

Chougule M.K. and Others Vs. Vinodkumar V. Kanabar and Anothers

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Court : Mumbai

Decided On : Sep-26-1997

Reported in : 1998(5)BomCR726; 1998(1)MhLj904

Judge : S.S. Parkar, J.

Acts : Bombay Municipal Corporation Act, 1888 - Sections 324 and 517(1); Bar Council of India Rules, 1961 - Rules 33 and 49; [Indian Penal Code \(IPC\), 1860](#) - Sections 217, 218 and 220

Appeal No. : Cri. W.P. No. 691 of 1995

Appellant : Chougule M.K. and Others

Respondent : Vinodkumar V. Kanabar and Anothers

Advocate for Def. : V.V. Kanabar, Adv.

Advocate for Pet/Ap. : V.T. Walawalkar, ;N.V. Walwalkar, ;S.B. Ujjainwala and ;U.H. Kedar, Advs.;D.N. Salvi, A.P.P.

Judgement :

ORDER

S.S. Parkar, J.

1.Leave to amend. Amendment to be carried out forthwith.

2. This writ petition is filed by the three officers of the B.M.C. working as AssistantEngineers and Ward Officer challenging the order dated 17-4-1995 passed by thelearned Metropolitan Magistrate, 17th Court, Mazgaon, Bombay disallowing the B.M.C. Law Officer from appearing in the said case and defending the petitioners who are accused in that case and also in other cases.

3. The respondent No. 1 complainant filed the above prosecution in the Magistrate's Court for offences, inter alia, under sections 217, 218 and 220 of Indian Penal Code for having disobeyed the direction of law, in other words the officers had failed in their duty cast on them under the provision of the B.M.C. Act and particularly under sub-section 2 of section 324 of the B.M.C. Act as they did not take action against the person who had dug up the streets and roads, by reinstalling them after the work was completed. By way of public interest litigation the aforesaid complaint was filed by the respondent No. 1 complainant.

4. The petitioners are the officers of the B.M.C. who are being defended by the Law Officer of the B.M.C. who is in the pay and salary of the B.M.C. It cannot be disputed that the Law Officer of the B.M.C. under the Advocates Act, 1961 is entitled to appear in the Court on behalf of the public body. The Supreme Court in the case of State of U.P. v. U.P. State Law Officers Association, reported in : [1994]1SCR348 has held that though they are on the full time rolls of the Government and the public bodies and are described as law officers, they are entitled to appear in Court of law by saving clause of Rule 49 of the Bar Council of India Rules, which waives the prohibition against the acceptance by a lawyer of a full time employment, the objection here is not that the lawyer on the pay roll of the B.M.C. cannot appear in the Court of law on behalf of the B.M.C., but the objection taken by respondent No. 1 complainant is that the B.M.C. lawyer who is in the employment of the B.M.C. cannot appear for the officers of the B.M.C. who are prosecuted in the Court of Law. That objection was upheld by the learned Magistrate in the impugned order dated 17-4-1995 which is annexed as Exhibit 'A' to this petition.

5. The learned Magistrate relying on the judgment of Delhi High Court in the case of Lt. Col. K.C. Sud, New Delhi v. S.C. Gudimani, reported in 1981 Cri.L.J. 1779

has held that the B.M.C. lawyer cannot appear for the officers of B.M.C. when they are facing criminal prosecution. In other words, the B.M.C. cannot defend or finance the petitioners-accused to defend themselves in a Court of Law since they are being prosecuted for criminal offence. The learned Magistrate further observed that B.M.C. being a public body, is a part of the State, and the offence against the State is also offence against the B.M.C.

6. The reasoning of the learned Magistrate cannot be accepted. The reliance of the learned Magistrate on the judgment of Delhi High Court referred to above is also misplaced. The Delhi High Court was considering whether the Public Prosecutor could appear against the State in a criminal matter. Public Prosecutor appearing against the State in a criminal matter filed by the State cannot be compared with Municipal Advocate defending the Municipal officials in a Criminal Court where the prosecution is lodged by an individual. The B.M.C. is never a prosecutor in any criminal prosecution except arising under the Bombay Municipal Corporation Act itself. I have been taken through the provisions of the B.M.C. Act where the penal provisions are applicable to the persons other than B.M.C. staff. The B.M.C. is a prosecutor for the offences which are committed not by the B.M.C. or any of its staff but by any person other than the B.M.C. staff.

7. Mr. Walawalkar has placed reliance on section 517(1)(g) of the B.M.C. Act which reads as follows :

'517(1) The Commissioner may ---

(g) defend any suit or other legal proceeding brought against the Corporation or against the Commissioner or a Deputy Commissioner or a Municipal Officer or servant in respect of anything done or omitted to be done by them, respectively, in their official capacity;'

8. The said provision specifically permits the Commissioner to defend any suit or other legal proceedings against the Corporation or against any Municipal Officer or servant in respect of anything done or omitted to be done by them in their official capacity. It is not disputed by the Counsel for the respondent No. 1 that the petitioners accused are being prosecuted for failure to discharge their official duty.

The criminal proceeding, as initiated against the petitioners, is a legal proceeding in respect of something which was omitted to be done by them, in their official capacity. The B.M.C. is not prosecuting them nor there is any provision in the B.M.C. Act, whereby the B.M.C. could have prosecuted them and, therefore, there can never be a conflict of interest between the B.M.C. and the defaulting officers so far as the present criminal proceedings are concerned.

9. Mr. Kanabar the learned advocate appearing on behalf of respondent No. 1 complainant placed his reliance on sub-section (2) of section 517 of B.M.C. Act, which reads as follows :

'517(2) Provided that the Commissioner shall not defend any suit or legal proceeding under clause (g) without first of all taking legal advice with regard thereto, and shall institute and prosecute any suit which the Corporation shall determine to have instituted and prosecuted.'

10. In the course of his argument, mistaking the legal advice for sanction, Mr. Kanabar contended that the petitioners have not produced any sanction in that behalf. In my judgment no sanction is necessary or is contemplated by the provision which is relied on by Mr. Kanabar, May be the Corporation and the Commissioner are of the view that the petitioners have not committed any default in the discharge of their duty and in that event there is no bar for the Corporation from defending these officers in the Court of Law and as such there cannot be any bar for the law officer of the B.M.C. appearing for these officers in the said criminal proceedings.

11. Mr. Kanabar also placed reliance on Rule 33 of the Bar Council of Maharashtra and Goa which reads as follows :

'33. An advocate who has, at any time, advised in connection with the institution of a suit, appeal or other matter or has drawn pleadings or acted for a party, shall not act, appear or plead for the opposite party.'

12. The reading of the above provision, itself shows that the reliance placed by Mr. Kanabar on the said rule is absolutely misplaced. It is not the case of the

complainant here that the B.M.C. lawyer had advised or appeared or drafted any pleading or acted in any way or appeared for the opposite party i.e. the complainant in this case and, therefore, above provision would not be applicable. He then placed reliance on the judgment of the Andhra Pradesh High Court in the case of Public Prosecutor v. Venkata Reddi, reported in 1961(1) Cri.L.J. 356. In that case the question was about the Public Prosecutor appearing to defend the accused after he ceased to be Public Prosecutor and the Court held that even if he had filed simple appearance on behalf of the State there was no bar to appear for the accused after he ceased to be the Public Prosecutor and the bar of professional ethics would stand only in case the Public Prosecutor had taken some further steps or done anything on behalf of the opposite party i.e. the State as a Public Prosecutor that he could not have subsequently appeared to defend the accused against whom he had appeared on behalf of the State.

13. For the aforesaid reasons, in my judgment, there is no legal bar for the law officer of the B.M.C. to appear on behalf of the petitioners and defend them in the above criminal proceedings.

14. For the said reasons the impugned order dated 17-4-1995 cannot be sustained in law and hence the same is quashed and set aside. Rule is absolute as regard prayer clause (iv) of the petition.

15. In view of the judgment and order passed today in Criminal Writ Petition No. 339 of 1996, petition does not survive as regards prayer Clause (i) for quashing the complaint being Criminal Case No. 30/S/94. As such the petition is dismissed as regards prayer clause (i) of the petition and rule discharged.

16. Petition disposed of accordingly.

17. Order accordingly.