
Swami Nath Vs The S.D.O. Machhlisahar, Dist. Jaunpur and Others

Civil Miscellaneous Writ No. 2200 of 1956

Court: Allahabad High Court

Date of Decision: March 12, 1958

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) â€” Section 45#General Clauses Act, 1897 â€” Section 3#Penal Code, 1860 (IPC) â€” Section 21#Uttar Pradesh Panchayat Raj Act, 1947 â€” Section 5A

Citation: AIR 1958 All 660 : (1958) 28 AWR 471

Hon'ble Judges: J. Sahai, J

Bench: Single Bench

Advocate: R.B. Misra, for the Appellant; Standing Counsel, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

J. Sahai, J.

The petitioner was a candidate at an election held to elect the Pradhan of village Chaujeetpur Rangwa. The other candidates were respondents Nos. 3 to 5. The petitioner's nomination paper was on scrutiny rejected on the ground that he had been a government servant

and was dismissed from service on the ground of misconduct. The misconduct that was attributed to him was that he had enticed away a woman.

The respondent No. 3 was declared elected at the election which was held on 19th December, 1955. The petitioner thereupon filed an election

petition which was dismissed. In the election petition he had raised the plea that his nomination paper had been improperly rejected because he

was not a government servant and did not fall within the provisions of 6. 5-A(d) of the U. P. Panchayat Raj Act. Thereafter the present writ

petition was filed in this Court.

2. The only question for decision in the case is whether the petitioner who was a Mukhia Was in the service of a State Government, the Central

Government, a local authority or a Nyaya Panchayat. It cannot be denied that the petitioner would be guilty of misconduct inasmuch as he was

removed for having enticed a woman who was not his married wife. Therefore the only question that remains is whether he was in the service of

any of the authorities mentioned in Clause (d) of Section 5-A.

3. A Mukhia is appointed by the District Magistrate u/s 45 (3) of the Code of Criminal Procedure which runs as follows:

Subject to rules in this behalf to be made by the State Government, the District Magistrate or Sub-divisional Magistrate may from time to time

appoint one or more persons with his or their consent to perform the duties of a village-headman under this section whether a village-headman has

or has not been appointed for that village under any other law""".

4. This section would show that there is no statutory provision for a particular number of Mukhias to be appointed in a particular Tillage, nor is it

necessary under the law that a Mukhia should necessarily be appointed in every village. It is the sole discretion of the District Magistrate or the

Sub-divisional Magistrate, as the case may be, whether or not to appoint a Mukhia and if so to appoint one or more Mukhias as they like.

In other words the office of Mukhia though recognized by law can only be created by an order passed either by the District Magistrate or a Sub-

divisional Magistrate and it is not a statutory post in the sense that a Mukhia has got to be appointed for every village or that a village cannot do

without a Mukhia. It is also well known that a Mukhia receives no remuneration for the services rendered by him. The duties of the Mukhia are

also not well defined. He does not hold a whole-time job.

No disciplinary proceedings can be taken against him. Under the provisions of Section 45 of the Code of Criminal Procedure he is required to

communicate to the nearest Magistrate or to the officer in charge of the nearest police station certain matters which are mentioned In Clauses (a) to

(f) of Sub-section (1) of that section. In other words the Mukhia is required under the law to convey to the officers mentioned in Section 45 the

permanent or temporary residence of any notorious, receiver or vendor of stolen property and to inform them if there is any person reasonably

suspected of being a ""thug"" robber, escaped convict or proclaimed offender who lives within his jurisdiction.

He has also to convey to the authorities mentioned above the commission of, or intention to commit, any non-bailable offence or any offence

punishable under Sections 143 144 145 147 or 148 of the Indian Penal Code. He should also inform of any unnatural death that takes place in the

village and also of the likelihood of the commission of the several offences which are mentioned in Clause (e) of Sub-section (1) of Section 45, Cr.

P. C.

Lastly he has to convey information in respect of matters relating to the maintenance of order or prevention of crime or safety of person or

property respecting which he has been directed by the District Magistrate to communicate information. These are the only known duties of a

Mukhia or a village-headman There is no relationship of employer and employee between him and the District Magistrate or the Sub-divisional

Magistrate or the State and the Central Government or any local authority or a Nyaya Panchayat. For the convenience of administration some

persons are selected as Mukhias to keep a watch and give the officers information in respect of matters contained in Clauses (a) to (f) of Section

45 (1), Cr. P. C.

5. In the case of Hari Shanker Prasad Gupta Vs. Sibban Lal Saksena, their Lordships of the Supreme Court have held that a headman or Mukhia

is a government servant, but that has been held not on general principles but on an interpretation of Section 123 of the Representation of the

People Act which runs as follows :

The following shall be deemed to be corrupt practices for the purposes of this Act:

.....

8. The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or by any other person with the connivance

of a candidate or his agent, any assistance for the furtherance of the prospects of the candidate's election from any person serving under the

Government of India or the Government of any State other than the giving of vote by such person.

Explanation: For the purposes of this clause-

.....

(b) a person serving under the Government of any State shall include a patwari, chaukidai, daredar, zaildar, shanbhagh, Karnam talati, talari, patil,

village munsif, village headman or any other village officer, by whatever name he is called, employed in that State, whether the office he holds is a

whole-time office or not, but shall not include any person (other than any such village officer as aforesaid) who has been declared by the State

Government to be a person to whom the provisions of this clause shall not apply.

It will therefore be noticed that the decision of the Supreme Court is based on the language of Section 123 itself and not on any other consideration.

The Panchayat Raj Act itself does not mention as to which persons will be deemed to be in the service of the State Government, the Central

Government, local authority or the Nyaya Panchayat, A government servant is also not defined in the General Clauses Act.

In some cases under the provisions of Section 21 of the Indian Penal Code the word ""servant"" has come up for judicial interpretation, and it has

been held to signify any person duly appointed and invested with authority to administer any part of the executive power of the government or to

execute any other public duty imposed by law whether it is judicial, executive or ministerial. Even if this test is adopted a Mukhia cannot be

deemed to be a government servant because he will not be a servant at all.

It must be proved before he can be deemed to be a servant of the government that he has the authority to administer any part of the executive

power of the government or to execute any other public duty imposed by law whether it is judicial, executive or ministerial. He has no such duty. It

is not his duty to take action on his own initiative; all that he is required to do is to give information to certain authorities in respect of certain

matters.

6. In the case of Goolbai Motabhai Shroff Vs. Pestonji Cowasji Bhandari, Pestonji Cowasji reported in 37 Bom L. R. 410: () (B), Mr. Justice

Wadia of the Bombay High Court had to decide as to what will constitute the relationship of master and servant, and the following observations in

his judgment are worth quoting :

A servant is a person who voluntarily agrees, whether for wages or not, to subject himself at all times during the period of his service to the lawful

orders and directions of another in respect of the work to be done by him. It is that other person who is entitled in law to give orders and to have

them obeyed.

The relationship, therefore, exists only between persons of whom the one has the control of the work done by the other, and it does not depend

merely on the mode of payment for service or for the time for which services are engaged, or the nature of those services or on the power of

dismissal, though these are certainly matters which the court may take into consideration in assessing the relationship. The test, therefore, is the

right of control which a person has in the manner in which the other does the work.

If a Mukhia does not work properly his appointment may be terminated but he cannot be punished and no disciplinary action can be taken against

him. He is not required to take leave of absence from any one if he is sick or if he wants to go out. He is not amenable to anybody's disciplinary

jurisdiction. He cannot be said to be under the control either of the State Government or the Central Government or any of the local authority or a

Nyaya Panchayat and does not conform to the description of a servant as given by Mr. Justice Wadia.

7. In Halsbury's Laws of England, 2nd Edition, Vol. 22, in paragraph 191 at p. 112 it is stated that whether or not in a given case, the relation of a

master and a servant exists is a question of fact; but in all cases the question imports the existence of power in the employer not only to direct what

work the servant is to do, but also the manner in which the work is to be done. It is further stated that a person may be the servant of another

although a third party has the power of appointing or dismissing him or requiring his dismissal or has powers of directions and control in regard to

his work or pay him his wages.

8. In *Nyalchand Virchand v. V. R. Patel* 9 El. L. R 451 (C) at pp. 460-61 the following observations are made :

In *Simmons v. Heath Laundry Co.* (1910) 1 K. B. 543 (D), where the Court of Appeal was dealing with the question as to what a contract of

service was, Buckley L. J. observed that a contract of service necessarily involved the existence of a servant. The observation of Bramwell L. J.

was quoted with approval that a servant is a person subject to the command of his master as to the manner in which he shall do his work. The

observations of Fletcher Moulton L. J. appear at p. 550 that the greater the amount of direct control exercised over the person rendering the

service, by the person contracting for them, the stronger the grounds for holding it to be a contract of service.

9. There is no direct control exercised over a Mukhia by any of the functionaries mentioned in Section 5-A(d) of the U. P. Panchayat Raj Act. So,

even judged by these standards a Mukhia cannot be said to be a government servant. The duties which are assigned to a Mukhia of headman u/s

45 of the Code of Criminal Procedure have also been assigned to an occupier of land and the agent of any such owner or occupier (in charge of

the management of the land).

Admittedly the owner or occupier of land and the agent of any such owner or occupier (in charge of the management of the land) cannot be

deemed to be a government servant. Therefore the mere fact that a Mukhia like the owner or occupier or the agent as the case may be has to

convey some information would not make him a government servant.

10. In the case of *Shivnandan Sharma Vs. The Punjab National Bank Ltd.*, the Supreme Court observed as follows :

It would thus appear that the question 38 to whose employee a particular person was has to be determined with reference to the facts and

circumstances of each individual cast. Lord Porter in the course of his speech in the reported case (*supra*) at p. 17 has observed as follows :

"Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is

employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under

discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time,

is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged."

In the same case the Supreme Court has quoted the following passage from Pollock's Law on Torts :

A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or as it has

been put, "retains the power of controlling the work", a servant is a person subject to the command of his master as to the manner in which he shall

do his work.....

Their Lordships have in the same judgment quoted the following passage from Salmond's Treatise on the Law of Torts :

What, then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a right of control over the

agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his

employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to

time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it --

he is bound by his contract, but not by his employer's orders.

In my opinion the Mukhia does not answer to any of the tests mentioned above.

11. In Iyer's Law Lexicon of British India, 1940 Edition, p. 1177, relying upon the English case of Hardy v. Ryle, (1829) 9 B & C 603 (F), at pp.

611, 612, it was observed as follows :

There is a very plain distinction between becoming the servant of an individual and contracting to do certain specific work. The same person may

contract to do work for many others, and cannot, with any propriety, be said to have contracted to serve each of them.

12. I have already said that a Mukhia's is not a whole-time job. Even if he be assumed to have contracted with the government to do certain

specific work, that is, to convey the information mentioned in Section 45 (1) (a) to (f) of the Code of Criminal Procedure, he retains the right to

work for others and for himself. It cannot therefore be said that he is in the service of the government.

13. In Webster's Dictionary a servant is defined as follows :

is one who serves or does service voluntarily or involuntarily; a person who is employed for another for menial offices or for other labour, and is

subject to his command; a person who labours or exercises himself for the benefit of another, his master or employer; a subordinate helper.

14. The functions of a Mukhia do not conform even to this description. In Iyer's Law Lexicon mentioned above a servant has also been defined as

follows :

A servant is one who is employed to render personal service to his employer, otherwise than in pursuit of an independent calling, and who in such

service remains entirely under the control and direction of the latter, who is called his master.

It would be seen that no such relationship exists between a Mukhia and the State Government or the Central Government or any of the

functionaries mentioned in Section 5-A of the U. P. Panchayat Raj Act.

15. In Hill v. Beckett (1915) 1 KB 578 (G), at p. 582 Avory, J, reinterpreting the mass of judicial decisions on master and servant, said :

There is no better working rule for determining the question than that laid down many years ago by Blackburn, J., in Reg v. Negus, (1873) 2

OCR 34 (H), at p. 37, where he said that the test is whether the alleged servant is under the control and bound to obey the orders of the alleged

master; if he is, then the relationship of master and servant exists.

Under the provisions of Section 45 of the Code of Criminal Procedure the Mukhia has not to obey any one's orders. Therefore, in my opinion, no

such relationship exists between the government or any other body mentioned in Section 5-A (d) and a Mukhia and even according to this

definition a Mukhia would not be a government servant.

16. In Vol. 3 of the Law Relating to Service in India by Barwell and Kar the learned authors have at p. 3 said as follows :

It is not very easy to define precisely who are Government servants. It may, however, be stated very broadly that persons who are paid for their

services out of the public or Government funds, come within this category.

In the present case the Mukhia's is not a salaried post and he receives no remuneration from the Government for the services rendered by him.

Considering all the aspects of the matter I am of the opinion that a Mukhia is not a government servant as contemplated by Section 5-A of the U.

P. Panchayat Raj Act, and the nomination paper of the petitioner was wrongfully rejected by the Returning Officer. It would be noticed that the

petitioner was not convicted by any Court and he has not been disqualified on the ground of conviction, for a criminal offence. The ejection tribunal

has not at all considered whether a Mukhia would be a government servant and if so of which government or which authority mentioned in Section

5-A of the U. P. Panchayat Raj Act.

17. I, therefore, allow this petition, quash the order of the learned Sub-divisional Officer dated 15th of May, 1956 and direct him to retry the

election petition case in the light of the observations made above. As the petition has not been opposed I make no order as to costs.