
(1985) 07 PAT CK 0005
In the Patna High Court
Case No : S.A. No. 238 of 1976

Executive Officer of Khagaul Municipality	APPELLANT
Vs	
Damodar Prasad and Others	RESPONDENT

Date of Decision : 05-07-1985

Acts Referred:

Bihar and Orissa Municipal Act, 1922 — Section 377

Citation : (1986) 34 BLJR 1

Hon'ble Judges : Prabha Shankar Mishra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Prabha Shankar Mishra, J.—This appeal by the Executive officer of Khagaul Municipality, in which the Commissioners of the said Municipality through the Chairman of the Municipality have been made respondent No. 2 and the erstwhile Executive Officer has been made the third respondent, is directed against a judgment of reversal

2. The plaintiff respondent was employed as Sanitary Inspector cum-Overseer in the Municipality. He was a permanent incumbent in the said post when the Municipality was superseded by the State Government and a Special Officer was appointed. There have been some differences, which are narrated in the plaint and mentioned in detail in the judgment of the court of appeal below between the plaintiff and the said Special Officer resulting in the order passed by him on 20-5-1959 removing the plaintiff from service. The plaintiff was communicated of his removal by order passed on 30-5-1959 on 1-6-1959. The super session of the Municipality had been recalled in the mean while. On 30-5-1959 the Special Officer handed over charge of his office to the Municipal Commissioner. The plaintiff was on leave from 1-5-1959 to 30-5-1959. On that date he was verbally informed by the Executive Officer that he had been removed from service and that the order had already been issued. The plaintiff was not allowed to join his post. He filed a representation before the Commissioner. His representation,

however, was ignored. He, accordingly, filed title suit No. 48 of 1959. Earlier to that the plaintiff had instituted a money suit being Money suit No. 360 of 1958 on the allegation that he was illegally denied his emoluments by the Special Officer.

3. The plaintiff alleged that he was given no opportunity of being heard against the charges, for which he was removed from service. The order by the Special Officer removing him from service was actuated by malice. He did everything against the plaintiff disregarding the statutory rules. The order terminating the contract of service was void.

4. The defendants controverted the allegations stating that the suit is not maintainable and is barred by limitation in view of the provisions u/s 377 of the Bihar and Orissa Municipal Act (hereinafter referred to as the Act). The Municipality was under supersession till 1-6-1959 when the Municipal Commissioners assumed office. Defendant No. 2, the Special Officer was till then exercising all the powers of commissioners. A proceeding in accordance with the rules was conducted against him. There was no malice or motive under which the Special Officer acted to remove the plaintiff from service. According to the defendants, the plaintiff was dismissed from service for gross indiscipline and flagrant disobedience of the orders of the competent authority. Memo No. 337 dated 30-5-1959 was issued to him to show cause by 5-5-1959 as to why he should not be removed from service. When the order was sent through the office peon of the Municipality, the plaintiff declined to receive the same. It was thereafter sent under registered cover through post. He refused to take delivery of the same. The Special Officer thereafter removed him by his order-dated 30-5-1959 and sent memo no. 337 dated 30-5-1959, which was served upon him on 1-6-1959.

5. The parties have contested this appeal generally on technical questions. While learned Counsel for the plaintiff respondent has submitted that the appeal is not maintainable at the instance of the Executive Officer of the Municipality, the Municipal Commissioners alone are competent to appeal, who have only joined the appeal as respondents and the Executive Officer, the appellant, is no authority to represent the body of Commissioners, learned Counsel for the appellant as also learned Counsel for the respondents, the Municipal Commissioners has submitted that the plaintiff's suit itself was not maintainable for not complying with the requirements of Section 377 of the Act. Besides the above, learned Counsel for the appellant has submitted that the court of appeal below has committed an error of law, in holding that the order dismissed the appellant passed by the Special Officer is void and without jurisdiction as the Special Officer was competent to make that order and that the rules as to the disciplinary proceedings against an employee of the Municipality have been followed in substance.

6. Section 12 of the Act says:

There shall be established for each municipality a body of commissioners, who shall be a body corporate by the name of the Municipal Commissioner the place by reference to which the municipality is known, having perpetual succession and a common seal, and may by that name sue and be sued.

A question, whether the chairman or the special officer can sue in the name of the Municipality or not, has fallen for decision in several cases before this Court.

7. In *Kali Prasad Sinha, Chairman, Buxar Municipality Vs. Badri Narain Sahu and Others*, , it has been pointed out that the Chairman does not represent the commissioners as a whole and he cannot be sued or sue in a representative capacity for the commissioners become a legal entity which legal entity is not represented by the Chairman, and, although reference is made to the chairman from time to time in the Act, he is a person who apart from such reference is unknown to the law and is not a legal entity but is merely a person. If the Chairman is sued, the plaintiff is entitled to relief only against him. In no sense of the word could he be held to be the representative for the purpose of the proceeding of the Municipal Commissioners and there is no justification on principal or on authority or under the Act itself to entitle a party to seek his relief against the commissioners by bringing an action against the Chairman. It is not merely a mistake of form but it goes to the very root of the action. In *Kamakhya Narayan Singh Vs. Chairman, Hazaribagh Municipality*, it has been pointed out "the use of the word "may" in Section 12 must be construed as "shall" and the Commissioners are to sue and be sued as Commissioners of Municipality." In *Raja Ram Chandra v. Patna Municipality* AIR 1957 Pat. 588 it has been stated "in case of Municipality having been superseded and put under the charge of a special officer, the nature of the corporate existence of the Municipality does not change, and by drawal of the order of supersession, even if there is no substitution of the Commissioners, the appeal does not abate".

8. A mere examination of the true purport of Section 12 of the Act, giving to the Municipal Commissioners option to sue or to a party to sue the Municipal Commissioners for any action against the Municipality, shall convince that the purpose is to bind the commissioners by the pronouncement of a court of law. An action taken by the plaintiff in a court of law against the Chairman of the Municipality or against its Executive Officer shall not bind the Municipal Commissioner, because there is no such provision binding them for what is found against the Chairman or the Executive Officer by a court of law, but all those who come to be associated with the Municipality serve the Municipality which is a body corporate by the name of the Municipal Commissioners of the place by reference to which the Municipality is known and any order made by a court in suit in which the Municipal Commissioners are imp leded as party shall bind not only them but all those who are associated with the commissioners, that is to say, the Municipality.

9. Learned Counsel for the respondent-Municipal Commissioners has, however, drawn my attention to Section 37(B) of the Act and the Fifth and Sixth schedules

thereof. He has also drawn my attention to Section 130 and Section 24 of the Act besides Section 12 of the Act referred to above. With reference to these provisions he has tried to persuade me to hold that delegation of duties under the Act shall make the Chairman or any other officer of the Municipality other than Commissioners competent to act and in the instant case the business delegated under the fifth and sixth schedules of the Municipal Act read with Section 37(B) will show that the Executive Officer is competent to act on behalf of the commissioners. It is not possible to accept the contention raised on behalf of the respondents that the Executive Officer shall be competent to sue in the name of the commissioners when Section 12 of the Act makes it imperative that the Commissioners may sue. Authorization to represent the Commissioners even in a proceeding in a court of law will not mean creation of the capacity to sue in the Executive officer. The Executive Officer acting in the interest of the Municipality can act no doubt but has to act as the body of Commissioners. The appeal, which is in continuation of the suit, is suing in a court of law by the Executive officer and not by the Municipal Commissioners. The Executive Officer's action in appeal before this Court cannot become the action by a body corporate, that is to say, a body of Commissioners.

10. I do not, however, propose to throw away the appeal on the said ground because learned Counsel appearing for the Municipal Commissioners has submitted that the Executive Officer has preferred this appeal at the instance of the Municipal Commissioner and if the appeal is not held to be competent at his instance the Municipal Commissioner may be transposed as the appellants in the appeal " Learned Counsel for the plaintiff-respondent has taken serious objection to this method and he seems to be right to a good extent, because unless there is a competent appeal before this Court, there is no question of transposition of any party made thereto as the appellant. But as I am inclined to examine the contention raised by learned Counsel for the appeal, particularly in relation to Section 377 of the Act and the nature of the order passed by the Special Officer of the Municipality against the plaintiff respondents, I do not make any final adjudication in this regard.

11. Section 377 of the Act says:

(1) No suit shall be brought against the commissioner of any municipality; or any of their officers or any person acting under their direction; for anything done under this Act until the expiration of one month next after notice in writing has been delivered or left at the officer of such commissioners, and also (if the suit is intended to be brought against any officer of the said commissioners or any person acting under their direction) at the place of abode of the person against whom such suit is threatened to be brought stating the cause of suit and the name and place of abode of the person who intends to bring the suit and unless such notice be proved, the court shall find for the defendant.

(2) Every such action shall be commenced within three months next after the accrual or the cause of action and not afterwards.

(3) If the commissioners or their officer, or any person to whom any such notice is given shall before the suit is brought tender sufficient amends to the plaintiff, such plaintiff shall not recover.

12. In *Lachminarayan Das Vs. Chairman, Cuttack Municipality*, . it has been pointed out:

like the English Public Authorities Protection Act, and Similar legislation in India, is for the purpose of protecting a public authority from suits in respect of act bona fide purporting to have been performed under the aegis of a lawful act but in which in spite of bona fides of the public authority the law has been overstepped and a tort has been committed It is not intended to apply to suits for the recovery of sums of money other than damages for tort, which are lawfully recoverable either under statute or at common law. It does not bar a suit for a declaration that an alteration in the plaintiff's assessment is illegal and for injunction to restrain the municipality from levying the increased assessment.

In *Commissioner of Buxar Municipality Vs. Bhagwan Das and Another*, . it has been clearly pointed out that;

A suit for a declaration that a certain assessment by municipality is illegal and ultra vires and for a permanent injunction restraining the municipality from realizing the tax is not barred by Section 377.

This matter should not delay me from referring to the well settled principles of law that an act done in violation of principles of natural justice in violation of a mandatory provision of law, without complying with condition precedent or mala fide in law, is an act as if not done in accordance with the law at all. Malice in law is proved by acts done by an authority on irrelevant or extraneous considerations or considerations not at all warranted by law as also in violation or without consideration of relevant facts and materials. One cannot fail to take notice of the facts as narrated and admitted showing that the plaintiff was put under suspension on 18-5-1959, on which date a departmental proceeding for his removal from service was started and only twelve days thereafter, i.e., on 30-5-1959 he has been dismissed from service. The Special Officer held office only until 30-5-1959. Before his relinquishing charge in favour of the Municipal Commissioners, he chose to dismiss the plaintiff from service. It is not in dispute that the model rules laying down service conditions and procedures for disciplinary action have been adopted by the Municipality and have statutory force. Rule 8 of the aforesaid model rules reads thus:

That no officer or servant of the commissioner shall ordinarily be dismissed from the pay and service of the Municipal Commissioners except on grounds of fraud continued and willful negligence of duty and offence involving moral turpitude.

Rule 9 further says:

that no order or dismissal, removal or reduction in rank or pay shall be passed on an officer or servant of the commissioners unless he (1) has been informed in

writing of the grounds on which it is proposed to take action (2) has been served with a copy of the grounds on which it is proposed to take action reduced to the form of a definite charge or charges together with the statements of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case (3) has been afforded an adequate opportunity of defending himself and to state whether he desires to be heard in person (4) has been afforded an adequate opportunity to adduce such evidence as may be considered to be reasonable (5) has been allowed to be present during any enquiry that may be made at his request or at the discretion of the authority concerned and has been permitted to cross examine such witness as may be produced against him. (6) has been afforded reasonable time to show cause against the imposition of punishment of dismissal, removal or reduction in rank or scale if the enquiring officer has arrived at a provisional conclusion that such punishment should be imposed.

13. How could the Special Officer presume that the plaintiff respondent was not willing to answer the charge levelled against him? How could he presume that no adjudication was necessary, without at least furnishing satisfaction to the requirements of Rules 8 and 9 for pronouncing the plaintiff respondent guilty? Why was he in a hurry, when action had already been initiated to dispose of the proceeding within twelve days from the date of its initiation, when he had to relinquish charge of his office.

14. The court of appeal below has traversed to the charges and come to a conclusion that they provide no such material upon which action of dismissal from service could have been taken. Rule 9 of the aforesaid rules makes even a second show cause notice imperative. Assuming that the plaintiff respondent had not participated in the enquiry and had failed to answer the charges, the Special Officer and/or the Municipal Commissioners were required, even in such situation, to serve upon the plaintiff respondent a notice calling upon him to show cause against the proposed punishment. The rule have undoubtedly been violated. The materials on the record do so that the Special officer acted with malice, if not in fact, in law. The order, removing, dismissing the plaintiff-respondent from service is without jurisdiction.

15. A feeble attempt has been made before me to argue that the plaintiff" suit for reinstatement is not maintainable. It is too late in the day to accept the ancient prerogative of the master to remove his servant at his whim. Authorities on the principle of law that the old concept of master and servant has undergone unavoidable change of granting to the employee protection of the statutes and obligation upon the employer to honour the statutory status of the employee are numerous. A court of law shall be duty bound to undo a wrong done to the employed when such statutory protection is denied to him. The suit for the action, as taken by the plaintiff respondent, is maintainable for this reason and the reason that the order removing him from service is void ab initio. Since the order, in my view is not one taken in accordance with law, it is not an order

under the Bihar & Orissa Municipal Act It has been made in violation of the statutory rules framed therein and is actuated by malice in law. The bar u/s 377 of the Act for the maintainability of the suit, that is to say, that the suit ought to have been instituted after a notice to the Municipal Commissioners or the officer concerned within three months after one month of the service of the notice, shall not be attracted.

16. There is no merit in this appeal. It is, accordingly, dismissed. There shall be no order as to costs.