication shall be made in such manner as that authority deems to be sufficient, or if the condition with respect to previous publication so requires, in such manner as the Government prescribes;

(c)there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(d) the authority having power to make the rules or bye-laws; and where the rules or bye- laws are to be made with the sanction, approval or concurrence of another authority, that authority also shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye-laws from any person with respect to the draft before the date so specified;

(e) the publication in the Official Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye-

laws after previous publication shall be conclusive proof that the rule or bye-law has been duly made".

The legislative procedure envisaged by Section 24, set out above, is in consonance with notions of justice and fair play as it would enable persons likely to be affected to be informed so that they may take such steps as may be open to them to have the wisdom of a proposal duly debated and considered before it becomes law. this mandatory procedure was not shown to have been complied with here. The result is that we are unable to hold, on the material on record, that a valid alteration in the age of retirement of the employee respondent was made in accordance with law. The High Court had not expressed any opinion on the question whether the contention of the employee-respondent, that his age of retirement was the one laid down as 58 for Central Government employees, was correct. As no contention had been advanced on this question before us and none seems to have been advanced on it before the High Court, we refrain from dealing with it.

The result is that both these appeals must fail and are hereby dismissed with one set of costs.

S.C. Appeals dismissed.