

HIGH COURT OF CHHATTISGARH AT BILASPURWPS No. 6936 of 2009

Smt. Bharti Dubey now (Ku. Bharti Pandey W/o Priy Dubey), aged about 35 years, R/o Naya Baradwar, Tahsil Sakti, District Janjgir-Champa (C.G.).

---Petitioner

Versus

1. State Of Chhattisgarh Through The Secretary, Department of Urban Development and Administration, Mantralaya, D.K.S. Bhawan, Raipur (C.G.).
2. Commissioner/Appellate Authority, Directorate Urban Administration and Development, Raipur (C.G.).
3. Nagar Panchayat Naya Baradwar, Through - It's Chief Municipal Officer, District Janjgir-Champa (C.G.).
4. The Collector, Janjgir, District Janjgir-Champa (C.G.).
5. Avinash Tiwari S/o Shri Dinesh Tiwari, aged about 36 years, R/o New Baradwar, District Janjgir-Champa (C.G.).
6. Ku.Nisha Shriwas D/o Shri Basant Lal Shriwas, aged about 35 years, R/o New Baradwar, District Janjgir-Champa (C.G.).

---Respondents

WPS No. 1102 of 2010

Ramsharan Yadav S/o Dujram Yadav, aged about 35 years, R/o village - Baradwar, Tahsil Sakti, District Janjgir-Champa (C.G.).

---Petitioner

Versus

1. State Of Chhattisgarh Through The Secretary, Department of Urban Development and Administration, Mantralaya, D.K.S. Bhawan, Raipur (C.G.).
2. Commissioner/Appellate Authority, Directorate Urban Administration and Development, Raipur (C.G.).
3. Nagar Panchayat Naya Baradwar, Through - It's Chief Municipal Officer, District Janjgir-Champa (C.G.).
4. The Collector, Janjgir, District Janjgir-Champa (C.G.).
5. Tiketram Suryavanshi S/o Guharam R/o Bhagodih, Tahsil Sakti, District Janjgir-Champa (C.G.).
6. Smt. Bharti Dubey W/o Shri Priya Dubey, R/o Naya Baradwar, Tahsil Sakti, District Janjgir-Champa (C.G.).

7. Avinash Tiwari S/o Shri Dinesh Tiwari, aged about 36 years, R/o New Baradwar, District Janjgir-Champa (C.G.).
8. Ku.Nisha Shriwas D/o Shri Basant Lal Shriwas, aged about 35 years, R/o New Baradwar, District Janjgir-Champa (C.G.).

---Respondents

For petitioners	:	Shri Ajay Shrivastava, Advocate.
For respondent No.3	:	Shri Dharmesh Shrivastava on behalf of Shri Akhilesh Kumar, Advocate.
For respondents No.5 & 6	:	Shri H.B.Agrawal, Senior Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

27/08/2018

1. The challenge in the present Writ Petitions is to the order passed by the Commissioner/Appellate Authority, Urban Administration Development Department dated 09/11/2009 whereby the Commissioner has set aside the order dated 18/03/2009 passed by the Collector and have ordered for restoration of the appointment order issued in favour of the respondents No. 5 & 6.
2. The facts of the case in brief is that, an advertisement was issued for filling up the post of Siksha Karmi – Grade-III. The two petitioners herein have also participated in the same. After the selection process was complete, the respondents issued an order of appointment in favour of the respondents No. 5 & 6 vide order dated 16/09/1998. The petitioners herein immediately preferred an appeal under Rule 12 of the Nagar Palika Siksha Karmi (Recruitment and Conditions of Service) Rules, 1998. The Collector after considering the contentions put forth by the petitioners allowed the appeal vide order dated 25/10/1999 and set aside the order of appointment

issued in favour of the respondents No. 5 & 6 and also ordered for giving appointment to the petitioners.

3. The petitioners in between were granted appointment on 15/11/2000.

4. The respondents No. 5 & 6 thereafter filed a Writ Petition (S) No. 538/2001 which got disposed off on 11/12/2003 directing the petitioners to avail the remedy of appeal before the Director Panchayat pursuant to which the respondents No. 5 & 6 preferred an appeal before the Director Panchayat who in turn refused to entertain the same on the ground that since the matter pertained to Urban Administration Department, the Director Panchayat as such would not have any authority and jurisdiction to decide the appeal.

5. The respondents No. 5 & 6 again preferred a Writ Petition before the High Court which was registered as WP No. 1759/2004 and on the submission of the respondents No. 5 & 6 who made a categorical statement before the High Court on 09/09/2005 that appropriate directions be issued to the Director/Commissioner of the Urban Administration Department, State of C.G. to decide the appeal preferred by the respondents No. 5 & 6 against the order of the Collector dated 25/10/1999.

6. On the submission of the respondents No. 5 & 6, the High Court disposed off the Writ Petition directing the Commissioner to decide the appeal/representation.

7. The Commissioner thereafter on 24/11/2005 by a by-parte order remitted the matter back to the Collector for a fresh adjudication.

8. The Collector thereafter vide order dated 18/03/2009 Annexure-P/3 decided the appeal again in favour of the present petitioners thereby holding that, the petitioners were rightly provided employment.

9. It is this order of the Collector which was challenged before the Commissioner, Urban Administration Department and which stands decided vide the impugned order Annexure-P/1 dated 09/11/2009 whereby the Commissioner has set-aside the order of the Collector dated 18/03/2009 and have ordered for restoring the appointment in favour of the respondents No. 5 & 6. It is this order of the Commissioner which is under challenge before this Court.

10. Primarily, two grounds have been raised by the counsel for the petitioners assailing the two orders.

11. Firstly, the competence of the Commissioner, Urban Administration Department in entertaining and deciding the appeal which according to the him was without jurisdiction as there is no provision of appeal conferred upon the Commissioner, Urban Administration Department against the order of Collector.

12. The second ground raised by the counsel for the petitioners is that, on merits of the case, the respondent authorities have not granted marks for the experience for the year 1996-1997 and if marks are allotted to the petitioners for their experience of the said period, the petitioners would be securing more marks than the respondents No. 5 & 6.

13. Since the first ground raised by the counsel for the petitioners goes into the very competence of the authorities concerned, this Court is inclined to decide the said ground first.

14. The provision of Rule has been enclosed along with the Writ Petition itself i.e. Chhattisgarh Nagar Palika Siksha Karmi (Recruitment and Conditions of Service), Rules 1998. For ready reference, Rule 12 is reproduced herein under:-

“१२. अपील — इन नियमों के अधीन पारित किसी भी आदेश के विरुद्ध नगरपालिका की स्थिति में संभागायुक्त को तथा नगरपालिका परिषद् व नगर पंचायत की स्थिति में कलेक्टर को अपील की जा सकेगी।”

15. The plain reading of the aforesaid Rule position would itself clearly reflect that, the provision of appeal from the order passed by the Nagar Panchayat/Nagar Palika was conferred upon the Collector. Against the order of Collector, no provision of appeal has been prescribed under the Rules.

16. In the absence of any powers conferred upon any of the authorities in the department against the order of Collector, the Commissioner as such cannot be presumed to have the power of deciding the appeal against the order of Collector.

17. The counsel for the respondents however opposing the petitions submits that, the petitioners herein are estopped from raising such objections for the reason that, they did not oppose the appeal being sent to the Commissioner when the Writ Petition i.e. WP No. 1759/2004 was disposed off on 09/09/2005. He further contended that, the petitioners herein also did not question the competency of the authority when the matter was being

heard by the Commissioner at the first instance and had remitted the matter back to the Collector vide his order dated 24/11/2005. According to the counsel for the respondents, when the petitioners did not question the authority's, power and jurisdiction before the aforesaid two forums at the first instance, they are estopped from raising such objections at this juncture. He also submits that, in any case, the private respondents had already questioned the order of Collector vide WP No. 1759/2004 at the first instance which would show that they had promptly agitated the matter before the Court and they cannot now be left remedyless only on the ground of technicalities i.e. competency of the authorities. It was also urged by the learned Senior counsel that, in the event if this Court reaches to the conclusion that the impugned order was without jurisdiction and competence, then the Writ Petition which was originally filed should also be restored by the order passed by this Court in the present Writ Petition so as to avoid situation where the other side takes a ground of limitation.

18. It would be relevant at this juncture to refer to the judgment passed by the Hon'ble Supreme Court in the case of Chandrabhai K. Bhoir & Ors. v. Krishna Arjun Bhoir & Ors. [2009 2 SCC 315] wherein while deciding the issue in respect of the jurisdiction of authority, the Supreme Court in paragraph 26 has held as under:-

“26. Thus, the said issue, in our opinion, did not attain finality.

In any view of the matter, an order passed without jurisdiction would be a nullity. It will be a coram non judice. It is non est in

the eye of law. Principles of res judicata would not apply to such cases.”

19. Reiterating the same, the Supreme Court again in the case of Zuari Cement Ltd. v. Regional Director E.S.I.C. Hyderabad & Ors. [2015 7 SCC 690] while deciding the issue of jurisdiction and competency of a particular Court in paragraph 12 has held as under:-

“12. As discussed earlier, in terms of Section 87 of the Act, only the appropriate government has the power to grant exemption to a factory or establishment or class of factories or establishments from the operation of the Act. In fact, the appellant-factory itself has obtained exemption from the appropriate Government-State Government under Section 87 of the Act for the period from 1986 to 1993. Likewise, the rejection of exemption was also under Section 87 of the Act. While so, seeking the relief of declaration from the ESI Court that the appellant is entitled to exemption from the operation of the Act is misconceived. Contrary to the scheme of the statute, the High Court, in our view, cannot confer jurisdiction upon the ESI Court to determine the issue of exemption. ESI Corporation, of course, did not raise any objection and subjected itself to the jurisdiction of the ESI Court. The objection as to want of jurisdiction can be raised at any stage when the Court lacks jurisdiction, the fact that the parties earlier acquiesced in the proceedings is of no consequence.

20. In the light of the submissions made by the counsels appearing on either side and also taking into consideration the Rule position as it stands what is relevant to take note of is the fact that, the Rules of 1998 was in force at the time when the dispute originally arose and for all practical purposes it would be the said Rules of 1998 which would be applicable so far as ascertaining the authority concerned to decide the appeal.

21. Rule 12 of the said Rules which has already been reproduced in the preceding paragraphs clearly spells out different authorities for the Municipal corporation and different authorities for the municipal council and nagar panchayat.

22. Rule 12 specifically holds that so far as the order arising out of the municipal corporation are concerned, it is the divisional commissioner which would be the appellate authority and so far as the municipal council and nagar panchayat is concerned, it would be the Collector who would be the appellate authority.

23. Further, what also reflect is that, beyond specifying this two authorities, the Rules do not prescribe any other authority for deciding second appeal against the order passed by the divisional Commissioner so far as the dispute generating from the municipal corporation is concerned and from the order of the Collector in respect of the proceedings drawn from the municipal council or nagar panchayat is concerned. That means the statute does not provide for a provision of appeal against the order passed by these authorities.

24. In the absence of any provision for second appeal prescribed under the Rules, the Commissioner on his own nor can such powers be conferred by mutual consent or even at the behest of the High Court. The Appellate authorities has to be specifically prescribed and notified under the Rules itself.

25. If we look into the order passed by this Court in WPS No. 1759/2004 it appears that, the Writ Petition got disposed off on the submission made by the petitioners therein i.e. the respondents No. 5 & 6 in the present Writ Petition who have made statement before the High Court to direct the Commissioner, Urban Administration Department to decide the appeal/representation.

26. It was not a case where the High Court had adjudicated upon the issue and had decided on availability of alternative remedy as pleaded by the petitioners in the Writ Petition.

27. Moreover, if we consider the ratio laid down by the Hon'ble Supreme Court in the aforementioned two judgments it clearly reflect that, the Supreme Court in a very categorical terms have held that, even the High Court could not have created a jurisdiction upon an authority which is otherwise not conferred under the law.

28. Given the aforesaid facts and circumstances of the case, the impugned order of the Commissioner, Urban Administration Department Annexure-P/1 dated 09/11/2009 is apparently without jurisdiction, authority and power and the same is not sustainable.

29. Once when an order has been passed by an incompetent officer without any jurisdiction, the same would amount to be Ab Initio void.

30. In the case of Deepak Agro Foods v. State of Rajasthan & Ors. [2008 7 SCC 748], the Supreme Court in paragraph 17 has made following observation:-

“17. All irregular or erroneous or even illegal orders cannot be held to be null and void as there is a fine distinction between the orders which are null and void and orders which are irregular, wrong or illegal. Where an authority making order lacks inherent jurisdiction, such order would be without jurisdiction, null, non est and void ab initio as defect of jurisdiction of an authority goes to the root of the matter and strikes at its very authority to pass any order and such a defect cannot be cured even by consent of the parties.”

31. The impugned order thus deserve to be and is accordingly set-aside/quashed.

32. So far as the submission of the learned Senior counsel that in the process of holding the present order to be passed by an incompetent officer or authority without jurisdiction, then the Writ Petition that they had filed i.e. WP No. 1759/2004 would have to be restored. This Court is not inclined to accept the said submission on the simple ground that, this Court in exercise of its writ jurisdiction while determining the order under challenge would not have the jurisdiction so far as the restoration of a Writ Petition which has already been decided by a different Court.

33. Reserving the right of the respondents No. 5 & 6 to take appropriate remedial measures if they so choose, the present Writ Petition stands allowed and the impugned order stands set aside/quashed with consequential benefits.

Sd/-

(P. Sam Koshy)
JUDGE

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