

(1988) 11 BOM CK 0049

In the Bombay High Court

Case No : Writ Petition No. 4700 of 1984

Municipal Council and Another

APPELLANT

Vs

Govind Dagadu Shinde

RESPONDENT

Date of Decision : 18-11-1988

Acts Referred:

Maharashtra Municipalities Act, 1965 — Section 76
Prevention of Food Adulteration Act, 1954 — Section 9

Citation : (1989) 1 BomCR 400 : (1988) 90 BOMLR 672

Hon'ble Judges : A.D. Tated, J

Bench : Single Bench

Advocate : B.P. Apte, for the Appellant; S.M. Dange, for the Respondent

Final Decision : Allowed

Judgement

A.D. Tated, J.—This petition is directed against the order dated 21st November, 1983 passed by the Civil Judge, Junior Division, Rahuri, in Regular Civil Suit No. 570 of 1982 whereby he granted an interim injunction staying the order of suspension of the petitioner defendant and the same order was confirmed in appeal by the Assistant Judge, Ahmednagar on 29th September, 1984 in Miscellaneous Appeal No. 327 of 1983.

2. The petitioner No 1 defendant No. 1 Council and the petitioner No.2-defendant No. 2 Chief Officer appointed the respondent-plaintiff as temporary Sanitary Inspector and Food Inspector with effect from 5th January, 1973 in the pay-scale of Rs. 145-5-185-E.B. 6-233-7-240 plus the dearness allowance as per the rules framed by the petitioner No.1-Council. The order of appointment is dated 3rd January, 1973. It is at.Ex. 19. On 18th March ,1973 the President of the petitioner No. 1-Council addressed a communication to the Commissioner of Food and Drug Administration, Maharashtra State, Griha Nirman Bhavan, Bandra, Bombay-51, for appointment of the respondent as Food Inspector by issuing necessary notification under the Prevention of Food Adulteration Act, 1954. As per that communication, the State Government in the Urban Development, Public

Health and Housing Department issued a notification dated 19th May, 1973 whereby the respondent was appointed as Food Inspector and the local area within the limits of the petitioner No. 1-Council was assigned to him for his functioning as Food Inspector. The petitioner No. 1-Council, on receiving complains against the respondent, instituted a departmental inquiry against him and by order dated 19th October, 1983 suspended him with effect from 20th October, 1983. The respondent challenged the suspension order by filing Regular Civil Suit No. 570 of 1982 in the Court of the learned Civil Judge. He applied for an ex parte ad interim injunction staying the suspension order, but an ad interim injunction was not granted and his application for injunction, after hearing both parties, was granted by the learned Civil Judge by his order dated 21st November, 1983. The learned Civil Judge thereby restrained the petitioners from giving effect to the suspension order dated 19th October, 1983. The petitioner preferred Miscellaneous Appeal No. 327 of 1983 to the District Court, Ahmednagar. It was heard by the learned Assistant Judge, and by his judgment and order dated 29th September, 1984 he dismissed the appeal. Feeling aggrieved, the defendants filed this writ petition.

3. The learned Counsel for the petitioners Municipal Council, Rahuri and its Chief Officer contends that the learned trial Judge and the learned Appellate Judge were not right in finding that the respondent plaintiff prima facie is a Government employee and not a municipal employee and hence the petitioner No. 1 Council had no right to hold a departmental inquiry and to suspend him. The learned Counsel contends that the respondent was appointed as Sanitary Inspector and Food Inspector of the petitioner No. 1 Council on 3rd January, 1973 and thereafter on its recommendations he was empowered by the State Government by issuing the notification dated 19th May, 1973 to act as Food Inspector for the local area of the petitioner No. 1 Council. He submits that after the appointment of the respondent as Sanitary Inspector and Food Inspector with effect from 5th January, 1973 the petitioner No. 1 Council moved the Government for creation of the post of Food Inspector, and the Government by order dated 28th March, 1973 created the post of the Food Inspector vide Ex. 19/2, and again on the recommendations of the Council appointed the respondent by the notification dated 19th May, 1973 as Food Inspector. The learned Counsel submits that the respondent does not cease to be an employee of the petitioner No. 1-Council by his appointment as Food Inspector u/s 9 of the Prevention of Food Adulteration Act, 1954, and that the Council retains the authority to hold a departmental inquiry against the respondent and to impose sentence even of dismissal from service on him. He referred to sections 75 and 76 of the Maharashtra Municipalities Act, 1965. Section 76 of the said Act reads as follows :

"76. (1) A Council may, with the sanction of the Director, create such posts of officers and servants other than those specified in sub-sections (1) and (2) of section 75 as it shall deem necessary for efficient execution of its duties under this Act.

(2) Subject to the provisions of sub-section (3), the qualifications, pay allowances and other conditions of service and the method of recruitment of any such officers and servants,---

(a) if the minimum salary (exclusive of allowances) of the post does not exceed Rs. 200 per month shall be determined by by-laws made by the Council in this behalf; and

(b) if the minimum salary (exclusive of allowances) of the post exceeds Rs. 200 shall be determined by general or special order made by the Director in this behalf.

(3) Subject to any general or special orders, which may, from time to time, be made by the State Government in this behalf, appointments to the posts created under sub-section (1), but excluding the posts of Municipal officers and servants, the minimum salary (exclusive of allowances) of which does not exceed Rs. 200, shall be made by the Chief Officer or any person duly authorised by the Council for the purpose, from the list of candidates selected by such agency or organisation, by whatever name called, as the State Government may, by general or special order, specify.

(4) No Council shall employ any person, who has not completed fifteenth year, to serve as a member of its sanitary staff."

4. The order of appointment of the respondent plaintiff as Food Inspector was made u/s 76 of the Maharashtra Municipalities Act, 1965, reproduced above, vide the order Ex. 19/2. From the mere fact that on the recommendations of the petitioner No. 1-defendant No. 1-Council the respondent the original plaintiff has then appointed as Food Inspector by the State Government by issuing a notification u/s 9 of the Prevention of Food Adulteration Act, 1954, he does not cease to be the Municipal employee and does not become the State employee. The learned Counsel for the respondent contends that the respondent-plaintiffs having been appointed as Food Inspector, he became a servant of the State Government and as Food Inspector he was not subordinate to the Municipal authorities and the Municipal authorities could not take any action against him. In support of his contention he relied on the decision of the learned Single Judge of the Delhi High Court in Pyare Lal Sharma v. New Delhi Municipal Committee and others 1980 Lab.I.C. 141 . In that case a Sanitary Inspector in the Health Department of the 1st respondent Committee was appointed u/s 9 of the Prevention of Food Adulteration Act as a Food Inspector to exercise powers within the local areas mentioned in the order. Later on certain inquiries were initiated ,charges framed and inquiry conducted against him by the 1st respondent Committee, which ultimately dismissed the petitioner from service. Every one of the charges made against the Sanitary Inspector was in regard to his conduct as Food Inspector. On those facts the learned Single Judge of the Delhi High Court held that the proceedings initiated against the petitioner in that case by the 1st respondent Committee were void ab initio, proceedings in respect

of his conduct as a Food Inspector could be initiated only by the authority who appointed him as Food Inspector. In that case it was held that no proceedings against the petitioner could be instituted regarding his conduct as Food Inspector by the authority other than the authority who appointed him as such Food Inspector. The learned Counsel for the petitioners-defendants contends that the reading of the decision of the Supreme Court in *Manager, Pyarchand Kesarimal Ponwal Bidi Factory Vs. Omkar Laxman Thange and Others*, , relied on by the learned Single Judge of the Delhi High Court, clearly shows that the employee does not cease to be in the employment of his employer on his services being lent to a third party and the right of dismissal does not vest in the hirer third party and that the right of dismissal continues to vest in the employer. According to the learned Counsel, the point in question has not been correctly decided in the aforesaid decision of the Delhi High Court.

5. Their Lordships of the Supreme Court in *Manager, Pyarchand Kesarimal Ponwal Bidi Factory Vs. Omkar Laxman Thange and Others*, , have considered the legal consequences on services of an employee lent to a third party. Their Lordships at page 827 of the report laid down the law thus :--

"A contract of service being thus incapable of transfer unilaterally, such a transfer of service from one employer to another can only be effected by a tripartite agreement between the employer, the employee and the third party, the effect of which would be to terminate the original contract of service by mutual consent and to make a new contract between the employee and the third party. Therefore, so long as the contract of service is not terminated, a new contract is not made as aforesaid and the employee continues to be in the employment of the employer. Therefore, when an employer orders him to do a certain work for another person, the employee still continues to be in his employment. The only thing that happens in such a case is that he carries out the orders of master. The employee has the right to claim his wages from the employer and not from the third party to whom his services are lent or hired. It may be that such third party may pay his wages during the time that he has hired his services but that is because of his agreement with the employer. That does not preclude the employee from claiming his wages from the employer. The hirer may also exercise control and direction in the doing of the thing for which he is hired or even the manner in which it is to be done. But if the employee fails to carry out his directions he cannot dismiss him and can only complain to the employer. The right of dismissal vests in the employer."

In view of the above law declared by the Supreme Court, it is futile to say that the respondent -plaintiff, having been appointed as a Food Inspector by the State Government by a notification dated 19th May, 1973, ceased to be the employee of the petitioner No. 1-Municipal Council. Even after his appointment as Food Inspector, he continues to be the employee of the petitioner No. 1-Council and the said Council alone can take disciplinary action against him. As an appointing authority of the respondent, the petitioner No. 1 Council alone is the competent

authority to dismiss him from service. Consequently, I am unable to agree with the learned Counsel for the respondent that the petitioner No. 1-Council could not initiate a departmental inquiry against the respondent and could not suspend him pending inquiry.

6. The learned Counsel for the petitioners defendants Municipal Council and Chief Officer submits that the petitioner No. 1-Council completed the departmental inquiry and the respondent-plaintiff has been compulsorily retired from service from 31st August, 1987. He submits that the order of suspension has now merged into the final order of compulsory retirement passed by petitioner No. 1-Council and, according to him, the respondent will have to challenge the order of compulsory retirement, if he is dissatisfied with the same, by taking necessary steps in the suit instituted by him challenging his order of suspension. According to the learned Counsel, the order of suspension was given effect to from 28th October, 1983 and though the courts below had passed orders granting an injunction against the defendants, those orders were stayed from time to time by the High Courts and the plaintiff continued under suspension and now as he has been compulsorily retired from service with effect from 31st August, 1987, the order of suspension cannot be set aside and he cannot be ordered to be reinstated. I find that there is much force in what the learned Counsel for the petitioners contends.

7. In the result, the petition is allowed and the rule is made absolute.

No order as to costs.