

Saurendra Nath Maity Vs. State of West Bengal and ors.

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Court : Kolkata

Decided On : Feb-24-2004

Reported in : 2004(2)CHN152

Judge : Altamas Kabir and ;Jyotirmay Bhattacharya, JJ.

Acts : Calcutta Municipal Corporation Act, 1980 - Section 415(1) and 415(6);
;Administrative Tribunal Act, 1985 - Section 15(1); ;[Constitution of India](#) - Article 311

Appeal No. : W.P.S.T. No. 10 of 2004

Appellant : Saurendra Nath Maity

Respondent : State of West Bengal and ors.

Advocate for Def. : Alope Ghosh and ;Achintya Banerjee, Advs. for respondent Nos. 2 and 3, ;Pratima Pratibha Choudhury and ;Sk. Mainuddin, Advs.

Advocate for Pet/Ap. : Ashok Maity and ;Saraswati Banerjee, Advs.

Disposition : Application dismissed

Judgement :

Altamas Kabir, J.

1. The petitioner, who was a member of the West Bengal Higher Judicial Service, retired on superannuation on 31st October, 2002, while functioning as Judge, City Civil and Sessions Court, VIII Bench, Calcutta. While the petitioner was in service, his name was forwarded to the Judicial Department along with the names of two other senior officers of the service for the purpose of filling up the vacancy in the post of Chairman, Municipal Building Tribunal, created under Section 415 of the Calcutta Municipal Corporation Act, 1980.

2. Pursuant to the above, the petitioner was selected and appointed as such Chairman of the Municipal Building Tribunal by Notification No. 770 dated 11th October, 2002, issued by the Department of Municipal Affairs, Government of West Bengal. The order was to take effect on the date of assumption of charge by the petitioner. The petitioner assumed charge of the office of Chairman of the said Tribunal in the afternoon of 31st October, 2002, which was the day of his retirement from active Judicial Service. Subsequently, by another Notification issued by the Department of Municipal Affairs, Government of West Bengal, the petitioner was reappointed in the post of Chairman of the said Tribunal for a period of two years from 1st November, 2002 to 31st October, 2004, in exercise of the powers conferred under Sub-sections (3) and (5) of Section 415 of the Calcutta Municipal Corporation Act, 1980, hereinafter referred to as the '1980 Act'.

3. On 30th June, 2003, the petitioner was served with a notification dated 27th June, 2003, issued by the Department of Municipal Affairs, Government of West Bengal, withdrawing his service as Chairman of the Municipal Building Tribunal, Calcutta Municipal Corporation, with effect from 30th June, 2003, until further orders.

4. Being aggrieved by the aforesaid action taken by the State Government in its Municipal Affairs Department, purportedly under Section 415(6) of the 1980 Act, the petitioner moved the West Bengal Administrative Tribunal by way of an application, being O.A. No. 770 of 2003. On an application for interim order in the said Original Application, the West Bengal Administrative Tribunal by its order dated 9th July, 2003, directed the authorities concerned to allow the petitioner to resume his duties forthwith. Liberty was also given to the respondents to apply for

modification/revocation/alteration of the interim order upon notice to the other side. During the pendency of the application the respondents moved this Court in a Writ Petition, being W.P.S.T. No. 621 of 2003, challenging the interim order as also the jurisdiction of the West Bengal Administrative Tribunal to entertain the matter. The said writ petition was disposed of by this Court with a direction upon the learned Tribunal to hear out the matter on the question of jurisdiction. The matter was accordingly heard by the learned Tribunal on the limited question of jurisdiction and by its order dated 2nd January, 2004, the learned Tribunal held that it had no jurisdiction to try the matter on the following grounds :

- i) The applicant ceased to be a Government officer after his retirement on superannuation from the previous service.
- ii) His present services were not in connection with the affairs of the State.
- iii) He was not getting salary from the State Exchequer.
- iv) Payment of his salary was made from the Municipal Fund.

5. While dismissing the petitioner's application for want of jurisdiction, the learned Tribunal also vacated the interim orders passed earlier in the matter.

6. The petitioner has challenged the said decision of the learned West Bengal Administrative Tribunal mainly on the ground that since the petitioner was the holder of a 'civil post' under the State Government the provisions of Article 311 of the Constitution were squarely attracted to the facts of his case and the Tribunal, therefore, had ample jurisdiction to entertain the application filed by the petitioner in terms of Section 15(1)(b) of the Administrative Tribunal Act, 1985.

7. The question which we are, therefore, called upon to answer in the facts of this case is whether the petitioner appointed as Chairman, Municipal Building Tribunal, Calcutta Municipal Corporation under Section 415(1) of the Calcutta Municipal Corporation Act, 1980, is the holder of a 'civil post' under the State Government, which would bring him within the ambit of Section 15(1)(b) of the Administrative Tribunal Act, 1985.

8. Appearing for the writ petitioner and supporting the view that in his capacity as Chairman, Municipal Building Tribunal, the petitioner was the holder of a 'civil post' under the State Government and thus amenable to the jurisdiction of the West Bengal Administrative Tribunal, Mr. Ashok Maity contended that the learned Tribunal had misconstrued the relevant criteria in holding that it had no jurisdiction to try the petitioner's case. Mr. Maity submitted that under Section 15(1)(b) of the Administrative Tribunal Act, 1985, the Administrative Tribunal for a State is to exercise on and from the appointed day all the jurisdiction, powers and authority exercisable immediately before that date by all Courts (except the Supreme Court) in relation to all service matters concerning a person appointed to any civil service of the State or any civil post under the State and pertaining to the service of such person in connection with the affairs of the State or any local or other authority under the control, of the State Government or of any corporation or society owned or other body as is controlled by the State Government. Mr. Maity submitted that since the petitioner had been appointed to a civil post under the State which involved the affairs of a local authority under the control of the State Government, the learned Tribunal erred in law in holding that it had no jurisdiction to try the petitioner's case.

9. Mr. Maity submitted that the question as to when a person may be said to hold a civil post under the Government fell for the consideration of the Hon'ble Supreme Court in the case of *State of Gujarat and Anr. v. Raman Lal Keshav Lal Soni and Ors.*, reported in : (1983)ILLJ284SC , wherein it was observed by the Constitution Bench that it was neither politic nor possible to lay down any definitive test to determine that a person may be said to hold a civil post under the Government. It was observed further that several factors may indicate relationship of master and servant and none may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of work, the right to issue directions and the right to determine and the source from which wages or salaries are paid and a host of such circumstances, may have to be considered to determine the

existence of the relationship of master and servant.

10. Mr. Maity submitted that in the aforesaid case the members of the Gujarat Panchayat Service constituted under Section 203 of the Gujarat Panchayat Act were hold to be Government servants holding civil posts under the Government.

11. Mr. Maity submitted that while coming to the aforesaid conclusion the Constitution Bench of the Supreme Court referred to and relied on its earlier decision in the case of Mathura Das Mohan Lal Kedia v. S.D. Munshaw, reported in : [1981]1SCR144 . In the said case also the same question had arisen for consideration and relying on its earlier decision in State of Assam v. Kanak Chandra Dutta, reported in : (1968)ILLJ288SC , it was observed that according to the aforesaid decision the true test for determination of the question whether a person is holding a civil post and/or is a member of the civil service is the existence of a relationship of master and servant between the State and the person holding a post under it and that the existence of such relationship is dependant upon the right of the State to select and appoint the holder of the post, its right to control the manner and method of his doing the work and the payment by it of his wages and remuneration. It was held further that the relationship of master and servant may be established by the presence of all or some of the factors referred to above in conjunction with other circumstances.

12. Mr. Maity urged that all the aforesaid ingredients were present in the instant case save and except for the fact that the salary and other remuneration of the Chairman, Municipal Building Tribunal was met out of the municipal funds. Mr. Maity submitted that except for the above the appointment of the petitioner and termination of his service was within the competence of the State Government and disciplinary action could also be taken by the State authorities.

13. In addition to the above, Mr. Maity contended further that the provisions of Section 415 of the 1980 Act had been amended and Sub-section (1) thereof provided after amendment that the Tribunal appointed under Section 415 would also, if felt necessary by the State Government, hear and decide appeals arising out of similar matters under various other Municipal Acts as indicated in the proviso to Sub-section (1).

14. Mr. Maity submitted that this clearly indicates that the manner of functioning and/or working of the Municipal Building Tribunal was under the control of the State Government and it is for the State Government to decide as to how the said Tribunal should act and perform its duties which made it obvious that the Tribunal was discharging duties in connection with the affairs of the State. Consequently, it would follow that the Chairman of the Municipal Building Tribunal, who was discharging duties in connection with the affairs of the State, was the holder of a civil post under the State and his conditions of service, therefore, attract the jurisdiction of the West Bengal Administrative Tribunal.

15. In support of his aforesaid contention, Mr. Maity also referred to the decision of the Hon'ble Supreme Court in the case of Superintendent of Post Offices v. P.K. Rajamma, reported in : [1977]3SCR678 , wherein extra-departmental agents connected with the Postal Department, whose conditions of service were governed by the Rules of 1965, were found to hold civil posts under the Union of India as contemplated by Article 311.

16. Mr. Maity submitted that the learned West Bengal Administrative Tribunal had misconstrued the provisions governing and/or controlling the appointment and functioning of the Chairman, Municipal Building Tribunal, Calcutta Municipal Corporation, which has led to and created confusion and has resulted in the erroneous finding that the learned Administrative Tribunal had no jurisdiction to try the petitioner's case.

17. Appearing for the Calcutta Municipal Corporation and the. Municipal Commissioner, the respondent Nos. 2 and 3 in the writ petition, Mr. Aloke Ghosh, assisted by Mr. Achintya Banerjee, submitted that the learned Tribunal had rightly held that it had no jurisdiction to try the petitioner's case as the petitioner did not hold a civil post under the Government and the provisions of Article 311 of the Constitution would not, therefore, have any application to his case so as to bring it within the jurisdiction of the West Bengal Administrative Tribunal. Referring to the decisions cited by Mr. Maity, Mr. Ghosh urged that the petitioner's appointment as Chairman was no doubt made by the State Government, but the same was made on the strength of a statutory, provision which did not leave any room for discretion

in the matter of such appointment. Mr. Ghosh submitted that the State Government has no other option but to appoint a Chairman who is or has been a member of the West Bengal Higher Judicial Service having such experience as may be prescribed. Mr. Ghosh submitted that it was not open to the State Government to appoint a Chairman of the Tribunal outside the parameters laid down in Sub-section (3) of Section 415 of the Calcutta Municipal Corporation Act, 1980.

18. Mr. Ghosh also urged that it was not open to the State Government to regulate the work or the conditions of service of the Chairman of the Municipal Building Tribunal and he was required to discharge such functions as has been prescribed under the 1980 Act. In effect, the State Government was only vested with the power to appoint and the power to remove the Chairman of the Tribunal under the provisions of Sub-section (3) and Sub-section (6) of the 1980 Act.

19. Mr. Ghosh urged that one of the more important aspects of the service conditions of the Chairman of the Municipal Building Tribunal is the payment of his salary from out of the Municipal Fund.

20. Mr. Ghosh lastly submitted that the functions of the Chairman, Municipal Building Tribunal, did not involve matters relating to the affairs of the State which was one of the more important criteria for determining as to whether a person was holding a civil post under the State Government or not. Referring to the decision of the Hon'ble Supreme Court in the case of Tekraj Vasandi v. Union of India and Ors., reported in : (1988)ILLJ341SC , Mr. Ghosh urged that as has been held in the said case even if an institution is considered to be 'State' within the meaning of Article 12, its employees do not become holder of civil posts so as to become entitled to the cover of Article 311. They would, however, be entitled to the benefits of Part 3 of the Constitution.

21. Mr. Ghosh submitted that in the case of Bishamber Nath Nehru, reported in AIR 1958 J & K page 6, a member of the Kashmir Municipal Service was held not to be in Government service and a distinction was made between those who were members of the Kashmir Municipal Service and J & K Civil Service.

22. Reference was also made to a Bench decision of the Punjab High Court in the case of *Mangal Sain v. State of Punjab and Anr.*, reported in , wherein it was categorically held that an Executive Officer of a Municipal Committee does not hold a civil post under the State. A similar view was also expressed by the Punjab High Court in *State of Punjab v. Prem Parkash*, reported in , wherein it was observed that whether a particular person is a municipal servant or a Government servant is determined by the functions which he performs. If he performs functions relating to a Municipal Committee, he is a municipal officer; but if he performs functions relating to Government, he is a Government servant. Mr. Ghosh reiterated that the Commissioner, Municipal Building Tribunal was not called upon to perform any function relating to the Government but that his functions were confined to the duties prescribed under the 1980 Act.

23. The last case on the subject referred to by Mr. Ghosh is a Bench decision of the Madhya Pradesh High Court, Jabbalpur Division, in the case of *Jagmohan Lal Bajpai v. State of M.P. and Ors.*, reported in 1977 (1) Service Law Reporter, page 746, wherein the provisions of the Madhya Pradesh Municipal Act, 1962, fell for consideration in relation to Article 309 of the Constitution. In the said decision it was categorically held that although the Municipal service was constituted by the State Government under Section 86 of the aforesaid Act, an employee of the Municipal Service could not be equated with the civil servants of the State. It was pointed out that although the said Municipal Service is required to be constituted by the State and the State has control over the employees in the service so constituted, such service could not be equated with the service involving the affairs of the Union or of any State as contemplated under Article 309 of the Constitution and the Municipal Service remains a service for staffing the Municipal Councils.

24. Mr. Ghosh submitted that the facts of the said case were in *pari materia* with the facts of the instant case and by no stretch of imagination could it be said that the Chairman of the Municipal Building Tribunal was discharging duties connected with the affairs of the State so as to make him the holder of a civil post which would bring him within the ambit of Article 311 of the Constitution and Section 15(1)(b) of the Administrative Tribunal Act, 1985.

25. Mr. Ghosh submitted that the learned Tribunal had rightly held that the petitioner in his capacity as Chairman, Municipal Building Tribunal, was not the holder of a civil post which would vest the State Administrative Tribunal with jurisdiction to consider the petitioner's case.

26. Appearing for the State and its authorities, Ms. P.P. Choudhury, adopted Mr. Ghosh's submissions and also placed strong reliance on the decision of the Punjab High Court in the case of *State of Punjab v. Prem Parkash* (supra). Ms. Choudhury urged that no interference was called for with the findings and order of the learned Tribunal and the instant writ application was liable to be dismissed.

27. We have given serious thought to the submissions made on behalf of the respective parties, having particular regard to the fact that the State Government was the petitioner's appointing as well as dismissing authority and to that extent could be said to be the petitioner's controlling authority. None of the other tests appear to fit the case sought to be made out by the petitioners. The duties to be performed by the petitioners are such as are prescribed either under the Calcutta Municipal Corporation Act, 1980, or other Municipal Acts having similar provisions. Except for extending the authority of the Chairman, Municipal Building Tribunal, to the different municipalities in the State, the State does not control the functions of the Tribunal nor its day-to-day activities. Furthermore, the duties to be performed by the Chairman, Municipal Building Tribunal, cannot be said to be in the nature of duties pertaining to the affairs of the State. Such duties are confined to those prescribed in the Act itself and are purely municipal in nature. Above all, the salary of the Chairman, Municipal Building Tribunal, is paid out of the Municipal Fund and not by the State Government.

28. In our view, taking all the aforesaid facts into consideration, as dealt with in the various decisions cited before us, we cannot but agree with the views expressed by the State Administrative Tribunal that the petitioner does not hold a civil post under the State and consequently the Tribunal has no jurisdiction to consider his case. The decisions cited by Mr. Maity do not come to his aid since the question of discharging of duties in connection with the affairs of the State was not under the consideration in those cases. In the light of the discussion made by the Hon'ble

Supreme Court in the case of Mathura Das Mohan Lal Kedia, (supra) it has to be kept in mind that the members of the Gujarat Panchayat Service were required to perform duties in connection with the affairs of the State and there was provision for transfer of a member of the State service to the Panchayat service created under the Gujarat Panchayat Act, 1961, That is the distinguishing feature of the decisions cited by Mr. Ghosh and those cited by Mr. Maity.

29. Since we are in agreement with the views expressed by the State Administrative Tribunal, we do not think this to be a fit case which calls for interference and the writ application is accordingly dismissed, but this will not prevent the writ petitioner from pursuing his remedy before the appropriate forum.

30. In the facts of the case, there will be no order as to costs.

31. If an urgent xerox certified copy of this judgment is applied for, the same is to be supplied to the applicant expeditiously, subject to compliance with all the required formalities.

Jyotirmay Bhattacharya, J.

I agree.

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