BOMBAY HIGH COURT

Broach Borough Municipality

Vs.

Bhadriklal Ambalal

F.A. No. 239 of 1947 (with F. A. No. 247 of 1947)

(Bhagwati and Dixit, JJ.)

12.09.1950

JUDGMENT

Bhagwati, J.

1. [His Lordship after stating facts as above proceeded :]

2. The first question which was agitated before us was whether the resolution dated 16-12-1942, was validly passed, and if not, what was the effect of the same. Under Section 33 (2), Bombay Municipal Boroughs Act, 1925, no Chief Officer can be removed from office, reduced or suspended unless by the votes of at least two-thirds of the whole number of councilors. This Municipality had 30 councilors and 20 councilors voted in favor of the resolution on that day, with the result that if the resolution was otherwise validly passed there was at least two-thirds of the whole number of councilors present at the meeting and the requirements of Section 33 (2) of the Act were complied with. Under Section 58 (f) of the Act, the Municipality was empowered to make rules not inconsistent with the Act determining, subject to the limitations imposed by Sections 33, 34 (5) and 34A, the mode and conditions of appointing, punishing or dismissing any officer or servant. Acting under the analogous power given under Section 46 (e), Bombay District-Municipal Act, 1901, the Municipality had made R. 182 contained in the Broach Municipal Rules of 1912, which ran as under :

> "(1) No officer or servant shall be dismissed without a reasonable opportunity being given him of being heard in his defense. Any written defense tendered shall be recorded and a written order shall be passed therein.
> (2) Every order of dismissal or confirming a dismissal shall be in writing and shall specify the charge or charges brought, the defense, and the reasons for the order."

There was also a rule, being R. 189, made under Section 46 (g), Bombay District Municipal Act,

1901, which provided:

> "Subject to Section 182 of the Act every Municipal officer or servant is liable to discharge at one month's notice, but, except with the concurrence of the President and the sanction of the Municipality, no officer, or servant whose salary exceeds Rs. 15 shall be discharged before he has reached the age of 55.
> Explanation: 'Discharge' does not include, 'dismissal'."

These rules were in so far as they were not inconsistent with the Bombay Municipal Boroughs Act, 1925, preserved under the provisions of Section 5 of the Act even though it was enacted there that the Bombay District Municipal Act, 1901, was not to apply to Municipal Boroughs, with the result that even after 1925, Rules 182 and 189 which were enacted under the corresponding provisions of the Bombay District Municipal Act, 1901, continued to apply to the servants of the Municipality. It was contended that the resolution dated 16-12-1942, was a resolution dismissing the pltf. from his employment as Chief Officer of the Municipality and the procedure which was laid down in R. 182 was not followed in that, no reasonable opportunity was given to him of being heard in his defense, no written defense was called for or tendered by him and no written order was passed on the same. It was, therefore, urged that the resolution dated 16-12-1942, was null and void by reason of non-compliance with the provisions of R. 182. It was also urged that before the said resolution was considered, an amendment was moved by two councilors asking that an explanation should be sought from the pltf. and the resolution be moved thereafter, which amendment was also wrongfully ruled out of order by the President, with the result that in accordance with the true position in law all the proceedings which took place after the said amendment was ruled out of order should be treated as naught and the resolution dated 16-12-1942, should be deemed not to have been passed.

3. On the other hand, it was contended on behalf of the Municipality that the resolution dated 16-12-1942, could not be challenged as null and void on this ground at all. It was contended that the provisions of R. 182 were not mandatory but merely directory and that the only statutory provision which had to be looked at in this behalf was Section 33 (2), Bombay Municipal Boroughs Act, that the said provisions had been complied with and that therefore the said resolution was not null and void as contended by the pltf. It was also contended that the amendment was not germane to the proposal and was in any event a negation of the resolution, with the result that the President was right in ruling it out of order, and that in any event the pltf. who was an outsider was not competent to question the validity of the said ruling of the President, the matter being purely a matter of internal administration of the affairs of the Municipality. It was therefore contended that the resolution was within the competence of the Municipality and was validly passed.

4. On the facts of the case, it cannot be denied that so far as the provisions of Section 33 (2), Bombay Municipal Boroughs Act are concerned, they were strictly complied with. Out of the 30

councilors of the Municipality 20 voted in favor of the resolution, with the result that there was, within the strict terms of the section, the removal of the pltf. from his office as Chief Officer by the votes of at least two-thirds of the whole number of councilors. The removal from office, however, could be either by way of dismissal or discharge. This was not a case of discharge with one month's notice as contemplated by R. 189. It was a case of a dismissal under the provisions of R. 182, and it is, therefore, necessary to consider whether the provisions of R. 182 had got to be complied with in order to validly remove the pltf. from his office of Chief Officer. The Municipality purported to dismiss the pltf. from his position as Chief Officer and it was prima facie necessary for it therefore to comply with the provisions of R. 182.

5. [His Lordship then set out the history of the events that had happened prior to the resolution passed by the Municipality on 16-12-1942 and came to the conclusion that the provisions of R. 182, Broach Municipal Rules, were not complied with. His Lordship then proceeded :] It was, however, contended that the provisions of R. 182; were not mandatory but were merely directory and that, therefore, any non-compliance with the provisions of R. 182 would not vitiate the resolution if it was otherwise validly passed. In support of this contention that the provisions of R. 182 were not mandatory but directory, reliance was placed on *Venkata Rao v. Secretary of State*[1], a decision of their Lordships of the P. C, where it was held that (p. 699):

> "The rules framed by the Secretary of State for India in Council, or by any other authority under Section 96B, relating to the conditions of service, pay, allowances, discipline, conduct, etc., of Govt. servants, do not form a contractual relationship between the Crown and its servants, but they are mere directions given by the Crown to the administrative authorities for their general guidance."

Their Lordships of the P. C. discussed the two cases of *Shenton v. Smith*[2], and observed (p. 703) :

> "In the first case Dr. Smith held office in the Govt. medical service in Western Australia and relied upon certain rules and regulations of the service as an essential part of his contract of service. He was dismissed and brought an action for damage which failed. Upon appeal to Her Majesty in Council, Lord Hobhouse, in giving their Lord-ships' judgment said (p. 234) :
> 'It appears to their Lordships that the proper grounds of decision in this case have been expressed by Stone J. in the Full Ct. They considered that unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law suit, but by an appeal of an official or political kind.....As for the regulations, their Lordships again agree with Stone J. that they are merely directions given by the Crown to the Govt. of Crown Colonies for general guidance, and that they do not constitute a

contract between the Crown and its servants.'

A special case such as was contemplated in the above ofted passage occurred in Gould's case, (1896) A. C. 575: (65 L. J. P. C. 82) where the Board, consisting of three members two of whom had sat in Shenton's case, (1895) A. C. 229: (64 l. J. P. C. 119), held that the Respondent Stuart held office in New South Wales under certain conditions expressly enacted in the body of the New South Wales Civil Service Act, 1884, and that these express provisions of the statute were inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure." Their Lordships were of the opinion that the non-compliance with the rules framed under Section 96B relating to conditions of service did not comprise any breach of a term of the contract of service but was merely non-compliance with the directions given by the Crown to the

[1]39 Bom. L. R. 699: AIR 1937 PC 31

[2](1895) A. C. 229 : (64 L. J. P. C. 119) and Gould v. Stuart, (1896) A. C. 575 : (65 L. J. P. C. 82)

administrative authorities for their general guidance and brought the case within the ruling of *Shenton v. Smith*[3], This was the distinction which really obtained between the two cases which went before their Lordships of the P. C., the one of *Rangachari v. Secretary of State*[4], and the other of *Venkata Rao v. Secretary of State*[5], As Lord Roche observed in *Rangachari's case*[6]

> "It is manifest that the stipulation or proviso as to dismissal is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time."

6. This was in contrast with the observations of Lord Roche himself in ***Venkata Rao v. Secretary of State, 39 Bom. L. r. 699 : (AIR 1937 PC 31)***, where in delivering the judgment of the Board his Lordship observed (p. 705) :

> "Section 96B and the rules make careful provision for redress of grievances by administrative process and it is to be observed that Sub-Section (5) in conclusion reaffirms the supreme authority of the Secretary of State in Council over the civil service. These considerations have irresistibly led their Lordships to the conclusion that no such right of action as is contended for by the applt. exists... They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, but will be regulated by rule."

These two cases and the observations of their Lordships of the P. C. therein came again to be considered by the P. C. in the case of ***High Commissioner for India and Pakistan v. I. M. Lall, 50 Bom. L. r. 649 : (AIR 1948 PC 121)***, where the same distinction was emphasised. In the case of ***High Commissioner for India and Pakistan V. I. M. Lall, (50 Bom. L. r. 649: AIR 1948 PC 121)*** their Lordships had to consider the provisions of Section 240, Govt. of India Act, 1935, and having regard to the fact that Sub-Section (3) actually provided that :

"No such person as aforesaid shall be dismissed or reduced in rank until he his been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him;"

which was a part of the statute itself, their Lordships contrasted that provision with the provision which though of a similar effect was incorporated in R. 55, Civil Service, Qualifications, Control and Appeal Rules, which was one of the rules framed under Sub-Section (2) of Section 96B.

Their Lordships observed (p. 654) :

"Contrasting the provisions of Section 96B of 1919 with the provisions of Section 240 of 1935 their Lordships have no difficulty in holding - in agreement with both the H. C. and the F. C. - that the provision as to a reasonable opportunity of showing cause against the action proposed is now put on the same footing as the

[3](1895) A. C. 229: (64 L. J. P. C. 119)
[4]39 Bom. L. r. 688 : (AIR 1937 PC 27)
[5]39 Bom. L. r. 699 : (AIR 1937 PC 31)
[6]39 Bom. L. r. 688 at p. 638: (AIR 1937 PC 27)

provision now in Sub-Section (2) of Section 240, which was the subject of decision in Rangachari's case, (39 Bom. L. R. 688: AIR 1937 PC 27) and that it is no longer resting on rules alterable from time to time, but is mandatory, and necessarily qualifies the right of the Crown recognised in Sub-Section (1) of Section 240 of 1935. The provisions of Section 96B (1), now reproduced as Sub-Section (2) of Section 240 of 1935, and of sub-ss. (2) and (3) of Section 240 are prohibitory in form, which is inconsistent with their being merely permissive." Their Lordships also observed (p. 655) :

"Their Lordships agree with the view taken by the majority of the F. C. In their opinion, Sub-Section (3) of Section 240 was not intended to be, and was not, a reproduction of R. 55, which was left unaffected as an administrative rule, Rule 55 is concerned that the civil servant shall be informed ' of the grounds on which it is proposed to take action,' and to afford him an adequate opportunity of defending himself against charges which have to be reduced to writing; this is in marked contrast to the statutory provisions of "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

These observations of their Lordships of the P. C. really go to show that the provision contained in R. 182 which is a part of the rules alterable from time to time is merely an administrative rule and is in marked contrast to the statutory provision of the type contained in Sections 33 (2) and 34A, Bombay Municipal Boroughs Act. If one has regard to the provisions of Section 34A, Bombay Municipal Boroughs Act, one finds that where the Provincial Govt. is empowered to veto the continuance of the Chief Officer, that power is fettered by the proviso which enacts that :

"No order shall be made under this section unless an inquiry has been made into the matter by such person and in such manner as the Provincial Govt. may direct and unless

> the person affected by the order has been given a reasonable opportunity at the inquiry of explaining the allegations made against him."

The very fact that such a provision is contained in the statute itself, viz., in the proviso to Section 34A, Bombay Municipal Boroughs Act where the question of the exercise of the power vested in the Provincial Govt. in that behalf is concerned, as contrasted with the provision contained in R. 182 of the rules which are alterable from time to time, shows really that R. 182 is not mandatory but directory in its character.

7. If then the provisions of R. 182 are directory, it remains to be considered what would be the effect of the non-compliance therewith on the resolution dated 16-12-1942, which was passed in flagrant violation of the same. Would the resolution be void in law altogether, or would it be a bad resolution in the sense that even though it was competent to the Municipality to pass such a resolution, it was in violation of the pltf.'s rights in the matter of his employment by the Municipality? If the provisions of R. 182 were mandatory, the result in terms of the decision of their Lordships of the P. C. in the *High Commissioner for India and Pakistan v. I. M. Lall*[7], would be that the resolution would be null and void and the pltf. would be held entitled to a declaration that his purported dismissal on 16-12-1942, was void and inoperative and that he remained the Chief Officer of the Municipality at the date of the institution of the suit. On the other hand, if the

[7](50 Bom. L. R. 649: AIR 1948 PC 121)

provisions of R. 182 were directory and were merely an administrative rule passed by the Municipality under the provisions of Section 58 (f), Bombay Municipal Boroughs Act, or the corresponding provisions contained in the Bombay District Municipal Act, 1901, the resolution would be bad in so far as it did not comply with the provisions of R. 182 and would amount to a wrongful dismissal of the pltf. from the employ of the Municipality and the pltf. would be entitled to damages for such wrongful dismissal, the resolution being nonetheless a valid resolution passed by the Municipality in compliance with the provisions of Section 33 (2) of the Act though in flagrant violation of R. 182. In our opinion, the provisions of R. 182 being merely directory in their character, the only effect of the non-compliance with the terms thereof was to render the resolution of the dismissal of the pltf. passed by the Municipality on 16-12-1942, wrongful and not void and inoperative. It amounted to a wrongful dismissal of the pltf. and would certainly give the pltf. a cause of action against the Municipality in the matter of such wrongful dismissal of his by the Municipality. Our attention was drawn to certain observations of our appeal Ct. in *Gokak Municipality v. Rajaram Shridhar*[8], where Broomfield J. discussed the position of an employee of a Municipality who had been dismissed from employ (P. 891) :

> "In the case of Crown servants, the prerogative of the Crown comes into play. It is quite reasonable to say in such a case that the general rule is that Crown servants can be dismissed at pleasure without giving a cause of action, and if any one alleges an exception to that rule, he must show that there is an exception in a statute which is binding on the

Crown. But if there is no general overriding principle of liability to dismissal at pleasure, if you have to look to the special law to ascertain what the conditions of service are, it is difficult to see why a distinction should be made between a statutory provision and a provision made by a statutory rule. Of course if there has merely been a breach of some rule dealing with matters of formality or procedure, it is reasonable to hold that the breach gives no cause of action against the local body. That was the case in *Municipal Board, Shahjahanpur v. Sukha Singh, i.* [9]. But in the case of a rule like R. 156 with which we are concerned, which clearly affects the conditions of service of Municipal employees, on what principle can one say that it is immaterial whether the Municipality observes the rule or not? Rule 156 as well as the other rules which have been referred to in the argument has been made under Section 46 of the Act of 1901 by which the Municipality has power to make rules not inconsistent with the Act, among other things for the guidance of their officers and servants and determining the mode and conditions of appointing, punishing or dismissing any officer or servant. Why should one say that this rule which purports to confer important rights on the employees of the Municipality is merely framed for the guidance of the officers of the Municipality or of the Municipality itself? It is worthy of note that the Municipality itself relied on this rule as the main defense to the suit. It hardly lies in the mouth of the applt. therefore to argue that a breach of the rule would not give a discharged employee a cause of action. In our view in the case of the discharge or dismissal of an employee of a local body a cause of action for damages for wrongful dismissal arises when there has been a breach of any provision, whether contained in a statute or rule made under the statute, which may fairly be regarded as forming one of the conditions of

[8]42 Bom. L. R. 886 : (AIR 1940 Bom 386)

[9] L.R.(1937) All. 434 : (AIR 1937 All 264)

service, and affecting the tenure of office of the employee concerned. In the present case therefore if we had held that there had been a breach of this r. 156, we should have held that the pltf. had a cause of action for damages."

No doubt these observations of the appeal Ct. here lend some support to the contention urged on behalf of the pltf. that R. 182 being also a condition of service, noncompliance with the provisions thereof would make the resolution null and void. We are, however, of the opinion that what the learned Judges of the appeal Ct. in *Gokak Municipality v. Rajaram Shridhar*[10], were discussing was the question whether the pltf. had a cause of action against the Municipality and not whether the resolution passed by the Municipality in flagrant violation of the R. 156 was null and void or would constitute a wrongful dismissal of the pltf. The learned Judges there held that whether the provision was contained in the statute itself or was enacted in a statutory rule, it constituted one of the conditions of service of the pltf. by the Municipality and the non-compliance with that provision afforded the pltf. a cause of action against the Municipality: The learned Judges had not had their minds directed towards the determination of the question

whether the non-compliance with the provision of a statutory rule of that nature would render the resolution passed by the Municipality null and void or would merely constitute a wrongful dismissal of the pltf. by the Municipality. The observations of the learned Judges in Gokak Municipality's case, 42 Bom. L.R. 886 at p. 891 : AIR 1940 Bombay 386 should not therefore, be taken as in any manner whatever militating against the position which we have enunciated above. The true position in law according to us, particularly having regard to the observations of their Lordships of the P. C. in *High Commissioner for India and Pakistan v. I.M. Lall*[11], is that the non-compliance with the merely directory provisions contained in R. 182 does not render the resolution of the Municipality passed on 16-12-1942, null and void, but renders the action taken by the Municipality against the pltf. in the manner tantamount to a wrongful dismissal of the pltf. in contravention of the provisions of R. 182 which certainly can so far as it stands be construed to be one of the conditions of service as between the pltf. and the Municipality.

8. It was, however, urged on behalf of the pltf. that the President having wrongfully ruled out of order the amendment proposed by the two councilors of the Municipality, we should treat all the proceedings at that meeting of 16-12-1942, after the amendment was thus ruled out of order as nugatory and should treat the resolution as not having been passed at all. In support of this contention, reliance was placed by the counsel for the pltf. on the case of *Henderson v. Bank of Australasia*[12], In that case the action was filed by a proprietor or member against the bank to test the validity of certain resolutions altering the deed of settlement of the bank passed at an extraordinary general meeting on 4-4-1889. One of the objections was that the pltf. wished to propose an amendment to the resolution, the chairman refused to put it, and therefore, he prevented the opinion of the shareholders being taken on a matter which was legitimately within the power of the meeting. It was held by the Ct. of appeal that the resolutions were carried at a meeting improperly conducted, for that the shareholders had a right, and should have been allowed, to move amendments, and that as that particular

[10]42 Bom. L. R. 886 : AIR 1940 Bom 386 [12](1890) 45 Ch. D. 330 : (59 L. J. Ch. 794)
[11]50 Bom. L.R. 649. AIR 1948 PC 121,

amendment was not put in consequence of the unfortunate ruling of the chairman, the refusal of the chairman invalidated the proceedings, and these resolutions could not stand. This decision was followed by Blagden J. in *T. H. Vakil v. Bombay Presidency Radio Club*[13], There a proposal was put before a general meeting of the company and an amendment moved to it was wrongly ruled out of order by the chairman. The member brought an action against the company asking for a declaration that the ruling given by the chairman was invalid and for consequential reliefs. The learned Judge held that as a general rule amendments moved to a proposition must be germane to its subject-matter and they must not be in substance a direct negation of it, that the amendment which was moved to the resolution there was not a direct negation of the proposition and could be properly moved, but was wrongly ruled out of order by the President. The learned Judge then considered what was the effect of the declaration which he was asked to make, referred to the case of *Henderson v. Bank of Australasia*[14] and observed (p. 431):

> "There an amendment by shareholders was improperly ruled out of order and

> subsequently the unamended proposition was put to the meeting and carried. In that respect the facts are distinct from those of this case where the unamended resolution was put to the meeting and lost. But, I think this is a distinction without a difference because the principle, as I understand it, which is stated in the judgment of Lopes L. J. is that the refusal by the Chairman to put an amendment to the meeting 'invalidates the proceedings' by which are meant the subsequent proceedings as regards that particular question; Lopes L. J. says 'It is to my mind perfectly clear that it does.' The reason is, as I take it, that the members who were present at the meeting have expressed their opinion on the substantive motion without having had an opportunity to express their opinion on the amendment and as a result of that it may well be (I do not say it is) that the real sense of the meeting has not yet been ascertained. The proper course for me is to make the declaration which I am asked to make under prayer (a) of the plaint and make an order as asked under prayer (e). I direct a general meeting to be convened for the purpose of receiving and adopting the documents mentioned in prayer (e) at fourteen days notice to be given by the deft. company. Recirculation of audited accounts, balance sheet, and report may be dispensed with. I declare that the resolution refusing to accept or adopt the accounts etc. was invalid."

Relying upon this decision of Blagden J. it was urged that the amendment was really germane to the subject-matter and not a direct negation of it and should therefore have been allowed by the President, that in so far as he ruled it out of order, that ruling of his was incorrect and that the position as it obtained at the point of time when the amendment was thus wrongfully ruled out of order should be resuscitated and the resolution dated 16-12-1942, should be deemed as not having been passed at all. It was urged, on the other hand, that the amendment was not germane to the subject-matter and was certainly a direct negation of it in so far as it moved that the proposition should not be considered at that meeting. We do not accept this contention. The main proposition was that the conduct of the Chief Officer should be considered by the meeting and proper action should be taken in regard thereto. The amendment which was moved was really germane to that proposition, and it was not a direct negation of it in so far as it did not say that the

[13] 47 Bom. L. R. 428 : (AIR 1945 Bom 475)

[14](1890) 45 Ch. D. 330 : (59 L. J. Ch. 794)

proposition should not be considered at all or negatived but it merely required a postponement of the consideration thereof pending the receipt of the explanation which should be called for from the pltf. If at all there was any merit in the amendment, it was that it required compliance with the provisions of R. 182. There was nothing therefore in the amendment as it was moved at the meeting which would go to show that it was a direct negation of the main proposition. In our opinion, therefore, the President was wrong in ruling it out of order. He should have really allowed the amendment to be put to vote, and there is no doubt in our mind that having regard to the temper of the majority of the councilors who had assembled there on 16-12-1942, the amendment would have been lost by a majority of the votes. That is, however, no consideration when we are determining what is the effect of the President having wrongfully ruled the

amendment out of order.

9. It was however urged on behalf of the Municipality that it was really a matter of internal administration of the Municipality and that the pltf. being an outsider or a third party, had no right as such to question the validity of the resolution which was passed after the President wrongfully ruled the amendment out of order. Several cases were cited before us, particularly, *Oxted Motor Co. In re*[15], *Tanjore Permanent Fund v. Sadasiva Rao*[16], *Municipal Board of Shahjahanpur v. Sukha Singh*[17], and *Parshuram D. Shamdasani v. Tata Industrial Bank*[18], which all according to the submission of counsel for the Municipality went to show that the right of vote was a right of property enjoyed by the member and that it was only the member whose right of vote which was thus thwarted that had the cause of action against the company to have the resolution passed in this manner declared null and void or not binding upon him. In *In re Oxted Motor Co*[19]., all the shareholders of the company had met and passed a resolution that it had been proved to the satisfaction of the company that it could not by reason of its liabilities continue its business and that it was advisable to wind up the same, and accordingly that the company be wound up voluntarily. It was, however, contended by a creditor who had obtained judgment against the company that the requirements of Section 69, Companies (Consolidation) Act, 1908, had not been complied with and that therefore the resolution to wind up the company had not been validly passed. It was held by the Ct. that (p. 37) :

> "That contention is not well founded. It would be an extraordinary result if after all the shareholders of a company have been present at a meeting and passed a resolution to wind up the company, afterwards any one else could impeach that resolution on the ground that the shareholders had not had notice of intention to propose the resolution as an extraordinary resolution and that therefore the requirements of Section 69 had not been complied with. In my opinion the share-holders are entitled to waive the formality of notice." Lush J. referred to the case of Express Engineering Works, Ltd.. In re. (1920) 1 Ch. 466 : (89 L. J. Ch. 379) and observed (p. 37):
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> "The Ct. of Appeal held, affirming Astbury J., that the requirements of the statute were intended for the protection of the share-holders, and that if the resolution was in a matter intra vires the members of the company, and there was no fraud, the shareholders were able to waive all formalities as regards notice and that the

[15](1921) 3 k. b. 32: (90 L. J. k. B. 1145)
[16] AIR 1926 Madras 705 : (95 I.C. 339)
[17] I. L. R. (1937) ALL. 434 : (AIR 1937 All 264)
[18]26 Bom. L. R. 987 : (AIR 1925 Bom 49)
[19](1921) 3 K. B. 32 : 90 L. J. K. B. 1145)

> resolution that had been passed was just as valid as if there had been the requisite notice,"

In *Tanjore Permanent Fund v. Sadasiva Rao*[20], the secretary of a company was dismissed from the office by the directors after three months' notice. At a general meeting of the Company the order of the Directors was cancelled and the meeting was adjourned. At the adjourned meeting the previous resolution was in turn cancelled and the dismissal of the Respondent confirmed. The Respondent then filed a suit for a declaration that this last resolution was not legal and that he

was entitled to continue as secretary and also for arrears of pay. It was found that proper notice of the resolution to be moved at the adjourned meeting was not given. It was held that the resolution was a matter within the powers of the company and it was not open to the pltf. to treat it as void. The learned Judge there observed (p. 706):

> "Consequently, applying the principle laid down in the above cited cases, I think that this resolution was a matter within the powers of the company and that it is not open to the pltf. to treat it as void. In *MacDougall v. Gardiner*[21], Nellish L. J. says :
> "In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the Company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called and then ultimately the majority gets its wishes.' These remarks apply very usefully to the facts of the present case and consequently I hold that the pltf. has no right to maintain this suit."

In *Municipal Board of Shahjahanpur v. Sukha Singh*[22], by a special resolution passed at a meeting convened for the purpose the Board abolished the Secretary's post and dispened with his services. It was not a dismissal and his conduct was never in question. According to the Rules and Regulations of the Municipality three days' notice had to be given to the members of the meeting, and in the case of three of the members this was not complied with ; but those members were present at the meeting and made no complaint of the shortness of notice. The pltf. appealed to the Comr. against the resolution, but was unsuccessful. He then brought a suit against the Municipal Board for a declaration that the resolution was illegal and ultra vires and that he still continued to be the secretary and entitled to his salary. It was held that: "a failure by the municipality to observe strictly the rules and regulations in the conduct of its business did not afford the pltf. a ground for maintaining the present suit. The municipality, when it engages a servant, does not make it part of its contract with him that in the conduct of its business it shall strictly observe these regulations."
The learned Judges there discussed the position at p. 438 of the report and observed (p. 438):

> "None of the three members who received late notice however complained in the present instance and we are satisfied that not only has the pltf's. position not been

[20] AIR 1926 Madras 705 : (95 I. C. 339)
[21](1875) 1 Ch. D. 13: (45 L. J. Ch. 27)
[22] I.L.R. (1937) ALL. 434 : AIR 1937 All 264

> prejudiced by the irregularity but that, in any event, the irregularity affords no ground for maintaining the present suit. We would refer in this connection to the p. C. decision in the case of *Shenton v. Smith*[23], The pltf. in that case had been dismissed by the Govt. of Western Australia. He complained that the action of the Govt. was illegal and ultra vires and he pleaded inter alia that the Govt. had failed to observe the regulations prescribed for it by the Colonial office in the matter of the dismissal of its servants. This

plea is considered at p. 235 of the judgment. It is there observed : "As for the regulations, their Lordships again agree with Stone J., that they are merely directions given by the Crown to the Govts. of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servant ... They are alterable from time to time without any assent on the part of Govt. servants, which could not be done if they were part of a contract with those servants. . . No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a Colonial Govt. to whom the regulations have been addressed, can insist upon holding office till removed according to the process thereby laid down. Any Govt. which departs from the regulations is amenable, not to the servants dismissed, but to its own official superiors, to whom it may be able to justify its action in any particular case.' In our judgment the principle adumbrated in their Lordships' observations above quoted apply to the circumstances of the present case. The pltf. as a mere servant of the municipality was not entitled to insist that the municipality should strictly observe the rules and regulations prescribed for the conduct of its business."

The case of *Parshuram D. Shamdasani v. Tata Industrial Bank*[24]*,* was also a case where a member of the company whose amendment was wrongfully ruled out of order ventilated his grievance before the Ct.

10. It was contended on the other hand by counsel for the pltf. that even a stranger would have a cause of action if a contractual obligation which had been entered into between him and the company was sought to be affected by the passing of an invalid resolution. He referred us to the case reported in New British Iron Co., In re: Beckwith, Ex parte, (1898) 1 Ch. 324: (67 L. J. Q. B. 164), where it was held that the provisions in regard to the directors' share qualification in the Articles of the Company, even though they were only a part of the contract between the shareholders inter se were, on the directors being employed and accepting office on the footing of them, embodied in the contract between the directors and the Company, that the remuneration was not due to the directors in their character of members, but under the contract so embodying the provisions, and that, in the winding-up of the company, the directors were entitled to rank as ordinary creditors in respect of the remuneration due to them at the commencement of the winding-up. He also referred us to the case reported in *Gulab Singh v. Punjab Zamindara Bank, Ltd*[25]*.,* where also a member had been appointed managing director of a Bank in pursuance of certain articles of the company, had acted for 11 years in that capacity, and the Ct. held that the articles constituted an implied contract between the member and the company, a suit for performance of which lies in a civil Ct. The managing director there had been removed by the company by a special resolution and he sued the company for a declaration that he

[23](1890) A. C. 229 : (64 L. J. p. C. 119)

[24]26 Bom. L. R. 987: (AIR 1925 Bom 49)

[25] AIR 1940 Lah 243: (190 I. C. 819)

was still the managing director because the resolution removing him from office was ultra vires. The Ct. held that the managing director was entitled to the declaration. The whole position as it was canvassed in that case was whether there was a contract between the managing director and

the Bank, and it was assumed that if there was a contract, the pltf. had a right to sue because his position was sought to be affected by an ultra vires resolution. This case went to the appeal Ct. and the appeal Ct. in its decision reported in *Gulab Singh v. Punjab Zamindara Bank Ltd*[26]*.,* confirmed the decision of the Ct. below holding that (p. 47) :

> "Even if the memorandum and articles of association of a company are held not to constitute a contract in themselves, an implied contract may be proved by the acts of the parties on the terms set out in the articles of association of the company:

Where in pursuance of certain articles acted upon by the company a shareholder was appointed managing director and acted as managing director for 11 years and was remunerated in accordance with the terms set out in the articles, the articles constitute an implied contract between the company and the shareholder so as to entitle him to the declaration that he was the managing director of the company." Here again the consideration on which the decision was based was that there was a contractual relationship established between the managing director and the company, and the company could not by any invalid resolution passed in that behalf affect the position of the managing director.

11. The cases which have been relied upon by counsel for the pltf. no doubt go to show that where there is a contractual obligation or relationship subsisting between the pltf. and the company the company would not be entitled to affect that position by an invalid resolution passed by it and the person affected would have a cause of action to have it declared that the resolution was invalidly passed and his position under the contract was not affected by any such invalid resolution. The position, however, as it obtains here is that of a particular amendment to a resolution having been wrongfully ruled out of order by the President. By such wrongful ruling the only right which was affected was the right of the member who moved the amendment or of the members present at the meeting who would have voted for or against the amendment, and it is this right which is affected by the President wrongfully ruling the amendment out of order. If any person has a right to make any grievance in that behalf it is the member who moved the amendment or who would have supported the amendment. If, however, the members who took part in the proceedings do not raise any such objection, it is not for any outsider or even a person who is affected by the resolution which is ultimately passed to make a grievance of it. His right is not at all affected by the wrongful ruling given by the President. A resolution in order that it should be bad, qua the outsider, should materially affect his right. A wrongful ruling given by the President, ruling the amendment out of order, does not affect the main resolution qua the outsider. The outsider is concerned mainly with the proposition as it has been moved in so far as it affected him. It cannot be said that he is affected in any manner whatever by reason of the President's wrong ruling in regard to a point of order. This is a matter purely for the internal administration of the affairs of the company, and at best it affords a grievance to a member of the company who is present at the meeting in so far as his right to vote on the amendment if it had been allowed to be properly moved

[26] AIR 1942 Lahore 47: (i. L. R. (1943) Lah. 28)
has been thwarted. We accept the principle which has been enunciated in the cases, particularly, *Tanjore Permanent Fund v. Sadasiva Rao*[27], and *Municipal Board, Shahjahanpur v. Sukha Singh, i. l. r*[28]. and the observations in *Shenton v. Smith*[29], quoted at p. 438 in the latter case (*Municipal Board of Shahjahanpur v. Sukha Singh, i. l. r*[30]. and we are of the opinion that it was not for the pltf. to challenge the validity of the resolution as ultimately passed, by reason of the wrongful ruling given by the President on the point of order. After the President ruled the amendment out of order, though wrongfully, the proceedings continued. All the Councilors present at the meeting voted on the main resolution and the ultimate resolution as it was passed on 16-12-1942, was validly passed in accordance with the provisions of Section 33 (2), Bombay Municipal Boroughs Act. We, therefore, negative the contention which was urged on behalf of the pltf. that the whole resolution as passed on 16-12-1942, was null and void by reason of the President's wrongfully ruling out of order the amendment moved by the two Councilors present at the meeting.

12. As a result of the above, we have come to the conclusion that the resolution passed on 16-12-1942 was not null and void by reason of the non-compliance with the provisions of r. 182 or by reason of the President having wrongfully ruled the amendment out of order. The resolution as passed was validly passed under the provisions of Section 33 (2), Bombay Municipal Boroughs Act. It was, however, wrongful in so far as the provisions of r. 182, which was one of the conditions of service of the pltf. with the Municipality, were not complied with, and therefore the pltf. was wrongfully dismissed by the Municipality.

13. While we are on this, we are constrained to observe that this case discloses a lamentable state in the administration of Municipal affairs. Even though r. 182 constituted inter alia one of the conditions of service, yet the Municipality completely disregarded the provisions thereof at its meeting held on 16-12-1942, to consider the conduct of the pltf. Counsel for the pltf. relied on the decision of their Lordships of the P. C. in *High Commissioner for India and Pakistan v. I. M. Lall*[31], But the difficulty in his way was that r. 182 is directory unlike Section 240 (3), Govt. of India Act, 1935, which their Lordships had to consider in that case before them. It seems strange that a person in the position of the pltf. should not have been given a reasonable opportunity of being heard in his defense and the Municipality should have been able to justify its action under Section 33 (2), Bombay Municipal Boroughs Act without complying with the provisions of r. 182. Section 34a of the Act. on the other hand recognizes the necessity of giving such an opportunity, and we see no reason why similar provision should not have been enacted in section 33 (2) of the Act but should have been, relegated merely to a rule which the Municipality might or might not observe. Apart from considerations of natural justice, there was a flagrant violation of the provisions of r. 182 in this case, and it is an elementary principle that a man should not be condemned without being given a reasonable opportunity of being heard in his defense. We would, therefore like to bring to the notice of the Govt. this peculiar aspect of the case so that the Govt. might consider if it is not desirable to make a provision in Section 33 (2) of the Act similar to that which is contained in the proviso (b) to Section 34A of the Act. It would bring the

position of the Chief Officer of the Municipality on a par with the position of

[27] AIR 1926 Madras 705: (95 i. C. 339)
[28](1937) all. 434 : (AIR 1937 All 264)
[29](1895) a. c. 229 : (64 l. J. p. C. 119)
[30](1937) all. 434 : (AIR 1937 All 264)
[31]50 Bom. l. r. 649 : AIR 1948 PC 121

the Crown servants as enacted in Section 240 (3), Govt. of India Act, 1935, and would secure the same much better than by relegating it to the provisions like r. 182 which are, as the P. C. observed, alterable from time to time and are administrative rules for the general guidance of the Municipality.

14. It was, however, contended on behalf of the Municipality that even though the provisions of r. 182 were not complied with and the pltf. was not given a hearing, it was open to the Municipality to contend that the pltf. was in fact guilty of negligence and misconduct in his employment and that his dismissal was, therefore, justified. Reliance was placed in support of this contention on an unreported decision of our appeal Ct. in *Lalbhai Chimanlal v. Municipal Borough, Ahmedabad*[32], That was a case of a Municipal employee suing the Municipal Borough of Ahmedabad. He had been wrongfully dismissed by the Municipality from its employ without complying with the terms of r. 271 which laid down that:

> "No officer or servant shall be discharged on account of gross negligence or inefficiency or be dismissed without a reasonable opportunity being given to him of making his defense; any written defense tendered by him shall be recorded and a written order shall be passed thereon."

The learned Judges in that appeal held that the pltf. had a cause of action and his cause of action was that he had been dismissed and his dismissal constituted a breach of a rule or condition of the contract of service between him and the Municipality. The question that was further mooted, however, before them was whether it was open to the Municipality to justify the dismissal of the pltf. in Ct. on the ground that he was guilty of negligence. The learned Judges discussed the law of Master and Servant and ultimately came to the conclusion and held that if the servant was negligent the master could dismiss him and justify his dismissal by pointing to his negligence. They discussed the provisions of R. 271 mentioned above and observed that :

> "The rules further lay down a certain procedure which has got to be followed by the domestic tribunal. But the right of the master to dismiss the servant on the ground of negligence is independent of and apart from the rules of procedure laid down which would regulate the domestic tribunal which would consider that issue. The rules of procedure are really framed in a sense for the benefit of the employer himself because if the employer follows those rules the Ct. is precluded from going behind the finding arrived at by that tribunal. But it is not possible to contend that by providing for a domestic tribunal the jurisdiction of the Ct. is ousted to consider the issue as to negligence or misconduct. In this particular case, the deft. raised that plea of negligence and an issue was raised by the trial Ct. and the trial Ct. decided that issue against the pltf. In our

opinion, the trial Ct. had the jurisdiction to try that issue, and the only question we have got to consider in this appeal is whether that issue is rightly decided by the trial Ct."

This decision of our appeal Ct. therefore, lays down the principle that even though the provisions of R. 182 may not have been complied with by the Municipality, it would be open to the Municipality to urge at the trial that the pltf. was in fact guilty of negligence

[32] f. a. No. 182 of 1948, d/-8-12-1949

and misconduct and was therefore rightfully dismissed by it.

15. It was contended, on the other hand, by counsel for the pltf. that no issue was specifically raised by the Municipality in the lower Ct. in this behalf even though there were certain passages in the Municipality's written statement as also the written statements of the several Councilors that the pltf. was guilty of negligence and misconduct, and that it was unfair therefore to allow the Municipality now to urge and try to establish before this Ct. that the pltf. was in fact guilty of negligence and misconduct so as to justify his dismissal. There is no doubt that there is no specific issue raised in the lower Ct. on this point, but specific allegations had been made in the written statement of the Municipality as also of some of the Councilors in this behalf, a compendious issue had been raised in the Ct. below in regard to the wrongful dismissal of the pltf., and evidence was led in the Ct. below on the four items which were the subject-matter of the charges levelled by the Municipality against the pltf. and which purported to be considered by the Municipality at its special general meeting called on 16-12-1942.

16. [His Lordship then considered the evidence which had been led on behalf of these four charges in the Ct. below and proceeded:] In the result, we have come to the conclusion that the Municipality has failed to prove that the pltf. was guilty of negligence or misconduct in the matter of the performance of his duties as the Chief Officer of the Municipality in the one or the other of the modes which were the subject-matter of the items 1 to 4 in the agenda of the meeting of 16-12-1942, and that the dismissal of the pltf. by the Municipality by this resolution dated 16-12-1942, was not at all justified. We are therefore confirmed in our opinion that the pltf. was wrongly dismissed by the Municipality.

17. It therefore remains to consider on this aspect of the case what are the damages which the pltf. is entitled to. The learned Judge below went on the basis of calculating damages for breach of contract under Section 73, Contract Act. He calculated the salary which the pltf. would have been entitled to up to the date of the decree and deducted therefrom the amount which the pltf. had earned during the interval. He calculated that Rs. 16,000 would be the amount of the pltf's. salary up to the date of the decree but that he had earned Rs. 10,000 in the interval and came to the conclusion that Rs. 6,000 would be the damages. He however, allowed the pltf. Rs. 3,000 as and by way of damages by reason of his wrongful dismissal by the Municipality. We do not understand how after having arrived at the figure of Rs. 6,000 the learned Judge came to reduce it to Rs. 3,000. We are, however, of the opinion that the measure of damages which was adopted

by the learned Judge below was wrong. There are decisions of our Ct. in the matter of such wrongful dismissal, the first of them being *Dhulia Municipality v. Ramchandra*[33], In that case Kale had been wrongfully dismissed by the Municipality, and in his judgment at p. 1278 Broomfield J. discussed the measure of damages. The position there was almost similar to the position which obtains here before us and the learned Judge 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 pltf. being removed from office at any time by a valid resolution under Section 33, the only damages which he can claim are wages for the period of notice." Wassoodew J. even though he discussed the position and

[33]39 Bom L. R. 1269 : (AIR 1938 Bom 137)

> made certain observations which would go to support the contention of the pltf. in regard to the right to remain in service until properly discharged, concurred with the view expressed by Broomfield J. and agreed with the measure of damages as it had been laid down by him. The measure of damages was again discussed in *Gokak Municipality v. Rajaram Shridhar*[34], The case of *Dhulia Municipality v. Ramchandra*[35], was followed there and it was laid down that:
>
> "The measure of damages in the case of a pltf. employed under a contract for a definite period is the actual loss incurred by him. In an action for wrongful dismissal the pltf. may therefore recover the wages for the whole unexpired period of service, though the fact that he has obtained or might reasonably have obtained other occupation will be taken into account. Where, however, the pltf. is liable to be discharged at a month's notice, he is entitled, on wrongful dismissal, to damages for the period of notice only."

Rule 189 of the Broach Municipal Rules, 1912, provided that :

> "Subject to Section 182 of the Act every Municipal officer or servant is liable to discharge at one month's notice, but, except with the concurrence of the President and the sanction of the Municipality, no officer or servant whose salary exceeds Rs. 15/- shall be discharged before he has reached the age of 55."

The case, therefore, comes clearly within the rulings of our appeal Ct. in *Dhulia Municipality v. Ramchandra*[36] and *Gokak Municipality v. Rajaram Shridhar*[37], There was no justification for the learned trial Judge to go into the question of the damages based on any other consideration whatever. The pltf. was relieved of his employment on 16-12-1942. He would have been entitled to a months' notice in any event expiring on 31-1-1943, and in our opinion he would be entitled to damages for wrongful dismissal calculated on the basis of his monthly salary between 17-12-1942 and 31-1-1943.

18. These damages are recoverable by the pltf. from the Municipality. The learned Judge, however, decreed the pltfs. claim for damages not only against the Municipality but also against

Defendant 3, 6, 8, 10, 13, 16 and 20 on the ground that in the passing of the said resolution dated 16-12-1942, they were actuated by express malice and were therefore liable to the pltf. in damages. Apart from the quantum of damages which we have discussed above, there is no legal ground on which these Defendant can be made liable to the pltf. in damages. They were no doubt the councilors of the Municipality who attended the meeting of the Municipality on that day and voted in favor of the resolution which resulted in the wrongful dismissal of the pltf. This fact, however, by itself does not furnish the pltf. any cause of action against them in damages. There was no contractual relationship between the pltf. and these Defendant The only liability of these Defendant to the pltf. would, therefore, be in tort, and it may be noted in this connection that there was no allegation in the plaint against these Defendant of any conspiracy or of unlawfully procuring the dismissal of the pltf. by the Municipality. In the absence of any such allegation it is impossible to fasten any liability on these Defendant for any damages sustained by the pltf. by reason of his wrongful dismissal by the Municipality. (Vide

[34](42 Bom. L. R. 886 : AIR 1940 Bom 386) [36](39 Bom. l. R. 1269 : AIR 1938 Bom 137)

[35]39 Bom. L. R. 1269 : (AIR 1938 Bom 137) [37](42 Bom. l. R. 886 : AIR 1940 Bom 386)

Prabhu Lal Upadhya v. Dist. Board Agra[38], To the extent, therefore, that the learned Judge below passed the decree against these Defendant for damages for wrongful dismissal, the learned Judge was wrong and that decree is liable, therefore, to be set aside, the only liability in that behalf being that of the Municipality which we have already set out hereinabove.

19. [The rest of the judgment is not material to this report. His Lordship concluded:] In the result, both the appeals will be allowed and the decree passed by the lower Ct. will be varied to the extent that the pltf. will be entitled to recover from deft. 1 a sum of Rs. 498-4-0 and Rs. 1,339-14-4 with interest thereon at the rate of 4 1/2 per cent. per annum from 31-1-1943, till judgment and to recover from Defendant 1, 3, 6, 8, 10, 13, 16 and 20 Rs. 5,000 being the damages for defamation as also costs of the suit and interest on judgment at 4 per cent. per annum till payment. The cross-objections of the pltf. in both the appeals will be dismissed.

Decree

[38] I.L.R. (1938) ALL. 252 : AIR 1938 All 276