Bhaskar Wable Vs Nasik City Municipality

Court: Bombay High Court

Date of Decision: Dec. 12, 1945

Acts Referred: Bombay Municipal Boroughs Act, 1925 â€" Section 34(5)(b)

Citation: AIR 1947 Bom 78

Hon'ble Judges: Rajadhyaksha, J

Bench: Division Bench

Judgement

Rajadhyaksha, J.
The appellant in this case Dr. Wable, was Medical Officer of Health of the Nasik City Municipality and was appointed

on probation on 31-8-1935. The order of appointment (which is Ex. 42 in this case) stated that ""he was appointed on probation to the post of the

Medical Officer of health of the Nasik Municipality on a consolidated salary of Rs. 300 on the scale of 300-20-500, efficiency bar-25-650.

Paragraph 3 of the order of appointment made it clear that his appointment would be subject to the decision of the General Body as regards the

questions of his probationary period and the cut to be made applicable to the salary of the post in question. It appears that in point of fact the

probationary period was not fixed until on 5-5-1938, the Municipality passed a resolution (EX. 48 in this case) stating that the probationary period

of Dr. Wable was fixed up to 31-5-1938, and that on that day he should be relieved of the charge of his office. Thereupon, after writing certain

letters to the Municipality and Government, the appellant instituted this suit against the Nasik City Municipality for a declaration that he was still in

the service of the Municipality, and for an injunction restraining the Municipality from interfering with the discharge of his duties as Medical Officer

of Health; in the alternative he also made a claim for damages. The suit was based on the ground that the resolution dispensing with his services

was illegal inasmuch as it was passed by the Municipality with a simple majority instead of with a two-third majority as required by Section 34(5)

(b), Bombay Municipal Boroughs Act, 1925. The suit was resisted by the Municipality on the ground that the appellant-plaintiff was appointed

temporarily on probation and was therefore not entitled to the privilege u/s 34(5)(b) of the Act, which requires that no health officer appointed,

whether temporarily or permanently, shall be removed from the service unless by the assent of at least two-thirds of the whole number of

councillors. It was therefore urged that the defendant was within its rights in removing the appellant by the vote of simple majority, which in this

case was 18: 9. It was further contended that the appellant could not claim the declaration or the injunction prayed for, and that he was not in any

case entitled to damages as claimed and any costs of notice charges. Both the lower Courts have held that the resolution which was passed by the

Municipality on 5-5-1938, was ultra vires and illegal, inasmuch as the services of the appellant could not have been terminated without the vote of

at least two-thirds of the total number of the councillors, which in this case was thirty-eight. They further held that, although the resolution of the

Municipality removing the appellant was ultra vires and illegal, the plaintiff could not ask for a declaration that he was still in the service of the

Municipality and claim damages on that footing. For this, both the lower Courts relied on the decision in Prabhu Lal Upadhya Vs. Dist. Board and

Another .1Then on the authority of the decision of this Court in 39 Bom. L.R. 1269the lower Courts came to the conclusion that the damages to

which the plaintiff was entitled was only the pay for one month which was the period of notice prescribed in Rule 182 of the Nasik Municipal

Rules. The trial Court there, fore passed a decree in favour of the plaintiff awarding Rs. 340 as damages and proportionate costs. This decree was

confirmed in appeal by the Assistant Judge of Nasik. Being dissatisfied with the decision of the two lower Courts the plaintiff has now come in

second appeal.

2. Both the lower Courts having held that Dr. Wable''s removal from office by the Municipality was ultra vires and illegal, the only point that was

urged by Mr. Jape on behalf of the appellant was the manner in which the relief should have been granted and the quantum of damages to which

the plaintiff was entitled. It was contended that, in view of the fact that the removal of the appellant has been held to be illegal and ultra vires, the

plaintiff should still be regarded as in the service of the Municipality and that a declaration should be granted to that effect. The learned Counsel

was not able to cite any authority for such a relief being granted. The case in 1941 F.C.E. 373 is no authority for such a proposition. His other

contention was that the decision of this Court in the case in 39 Bom. L, Rule 12692 requires re-consideration inasmuch as the quantum of damages

which has been held to be payable in such cases is totally inadequate. His argument was that, if the resolution passed by the Municipality was illegal

and ultra vires, it must be deemed to have been of no effect and therefore the quantum of damages must be decided, not with reference to Rule

182 but by reference to the salary which the plaintiff would have earned if he had continued in service. The facts in the Dhulia Municipality''s case2

are practically on all fours with the facts of the present case. There also Section 182, Bombay District Municipal Act, 1901, required the consent

of the two-thirds of the total number of the councillors before a Chief Officer could be dismissed from service, and there also there was a Rule

188, Dhulia Municipal Rules, under which, subject to Section 182 of the Act, every municipal servant was liable to be discharged at one month''s

notice. The corresponding sections and the rule under the Bombay Municipal Boroughs Act are Section 34(5) and Rule 182, Nasik Municipal

Rules. Reading the section and the rule together this Court held (p. 1278):

The effect of Rule 188 and Section 132 read together seems to me to be that a Chief Officer is entitled like any other municipal officer or servant

to one month''s notice before discharge. But his position differs from that of other municipal officers and servants in this that he cannot be

discharged except in the manner provided by Section 182 or Section 33 of the present Act.

Later on in the same judgment Broomfield J., observed (p. 1278):

As it is not to be regarded as a case of service during good behaviour, and as there was nothing to prevent the plaintiff being removed from office

at any time by a valid resolution u/s 33, the only damages which he can claim are wages for the period of notice that is to say, Rs. 360.

3. The learned Counsel for the appellant urged that the principles of this decision require to be reconsidered and suggested that this appeal should

be referred to a Full Bench, as the effect of that decision is that it was open to the Municipality to disregard the provisions of Section 34(5),

Bombay Municipal Boroughs Act, provided it was prepared to pay damages to the extent of one month''s wages. We do not wish to express any

opinion about the correctness or otherwise of the decision in that case as we think that the present case must be decided against the appellant on

the point as regards the ultra vires nature of the resolution which was passed by the Municipality. But there is no doubt that in view of that decision

the salutary provisions of Section 34(5) requiring two-thirds majority for the dismissal of a health officer can be set at naught, and the only penalty

that the municipality snakes itself liable to pay is damages to the extent of one month''s wages of the officer concerned. Whether such a position

should be allowed to continue is a matter not for us to decide but for the executive authorities concerned to consider. It is true that it is possible for

Government to suspend a resolution of municipalities which in effect contravenes the provisions of Section 34(5). Whether such intervention by

Government is desirable at every stage or not is also not a matter for us to express opinion upon, but the authorities will no doubt consider the

position and make any necessary legislative changes which they may think necessary.

4. In our opinion this appeal can be decided on a consideration of the question whether the resolution passed by the Municipality on 5-5-1938

was illegal and ultra vires. Both the lower Courts have come to the conclusion that the resolution was bad inasmuch as it was passed not by two-

thirds majority but by a simple majority. Mr. Dharap on behalf of the respondent has argued that this decision of the lower Courts is wrong and

that the services of the plaintiff-appellant were properly dispensed with by the resolution passed by a simple majority. The whole basis of the

plaintiff''s case is that the resolution passed by the Municipality on 5-5-1938, was illegal and that he was therefore entitled to damages, declaration

and injunction. If it is held that the resolution was in order, then the whole basis of the plaintiff''s case disappears and the plaintiff''s claim would fail

and his suit must be dismissed. We have therefore to consider whether the resolution of 5-5-1938, was illegal or not.

5. It has been contended on behalf of the appellant that u/s 34(5) he was not removable from office except with the assent of the two-thirds of the

whole number of councillors. The whole number of councillors in this case was thirty-eight, and it is argued that the plaintiff should not have been

removed from service unless there was assent of at least twenty six municipal councillors. In the resolution that was adopted on 5-5-1938, eighteen

voted in favour and nine against the removal of the appellant from office. It was therefore contended (and this contention found favour with both

the lower Courts) that the removal was illegal and ultra vires as offending against Section 34(5), Bombay Municipal Boroughs Act. This section

would apply if the officer concerned was appointed temporarily or permanently. The question therefore arises whether Dr. Wable was appointed

either temporarily or permanently. The order of appointment stated that he had been appointed on probation and that the period of probation

would be fixed later on by the Municipality. No such resolution fixing the period was passed until 5-5-1938 when the period was fixed as ending

on 31-5-1938. It was contended by learned Counsel on behalf of the appellant that the plaintiff-appellant must be regarded as having been

appointed permanently to the post of the Health Officer We see no justification for coming to such a conclusion. The order of appointment

specifically stated that he had been appointed on probation, and learned Counsel was not able to point out any particular date when the position of

the appellant changed from that of a probationer to a permanent employee. The notice under which the applications for the post were invited

clearly stated that the appellant would be on probation; and, until the resolution of 5-5-1938 was passed by the Municipality, there was no

resolution changing the status of the appellant from that of the probationer to that of a permanently appointed Health Officer. We must therefore

come to the conclusion that the appellant continued to be a probationer and never obtained the status of a permanent Health Officer.

6. It was then argued by the learned Counsel that even as a probationer the plaintiff-appellant was entitled to the protection given by Section

34(5), Bombay Municipal Boroughs Act. We do not think that this contention can be accepted. When an officer is appointed on probation he

holds office until the appointing authority is able to come to a conclusion whether his work is satisfactory and whether he should be continued in

service; till then he is holding his office at the pleasure of the appointing authority and his appointment can be terminated either by the efflux of time

where specified period has been fixed for probation or by the fixing of a date after the probationer enters upon the office. This is the essential

difference between a permanent appointment and the appointment on probation. It is a contradiction in terms to say that a probationer attains the

status of a permanent officer when the tenure of that officer can be brought to an end at any time, for any reason, or even for no reason. Learned

counsel invited our attention to a note on p. 5 of the Bombay Civil Services Rules Manual which is to the following effect:

The status of a probationer is to be considered as having the attributes of a substantive status except where the rules prescribe otherwise.

7. This note must, in our opinion, mean that the probationer is to be considered as having the attributes of a substantive status in so far as they can

be the same. But, when there is the essential difference of the tenure being brought to an end at any time in the case of a probationer, it is difficult to

say that so far as that tenure is concerned the probationer stands on the same footing as a person holding a substantive post. This note must, in our

opinion, be deemed to confer upon a probationer the same advantages as a substantive appointee has in such matters as pay, increments and

leave. It was presumably for this reason that the plaintiff, though a probationer, was given two increments. In our views the plaintiff while holding

the post of the Medical Officer of Health on probation cannot be regarded as a permanent Health Officer of the Municipality and was not therefore

entitled to require the assent of the two thirds of councillors before his services could be dispensed with. In this view the plaintiff"s suit should have

been dismissed; but there has been no appeal by the Municipality against the decree passed by the lower Courts awarding Rs. 340 as damages to

the plaintiff, and therefore the decree to that extent must be allowed to stand. In the result, therefore, the appeal fails and must be dismissed with

costs.

Macklin, J.

8. I agree. The question reduces itself to a small compass. It is impossible to dispute the fact that the plaintiff was appointed on probation; and it is

impossible to adduce any serious argument against the view that throughout his service he continued to be on probation. He was on probation

unless he ceased to be on probation and became permanent; and the fact that he was twice given increments and the fact that his period of

probation was not fixed until he had served for nearly three years cannot have the effect of converting a probationary service into a substantive

service. What happened was that a period was fixed for his probationary service by the resolution now challenged (which it was perfectly within

the competence of the Municipality to do) and thereby his service as a whole came to an end on the date so stated in the absence of any order

confirming him in his appointment after the expiry of the probationary period. That is one aspect from which this case can be looked at. His service

as a whole came to an end, and it was put an end to merely by fixing the period of his probationary service. There was no dismissal as such.

9. On the other hand, if we treat the resolution of the Municipality as amounting to a resolution of dismissal, then the question is whether the

protection given to temporary and permanent Health Officers by Section 34(5) applies to a Health Officer on probation, since it cannot be

disputed that at the date of the resolution the plaintiff was still on probation. In this connection, I entirely agree with the remarks of my learned

brother; it is a contradiction in terms to say that a person holding probationary status is the same as a person holding permanent status. A person

who is liable to have his services ended for any reason or no reason at all during the period of probation cannot surely be ""permanent"" in the sense

that an ordinary servant is permanent, when certain specified reasons either by the general law or by the regulations have to be the basis of a

dismissal. We have not the slightest doubt that Section 34(5) does not, and was never intended to, apply to probationers. There is thus no basis for

the plaintiff''s case, and it should have been dismissed at the outset. I agree however that in the absence of an appeal by the Municipality the order

of the lower appellate Court in so far as it is in favour of the plaintiff must stand.