**Bhanwarlal Vs. State and ors.**

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**Court** : Rajasthan

**Decided On :** Apr-23-2001

**Reported in** : 2002(1)WLN333

**Judge** : B.S. Chauhan, J.

**Appeal No.** : S.B. Civil Writ Petition No. 4746 of 2000

**Appellant** : Bhanwarlal

**Respondent** : State and ors.

**Advocate for Pet/Ap.** : Shri. S.D. Vyas

**Disposition** : Petition allowed

**Judgement** :

**Dr. B.S. Chauhan, J.**

1. The instant writ petition has been filed for quashing the impugned order dated 12.12.2000 by which the petitioner has been replaced by another nominated member in Municipal Board, Mt. Abu.

2. The facts and circumstances giving rise to this case are that the petitioner was nominated by the State Government in exercise of its powers Under Section 9 of the Rajasthan Municipalities Act, 1959 (for short 'the Act) as a member of the

Municipality Board, Mt. Abu vide order dated 16.11.2000 (Annex. 1) along with one Shri Parmanand. The said government order was published in the Official Gazette on 25.11.2000 (Annex. 2). However, vide order dated 12.12.2000 (Annex. 3), Mohd. Yusuf Khan, respondent No. 4 shown to have been nominated in place of the petitioner and that government order stood notified in the Official Gazette on 13.12.2000 (Annex.R/1). Hence, this petition.

3. Shri S.D. Vyas, learned Counsel for the petitioner has submitted that as the Act provides for a particular procedure for removal of its member by holding an inquiry for mis-conduct, the respondent could not have removed the petitioner so unceremoniously. Petitioner's removal has been made in flagrant violation of principles of natural justice as no opportunity of hearing was given to him nor any charges have been framed as required Under Section 63 of the Act.

4. On the other hand, the respondents No. 1 and 2 have taken the plea that the respondent No. 4 had initially been nominated and by inadvertence petitioner's name had been published in the order. Therefore, it required only to issue on corrigendum and not of removal of the petitioner and nomination of respondent No. 4. Respondent No. 4 has submitted in his reply that petitioner had not taken oath till today, therefore, he cannot be deemed to be a member of the Board and his nomination or removal remains inconsequential. Moreso, the petitioner has been removed rightly as he would hold the office only at the pleasure of the Government.

5. I have considered the rival submissions made by the learned Counsel for the parties. The averments taken by the respondent No. 4 that the petitioner has not taken oath till today, therefore, he cannot claim himself to be a member of the Board has not been agitated by the learned Counsel at the time of arguments. Therefore, that issue cannot be dealt with for the reason that the other side did not have the opportunity to make any submissions in law on that count. The amended provisions of Section 9 of the Act, vide notification dated 22.7.2000 published on the same date in the Extra-ordinary Gazette authorise the 'State Government to nominate three members or 10% of the members of the elected members of the Municipality, whichever is less, having special knowledge or experience in

Municipal Administration'. Second proviso thereto reads as under:

The State Government shall have power to withdraw a member nominated under Sub-Clause (2) at any time.

6. Shri S.D. Vyas, learned Counsel appearing for the petitioner has submitted that there is no distinction between the elected and nominated member. The removal without following the procedure prescribed Under Section 63 of the Act is not permissible. To fortify his contention, he has placed very heavy reliance upon the judgment of this Court in Kanta Devi and Anr. v. State of Rajasthan and Ors. 1956 ILR (Raj.) 1062 wherein this Court considered the then existing provisions in the Act and reached the conclusion as under:

The question is whether there is anything in the Act which treats the nominated members in a different manner after their nomination has been made in the Act . . . . . We see no reason why we should assume a power in the Government to cancel the appointment of a nominated member, unless that power is conferred by law. The only provision, as we have already pointed out is Section 16 of the General Clauses Act, 1897 which gives power of dismissal and which will include removal by the appointing authority; but the power Under Section 16 is subject to a different intention appearing in the law or order under which the appointment is made . . . . .

Section 14 applies also to nominate members, and we failed to see why we should put the nominated members in a less advantageous position and why we should hold that there is a reserve in Government to change the nomination. . . . . If it was the intention of the Legislature to make a difference between an elected member and a nominated member in his connection we could have found Section 14 in two parts-one providing for elected members and the other providing for nominated members, and there should have been a specific provision that nomination of a member may be cancelled by the Government before he takes the seat of Office or before the term of the Board begins.

7. The Court further observed that 'the Government having exercised power Under Section 9 to take a nomination once exhaust that power and cannot nominate

another person to the same seat. A second order nominating some other person and cancelling an earlier order of nomination, therefore, beyond the jurisdiction of the Government and the first order must take effect unless it is shown that the first order was issue by mistake on fact, as for example, where the Government nominates A and B as members and somebody in the Office issues an order in favour of C and D'.

8. Thus, in view of the above, Shri Vyas has contended that the Government is permitted to correct a bonafide mistake occurred inadvertently but in the instant case, it is a case of replacement by the respondent No. 4, which is not permissible.

9. On the other hand, learned Counsel appearing for the respondents had placed reliance upon the judgment of the Hon'ble Supreme Court in Om Narain Aggarwal and Ors. v. Near Palika, Shahajahanpur and Ors. : [1993]2SCR34 wherein in a similar situation, the Hon'ble Supreme Court, while interpreting analogous provision of the U.P. Municipalities Act, held as under:

In respect of a nominated member, power of curtailment of term has now been given to the State Government....The nominated members do not have the will or authority of any residents of the Municipal Board behind them as may be present in the case of an elected member, the Legislature has provided the grounds in Section 40 of the Act under which the members could be removed. But so far as the nominated members are concerned, the legislature, in its wisdom has provided that they shall hold Office during the pleasure of the Government. It has not been argued from the side of the respondents that the legislature had no such power to legislature the 4th proviso.

Further the Hon'ble Supreme Court held that providing for a different mode or removal of the nominated member at the pleasure of the Government and only on the ground of mis-conduct is not discriminatory because the nominated members form a separate and distinct class in itself.

10. If the instant case is examined in view of the aforesaid judgment, it falls squarely covered by the judgment of the Hon'ble Supreme Court in Om Narain

Aggarwal (supra) to the extent that removal of the nominated members can be made at the sweet will of the Government. The judgment in Kanta Devi (supra) has no application in the case for the reason that at that time, there was no provision for removal of nominated members at the pleasure of the Government.

11. Learned Counsel for the petitioner has submitted that the doctrine of pleasure embodied in proviso to Section 9 of the Act does not mean an absolute, arbitrary and discretionary power in the Statutory Authority. The discretion has to be exercised on the basis of the facts and for invoking such provision, there must be sufficient material which would warrant the exercise of such power. The application of the said doctrine has been considered by the Hon'ble Supreme Court time and again.

12. In State of U.P. v. Babu Ram Upadhyaya : 1961 CriLJ773 , the Hon'ble Supreme Court held that the power of the Governor to dismiss at pleasure subject to the provisions of Article 311, is not an executive power Under Article 154 but a Constitutional power and cannot be delegated to the officers subordinate to him. In Moti Ram Deka v. General Manager, N.E.F. Railways : (1964)IILLJ467SC , the Court reviewed its earlier judgment and held that the Doctrine of Pleasure enshrined in Article 310 is not absolute as it is subject to the provisions of Article 311(2) of the Constitution of India. That ratio was reiterated by a Larger Bench of the Supreme Court in Shamsher Singh v. State of Punjab : (1974)IILLJ465SC . In Union of India v. Tulsi Ram Patel : (1985)IILLJ206SC , the Apex Court considered all its earlier judgments on pleasure doctrine and held that Article 311(2) is an exception to the said doctrine contained in Article 310(1) of the Constitution of India. However, the second proviso to Article 311(2) have been introduced in public interest and provided for Constitutional prohibitory injunction restraining the disciplinary authority from holding enquiry where any of the three clauses of second proviso became applicable. But such exclusion of inquiry did not render the delinquent without remedy as the post-decisional remedies i.e. appeal, review etc. were maintainable against such order.

13. The law, as enunciated above, is applicable in service matters and would not apply in a case where the question of removal of nominated members of the

Municipal Board is involved, for the reason that the same cannot be equated with the employees or Government servant. Vide Dr. D.C. Saxena v. State of Haryana : [1987]167ITR161(SC) and Om Narain Agrawal (supra)].

14. In the instant case, as the statute itself provides for the removal of the nominated member at the pleasure of the Government, it cannot be argued without challenging the validity of the said proviso of Section 9 of the Act that the Government cannot remove the petitioner at its sweet will.

15. Be that as it may, the instant case stands on a different footing. The respondents No. 1 and 2 in paragraph 6 of their reply have categorically stated as under:

In this case, due to bonafide mistake, petitioner was nominated whereas he is having less knowledge or experience than the respondent No. 4 Mohd. Yusuf Khan.

16. The Government had not issued any notification for removal of the petitioner and nominating the respondent No. 4. The order dated 12.12.2000 (Annex. 3) and notification dated 13.12.2000 provides for a corrigendum to the effect that in place of Shri Bhanwarlal Verma, the name of Shri Mohd. Yusuf Khan be read. The stand taken by the respondents No. 1 and 2 is contradictory to the said notification. The said respondents had admitted that petitioner stood nominated by mistake which was rectified by nominating the respondent No. 4. For removal of the petitioner and nominating respondent No. 4, corrigendum cannot serve the purpose. The Government ought to have issued a clear notification for removal of the petitioner and nominatng the respondent No. 4 in his place.

17. In Commissioner of Sales Tax, U. P. v. Dunlop India Ltd. 1992 STC 571 the Allahabad High Court had to deal with the issue of corrigendum and held that corrigendum, when issued to correct a notification, would relate back to the date of issue of the original notification.

18. In Piara Singh v. State of Punjab and Ors. : AIR 2000 SC2352 , the Hon'ble Apex Court considered the scope and application of a corrigendum and held as

under:

In any case, in the present case it cannot be said that there is a clerical or arithmetical error in mentioned Khasra number or its area in the sale certificate.... Considering the long lapse of time and the fact that there is no question of a clerical or arithmetical error, the authorities ought not to have exercised jurisdiction Under Section 25(2) of the Act which only empowers the authority to correct clerical or arithmetical mistake in any order or errors arising therein from any accidental slip or omission. Under the guise of corrigendum authorities have passed an order handing over possession of additional land in favour of respondent No. 2. It is also apparent that the Chief Settlement Commissioner has not applied his mind to the facts of the case and has only observed that there is no bar on issuing the second corrigendum or more corrigenda in correcting the arithmetical error.

Therefore, it was held that the corrigendum can be used only to rectify a mistake of clerical or typographical error crept in because of omission or accidental slip but in case it amounts to amendment, the corrigendum is not permissible. Corrigendum may be used only for rectification of a mistake as permissible Under Section 152 of the Code of Civil Procedure or Section 154 of the Income Tax Act but it cannot be used to change the order or to withdraw the rights conferred upon the individuals.

19. This Court also considered a similar case in Kandoi Kabliwala v. Assistant Commercial Taxes Officer, Pali 75 STC 316, wherein a notification granting exemption to the 'Deshi Sweetmeats' and 'Namkins' was issued. By a subsequent notification, exemption of tax in respect of 'Namkin' was withdrawn an after some time, a corrigendum was issued to the notification withdrawing the exemption of tax in respect of 'Namkin' making it applicable also to the case of 'Deshi Sweetmeats'. This Court quashed the said corrigendum observing as under:

The said corrigendum notification dated October 5, 1972 is in fact an addendum to the Notification dated April 26, 1972 and not a corrigendum. . . . . Two notifications dealt with two different commodities, number 13 dealt with 'Desi Sweetmeats' and number 14 deal with 'Namkins.' There was no question of any

correction to the notification relating to 'Namkins.' These two commodities namely 'Desi Sweetmeats' and 'Namkins' were exempted through two different notifications. . . . . Similar Notification could be issued on this date rescinding notification relating to the 'Desi Sweetmeats' and admittedly this was not done. By issuing Notification dated October 5, 1972, the exemption from the payment of tax on the sale of 'Desi Sweetmeats' could not be withdrawn with retrospective effect.

20. Similarly, in Citadel Fine Pharmaceuticals v. State of Tamil Nadu and Ors. 119 STC 315, the Tamil Nadu Taxation Special Tribunal considered a case in which by issuing an erreta, certain exemptions were withdrawn. The Tribunal held as under:

The learned Counsel for the petitioner would contended that, errata is meant correction of the typographical mistakes, but it cannot have the effect of law of take away the vested rights of a citizen and therefore, except for the purpose of correcting the typographical errors like spelling mistakes, it cannot have the effect of nullifying the concession given under the original notification . . . . . In view of these reasons, we hold that the two erratas to the notifications are illegal in so far as they affect the vested right of the petitioner . . . . . .

21. In view of the above, it cannot be held that the impugned corrigendum has been issued to correct any typographical error or omission therein. It tantamounts to withdraw the vested rights of the petitioner.

22. In the instant case, the Government had not sought corrigendum to correct a typographical or arithmetical mistake. It amounts to removal of the petitioner and nomination of respondent No. 4 Government had not issued any notification for that purpose and it cannot be permitted to take away the vested rights of the petitioner without issuing a proper notification for his removal.

23. Thus petition succeeds and is allowed. The order dated 12.12.2000 (Annex. 3) and all other consequential orders, if any, are hereby quashed. In the facts and circumstances, no order as to costs.