

(1972) 04 BOM CK 0008

In the Bombay High Court

Case No : Misc. Petition No. 231 of 1966

Idandas Phagunmal Asnani

APPELLANT

Vs

S.E. Sukhtankar, Municipal Commissioner and Others

RESPONDENT

Date of Decision : 06-04-1972

Acts Referred:

Bombay General Clauses Act, 1904 — Section 16
Bombay Municipal Corporation Act, 1888 — Section 83(2)
Constitution of India, 1950 — Article 226

Citation : (1972) 2 LLJ 434

Hon'ble Judges : Vimadalal, J

Bench : Single Bench

Judgement

1. This is a petition under Art. 226 of the Constitution by a dismissed municipal employee to quash and set aside the orders of dismissal passed against him and to reinstate him with back salary and continuity of service and all rights, benefits and privileges as if the said order of dismissal had not been passed.

2. The facts of the petitioner's case are that the petitioner was appointed as an overseer in the service of the third respondent-corporation sometime in July, 1948 and after certain promotions and proceedings to which it is unnecessary to refer, he was transferred on October 1, 1962 to the Loan Works Construction Branch, Byculla, and was assigned the work of laying the 6" water-main in the proposed footpaths on either side of Peder Road in addition to other works in progress elsewhere. In January, 1963 he was informed by a circular that he should remain present for a preliminary inquiry against him on the January 29, 1968, which was to be held by the Executive Engineer of the Municipal Corporation. On October 5, 1963 the petitioner was served with a charge-sheet dated October 11, 1963, which was accompanied by a statement of allegations and a copy of the preliminary inquiry and other documents. In para 18 of the petition it is stated that on March 7, 1964 he was surprised when he was called at the municipal office and served with a letter of that date in which it was stated that the petitioner had failed to remain present at the inquiry which had,

therefore, been held in his absence and he was directed to intimate to the Enquiry Officer whether he wished to cross-examine any of the witnesses. In para 20 of the petition the petitioner has averred that the Enquiry Officer had violated the principles of natural justice by holding the enquiry behind his back. In para 23 of the petition it is stated that after the cross-examination of witnesses, the petitioner filed his statement of defence, and by a show cause notice, dated February 3, 1965, signed by the second respondent the petitioner was informed that the first respondent, after considering the report of the Enquiry Officer and the evidence on record had held certain charges to have been proved against the petitioner and the petitioner should show cause why he should not be dismissed from municipal service in view of those charges proved against him. On October 5, 1965 the petitioner received an order informing him that the first respondent had passed orders with the previous approval of the standing committee required under S. 83(2)(a) of the Bombay Municipal Corporation Act that the petitioner be dismissed from municipal service.

3. The validity of the order of dismissal passed against the petitioner has been sought to be challenged in the present petition on numerous grounds which raise several questions of fact, and in exercise of the discretion which I have in the matter I would decline to grant any relief to the petitioner on that ground alone, but I do not propose to confine my judgment to the same. Mr. M. O. Chinoy on behalf of the respondents has raised a preliminary objection as to whether the petitioner who is a municipal employee can maintain the petition as framed. It may at once be clarified that it is not the case of the petitioner anywhere in the petition that he holds any office or status as such and it may be pointed out that in the very first para of the petition he has claimed only to be an employee of the third respondent-corporation. For the purpose of disposing of the preliminary objection raised by Mr. Chinoy I must first refer to the relevant sections of the Bombay Municipal Corporation Act, 1888. Under sub-s. (3)(b) of S. 64 of that Act the executive power of the corporation vests in the Municipal Commissioner, and under S. 80A(2) of the said Act the power of appointing municipal officers and servants whose minimum monthly salary exclusive of allowances does not exceed Rs. 500 vests in the Municipal Commissioner. Section 83(1) of the Act enacts that every municipal officer or servant may be dismissed or otherwise punished for breach of "departmental rules" of discipline or for carelessness, unfitness, neglect of duty or other misconduct by the authority by whom he was appointed. Proviso (a) which is part of sub-s. (2) of the said section lays down that no officer whose monthly emoluments exceed Rs. 400 can be dismissed by the Commissioner "without the previous approval of the standing committee", and it is not disputed that the case of the present petitioner would fall within the said proviso. Curiously enough, the Act does not confer any express rule making power on the Municipal Commissioner but the said S. 83(1) by clear implication provides for departmental rules being framed by him and pursuant to that power (read with the power implicit in S. 64 of the said Act) the Municipal Commissioner has framed certain rules which by Chapter II thereof provide for

the holding of what have been headed as "Departmental Enquiries" in the Manual of Departmental Enquiries. Rule 22 thereof prescribes that the proceedings in a departmental enquiry are of a quasi-judicial nature and the authority holding it must act according to definite rules and procedure and observe the principles of natural justice (sic) in good faith.

4. The first proposition canvassed by Mr. Chinoy on behalf of the municipal authorities was that the power of appointment contained in S. 80A implies the power to dismiss in the same authority which makes the appointment, and in support of that proposition he has relied upon the decision of the Federal Court in the case of *Rayarappan v. K. V. Madhav Anne* 1949 F.C.R. 667, in which that proposition has been laid down in connection with the Court's power to appoint a receiver under O.40, R. 1 of the Code of Civil procedure. In doing so the Federal Court relied upon S. 16 of the General Clauses Act, 1897, and it may be mentioned that an identical provision is to be found in S. 16 of the Bombay General Clauses Act, 1904, which would be applicable to the present case. It is the contention of Mr. Chinoy that when S. 83 lays down that every municipal officer or servant could be dismissed by the authority who appointed him it is merely reaffirming the power which is implicit in the very appointment of such officer by that authority and not conferring a new power. Mr. Chinoy has submitted that for the sake of clarity the Legislature has in S. 83 enacted which is the officer who has the power to dismiss a municipal officer or servant. In my opinion, that submission of Mr. Chinoy is clearly right in view of the decision of the Federal Court in *Rayarappan v. K. V. Madhav Anne* (supra) relying on the provisions of S. 16 of the Bombay General Clauses Act, 1904.

5. Mr. Chinoy has next submitted that the present petition is not maintainable in view of the unreported decision of a Full Bench of this Court dated November 9, 1971 in Second Appeal No. 576 of 1961 in so far as it seeks to quash the orders of dismissal passed against the petitioner and to seek reinstatement with back salary and other benefits and privileges. The Full Bench was concerned in the said case with a suit brought by a sanitary inspector employed by the Sangamner Municipality which was governed by the Bombay District Municipal Act, 1901, challenging the order of dismissal and seeking to recover arrears of salary, damages, etc., on the ground that the order that was passed against the plaintiff-appellant in the said case was in violation of the principles of natural justice contained in Rule 177 of the Rules of the said municipality and was, therefore, void and illegal. The trial Court granted a declaration to the plaintiff that his dismissal was wrongful but declined to grant him any further declaration or any other benefits other than a month's salary in lieu of notice and that decree was confirmed in first appeal by the Assistant Judge, Ahmednagar. On a second appeal being filed in this Court the matter was referred by a Division Bench to a Full Bench for its opinion on the following two questions :

(1) Whether a breach of a rule regarding an enquiry into the conduct of a municipal servant before his dismissal from employment entails the same

consequence as breach of provisions of Art. 311 of the Constitution ?

(2) If a municipal servant is dismissed in breach of such a rule, what would be the relief to which he would be entitled ?

The Full Bench answered the first question in the negative and the second question by stating that a municipal servant dismissed in breach of a rule relating to an enquiry would be entitled only to declaration that his dismissal was wrongful and to salary for the period of notice, but neither to reinstatement in service nor to arrears of salary on the basis that the dismissal was void and illegal. After referring to S. 184 of the Bombay District Municipal Act, 1901, dealing with the mode and conditions of appointment, punishment or dismissal of a municipal officer or servant, the Full Bench referred to the rules framed under S. 46 of the said Act and thereafter dealt with various decisions relating to the points which had been referred to it. The Full Bench ultimately laid down that on an examination of the various decisions discussed by it cases of dismissal of servants would fall into four classes, viz., (1) cases in which persons employed under the Union or a State are dismissed in violation of Art. 311(2) of the Constitution; (2) cases in which an industrial worker was dismissed in violation of the provisions of an industrial law; (3) cases of dismissal from service of a person who was entitled to an office or status under a statute by an order which affects that office or status; and (4) cases in which a statutory body acts either in breach of the statute or in breach of the rules and regulations framed under the statute. The Full Bench proceeded to state that as far as the last category was concerned the decision would depend on a consideration of the question as to whether the order passed by the statutory body was one in breach of a mandatory obligation imposed by the statute or was in breach of a mere rule or regulation relating to the conditions of service. The Full Bench held that in the former case the order of dismissal would be null and void and not merely wrongful and as a consequence the employee would be entitled to be reinstated in service and to past salary but in the latter case, the employee would be entitled only to a declaration that the dismissal was wrongful and to damages by way of salary for the period of notice. The Full Bench then held that the case before them was one of a purely master and servant relationship in which the master was under no statutory or other restriction as to the kind of contract which he could make with his servants or the grounds on which he could dismiss them and was under no statutory obligation by reason of which he could not terminate the services of his employees except by complying with such an obligation. The Full Bench, therefore, held that by not complying with Rule 177 of the Rules framed under S. 46 of Bombay District Municipal Act, 1901, which provided for a reasonable opportunity of being heard in defence the municipal authorities in the said case had undoubtedly acted irregularly in the exercise of that jurisdiction but the consequence was only that the appellant plaintiff was entitled to a declaration that the order of dismissal was wrongful and to salary for the period of notice. Mr. Chinoy has contended that the said decision of the full Bench concludes the matter as far as his preliminary objection to the

maintainability of the present petition is concerned and I must hold that the relationship as between the petitioner and the municipal authorities was purely a master and servant relationship and the petitioner was not entitled to either of the reliefs claimed by him in this petition and the petition as framed was, therefore, not maintainable.

6. Mr. Nadkarni has, on the other hand, contended that the decision in the Full Bench case is distinguishable in so far as the said judgment only deals with the effect of violation of rules and regulation but does not deal with an inquiry that is violative of a section of the Act, viz., S. 83 in the present case, in which in his opinion the power to act according to the principles of natural justice is clearly implicit. It is the contention of Mr. Nadkarni that whenever there is a statutory power of dismissal as contained in S. 83 of the Bombay Municipal Corporation Act it takes the cases out of the master and servant relationship. It is true that the judgment of the Full Bench in the said case deals only with the effect of violation of the relevant rules framed under the Bombay District Municipal Act, 1901. I must, however, assume that the Full Bench had in mind and had considered the relevant provisions of that Act also having regard particularly to the fact that S. 184 thereof has actually been referred to in its judgment. Moreover, as Mr. Chinoy has rightly pointed out, the Full Bench has in its judgment laid down four broad propositions in the face of which it is impossible to accept Mr. Nadkarni's contention. Those propositions are : (1) that it is wrong to treat the case of a municipal servant on a footing different from that of a private employee; (2) that though the municipality is a statutory body the contract of service between it and its employees is essentially a contract between master and servant; (3) that in the case before the Full Bench which was purely one of a master and servant relationship, the master was under no statutory or other restriction as to the kind of contract which he could make with his servants or the grounds on which he could dismiss them; and (4) the appointment of the appellant before them was neither to an officer nor to a status. Having regard to these four clear propositions formulated by the Full Bench by which I am bound and with which I respectfully agree, it must be held that the contract of employment between the petitioner before me and the municipal authorities was an ordinary contract between master and servant and the petitioner is not entitled to maintain this petition for either of the reliefs claimed by him. Moreover, there is a decision of the Privy Council which, in my opinion, provides a complete answer to the way in which Mr. Nadkarni sought to distinguish the decision in the Full Bench case to which I have just referred. That decision of the Privy Council was in the case of *University Council of the Vidyodaya University of Ceylon v. Linus Silva* (1965) 1 W.I.R. 77, in which the services of the respondent who was a lecturer in Economics in a University had been terminated by the Vice-Chancellor under the powers conferred upon him by S. 18(e) of the University statute, and the respondent applied to the Supreme Court of Ceylon for appropriate writs to quash that order of termination contending that, as was not disputed, he had not been told of the nature of accusations against him nor had he been afforded an opportunity of

being heard in his own defence. Section 18(e) of the University statute enacted that subject to the provisions of the Act and of the Statutes, Regulations and Rules, the Council shall have and was to perform the powers and duties therein enumerated, clause (e) of which related to the appointment of officers and also conferred power to suspend or dismiss any officer or teacher on grounds of incapacity or unfitness. The said case was, therefore, clearly a case where the power of dismissal contained in S. 18(e) of the University Statute was similar to that contained in S. 83 of the Bombay Municipal Corporation Act, 1888, and appears, as Mr. Chinoy has rightly contended, to be on all fours with the present case. The Privy Council held (at p. 79) that the law was well-settled that if, where there was an ordinary contractual relationship of master and servant, the master terminated the contract the servant could not obtain an order of certiorari but could only pursue his claim for damages if he was wrongfully dismissed. The very contention which Mr. Nadkarni has raised was urged before the Privy Council, viz., that if someone had the power to determine what the rights of an individual are to be then a duty to act judicially arises simply from the nature of the power. The Privy Council rejected that submission as too wide, observing that no case was cited before it in which an order of certiorari had been made directing the quashing of an order of dismissal of a servant. The Privy Council held (at p. 90) that a teacher who had an appointment with the University was in the ordinary sense a servant of the University, and the circumstances that the University was established by statute and was regulated by statutory enactments contained in the Act did not involve that contracts of employment which were made with teachers and which were subject to the provisions of S. 18(e) thereof were other than ordinary contracts of master and servant. In my opinion this decision of the Privy Council affords a complete answer to Mr. Nadkarni's contention and it is not really necessary for me to refer to any of the other decisions that were cited by Mr. Chinoy in the course of his arguments. I may, however, mention some of those decisions which clearly support the preliminary objection raised by Mr. Chinoy. They are the decisions in the cases of Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi, , Ratilal Chhaganlal Vs. Dhari District Municipality, , Indian Airlines Corporation Vs. Sukhdeo Rai, , and Lekh Raj Khurana Vs. Union of India (UOI), .

7. I must, however, deal with two decisions which were strongly relied on by Mr. Nadkarni. The first of them was the decision of the House of Lords in the well-known case of Ridge v. Baldwin [1964] A.C. 40. The appeal before the House of Lords arose out of the purported dismissal of the appellant from the office of the chief constable in the Brighton Police Force. The appellant claimed that his purported dismissal was illegal and void and that he continued to be the chief constable of Brighton and also claimed payment of salary from the date of his purported dismissal, viz., the March 7, 1958. Alternatively, he claimed a declaration that he was entitled to a pension of a certain amount for the term of his natural life from the March 7, 1958. That claim was dismissed by the trial Court and the dismissal thereof was confirmed by Court of Appeal. A further

appeal to the House of Lords succeeded on the ground that the rules of natural justice had not been observed. The said case is, however, clearly distinguishable in so far as Lord Reid in delivering his judgment formulated (at p. 65) three classes into which cases of dismissal fell, viz., (1) the dismissal of a servant by his master; (2) the dismissal from an office held during pleasure; and (3) the dismissal from an office where there must be something against a man to warrant his dismissal. He then proceeded to state that the law regarding master and servant was not in doubt and that there could not be any specific performance of a contract of service and the master could terminate the contract with his servant at any time and for any reason or for none. He further laid down that if the master did so in a manner not warranted by the contract he had to pay damages for breach of contract, but that the case before him did not fall within that class because the chief constable was not the servant of the watch committee or of any one else but fell within the third of the classes formulated by him. The case of *Ridge v. Baldwin* was, therefore, clearly a case where the relationship was not purely a relationship of master and servant as in the present case and can be clearly distinguished on that ground. In fact that is how the case of *Ridge v. Baldwin* was distinguished by Shelat, J. in his judgment in the case of *Indian Airlines Corporation v. Sukhdeo Rai*, mentioned above. The case of *Ridge v. Baldwin* is, therefore, of no assistance whatsoever to the petitioner as far as the preliminary objection raised by Mr. Chinoy in the present case is concerned.

8. The next decision on which Mr. Nadkarni strongly relied was that in the case of *Manekji v. Municipal Commissioner of Bombay* 32 Bom. L.R. 463. That was a case of a suit filed by the Assistant Health Officer of the Bombay Municipal Corporation for damages for wrongful dismissal. It was alleged that the enquiry held by the Commissioner was ex parte and gave him no opportunity to cross-examine the witnesses or of being adequately heard. Kemp, J. dismissed the suit holding that the plaintiff was not entitled to ask the Court to revise the decision of the standing committee and the Municipal Commissioner and that the plaintiff had been given every opportunity of meeting the charge levelled against him. On a letters patent appeal being filed, the same was dismissed by the Division Bench on the ground that the plaintiff had had a full and fair opportunity of having his case heard before the standing committee and that the relationship between the parties was not the ordinary relationship of master and servant but the plaintiff had a right to challenge the decision on facts in a Court of law. The main ground upon which the appellant relied was that he had a right, as in an ordinary case as between master and servant, to challenge the decision on facts in a Court of law. Alternatively it was contended that even if the standing committee was a domestic Tribunal constituted by the Act to determine those matters and that normally their decision would be final, if it disregarded the principles of natural justice then that decision could be challenged in a Court of law. Marten, C.J. held that in the case before them the standing committee was constituted by the statute to be a domestic tribunal and that it was never intended by the statute to retain the ordinary law regulating the dismissal of a servant by his master, and to

the same effect was the view taken by Blackwell, J. (at p. 479). I am afraid that view is no longer good law and the decision in Manekji's case, as far as the proposition is concerned, is impliedly overruled by the unreported decision of the Full Bench which has been discussed by me above. Manekji's case is, therefore, no longer good law and cannot be availed of by Mr. Nadkarni and I must uphold the preliminary objection of Mr. Chinoy on behalf of the respondents. I hold that the petition, as framed, is not maintainable in view of the fact that the relationship between the petitioner and the municipal authorities was the ordinary relationship of master and servant.

9. In the result, both on the ground stated in the preceding paragraph, as well as on the ground that, in the exercise of my discretion, I would not grant the relief on the grounds stated in para 46 of the petition in which several questions of fact have been raised, I must dismiss this petition with costs.