
(1961) 04 AHC CK 0028
In the Allahabad High Court
Case No : Special Appeal No. 270 of 1957

The U.P. State

APPELLANT

Vs

Murtaza Ali and Another

RESPONDENT

Date of Decision : 03-04-1961

Acts Referred:

Uttar Pradesh Municipalities Act, 1916 — Section 296, 296(2), 297, 297(1), 57(2)

Citation : AIR 1961 All 477 : (1961) 31 AWR 387

Hon'ble Judges : M.C. Desai, C.J;S.N. Dwivedi, J;B. Mukerji, J

Bench : Full Bench

Advocate : K.B. Asthana, for the Appellant; S.C. Khare, for the Respondent

Final Decision : Dismissed

Judgement

Desai, C.J.—I agree with my brother Dwivedi that the regulations published in Notification No. 6471/XI-226-46, dated the 29th November, 1946, and printed at p. 654 of the Municipal Manual, Uttar Pradesh, Vol. I, 1952, are, in their application to an executive officer of a municipal board, ultra vires the State Government. Since we are overruling a decision of our brother Tandon, I consider it necessary to add a few words of my own.

2. The Municipalities Act contains different provisions regarding appointment, punishment, dismissal etc. of different classes of officers and servants, and it is by no means certain that the impugned regulations are meant to govern the dismissal, removal or reduction of an executive officer. The provision "every order of dismissal, removal or reduction shall be in writing" means that the regulations govern the dismissal, removal or reduction by an "order" and not by a "resolution" of the board.

An executive officer is liable to be punished, dismissed or removed by a special resolution of the board, (vide Section 58), as well as by an ordinary resolution of the board on a recommendation made by the President after an enquiry u/s 69-A. In either case it is the resolution and not order of the board by which the

executive officer is punished, dismissed or removed. "Resolution" is distinct from "order" and "order" does not comprise a resolution. Regulation No. 2 refers to "order" and not "resolution".

Further, the express requirement that the order must be in writing suggests that the regulation is not meant to apply to a resolution because a resolution is always reduced to writing. An executive officer, or any other officer, can be dismissed, removed or reduced also by an order, provided that the order is of the State Government passed on a record of enquiry completed against him by the President and submitted with his recommendation- to the State Government. It maybe that the regulations, though expressed in wide language, are intended to apply when the State Government passes an order against an executive officer or other officer or servant.

3. The Act contains provisions dealing with the heads "service" "conditions of service" and "period of service." Section 57(3) deals with conditions of service of executive officers and medical officers of health. Section 59(3) deals with conditions of service of officiating executive officers. Sections 66(2) and 68(2) deal with conditions attached to the appointment of secretaries and other officers.

Section 297 (1) (f), (h), (i), (j), (k) and (l) deals with regulations to be made by a board in respect of (a) monthly salaries of certain servants, (b) allowances of the servants employed by a board, (c) security to be furnished, by a servant of a board, (d) leave to servants of a board, (e) the period of service of servants of a board and the conditions under which they are entitled to receive gratuities or compassionate allowance on retirement, or on their becoming disabled through the execution of their duty and (f) contributions to a pension or provident fund established by a board.

It is obvious from these provisions that the heads "service", "conditions of service," and "period of service" are different from one another. Even if the head "service" or "conditions of service" might be said to comprise everything from the commencement to the termination of service, the head "period of service" cannot be said to comprise everything. How a service can be terminated may be a part of the conditions of service, but service can be terminated in various ways, such as by expiry of the period of service, by resignation, by death, by dismissal or by removal.

Consequently "period of service" is only one of several matters comprised in "conditions of service" or "service." "Conditions of service" may include "period of service" but "period of service" does not include everything connected with "service" or "conditions of service." Rules regarding "conditions of service" may include rules regarding "period of service", but rules regarding "period of service" cannot include rules regarding the termination of service otherwise than by expiry of the period of service.

Consequently, rules regarding dismissal or removal do not come within the scope of rules regarding "period of service". Section 297 (1) (k) (old or unamended)

confers power to make regulation only in respect of "period of service", and not in respect of other matters relating to servants, such as dismissal or removal. When a servant is dismissed or removed, he is dismissed or removed, even though the period of service has not expired; as a matter of fact dismissal or removal can be ordered only during service, i.e. so long as the period of service has not expired.

The power to make regulations regarding gratuities and compassionate allowance conferred by Section 297 (1) (k) along with the power to make regulations regarding the period of service, confirms the view that I take; a question of payment of gratuity or compassionate allowance arises only when the service is terminated by expiry of the period of service and not when it is terminated by dismissal or removal. A servant, who is punished by dismissal or removal, is never thought to be entitled to a gratuity or compassionate allowance. Consequently the power to make regulations regarding dismissal or removal is not comprised in the power to make regulations regarding period of service.

4. An executive officer can be dismissed or removed only by a resolution of a board passed u/s 58 or 69-A. What procedure should be adopted by a board before passing such a resolution is not a matter included in "period of service", or "matters similar to those set forth in Clauses (e) to (m)". The conditions of service of an executive officer are subject to the approval of the State Government, vide Section 57 (3); the provision regarding punishment, dismissal or removal by a special re-solution in the very next section indicates that "punishment, dismissal or removal" is not included in "conditions of service." When provision regarding punishment, dismissal and removal is made in Section 58, provision for the same could not have been made also in Section 57(3); in other words, "punishment", "dismissal" and "removal" are matters distinct from "conditions of service".

5. The impugned regulations cannot be said to have been made by the State Government in exercise of the power conferred upon it by section 57(3), because in exercise of that power it can only approve of the conditions of service imposed by a board and not itself impose conditions of service.

6. It is not known what are the conditions of service of executive officers in this municipal board; the appellant has not placed before us any rules made by the board regarding conditions of service of executive officers and apparently does not rely upon them.

7. I agree with my learned brother that section 297 (1) (k) does not authorise a board to make regulations about the procedure to be followed by it for dismissing, removing or reducing its executive officer.

8. A board cannot make these regulations even in exercise of the power conferred by section 297 (1) (n). "Dismissal", "removal" and "reduction" cannot be said to be matters similar to "allowances," "security," "leave," "period of service" and "contributions to a pension or provident fund". As a matter of fact

they are matters as distinct from (if not more distinct than) "allowances," "security", "leave," "period of service" and "contributions" as they themselves are distinct from one another.

9. The power of the State Government to make regulations conferred by Section 297 (2) is the same as that of a board, and no regulation that cannot be made by a board would be intra vires the State Government. Further, the power to make regulations is limited by the condition that they must be consistent with the Act. The power conferred upon a board to punish, dismiss or remove its executive officer by a resolution cannot be abridged by such requirements as are contained in the impugned regulations.

10. Only one resolution is required to be passed by a board for punishing, dismissing or removing its executive officer, and not two- The impugned regulations, on the other hand, contemplate two decisions, one finding the executive officer guilty and the other imposing punishment. Unless the board has first adjudged him guilty and tentatively decided to impose a certain punishment, it cannot, in compliance with regulation No. 1, give him an opportunity to show cause against the proposed punishment. Since it can act only through a resolution, it means that it must first adjudge him guilty by passing one resolution and then impose punishment upon him by passing another resolution, but Section 58 contemplates only one resolution, and it follows that the procedure laid down in the impugned regulations cannot be followed and they would be inconsistent with Section 58.

11. The regulations purport to have been, made by the State Government in exercise of the power conferred by Section 297, Sub-section (2) react with Sub-section (1) (n) and not Section 296 (2)(b), The Act makes a distinction between "rules" and "regulations;" Section 296 confers power to make rules, and Section 297 to make regulations. We are concerned with what is expressly called "regulations" and not "rules;" therefore, they could not have been made in exercise of the power conferred by Section 296.

Moreover, the regulations imposing restrictions on the power of a board to punish, dismiss or remove an executive officer by prescribing certain conditions to be fulfilled cannot be said to be made for the purpose of "carrying out the provisions of this enactment". I also agree with my learned brother that the amendment made in Section 297 (1) (k), subsequent to the making of the impugned regulations, will not breathe life into them, if they were lifeless when enacted.

The eclipse theory may apply to a law that became void under Article 13 of the Constitution but not to a law which was ultra vires the authority by which it was made. I rely on the observations made in *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, , by Das A. C. J. at p. 599, drawing a distinction between existing laws becoming void under Article 13 of the Constitution on the Constitution being given effect to and post Constitution laws

inconsistent with the provisions of the Constitution, which "never came to life, but were still born as it were;" the former could be revitalised, but not the latter.

12. I do not agree with the appellant's counsel that the regulations were not still born, that at the most they were ineffective in respect of executive officers but were effective in respect of other servants and that after the amendment they could be effective in respect of executive officers also. In my view they were completely lifeless when made in 1946; as I explained earlier, the powers conferred by Sections 296 and 297 did not include the power to make them.

13. It was contended by the appellant's counsel that a rule purporting to have been made by an authority in exercise of a certain power will be sustained if it could have been made under another power and not under the power under which it purports to have been made. The correct law is that if a rule purports to have been made under one provision it cannot be sustained under another provision even though it could have been made under it (see *P. Balakotaiah Vs. The Union of India (UOI) and Others*,

It is essential that an authority making a regulation in the exercise of a power conferred by a statute states it in the regulation itself, so that the public may know at once whether it is ultra vires or intra vires and may act accordingly. A regulation is made for the public and the public have a right to know the authority under which it is made, as soon as it is made, so that they know whether they are bound by it or not. That is why in delegated legislation the authority is stated. This object would be defeated if the delegate is permitted to take shelter behind an undisclosed authority. An act of a delegate purporting to act under one authority cannot be sustained by reference to another authority.

14. I, therefore, hold that the regulations, if they are intended to govern "dismissal", "removal" and "reduction" of executive officers, are ultra vires the State Government.

Dwivedi, J.

Mukerji, J.

14a. A Division Bench of this court has referred for our opinion the following question:

"Whether the regulations regarding dismissal, removal or reduction of Municipal employees, printed at page 654 of the Municipal Manual, 1952 Edition are valid?"

15. The relevant regulation reads:

"1. No officer or servant shall be dismissed, removed or reduced without a reasonable opportunity being given to him of showing cause against the action proposed to be taken in regard to him. Any written defence tendered shall be recorded and a written order shall be passed.

2....."

16. It is common ground between the parties that the first respondent was removed from the office of Executive Officer, Municipal Board, Sikandra Rao, by an order sometime in 1954 without adopting the procedure provided for in these regulations. The appellant however contends that non-compliance with these regulations does not vitiate the order, for the regulations are ultra vires the regulation making " authority. These regulations were made in 1946 by the Provincial Government.

17. Our answer to the question is in the negative. We shall now proceed to state our reasons.

18. Sub-section (1) of Section 57 of the Municipalities Act (hereinafter called the Act) enjoins upon a Municipal Board to appoint an Executive Officer by a special resolution. Sub-section (2) thereof provides that "the appointment, salaries) and conditions of service of Executive Officers" shall be "subject to the approval of the State Government". Sub-section (1) of Section 58 confers power on a Municipal Board be "punish, dismiss or remove its Executive Officer" and imposes two fetters on the power, namely, that (1) the power shall be exercised by a special resolution supported by not less than two-thirds of the members constituting a Municipal Board and (2) the Executive Officer shall have a right of appeal to the State Government against the order of punishment, dismissal or removal.

It may be observed that Section 58 ex facie imposes no other limitations on the power of a Municipal Board to punish and dismiss its Executive Officer, and there is no statutory obligation on it to give him any opportunity of showing cause against the action proposed to be taken in regard to him. This statutory obligation is a recent legislative innovation in India, and its ancestry does not go further back than the Government of India Act, 1935. This Act, by its Section 240(3), for the first time, created this statutory obligation in regard to dismissal, removal and reduction in rank of a civil servant; later, it was engrafted to Article 311(1) of our Constitution. It was. not in vogue when the Act was made in 1916, and perhaps this fact accounts for its omission from Section 58(1).

19. Section 297 of the Act, in so far as it is pertinent for our purposes and as it stood in 1948, may now be set out:

"Section 297 (1) -- A board maymake regulations--as to all or any of the following matters:

(a)

(b)

(c)

(d) the establishment of Committees, other than merely advisory Committees, for any purpose, and the determination of all matters relating to the constitution and procedure of such committees;

(e) the avoidance of any entry shown in the third column of Schedule II; (f)
(g)

(h) the absentee or other allowances of the servants employed by a board;

(i) the amount and nature of the security to be furnished by a servant of a Board from whom it is deemed expedient to require security;

(j) the grant of leave to servants of a board and the remuneration to be paid to the persons, if any, appointed to act for them whilst on leave;

(k) the period of service of all servants of a board and the conditions under which such servants, or any of them, shall receive gratuities or compassionate allowances or retirement, or on their becoming disabled through the execution of their duty, and the amount of such gratuities or compassionate allowances; and the conditions under which any gratuities or allowances may be paid to the surviving relatives of any such servants whose death has been caused through the execution of their duty;

(1) the payment of contributions at such rates and subject to such conditions as may be prescribed in such regulations, to a pension or provident fund established by the board or with the approval of the board, by the said servants;

"(m) the conditions subject to which sums due to a board may be written off as irrecoverable and the conditions subject to which the whole or any part of a fee chargeable for distress may be remitted;

(n) All matters similar to those set forth in Clauses (e) to (m) and not otherwise provided for in this sub-section;

(o)

(2) Provided that the Provincial Government may, if it thinks fit, make regulations consistent with this Act in respect of any of the matters specified in Clauses (d) and (h) to (n) of Subsection (1)"

20. It will be seen that Sub-section (1) enumerates certain matters which may form the topic of sub-legislation, by a Municipal Board, while Sub-section (2) restricts the power of the State Government to make regulations with respect to the matters enumerated in Clauses (d) and (h) to (n) of Sub-section (1). Admittedly, Clauses (d), (e) and (m) are not material to our purposes, Clauses (h), (i), (j) and (1) relate to matters during subsistence of the relationship of master and servant. Clause (k) relates to superannuation and break in service by disability or death of a servant, and matters connected therewith. None of these clauses seem to us to relate to matters associated with the formation and determination of the contract of service.

These topics are foreign to them. The subject-matter of the impugned regulations is associated with determination of the contract of service which is characteristically different from superannuation and termination of service by

death or disability. In the former there is complete disruption of the bonds of service by the supervention of a willful act of the master Or the servant; in the latter, service comes to an automatic end and without any act of the master or servant. Furthermore the relation of master and servant notionally subsists for some purpose in the case of superannuation, e.g. for the payment of pension, gratuity, provident fund and compassionate allowance.

Again, in some cases of superannuation payment of pension may also envisage unbroken obligation of the servant's fidelity to his previous master. There is no complete tearing of the bonds of service as is the case in dismissal and removal of a servant. We are accordingly of opinion that Clause (n) read with the phrase "the period of service of all servants" in Clauses (k) cannot comprehend the subject-matter of the impugned regulations. What they provide for cannot be said to be similar to the topic of the period of service". There is no resemblance between them and they refer to different phases of service and carry different connotations.

21. We are unable to lend liberal interpretation to the expression "the period of service" by reference to its genus "service". The analogy of the rule of liberal construction of legislative heads in Schedule VIII to the Constitution cannot be extended to the construction of the scope of the topic of "the period of service" in Clause (k) by reference to its genus "service" so as to include the subject-matter of the impugned regulations which also belongs to the same genus. The reasons are obvious; Firstly Section 297 of the Act is not an organic law; secondly, this section is a specimen of delegated legislation. The analogy of the rules of interpretation in regard to delegated legislation would be more appropriate in the context. Delegated legislation prescribes a standard for the guidance of the delegated authority, and it cannot be so construed as to confer a power of making new laws inconsistent with the parent Act.

22. It may also be helpful to refer to the U. P. Municipalities (Amendment) Act (VII of 1953) whereby the words "conditions of service including" were inserted by the Legislature between the word "the" and the words "period of service" in Clause (k). The amendment indirectly furnishes legislative exposition of the scope of the phrase "the period of service". If the Legislature had considered that this phrase, read with Clause (n), includes "conditions of service", which the impugned regulations purport to regulate, it would not have passed an Act in 1953 to add a surplusage in Clause (k). (See for the rule of legislative exposition Craies on Statute Law, 5th edition).

23. In Prakash Chandra v. State of U. P., Writ No. 2740 of 1957, decided on April 22, 1960, a learned single Judge has held that the impugned regulations could be supported by the phrase "period of service" in Clause (k). With respect to the learned Judge we think that his view is not correct.

24. The amended Clause (k) cannot breathe life into the void regulations, because the 1953 amendment is not retrospective. Section 300 of the Act, read

with Section 23 of the U. P. General Clauses Act, also presents another hurdle in the way. A rule or regulation may be made by the Government after its previous publication in the U. P. Gazette and invitation and consideration of objections to it and by subsequent publication of it in its final shape in the U. P. Gazette.

The impugned regulations might have been considered, as we do, by Municipal Boards to be ultra vires and consequently they might not have opposed it, when it was first published in the Gazette in 1946. Judicial support to the impugned regulations by the aid of the amendment would deprive Municipal Boards of their valuable statutory right to oppose enactment of a rule or regulation. We cannot therefore permissibly revitalise the regulations with the aid of the subsequent amendment.

25. The impugned regulations cannot also be saved by the provisions of Clause (a) of Sub-section (2) of Section 296 of the Act. Clause (a) empowers the Government to make a rule in regard to any matter wherefor power is conferred on it either expressly or impliedly by the Act or any other law. We have not been referred to any law except the Act for this purpose. No section of the Act, as it was in 1946, expressly makes a grant of power to the Government to make the impugned regulations. The words "by implication" in Clause (a) refer to those provisions of the Act which authorise the Government to make a rule or regulation in implied terms, e.g., Sections 57(2), 77, 78(2).

26. Clause (b) of Sub-section (2) of Section 296 of the Act is also of no avail. It enables the Government to make rules consistent with the Act generally for the guidance of a board in any matter connected with carrying put of the provisions of the Act or any other enactment in relation to municipalities. Any matter, regarding which a rule may be made, should firstly be "connected with" the carrying out of the provisions of the Act or any other enactment, and, secondly, it should be designed to carry out the provisions of the Act or any enactment.

The words "connected with" signify that any matter, with respect to which a rule is made, should bear a proximate and not remote connection with the object of "carrying out the provisions of the Act or any other law". (See *Rex v. Basudeva* AIR 1950 FC 67 at p. 68). The phrase "carrying out the provisions of the Act or any other enactment" connotes that the rule, which is made under its canopy, should be restricted to the same field of operations as that marked out by the Act or any other law itself. The rule-making authority cannot enlarge legislatively that field.

In the guise of the phrase it is not open to the rule-making authority to add to the efficacy of the power by additional means. In other words, one may complement but not supplement a granted power. (See *Carbines v. Powell* 36 C. L. R. 88 at p. 92). The power bestowed by the phrase will authorise the provision of subsidiary means of carrying into effect what is enacted in the Act or any other law itself and will comprehend what is incidental to the execution of their specific provisions. But such a power will not enable the rule making authority to

add new and different means of carrying them out.

27. It is argued that the impugned regulations are designed to carry out the provisions of Section 58 (1) of the Act. We have not been referred to any other provision of the Act or of any other law. As already stated, that section bestows a power on a Municipal Board to punish, dismiss or remove its Executive Officer. The section further provides that the power shall be exercised by a special resolution supported by the prescribed majority of the members of a Municipal Board and subject to any order of the State Government on appeal.

The rule-making authority may make rules for carrying out the provisions of this section. For example, it may make a rule, if there is already no provision in the Act, prescribing the mode of service of a notice regarding the special resolution on members it may provide how, when and by whom a meeting would be convened for.....considering the special resolution; it may further provide how the resolution shall be moved, discussed and passed. It may also regulate the procedure for appeal.

The impugned regulation is embraced by none of these illustrations, nor does it appear to be subsidiary or incidental to Section 58(1) as a whole. It is plain that the regulations supplement, and not complement the provisions of Section 58(1), for they add a new limitation on the exercise of the power of punishing, dismissing and removing an Executive Officer. Consequently we have no doubt that they have overstepped the power conferred u/s 296 (2) (b).

28. We cannot also support the impugned regulations by the provisions of Section 57 (2) of the Act, which declares that the appointment, salaries and conditions of service of an Executive Officer shall be subject to the "approval" of the Government. The word "approval", which means confirmation, is the key to an understanding of the real scope of this section; it implies that a Municipal Board should initiate tentatively a scheme providing for conditions of service of an Executive Officer, which would become final when confirmed by the Government. The section does not confer any independent power on the Government to regulate conditions of his service at its own initiative.

29. For the reasons discussed above we are of opinion that the impugned regulations are ultra vires the rule-and-regulation-making authority. Our answer to the question, referred to us is accordingly in the negative.

30. Sri Section C. Khare submits that the Government, which made the impugned regulations, is estopped from challenging their legitimacy. It is not for us to examine this submission, for it goes beyond the purview of the reference. Sri Khare may more properly raise this matter before the bench which would now hear the appeal.

31. Before parting with the case we desire to make it clear that we should not be taken not to have appreciated the importance and necessity of the impugned regulations. Indeed we can say without hesitation that there is evident need of

such regulations as a safeguard for municipal servants from arbitrary exercise of the power of dismissal and removal. But desirability and need is one thing; and its invalidity a different matter. As Judges we cannot affect our judgment by the wisdom or unwisdom of any law. Our duty is to interpret, and not to make a law; the latter is an exclusive domain of the law-making authority.

32. The reference shall now go back with our answer to the bench for hearing the appeal.