
(1969) 08 CAL CK 0001
In the Calcutta High Court
Case No : C.R. 1010 (W) of 1969

Abu Mohammed Ismail Siddique

APPELLANT

Vs

State of W. Bengal and Others

RESPONDENT

Date of Decision : 01-08-1969

Acts Referred:

Calcutta Municipal Act, 1951 — Section 19(1)(i), 22

Citation : 74 CWN 299

Hon'ble Judges : Prodyot Kumar Banerji, J

Bench : Single Bench

Advocate : Noni Coomar Chakravarti and Sibendra Nath Sengupta, for the Appellant; S.K. Acharyya and J.N. Halder for Opposite Party No. 1 and A.D. Mukherjee, Madan Mohan Mallick and Sakti Prosad Mukherjee for Opposite Party No. 3, for the Respondent

Judgement

Prodyot Kumar Banerji, J.—This Rule is directed against an order passed by the State Government appointing Respondent No. 3 as the Commissioner of the Corporation of Calcutta. The petitioner is a rate payer of the Corporation of Calcutta and pays occupier's share of tax of the premises No. 7/1, Ram Lochan Mallick Street, Calcutta-7. It is stated in the petition that the petitioner "has right to the services of the said Corporation and is entitled to be assured that the duties of the said Corporation are performed and its revenue disbursed in accordance with the provision of law." In the premises, the petitioner is vitally interested in the appointment of the Commissioner of the Corporation of Calcutta being made in accordance with law. On the resignation of Mr. J.C. Sengupta who held the office of the Commissioner of the Corporation of Calcutta Mr. Priyo Guha Dy. Commissioner No. 1 was appointed u/s 22 of the Calcutta Municipal Act, 1951 to officiate as Commissioner for a period of not more than four months. The petitioner however came to know from the news item published in the Hindusthan Standard that Mr. Dulal Gopal Mukherjee has been appointed as the Commissioner of the Calcutta Corporation and that Mr. Mukherjee to take over the charge of the office on 22nd April, 1969. The said order of appointment is the

matter of challenge in this application and the ground taken to the Rule is that Mr. Mukherjee is a superannuated officer and as such he is not an officer in the service of the Government and the appointment is therefore bad in law.

2. Mr. Nani Coomar Chakravarti, appearing for the petitioner argued that the appointment of Mr. Mukherjee is bad in law and Mr. Mukherjee is not an officer in the service of the Government nor "he has been an officer in the service of the Government". Mr. Chakravarti submitted that the words "has been an officer in the service of the Government" can only apply in case of an officer who has gone on leave preparatory to retirement and his age of superannuation has not been reached as yet or an officer has been sent on deputation to any statutory Corporation where he is working.

3. Mr. Chakravarti argued that "has been" means "is" and as such unless the officer is at present in the service of the Government section 19(1)(i) of the Calcutta Municipal Act has no application.

4. Mr. Advocate General appearing for the State argued that the word "officer" in section 19(1)(a) means an officer who was paid by the State and the words "has been" means that the said person "has been" an officer of the Government in some time past and need not be an officer still working at the relevant time. It was argued that the petitioner has no locus standi to maintain the application for a writ of mandamus and/or certiorari as the petitioner is personally aggrieved.

5. Mr. Apurbadhan Mukherjee on behalf of the Respondent and Sri Dulal Gopal Mukherjee placed before me different instances where the words "has been" was used to denote a past event. He referred to me a passage from the Bible Psalms 37 Verse 25 which reads as follows: "I have been young and now an old", and submitted that "have been" means that "he was young and now he is old" similarly the words "has been an officer in the service of the Government" means a person who was an officer in the service of the Government. Mr. Mukherjee referred to different literary writings by Shakespeare, Wordsworth, Keats and Bertrand Russell to bring home the meaning of the word "has been". Before I deal with the argument advanced by the parties, it would be convenient to set out the order of appointment of Sri D.G. Mukherjee being annexure "X" of the affidavit-in-opposition by the State Government

In exercise of the power conferred by clause (a) of sub-section (2) and sub-section (2) of the section 19 of the Calcutta Municipal Act, 1951 (West Bengal Act XXXTII of 1951) the Governor is pleased hereby to appoint Sri Dulal Gopal Mukherjee, a retired Chief Engineer of the Irrigation and Waterways Directorate, Government of West Bengal, as the Commissioner under the said Act for a period of one year with effect from the forenoon of the 22nd April, 1969.

6. The order of appointment was made by the State Government in the exercise of the power u/s 19(1)(a) and 19(2) of the Calcutta Municipal Act, 1951. The section 19(1) and (2) of the Calcutta Municipal Act, 1951 reads as follows:

(1) The State Government shall, by notification in the official gazette, appoint-

(a) a person who is or has been an officer in the service of Government, or

(b) in consultation with the State Public Service Commission, any other person, as the Commissioner upon such terms and conditions as it may determine and the Commissioner shall not be a member of the Corporation.

(2) The appointment of a Commissioner under sub-section (1) shall be in force for such period, not exceeding five years in the first instance, as may be specified in the notification, but the State Government may, in consultation with the Corporation, extend the period from time to time, so, however, that the total period of extension does not exceed five years.

7. It is conceded by the parties before me that section 19(1)(b) has no application in the facts of this case.

8. Mr. Chakravarti submitted that 19(1)(a) is only applicable in case where the person sought to be appointed a Commissioner is either in the service of the State Government or that such person is on leave preparatory to retirement on superannuation or that such person is on deputation to any statutory corporation.

9. Mr. Chakravarti submitted that if any other person is appointed (under) section 19(1)(a) has no application. It is submitted by Mr. Chakravarti that the Respondent No. 3 is not a person in the service of the State Government or a person on leave preparatory to the retirement and has not reached the age of superannuation as yet or an officer on deputation to any statutory corporation, and as such section 19(1)(a) has no application. The Respondent No. 3 being a retired Government servant he cannot be stated to be a person "has been in the service of the Government". That being so, Mr. Chakravarty submitted that the order of appointment of Sri D.G. Mukherjee is beyond the power of the State Government u/s 19(1)(a) of the Calcutta Municipal Act of 1951. Mr. Chakravarti's contention is in my opinion quite untenable. Before a person is superannuated but goes on leave preparatory to retirement, he does not cease to be in the service of the Government. Similarly when a Government officer goes on deputation to any statutory corporation he does not cease to be an officer of the Government either. An officer on deputation remains in the cadre in which he was included before the officer is sent on deputation. Both the instances cited above are covered by the expression "any person who is an officer in the service of the Government" and will not come under the expression "has been in the service of the Government."

10. Mr. Chakravarty's contention is that on reading of the words "has been an officer in the service of the Government", he must be an officer as such when the appointment is made or in the other words, "has been", is to be construed as "he is" that is to say in the words of Mr. Chakravarti, he continues at the time of the appointment to be still in the service of the Government. Mr. Chakravarti referred to two cases in support of his contention, namely, (1) 10 Q.B., 730 where "hath

been resident" were construed as "who was resident and is continuing to be resident" as also the case reported in (2) AIR 1935 Mad. 921 at page 922.

11. Mr. Advocate General appearing for the Respondent however contended that the word "has been" means that he was in sometime past officer of the Government and in support of his contention Mr. Advocate General relied on the case reported in (3) AIR 1958 All 323.

12. Mr. Chakravarti however stated that in the Allahabad decision Their Lordships were considering the cases under the Representation of People's Act and that interpretation has no application in respect of the case u/s 19(1)(a) of the Calcutta Municipal Act. He however relies on (2) Kallepalle Krishnamurthi and Another Vs. The Madras Hindu Religious Endowments Board and Others, in which the word "has been" interpreted to mean a continuous thing.

13. Mr. A.D. Mukherjee appearing on behalf of the Respondent argues that the Madras decision was dealing with a clause by which a particular post has been made hereditary and in fact Mr. Mukherjee submits in the facts of that case "has been" means a continuous thing which happened in the past and continues in the present also. In fact that clause enumerates the right to any post on the basis of hereditary and in that case it cannot but mean to be a continuous thing.

14. On the plain reading of the section it appears to me that section (19)(1)(a) applies to cases of an officer who is still in the service of the Government or has been an officer in the service of the Government. There is no dispute that the Respondent No. 3 was not an officer in the service of the State Government at the relevant time when the order of appointment was made, as he retired from the service already. Therefore he does not come within the meaning of the clause that "he is an officer in the service of the Government."

15. The dispute however is whether "he has been an officer in the service of the Government." The Respondent No. 3 having retired from service he cannot come within the meaning of the words a person who is in the service of the Government. These words do not apply to him. Mr. Chakravarti argued that the words "in the service of the Government" make it clear that such person must be an officer who is still serving the Government. In fact, if the words "has been" means for the purpose of the section as argued by Mr. Chakravarti that he is still continuing to be in service of the Government, the words "he is in the service of the State Government" becomes redundant. That meaning cannot be given in view of the words used in the statute itself. The provision of section 19(1) (a) makes a clear distinction in my opinion between a person who is in the service of the Government and a person who has been in the service of the Government. If Mr. Chakravarti's argument is accepted this distinction becomes non est and the meaning of the words "a person who is in the service of the Government" and "has been in the service in the Government" becomes synonymous. It is clear from the statute itself that it was not the intention of the legislature to give the same meaning to the different words mentioned in the statute and in fact in my

opinion the words are clear enough to my mind what was intended by the use of the words "is" and "has been" in the section. In one case it applies to the case of a person who is a Government officer and in other case he ceased to be such. The State has power to appoint a person who is an officer in the service of the Government that is, a person who sometime before was an officer in the service of the Government and includes an officer retired from the service of the Government.

16. The view I take is also supported by the decision reported in (3) Mubarak Mazdoor Vs. K.K. Banerji, . I respectfully agree with the view expressed in the said decision at page 324 of the report. Their Lordships of the Allahabad High Court held as follows : "has been" when not followed by a participle is the present perfect tense of "to be", and accordingly indicates that the state of being has existed and may be "but not necessarily is continuing". For example, the statement "A has been to Ceylon" indicates that "A has visited Ceylon but is not there now": whereas the sentence. "The baby has been ill all day" implies "not only that the baby has been ill but is still ill".

On the other hand, "Y" has been "a soldier" excludes neither the possibility that Y is still a soldier not that he has ceased to be one. We are clearly of opinion that the phrase "a person who has been a Judge" means "a person who has, at some time past, held Office as a Judge, but that does not necessarily mean that the person must be holding office as a Judge at the time of his appointment as a member of the tribunal".

17. Mr. Mukherjee pointed out that this application is not maintainable at the instance of the petitioner. It appears that the petitioner is only a rate payer and he has prayed for a writ in the nature of mandamus. He has also prayed for a writ in the nature of certiorari which is prima facie not applicable the order not being a quasi judicial order and as he has asked for a writ of mandamus the petitioner cannot be said to be an aggrieved party. Whether the petitioner can ask for a writ of quo warranto is a different matter. But as I have decided this case on merits, I do not decide this point of preliminary nature taken by Mr. Mukherjee. In the result, the Rule is discharged.

There will be no order as to costs. All interim orders are vacated.

As prayed for, there will be an order staying the operation of the order for one week from the date hereof.