

(1992) 07 AHC CK 0031

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 6318 of 1992

Mahabir Prasad Dwivedi

APPELLANT

Vs

State of Uttar Pradesh and others

RESPONDENT

Date of Decision : 27-07-1992

Acts Referred:

Constitution of India, 1950 — Article 14
Uttar Pradesh Town Areas Act, 1914 — Section 7

Citation : AIR 1992 All 351 : (1992) 2 UPLBEC 1074

Hon'ble Judges : M. Katju, J

Bench : Single Bench

Advocate : Shri S.N. Singh and Mr. R.N. Singh, for the Appellant;

Judgement

M. Katju, J.—The petitioner was elected Chairman of Town Area, Oran, District Banda in 1988. By means of the present petition the petitioner has challenged the impugned order of the District Magistrate, Banda dated 10-1-1992 (Annexure-9 to the writ petition) u/s 7-A of the U.P. Town Area Act removing the petitioner from the post of Chairman, as well as the order of the State Government dated 21-1-1992 (Annexure-10) to the writ petition) confirming the aforesaid order, and also the order Of the District Magistrate dated 24-1-1992 (Annexure-1) appointing a prescribed authority.

2. Counter and rejoinder affidavits have been filed and I have heard Shri R. N. Singh, learned counsel for the petitioner and Shri Yatindra Singh and Standing Counsel for the respondents, and I am disposing of this writ petition finally.

3. Section 7-A(I) of the U. P. Town Areas Act states as follows :--

"7-A. Removal of a Chairman or a member of a committee.-- (1) The prescribed authority, or, where an authority has not been prescribed, the District Magistrate, may remove a Chairman or any member of the Committee who, in its or his opinion.

(a) has been guilty of gross misconduct or failure in the discharge of his duties, or

(b) has failed to pay for a period of more than one year any taxes, or other dues payable by him to the Committee, or

(c) has become disqualified for being a member u/s 6-K :

Provided, firstly, that before making an order removing the Chairman or the member, as the case may be, he shall be allowed an opportunity to subject his explanation on the charges or charge against him.

Provided, secondly, that no order for removal shall take effect unless it is confirmed by the State Government."

4. Learned counsel for the petitioner made three submissions before me (1) no opportunity of hearing was given by the State Government to the petitioner under the second proviso of Sec. 7-A (1) before confirming the order of the District Magistrate dated 10-1-1992 (2) No reasons have been given in the impugned order of confirmation dated 21-1-92, and (3) The order of removal dated 10-1-92 is arbitrary.

5. It is not necessary to go into the third submission as in my opinion the writ petition deserves to be allowed on the basis of the first two submissions.

6. In Paragraphs 19 and 21 of the writ petition it is alleged that the State Government did not give the petitioner opportunity of hearing before passing the confirmation order. The reply to these averments are in Paragraphs 18 and 20 of the counter affidavit of the State Government. Paragraph 18 denies the allegation in para 19 of the writ petition and asserts that the action was taken after getting a reply to the charges from the petitioners. This assertion is very vague, and I can only take it to mean that the D. M. passed his order after getting a reply from the petitioner. There is no material to indicate that the State Government also gave an opportunity, rather para 20 of the counter affidavit states that such opportunity is not necessary. I therefore hold that no opportunity of hearing was given by the State Government.

7. At a first glance at Sec. 7-A(I) it seems that the State Government does not have to give opportunity of hearing before passing an order of confirmation under the second proviso to Sec. 7-A(1) since there is no specific requirement to that effect -- This impression is further strengthened by the fact that the first proviso specifically requires opportunity of hearing, and hence it is contended that since the second proviso to Sec. 7-A (1) is in close proximity to the first proviso it must be inferred that the legislature did not intend that an opportunity of hearing should be given before passing an order of confirmation.

8. However, a deeper analysis of Sec. 7-A and the Scheme of the Act has persuaded me to reach to the conclusion that an opportunity of hearing must be given by the State Government before passing an order of confirmation, and such order must give proper reasons.

9. It may be noted that the Chairman of a Town Area is an elected functionary,

and hence to remove him and impose an administrator is a serious matter. A democratically elected person should not be easily removed, and his removal must be strictly in accordance with law.

10. The second proviso to Sec. 7A(1) states that the removal order shall not take effect unless it is confirmed. Now confirmation orders can be of various types under different laws. For example, a person can be appointed a temporary employee, and he may later be confirmed. The order appointing him in a temporary capacity becomes effective immediately (or from the date specified in the order), and it cannot be said that such order becomes effective only when the employee is confirmed.

11. The confirmation under the second proviso to Sec. 7A(1) is thus different from the confirmation referred to above. The second proviso says that the order of removal shall not take effect unless it is confirmed. This means that the effective order of removal of the Chairman is really passed by the State Government, and the order of the District Magistrate is not a final order. Since the effective order is passed by the State Government, in my opinion, the State Government should give opportunity of hearing before passing it. This opinion is strengthened when we bear in mind that the District Magistrate being posted in a particular district, may be under local pressure, and hence the State Government has reserved to itself the power to take a final decision.

12. It is settled law that even if the statute is silent, an opportunity of hearing may have to be given by the executive authority if its order has civil consequence vide *State of Haryana Vs. Ram Kishan and Others*, *O.P. Gupta Vs. Union of India (UOI) and Others*, *K.I. Shephard and Others Vs. Union of India (UOI) and Others*, *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, .

13. In his book, "The Discipline of Law" Lord Denning has pointed out (in the Chapter entitled "Administrative Decisions") that earlier the view of the court was that if a public authority was acting judicially its conduct was subject to control by courts, but if it was acting administratively its decisions were virtually exempt from Court control. However, in the last few decades there has been a fundamental change in the view of the court, and now the difference between judicial and administrative decisions has almost disappeared (see in this connection *S.L. Kapoor Vs. Jagmohan and Others*, .

14. In India, too, after the landmark judgment Supreme Court in *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, followed by *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, it is settled view that (1) even administrative authorities have to give opportunity of hearing if their order has civil consequence, and (2) such opportunity may be necessary even if the Statute is silent.

15. Thus in *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, it was observed by the Supreme Court (in para 199) "It is now well settled that the "Audi Alteram Partem" rule which in essence enforces the equality clauses in

Article 14 of the Constitution is applicable not only to quasi-judicial orders but to administrative orders affecting prejudicially the party in question unless the application of the rule has been expressly excluded by the Act or Regulation or Rule".

16. In *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, (following in *Union of India and another Vs. Ex Constable Amrik Singh*, the Supreme Court observed; "Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature.

17. The court further observed (in para 63) "The audi alteram partem rule may therefore, by the experimental test, be excluded, if importing the right to be heard has the effect of paralyzing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vita) importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is wholesome rule designed to secure the rule of law and the Court could not be too ready to eschew it in its application to given case-- The Court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case."

18. Now it is true that the rules of natural justice are not be applied in the abstract or in a dogmatic way. Natural justice is not a rule of the thumb or a straight jacket formula, vide *Maharashtra State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi and Others*, . In *Union of India and Another Vs. Tulsiram Patel and Others*, the Supreme Court held that the certain situation not only can the rules of natural justice be modified but they can even be excluded. However, as held in *Delhi Transport Corp. v. D.T.C. Mazdoor Congress* (supra) such exclusion of the principles of natural justice must only be done in exceptional case e.g. If importing the right to be heard has the effect of paralysing the administrative process, or the situation required promptitude. In *S.L. Kapoor Vs. Jagmohan and Others*, the Supreme Court negated the contention that there may be an emergent situation, and hence no opportunity of hearing should be required before dissolving a municipal committee.

19. In my opinion, the confirmation of an order of removal under S. 7A does not come within any exceptional situation as contemplated above. Hence, as held in *Maneka Gandhi's case* (supra) we should salvage the rule of audi alteram partem and import it into the second proviso to S. 7A(1). The State Government before passing the confirmation order must give a short opportunity of hearing (which need not be oral) and then pass a reasoned order. Such a procedure will be conclusive to fairness and avoid unnecessary apprehension and bickering.

20. In recent years the Supreme Court has been steadily expanding the sphere of administrative law, and has been emphasising that broader notices of fairness are not required. If the Chairman of a Town area is not given a short opportunity

of hearing before passing the order of confirmation then apprehensions of unfairness and mala fides may well arise. Hence it will be in the interest of democracy and our body politic that such opportunity of hearing should be given.

21. 1 may not deal with the submission of learned counsel for the respondents that since the first proviso to S.7A(1) Specifically provides for giving opportunity of hearing while the second proviso is silent, hence we should conclude that the legislature never intended that opportunity of hearing must be given before passing the confirmation order. It is true that where in a statute one provision requires giving opportunity of hearing while another provision is silent, it is possible to deduce that the legislature never intended to give such opportunity in the latter provision. However, this is not an absolute rule. Thus, in *S.L. Kapoor Vs. Jagmohan and Others*, it was held by the Supreme Court (in para 10) that although S. 16 of the Punjab Municipal Act expressly provided for an opportunity of hearing whereas S. 238 of the same Act did not expressly provide for any such opportunity, yet an opportunity of hearing must be given before passing the order under S: 238. In that case it was held that the order of the Lt. Governor of Delhi under S. 238 superseding the New Delhi Municipal Committee without giving opportunity of hearing was vitiated in law.

22. In *S. L. Kapoor's* case (supra) the Supreme Court observed "It is not always a necessary inference that if opportunity is expressly provided in one provision and not so provided in another, opportunity is to be considered as excluded from that other provision. It may be weighty consideration to be taken into account but the weightier consideration is whether the administrative action entails civil consequences."

23. Thus it is clear that even if in one provision of a statute opportunity is specifically prescribed while another provision is silent on the issue, the Court can still hold that even the latter requires opportunity.

24. It follows that for deciding whether an opportunity of hearing is to be given or not we must see the nature of the order which is to be passed and the entire scheme of the Act. Under the U.P. Town Areas Act elections are held for various posts including the post of Chairman. The Legislature realising the serious consequences of removal of an elected functionary has deliberately not left it to the sole discretion of the District Magistrate. The State Government is therefore, the ultimate Judge in the matter and hence it must pass the order of confirmation under S. 7A(1) after giving opportunity of hearing.

25. It can, however, be urged that *S. L. Kapoor's* case (supra) is distinguishable because under the Punjab Municipal Act Ss. 16 and 238 are situated far apart, whereas under S. 7A(1) of the U.P. Town Areas Act the first and second proviso are in close proximity. In my opinion, proximity between two provisions of an Act can no doubt be one of the several considerations in deciding whether to import the requirement in the one provision to another provision but it cannot be the sole or even decisive consideration. It is the nature of the order to be passed

and the scheme of the Act which are more important considerations. The order of confirmation under S. 7A(1) will have serious civil consequence. Not only the Chairman of the Town Areas but also large number of people in the area may feel affected by such an order. Hence it is only fair that the Chairman be given opportunity of hearing before passing the order, though such hearing need not be a personal hearing.

26. In this connection we can utilise the anusanga principle of Mimansa by adding the words "after giving opportunity of hearing to him" after the words "unless it is confirmed by the State Government" in the second proviso to S.7A(1).

27. Now the literal rule of interpretation states that we should not add or delete words in a statute by judicial interpretation (see Craies on Statute Law Edn. Pp. 69-73 and 520-522). However, even Western Jurisprudence recognises the principle of cases omissus which permits addition of words in certain situations. Thus, Maxwell in his "Interpretation of Statutes" permits addition of words in certain situations (see chapter on "Exceptional Construction")

28. In England the literal rule is more strictly observed than in countries having a written constitution. This is because under Britain's unwritten constitution Parliament is Supreme Court, and hence the tradition has been that Courts should not readily modify, add or delete words in a Parliamentary Statute. In "The Discipline of Law" Lord Denning had advocated a change from the grammatical approach to the modern purposive approach. The tide in England at first swept in favour of such an approach, but subsequently, it ebbed again in favour of the grammatical approach (see Lord Denning's "The Closing Chapter, Book Two, Section Four).

29. In countries with a written constitution, however, there is more scope for social engineering. As observed by the Supreme Court in State of Tamil Nadu and Others Vs. St. Joseph Teachers Training Institute and Another, "The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is therefore not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of society, or, to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of society. Hence in countries like ours which have a written Constitution we can add (or delete) words not only in the situations contemplated by Maxwell and Craies but also in other situations in order to make the statute more equitable, fair, rational or democratic. For this purpose we can usefully utilise the Mimansa Principles of Interpretation.

30. It is deeply regrettable that in our courts of law lawyers quote Maxwell and Craies but nobody refers to the Mimansa Principles of Interpretation. Most

Lawyers would not have even heard of their existence. Today our so-called educated people are largely ignorant about the great intellectual achievements of our ancestors and intellectual treasury which they have bequeathed us. The Mimamsa Principles of Interpretation is part of that great intellectual treasury, but it is distressing to note that apart from the reference to these principles in the judgment of Sir John Edge, the then Chief Justice of Allahabad High Court, in *Beni Prasad v. HarDOI Bibi* ILR 1892 All 67 a hundred years ago there has been almost no utilization of these principles even in our own country. Many of the Mimamsa principles are rational and scientific and can be utilized in the legal field (see in this connection K. L. Sarkar's "Mimamsa Rules of Interpretation" which is a collection of Tagore Law Lectures delivered in 1905 and which contains the best exposition of these principles).

31. The Mimamsa principles of interpretation, as laid down by Jaimini in his sutras and as explained by Sabar, Kumarila Bhatta, Prabhakar, Madan Mishra, etc. were regularly used by our renowned jurists like Vijnaneshwar (author of *Mitakshara*), Jimutsahan (author of *Dayabhag*), Nand Pandit (author of *Dattak Mimamsa*) etc. whenever there was any conflict between two Smritis, e.g. *Manusmriti* and *Yajnavalkya Smriti*, or ambiguity or obscurity in any Smriti these principles were utilized. Thus, the Mimamsa principles were our traditional system or interpretation of legal texts. Although originally they were created for interpreting religious texts pertaining to the Yagya (sacrifice), gradually they came to be utilized for interpreting legal texts also (see also in this connection P. V. Kane's *History of the Dharmashstra*, Vol. V. Pt. II Ch. XXIX and Ch. XXX Pp. 1282-1351).

32. In Mimamsa, *Casus Omissus* is known as *adhyahara*. The *adhyadara* principle permits us to add words to a legal text. However, the superiority of the Mimamsa principles over Maxwell's principles in this respect is shown by the fact the Maxwell does not go into further detail and does not mention the sub-categories coming under the general category of cases *omissus*. In the Mimamsa system, on the other hand, the general category of *adhyahara* has under it several sub-categories e.g. *anusanga*, *anukarsha*, etc. Since in this case we are concerned with the *anusanga* principles, I may explain it in some detail.

33. The *anusanga* principle (or elliptical extension) states that an expression occurring in one clause is often meant also for a neighbouring clause, and it is only for economy that it is only mentioned in the former (see Jaimini 2, 2, 16). The *anusanga* principle has a further sub-categorisation. If a clause which occurs in a subsequent sentence is to be, read into a previous sentence it is a case of *Tadapakarsha*, but when it is vice versa it is case of *Tadutkarsha*, Jaimini deprecates *Tadapakarsha* (i.e. transference backwards) and permits it only in exceptional cases. However, there is no deprecation of *Tadutkarsha*. Since in the present case relating to the second proviso to S. 7A(1) of the U.P. Town Areas Act we are concerned with *Tadutkarsha* such transference can be readily accpeted.

34. The principle of Mimansa was used by Jimutvahana in Dayabhag. Jimutvahana found that there is a text of Manu which states : "Of a woman married according to the Brahma, Daiva, Arsha, Gandharva and Prajapatya form, the property shall go to her husband if she die without issue. But her property, given to her on her marriage in the form called Asura, Rakshasa and Paisacha, on her death without issue shall become the property of her Parents."

35. It can be seen that in the second sentence the word "property" is qualified by the words "given to her on her marriage", whereas in the first sentence there is no such qualification. Jimutvahana. using the anusanga principle of Mimansa, said that the words "given to her on her marriage" should also be inserted in the first sentence after the word "property", and hence there also the word "property" must be interpreted in a qualified sense.

36. In the Mitakshara also the anusanga principle of Mimansa has been used. Yajna-valkya II. 135-136 laid down the. order of succession to the wealth of a person dying sonless. Yajnavalkya II. 137 deals with succession to property of a forest permit, an anaesthetic, or a perpetual Vedic student. The Mitakshara then holds that Yajnavalkya II. 138" samaristinastu samaristi" is to be construed as an exception to Yajnavalkya II. 135 136 and understands that the words "of one dying without having a son" (grant son or great grand son) are to^ be supplied before Yajnavalkya II. 138 from XI, 136, i.e. there is to be anusanga of the word "svaryatesya-putrasya".

37. Hence, using the anusanga principle of Mimansa we must add the requirement to give opportunity of hearing in the second proviso to S.7A(i) also, by transferring it from the first proviso.

38. I am also of the opinion that the confirmation order should contain proper reasons and these reasons must deal with the reply given to the show cause notice given by the State Government (which I have already held to be a necessary requirement). In the present case the confirmation order dated 21-1-92 (Annexure-10 to the writ petition) does not give any reasons, what to say of proper reasons. All that has been said in the confirmation order is that since the District Magistrate has found the petitioner guilty and has not found his explanation acceptable, hence the State Government is confirming his order. This is hardly a way to pass the confirmation order. I have already held that the order of confirmation has serious civil consequences. It follows that the said order must not only contain reasons, but these reasons must be proper. In other words, the reasons given must deal with the version of the accused. Of course the reasons need not be elaborate like a judgment of a Court, but they must at least give in brief why the version of the accused is not found acceptable.

39. The requirement to give reasons has been elaborately discussed by the Supreme Court in S.N. Mukherjee Vs. Union of India, . It has been clarified in that judgment that while in U.S.A. Courts insist on recording of reasons by administrative authorities, the English Common Law has no such requirement. In

India, as held in S. N. Mukherjee's case, the approach of the Courts is more in line with that of the American Courts.

40. In *Madhya Pradesh Industries Ltd. Vs. Union of India and Others (UOI)*, Subba Rao, J. observed at page 674. The condition to give reasons introduces clarity and excludes, or at any rate minimizes, arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory Court to keep the tribunals within bounds". It may be noted that the other two judges in the 3 member bench held in that case that an appellate/ revisional order of affirmance need not give reasons. However, the view of Subba Rao, J. was approved by the Constitution Bench of the Supreme Court in *Bharat Raja Vs. The Union of India (UOI) and Others*, and thereafter also in a series of decisions culminating in S.N. Mukherjee's case (*supra*). Most of these decisions have been referred to in S.N. Mukherjee's case, and hence I need not mention them. The requirement to give reasons is now a principle of natural justice, unless expressly or by necessary implication excluded vide S. N. Mukherjee's case (*supra*), *State of West Bengal v. Atul Krishna Shaw* AIR 1970 SC 2205 *Star Enterprises and Others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others*, .

41. It may be noted that in S.N. Mukherjee's case (*supra*) the Supreme Court held that the authority which confirms the findings and sentence of a Court martial need not record reasons. This part of the judgment is distinguishable on the ground that that was a case relating to a member of the Armed Forces, and as observed in para 42 of the judgment the legal position regarding the members of the Armed Forces is somewhat different from that of the other citizens of the country. There is greater stringency and somewhat less emphasis on natural justice in the case of the former. The reasons for this are obvious. Considering the nature of the functions which members of the Armed Forces perform and the standard of discipline required from them the principles of natural justice cannot be given as much free play as given in the case of civilians. Hence the ratio of S. N. Mukherjee's case, insofar as it says that the confirmation order need not give reasons, must be confined to members of the Armed Forces.

42. For the above reasons the writ petition is allowed. The impugned order of the State Government dated 21-1-92 as well as the consequential order of D. M. dated 21-1-92 are quashed. The petitioner will be permitted to function as Chairman of Town Area, Oram. However, it is open to the State Government to pass a fresh order after giving opportunity of hearing to the petitioner and by giving reasons. No order as to costs.

43. Petition allowed.