

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10445 OF 2011

Dilip Haribhau Pawar

.... Petitioner

Vs.

Chief Officer,

Khopoli Municipal Council,

Khopoli, Dist: Raigad & 2 Others

.... Respondents

Mr. Balkrishna D. Joshi for the Petitioner.

Mr. Gardre N.G. i/by M/s. L.C. Tolat & Co. for
Respondent No.1.

Mr. A.B. Vagyani, GP, with Mr. V.N. Sagare, AGP,
for Respondent No.3.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

DATE : FEBRUARY 17, 2017

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):

1. The petitioner has complained about an action of the Khopoli Municipal Council, Khopoli, as, according to the petitioner, he is not paid the monetary and retirement benefits which he is entitled to in the post of Office Superintendent and the grade pay, as enumerated in prayer clauses (b) and (c) of

the petition.

2. The petitioner seeks a declaration that he has retired as an Office Superintendent with grade pay and both amounts set out in prayer clause (a) of the petition, are due and payable to him.

3. The argument of Mr. Joshi, appearing for the petitioner, is that the petitioner joined the service of Khopoli Municipal Council on 1-8-1976 as an Octroi Naka Clerk in the pay scale of Rs.260-495. That was based on the appointment letter issued in his favour. On 15-12-1979, he was promoted as City Bus Ticket Checker in the pay scale of Rs.290-540. When the petitioner joined the service of Khopoli Municipal Council, the recommendations of Badkas Pay Commission were in force and applicable. The pay scale of the petitioner was revised as per a further Commission's report, namely, the Bhole Pay Commission with retrospective effect. The petitioner relies upon a Government Resolution dated 13-4-1972, under which certain posts were sanctioned by the Director of Municipal

Administration. That on the establishment of the Khopoli Municipal Corporation a post existed and particularly styled as Office Superintendent. The petitioner states that on 16-11-1989 the Chief Officer of the Khopoli Municipal Council transferred the petitioner from the post of Assistant Octroi Inspector to the post of Office Superintendent. This order of the Chief Officer was thereafter placed before the Council and the Standing Committee of the Council passed a Resolution dated 24-9-1990, approving the petitioner's appointment to the promotional post. The Pay Commission's recommendations prevailing at that time entitled the petitioner to be appointed as an Office Superintendent. The post of the Office Superintendent on the establishment of the Khopoli Municipal Council could have accommodated, according to the petitioner, only one person. However, though he was performing the duties of Office Superintendent, his designation was Octroi Inspector. The petitioner states that in terms of the Standing Committee's Resolution and when the petitioner worked as a full time Office Superintendent, he could not have been denied the benefits of

the Pay Commissions and that is how he proceeds to narrate the entitlement in the pleadings in the writ petition.

4. While not keeping back from this Court the fact that an audit was carried out of the accounts of the Khopoli Municipal Council and the Auditor raised an objection with regard to fixation of the pay admissible to the petitioner and recommended that the same be determined in accordance with his proposals and objections. Yet, the petitioner says that nothing was done by the Khopoli Municipal Council in terms of the Auditor's report. The objection raised by the Auditor was later on not pursued for an explanation was provided by the Chief Officer. However, once again that objection surfaced during the course of audit of the books of account for the year 2004-2005 (objection No.8). The petitioner states that the same objections were raised again and again in the years 2005-2006, 2006-2007 and 2007-2008. Each time the objections of the Auditor were resisted by the Council and it gave a reply to the same. The matter was not pursued. The staffing pattern of the Khopoli Municipal Council was approved by the Director of

Municipal Administration and with the pay scale for the post of Office Superintendent (Rs.5500-9000). The designation was changed from Office Superintendent to Administrative Officer. The petitioner, therefore, relies upon these developments to submit that the audit objection does not survive.

5. Despite this position emerging from the records, the petitioner submits that he has not been paid the amounts which he could have validly claimed and was entitled to post his retirement on 30-4-2011. He submitted a detailed representation so as to recompute and recalculate his retiral benefits and that having not been done nor was there any response, the present writ petition.

6. An affidavit in reply is filed to this writ petition by the Chief Officer of the Khopoli Municipal Council in which it is stated that the matter is pending before the Divisional Commissioner. Since the matter is pending before the Divisional Commissioner and particulars have to be provided to him, until his decision, nothing should be done nor should this Court

decide and rule upon the controversy.

7. In the meanwhile and during the pendency of this writ petition, on 2-8-2014 an order is passed by the Divisional Commissioner. By an amendment, this order is also impugned.

8. Mr. Joshi, appearing for the petitioner, would submit that in the light of the admitted facts and circumstances, there was no warrant for withholding the petitioner's retiral benefits and as computed by him. A lesser amount and to his detriment being paid would deprive him of the legitimate monetary benefits as per his entitlement and the pay scale. The pay scales and the post have been duly approved. If there was an objection raised by the Auditor and if that was complied with and nothing was done in pursuance thereof, then, it is not permissible to deprive the petitioner of his lawful entitlement.

9. Mr. Joshi also submits that there is a serious legal infirmity inasmuch as the Divisional Commissioner passed an order unmindful of the fact that the petitioner has not approached him. Secondly, he has not recorded any opinion in

terms of the statutory provisions. Thirdly, the statutory provisions do not empower a Divisional Commissioner to pass the order. Mr. Joshi has invited our attention to Section 79(6) of the Maharashtra Municipal Councils, Nagar Panchayats & Industrial Townships Act, 1965 (for short, "the Act") which was invoked by the Divisional Commissioner in this case and the power of control vesting in the State Government. Mr. Joshi would submit that by Chapter XXIII, titled as, Control, the Director, the Collector, or any officer of the Government authorised by the State Government, the Director or the Collector shall severally have power to enter on and inspect, or cause to be entered on and inspected any immovable property occupied by or movable property belonging to any Council or any institution under its control or management or any work in progress under it or under its direction and to call for or inspect any extract from any Council's or its committee's proceedings and any book or document in the possession of or under the control of the Council or any of its committees (Section 306). Then, by Section 307 of the Act there is power to call for returns

and reports conferred upon the Director or the Collector. The power to suspend execution of orders and resolution of Council on certain grounds vests in the Collector in terms of Section 308, but even in this provision, by sub-section (4) a discretion is vested in the Director to take the requisite steps to act and pass an order. By Section 309, there is an extraordinary power of execution of certain works in case of emergency, which also is a power to be exercised by the Collector. It is submitted that the power of the Director to prevent extravagance in the employment of establishment conferred by Section 310 cannot be assumed or usurped by the Divisional Commissioner. In the instant case, the order passed on 2-8-2014 is by the Divisional Commissioner. Therefore, it is *ex facie* erroneous and illegal. This assumption of power vitiates completely the conclusion. He had no authority to go into the matter and raised purportedly by the Council or by the power conferred in the Competent Authority vide Section 310 *suo motu*.

10. In the afternoon session and before recess we called upon the learned Government Pleader to take instructions as to

how the order has been passed by the Divisional Commissioner and Regional Director of the Municipal Council Administration, Konkan Division and traceable to Section 79(6) of the Act. Mr. Vagyani though invited our attention to both the provisions, having referred to them with the assistance of Mr. Joshi, we do not think that Mr. Vagyani's reliance on these provisions is well founded. The power conferred is to be exercised by the Director. The power in this case is exercised by the Divisional Commissioner. We do not know whether he is an authority and in terms of Section 310 or Section 306 of the Act, who can be said to be authorised by the State Government. No authorisation in that regard is placed before us. The term "Director" has been defined in the Act and to mean the person appointed by the State Government to be the Director of Municipal Administration under the Act. In such circumstances, we do not think that the order dated 2-8-2014 has been passed by an authority, competent to pass it. It is a usurpation of the authority by the Divisional Commissioner and without the prerequisites for exercise of the jurisdiction being satisfied. On this ground

alone, we quash and set aside the order dated 2-8-2014.

11. We, now and ordinarily would be justified in directing that the petitioner be paid all the amounts and as claimed in the writ petition, after verification and scrutiny of the relevant records, however, Mr. Vaganyi, on further instructions, states that a final opportunity be provided to the Director to look into the records and papers and, if necessary, to arrive at the requisite opinion and in terms of the statutory provisions. This Court may set a time limit for the Director to do so and if he decides to embark upon an enquiry contemplated by the legal provisions, he shall cause a notice to be issued to both the petitioner and the Council. Thereupon, it is stated by Mr. Vaganyi that the Director will pass a reasoned order and as expeditiously as possible.

12. It is only with a view to give an opportunity, as desired by Mr. Vaganyi, but without expressing any opinion as to the maintainability of the proceedings, the power of the Director, his jurisdiction, we direct that in the event the said

authority desires to take steps, as indicated above, it shall cause a notice to be issued to the petitioner as also the Khopoli Municipal Council and after hearing them pass a reasoned order as expeditiously as possible and within a period of eight weeks from the date the requisite opinion is formed. However, we clarify that our order and direction in terms aforesaid shall not be construed as an opinion on the power of the Director, or his jurisdiction and authority, so also the maintainability of any proceedings before him. We further clarify that the objections of the petitioner on each of the above are kept open. They can be raised during the course of the proceedings, if any, before the Director and the Director will have to rule upon them irrespective of any earlier orders or the observations and findings therein. He also to proceed on the footing that this Court has not ordered him to pass any order. The matter shall be decided strictly in accordance with law and within the time frame stipulated above.

13. The petition is disposed of in the above terms.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)