

(1958) 09 CAL CK 0011
In the Calcutta High Court
Case No : Matter No. 43 of 1958

Nripendra N. Majumdar

APPELLANT

Vs

N.M. Bardhan and Others

RESPONDENT

Date of Decision : 18-09-1958

Acts Referred:

Calcutta Municipal Act, 1951 — Section 77, 87

Citation : AIR 1959 Cal 219

Hon'ble Judges : D.N. Sinha, J

Bench : Single Bench

Advocate : S. Roy and Tarak Bose, S.C. Sen, T. Dastidar, for the Appellant;

Judgement

D.N. Sinha, J.—The facts in this case are shortly as follows: The petitioner was appointed as a Sub-Inspector of the Municipal Market, College Street Branch under the Corporation of Calcutta, in the year 1938 In March 1945, the petitioner was promoted to the post of Conservancy Supervisor. In 1948, the Corporation was temporarily superseded and an Administrative Officer was appointed. On the 23th April 1952. an order was passed by the Administrative Officer dismissing the petitioner from service. The 1951 Act came into force on the 1st May 1952, and the supersession came to an end. The order of dismissal was served on the petitioner On the 3rd of May 1952. It appears that the Corporation became dissatisfied with various orders of appointment and discharge made by the Administrative Officer, and a Sub-Committee of 13 members was appointed u/s 98(1) of the Act, to examine and scrutinise such cases. The case of the petitioner amongst others was considered by the Special Committee. On the 13th of June 1952, the Sub-Committee recommended that the order of dismissal of the petitioner should be set aside. Sometime in June 1952, a resolution was passed by the Corporation accepting the recommendation of the Special Committee and reinstating the petitioner. It appears that thereafter doubts were felt as to whether the order of reinstatement was valid and sometime in June 1954, the Commissioner to the Corporation passed an order of suspension upon the

petitioner, pending a decision on that point. On the 10th September 1954, an order was published by the State Government through the Local Self Government Department, a copy whereof is set out in paragraph 14 of the petition. By this order that part of the resolution of the Corporation which reinstated the petitioner was annulled, in exercise of the power conferred by Section 47 of the Calcutta Municipal Act, 1951. It is against this order that this Rule is directed. The snort point that arises here is as follows: According to Government, the resolution of the Corporation reinstating the petitioner is invalid because the petitioner having been dismissed by the Administrative Officer, could not, in the opinion of the Government, be reinstated by the Corporation. What the Corporation could do was to make an order of fresh appointment. Treating the order of reinstatement as a fresh appointment, the Govt. considered that the provisions of Section 81(2) of the Calcutta Municipal Act, 1951 had not been observed. Under that provision, appointment to posts carrying a maximum salary not below Rs. 250A but below Rs. 1500/- should be made on the recommendation of the Municipal Service Commission. There is no doubt that in this case the Municipal Service Commission was not consulted. The point therefore that has to be decided is very short. If the petitioner was validly dismissed on the 26th April 1952, then indeed the Corporation would have no jurisdiction to reinstate him. What it could do was to reappoint him. Equally, there is no doubt that reappointment would require observance of the procedure laid down in Section 81(2) of the Act, namely consultation with the Municipal Service Commission. In order to meet this point, Mr. Roy on behalf of the petitioner has advanced the following argument: He says that it is true that on the 26th April 1952. an order was made by the Administrative Officer. It was however not communicated to the petitioner until the 3rd of May 1952. He says that an order could only be said to have been completed when it was communicated, and consequently the dismissal must be taken to have taken place on the 3rd of May 1952. So far as the facts are concerned, the parties are agreed that the order was made on the 26th April 1952, a letter was issued on the 30th of April 1952, but no attempt to serve it was made before the 3rd of May 1952. It appears that the petitioner was on leave for a few days and it was only upon his return on the 3rd of May 1952 that this order of dismissal was served upon him. If of course the order of dismissal is effective only on the 3rd of May 1952, then further complications arise. u/s 77 of the said Act, any person, who immediately before the commencement of the Act, was holding any post as a municipal officer or a servant under the Corporation shall be deemed to be appointed to the corresponding post under the Corpotation as constituted under that Act. Therefore, assuming that the Act came into operation on the 1st of May 1932, the petitioner, if he had not been dismissed before that date, became an employee of the Corporation of Calcutta. Under those circumstances, it is extremely doubtful whether the order of dismissal by the Administrative Officer could be effective on the 3rd. of May 1952. Even assuming that it was effective, if the dismissal is by the Corporation as it must be if it took place on the 3rd of May 1952, then the order of reinstatement would be in order, whereas if it is a

dismissal on the 26th April 1952 by the Administrative Officer, then the order of reinstatement must be held to be bad. Upon this short point, namely as to the effective date of the order Mr. Roy has quoted several authorities. He has placed before me the judgment of Bose, J. in *Calcutta Cloth Agency v. S. Banerjee*, an unreported judgment dated the 3rd of April 1947. In that case the question arose as to whether an application before the Board of Revenue by way of revision was barred by limitation or not. What happened was that an application had been made before the Board of Revenue but this application was dealt with without any notice to the appellant and the question was as to from what date an application u/s 21 of the Sales Tax Act for reference of such question to this Court should be calculated. Bose, J., held that the date from which it should be calculated must be the date not when it was made ex parte but when the order was communicated. I will now proceed to deal with some earlier decisions. The first case is a decision of the Bombay High Court. *Abdul Ali v. Mirja Khan*. ILR 28 Bom 8. In that case, it was held that the expression "making of the order", in Section 77 of the Indian Registration Act meant not merely recording of the order of refusal in writing, but communicating it to the party concerned, and hence a suit brought under the provisions of Section 77 of the Indian Registration Act might be filed within 30 days of the date on which the order of refusal was communicated to the party concerned. Chandavarkar J. said as follows :

"An order does not become an order unless and until steps are taken by the officer passing it to bring it to the consciousness and knowledge of the party against whom it is passed. If the party affected by the order acts in such a way as to prevent the officer from communicating it to him within a reasonable time after he has written it, it may be that the date of the order would be the date when it could have been brought to the knowledge of the party within a reasonable period."

2. The next case is a decision of the Madras High Court, *Secretary of State v. C. Narayanaswami* ILR 34 Mad 151. That was a case under the provisions of the Madras Survey and Boundaries Act. The learned Judge said as follows:--

"A decision cannot properly be said to be passed until it is in some way pronounced or published under such circumstances that the parties affected by it have reasonable opportunity of knowing what it contains. Till then, though it may be written out, signed and dated, it is nothing but the decision which the officer intends to pass. It is not passed so long as it is open to him to tear up what he has written and write something else."

3. The next decision to be considered is *Swaminathan alias Chidambaram Pillai Vs. Lakshmanan Chettiar and Another*, . That case also dealt with Section 77 of the Indian Registration Act. It was held that where an order is passed in the presence of the parties immediately after enquiry by the Registrar, the time should be calculated from the day of the order. But if the order was not so pronounced and the person concerned did not know that his request for registration has been refused, then time should be calculated only from the day

when the order was communicated. Ray J. said as follows:--

"Apart from authority, it seems to me that there can be no valid order unless it is made after notice to the parties affected by it, or it is communicated to them in the absence of such notice. To take a contrary view seems opposed to reason and principle.""

4. Bose T. in the case cited above has pointed out that in a Division Bench of this Court presided over by Woodroffe J. *Matabbar Mollah v. Sashi Bhusan* 16 Cal WN 20, it was assumed that the principle laid down in the case of ILR 28 Bom 8 was correct.

5. The Madras and the Bombay views however, were dissented from by Biswas J. in *Mafizur Rahman v. Sm. Jamila Khatun* 42 C WN 1174. The learned Judge was of the opinion that the statute laid down that time was to be calculated from "making of the order", and should not be taken to provide that the calculation was to be from the communication of the order. The earlier Bench decision of this Court was not brought to the notice of Biswas J.

6. With respect, I agree with the view taken by Bose J. that the Bombay and Madras views are preferable. In my opinion the position may be summed up as follows:

(1) An order may be taken to be made on the date it came into existence, if the nature of the order is such that it is not necessary to communicate it to anyone. It is easy to see that only very few orders will satisfy this test.

(2) If an order is made which affects the rights of a person, then the order must be communicated to such person in order to be complete and effective. The date of the order is the date when it is made known to the affected party. To this however, there are certain exceptions, which are as follows;

(i) Where the order is made in the presence of the party, whose right has been affected,

(ii) Where notice has been given to the party affected by the order to be present at the announcement, but in spite of such notice, he fails to be present. Where the method of giving notice is prescribed, e.g., by publication in the Gazette, compliance with the same will be deemed sufficient, as also in a case where the law presumes knowledge.

(iii) Where owing to the obstruction of the party affected himself, the order cannot be communicated within a reasonable time.

(iv) Where the authority making the order, in spite of reasonable efforts has been unable to serve the order within a reasonable time or at all. In such a case, the date of making of the order is the date of the order.

7. Barring these exceptions. I think that the law is that an order which affects the interests of a person cannot be said to be effectively made until it has been

brought to his notice. Particularly, an order of dismissal would come within this category. After all, in an employment there are two parties, the employer and the employee, and it is not possible to bring the employment to an end unilaterally without Knowledge of the other side, Take this case. Suppose that the Administrative Officer passed an order and put it inside the drawer of his desk and said nothing about it for six months, during which the employee went on working. Could it be said that he was no longer in the employ of the Corporation, and that he would not be entitled to his wages? I should think that such a stand would be absurd. In this particular case, it has not been established that the matter comes within any of the exceptions I have mentioned above. There was no occasion to wait from the 26th April to the 3rd of May 1952. Certainly the employee's address was known and the order could have been sent to him by post if he was on leave. Following one of the reasonings given above, it might be said that the Administrative Officer during this interregnum might have changed his mind and countermanded or destroyed the order. In my opinion, the order cannot be said to have been made until the 3rd of May 1952, when it was served upon the petitioner. It is from that date that his dismissal should be counted. If that is so then in view of the reasonings, I have set out above, the reinstatement by the Corporation was quite in order. In fact, it is doubtful whether he had ever been dismissed. However, I need not deal with that aspect of the matter. It is sufficient to hold that the order of reinstatement made by the Corporation by its resolution in June 1952 was quite in order, and the order by the State Government annulling the resolution is defective and this must be made absolute. There will be a writ in the nature of certiorari issued quashing the same and a writ in the nature of mandamus directing the State Government not to give effect to it. There will be no order as to costs.