

PUNJAB AND HARYANA HIGH COURT

Mangal Sain

Vs

The State of Punjab

(Harman Singh and Soni, JJ.)

21.05.1951

JUDGMENT

Harnam Singh, J.

1. In order to appreciate the points which we are called upon to determine in Civil Miscellaneous No. 747 of 1950 the facts, so far as material, may be set out in some detail.

2. Under the provisions of Sub-section (9) of Section 3 of the Punjab Municipal (Executive Officer) Act, 1931, hereinafter referred to as the Act, the Punjab Government appointed 'Shri' Mangal Sain as Executive Officer, Municipal Committee, Ambala City, with effect from the date that 'Shri' Mangal Sain assumed charge of that office. Sub-section (9) of Section 3 of the Act reads:

"3 (9) Whenever an Executive Officer dies, resigns or is removed the Committee shall, within three months of his death, resignation or removal, appoint another person to be Executive Officer in the manner provided in Sub-sections (1) to (3), and if the Committee fails to appoint such a person within such period the State Government may appoint such a person in the manner provided in Sub-section (4): "

3. Shri Mangal Sain assumed charge of office on the 21st of January, 1949 (forenoon).

4. Under Sub-section (7) of Section 3 of the Act the State Government ordered on the 4th of December, 1950, the removal of Shri Mangal Sain from the office of Executive Officer of the Municipal Committee, Ambala City. Sub-section (7) of Section 3 of the Act reads:

"3 (7) The Executive Officer may at any time be suspended or removed from office by the State Government, and shall be so suspended or removed if at a meeting of the Committee convened to consider the question of his suspension or removal not less than five-eighths of the total number of members constituting the Committee for the time

being vote in favour of his suspension or removal, and if the Executive Officer is suspended the Committee shall appoint some person with the approval of the State Government to officiate as Executive Officer."

5. On the 19th of December, 1950, Shri Mangal Sain applied for writs of 'certiorari', prohibition and certain other reliefs under Article 226 of the Constitution of India alleging that the order passed by the Punjab Government on the 4th of December, 1950, removing him from the office of Executive Officer, Municipal Committee, Ambala City, contravenes the mandatory provisions of Article 311 of the Con-

stitution of India inasmuch as he has not been given reasonable opportunity to show cause against his removal from that office.

6. Upon the application of 'Shri' Mangal , Sain the learned Chief Justice ordered on the 20th of December, 1950: Rule. Fix next week. 'Interim' order of Committee not to make appointment in meanwhile."

7. On the 23rd of April, 1951, 'Shri' Mangal Sain applied for permission to amend the application by substituting the word 'mandamus' for the word 'certiorari' in the heading and paragraph No. 15 of the application and in arguing the case counsel for the parties have treated the application as if it were an application for 'mandamus' and other reliefs.

8. In these proceedings it is not disputed that a writ of 'mandamus' lies to compel the restoration of a person to an office of which he has been wrongfully dispossessed provided such office is of a public nature. Indeed, the rule of law is firmly established that if public officials fail to perform any public duty of which they have been charged, a writ of 'mandamus' will lie to compel them to carry out that duty. On this point paras. Nos. 1271 and 1281, Halsbury's Laws of England, Volume 9 (second edition), may be seen.

9. As stated above, 'Shri' Mangal Sain applicant maintains that the order passed by the State Government on the 4th of December* 1950, removing him from the office of Executive Officer, Municipal Committee, Ambala City, contravenes the mandatory provisions of Article 311 of the Constitution of India inasmuch as he has not been given reasonable opportunity to show cause against his removal from that office. Relevant provisions of Article 311 read:

"311 (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him,"

10. In order to attract the application of Article 311, it is necessary to show, firstly, that Shri Mangal Sain held a civil post, and, secondly, that the civil post was under the State.

11. Now, the expression "civil post" is not defined in the Constitution of India. Reading, however, Articles 310 and 311 together, the conclusion is inescapable that the expression "civil post" as used in Article 311 means "a post or office on the civil side of the administration" as distinguished from "post connected with defence". Clearly, the post that 'Shri' Mangal Sain held was a civil post.

12. Mr. Daulat' Ram Prem, learned counsel for the applicant, urges that the post that 'Shri' Mangal Sain held was a post under the State. On this point counsel cites 'S. D. Marathe v. Pandurang Narayaria', AIR (25) 1938 Bom 419.

13. Articles 308 to 323 of the Constitution of India deal with services under the Union and the States. Article 308 provides that in Part XIV, unless the context otherwise requires, the expression "State" means a State specified in Part A or Part B of the First Schedule. In Parts III and IV of the Constitution of India the expression "State" includes "the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India." This meaning is not assigned to the expression "State" in Part XIV of the Constitution of India. From this alone it follows that the expression "civil post under a State" does not include the post held by persons in the service of any local authority within the territory of the State.

14. In my judgment the view set out in the preceding para, finds support from Articles 320 and 321 of the Constitution of India. Article 309 'inter alia' makes provision for recruitment and conditions of service of persons serving a State. Articles 315 and 320 deal with the appointment of a Public Service Commission for a State and the functions of that Commission. Article 321 then provides that an Act made by the Legislature of a State may provide for the exercise of additional functions by the State Public Service Commission as respects service of any local authority or other body corporate constituted by law or of any public institution. Clearly, if persons holding posts under a local authority were holding those posts under the "State", there was no necessity for extending the functions of the State Public Service Commission as respects the services of local authority. That being so, in my opinion, Municipal employees do not hold civil posts under the State and are, therefore, not entitled to the protection afforded by Article 311 of the Constitution of India.

15. In 'AIR (25) 1938 Bom 419' the question that arose for decision, was whether Shri S. D. Marathe was a servant of the Crown in India within Section 270 of the Government of India Act, 1935. Shri S. D. Marathe was officer in charge of the grant-in-aid dispensary of Karjat 'taluka' of the Kolaba District, but he was a member of the Bombay Subordinate Medical Service. If so, Shri S. D. Marathe though posted for the time being in a dispensary maintained by a local

authority was a servant of the Crown in India within Section 270, Government of India Act, 1935. AIR (25) 1938 Bom 419', does not lay down that Municipal employees hold their posts under the State.

16. Then it is argued that considering that under entry 5 of the State List, Constitution of India, the State Legislature enacts laws with respect to Local Government and a Minister of the State holds the portfolio of Local Government, persons in the service of a local authority hold civil posts under the State. The argument put in this form seems to me to be plainly unacceptable. In the first place the argument raised conflicts with the provisions of Part XIV of the Constitution of India referred to above. In the second place, to quote one example, the argument raised would show that all employees in an Industrial Concern within the territories of a State hold civil posts under that State because under Entry 24 of the State List the State Legislature is competent to enact laws on Industries subject to the provisions of Entry 52 of List I and one of the Ministers of the State holds the portfolio of Industries. Clearly, persons serving in the departments of Local Government and Industries hold civil posts under the State but not so the persons serving in Local Bodies or the Industrial Concerns.

17. Basing himself on the provisions of Sub-sections (7) and (9) of Section 3 of the Act, counsel then argues that 'Shri' Mangal Sain held a post under the State within the meaning of Article 311 of the Constitution of India. Sub-sections (1) to (3) of Section 3 provide for the appointment of an Executive Officer by the Municipal Committee concerned. In case the Municipal Committee fails to appoint an Executive Officer in the manner provided in Sub-sections (1) to (3) of Section 3 of the Act, the State Government may appoint such a person.

18. Under Sub-section (6) of Section 3 the remuneration of the Executive Officer appointed under Sub-section (9) of Section 3 is payable by the Committee from the Municipal fund. Sub-section (7) of Section 3 of the Act provides that an Executive Officer shall be suspended or removed from office by the State Government if at a meeting of the Committee convened to consider the question of his suspension or removal not less than five-eighths of the total number of members constituting the Committee for the time being vote in favour of his suspension or removal. In other words if five-eighths of the total number of members constituting the Committee for the time being vote in favour of the suspension or removal of the Executive Officer of that Committee, the State Government is obliged by law to suspend or remove that Executive Officer. That being so, the mere fact that 'Shri' Mangal Sain was appointed and has been removed from office by the State Government does not show that 'Shri' Mangal Sain held the post of Executive Officer, Municipal Committee, Ambala City, under the State.

19. In '*Bogg v. Pearse*', the plaintiff instituted proceedings for the recovery of £ 500 from the Commissioners, the ground of payment being an appointment of the plaintiff as street-keeper under the provisions of an Act of Parliament which enacts that the Commissioners shall from time to time appoint a street-keeper with such salary and allowances as they think reasonable and

may remove such street-keeper and appoint another street-keeper in his stead. In that case it was said that the Act did not give to the plaintiff cause of action for recovering wages and salary from the Commissioners for having filled the office of street-keeper.' Indeed, a person may be the servant of another although a third party has the power of appointing or dismissing him. On this point para. 191, Halsbury's Laws of England, Volume XXII (second edition), may be seen. For the foregoing reasons I find that the provisions of Sub-sections (7) and (9) of Section 3 of the Act do not establish that 'Shri' Mangal Sain held a civil post under the State within Article 311 of the Constitution of India.

20. No other argument was raised in these proceedings.

21. Finding as I do that Municipal employees do not hold civil posts under the State within Article 311 of the Constitution of India and "that 'Shri' Mangal Sain, who was appointed and removed by the State Government, did not hold a civil post under the State, I have no doubt that 'Shri' Mangal Sain is not entitled to the protection afforded by Article 311 of the Constitution of India.

22. In the result, I dismiss with costs the application of 'Shri' Mangal Sain for 'mandamus' and other reliefs.

Soni, J.

23. This is an application for writs under Article 226 of the Constitution against the State and against the Municipal Committee, Ambala City. The petitioner states in his application that on the 7th January 1949, he was appointed as Executive Officer of the Municipal Committee, Ambala City, for a period of five years from the date of his assuming charge. His appointment was made under Section 3, Sub-section (9) of the Punjab Municipal (Executive Officer) Act, 1931. The petitioner assumed charge of his duties on the 21st January 1949. On the 6th of December 1950 the petitioner was handed over a copy of Punjab Government notification, dated the 4th December, 1950, by which the Government removed him from the office under the provisions of Section 3, Sub-section (7) of the said Act and he was relieved of his duties that day. The petitioner's grievance is that before the said Government notification removing him from his office was handed over to him, neither any charge-sheet was served upon him nor any enquiry was made, nor any explanation was called for from him, nor any opportunity of showing cause against the proposal to remove him from his office was given to him; that he did not know at all of any intention or proposal to remove him from the office. The petitioner's contentions are that he was holding a civil post under the State of Punjab, that the provisions of Clause (2) of Article 311 of the Constitution have been contravened by Government, that the action of Government is illegal, 'mala fide, ultra vires' and not warranted by law or procedure and is against the express and mandatory provisions of the Constitution which require that he should be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

24. The petitioner in his petition states what he thinks were the reasons for the Government

taking action against him and he says that there was nothing in those reasons.

25. The petitioner states further in his petition that the Government asked the Municipal Committee, Ambala City, to appoint a new Executive Officer in his place, but that no Executive Officer has been appointed so far. He has put in this petition in this Court as there was no other effectual remedy available to him except to ask for writs of 'certiorari' and prohibition or other orders under Article 226 of the Constitution. His prayer is that a writ of 'certiorari' or order should be made cancelling the order of the Government of the 4th December, 1950, and a writ of prohibition should be issued against the Government and Municipal Committee, Ambala City, restraining them from appointing any other person as Executive Officer, Municipal Committee, Ambala City. The petitioner also prayed that he should not be removed from the office of the Executive Officer before the expire of the contracted period of five years.

26. When this application came up for hearing in this Court the learned Chief Justice ordered an 'ad interim' order to issue to the Municipal Committee not to make an appointment till the hearing in this Court.

27. We have heard Mr. D. R. Prem for the petitioner and the Advocate-General on behalf of the State. Mr. Kartar Singh Chhachi was also present on behalf of the Municipal Committee of Ambala City. The learned counsel for the petitioner argued that the petitioner was holding a civil post under the State although he was not a member of the Civil Services of the State. He argued that Municipal Committees come under Local Self-Government and Local Self-Government is one of the functions of the State and that the petitioner was appointed by the Government by its order of the 7th January, 1949, which order was issued by the Secretary to Government, East Punjab, Medical, Local Government and Industries Departments. The learned counsel referred to the letter of appointment which stated:

".....I am directed to say that/under the provisions of Sub-section (9) of Section 3 of/the Punjab Municipal (Executive Officer) Act, 1931, the Governor of East Punjab is pleased to appoint Shri Mangal Sain Marwahas Executive Officer of the Municipal Committee of Ambala City for a period of five years with effect from the date he assumed charge of his post..... ."

Sub-section (9) of Section 3 of the Punjab Municipal (Executive Officer) Act, 1931, reads :

"Whenever, an Executive Officer dies, resigns or is removed, the Committee shall, within three months of his death, resignation or removal, appoint another person to be Executive Officer in the manner provided in subsections (1) to (3), and if the Committee fails to appoint such a person within such period the Local Government may appoint such a person in the manner provided in subsection (4)."

There is a proviso to this sub-section which is not material. In Sub-section (1) of Section 3 it is enacted that the Committee shall by resolution to be passed, by not less than five-eighths of the total number of members constituting the Committee for the time being, appoint a person as Executive Officer within three months from the date of the notification issued under Sub-section (2) of Section 1, by which this Act is notified to be extended to any Municipality in the Punjab. Sub-section (2) of Section 3 deals with the cases when the five-eighths majority is not obtained and this sub-section provides for another meeting to be held for that purpose. In Sub-section (3) of Section 3, the five-eighths majority is insisted. Sub-section (4) of Section 3 enacts :

"If the Committee fails to appoint an Executive Officer within three months from the date of notification issued under Sub-section (2) of Section 1, the Local Government may appoint any person as Executive Officer of the Committee for a renewable period not exceeding five years on such rate of monthly pay not exceeding Rs. 1,500/- inclusive of all allowances as it may deem fit."

Sub-section (7) of Section 3 enacts :

"The Executive Officer may at any time be suspended or removed from office by the Local Government, and shall be so suspended or removed if at a meeting of the Committee convened to consider the question of his suspension or removal not less than five-eighths of the total number of members constituting the Committee for the time being vote in favour of his suspension or removal, and if the Executive Officer is suspended the Committee shall appoint some person with the approval of the Local Government to officiate as Executive Officer."

28. Mr. Prem's argument on reading the various sub-sections of Section 3 is that the Executive Officer is a creature of the State; he is appointed by the State; he is dismissed by the State and holds a post under the State. Such being the conditions of appointment of the Executive Officer it is contended that he is the holder of a civil post under the State and as such is protected by Article 311 of the Constitution. Mr. Prem referred to the case of S. D. Marathe, reported in 'AIR 1938 Bom 419 : ILR (1938) Bom 770', in which the point to be determined by the Court was whether the prosecution of Dr. Marathe, the accused in that case, was competent as the consent of the Governor of Bombay had not been obtained. The case had to be decided with reference to Section 270 of the Government of India Act, 1935, the relevant part of which section ran thus :

"No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as servant of the Crown in India or Burma before the relevant date (the relevant date being 1-4-1937), except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of . Burma, of the Governor-General in his discretion, and in the case of a person employed in. connection with the affairs of a province, of the Governor of that province in his discretion."

Dr. Marathe was member of the Bombay Sub-ordinate Medical Service. He was in charge of a dispensary at a place in the Bombay Presidency. It was held that Dr. Marathe was a servant of the Crown and that the act complained of was done or purported to be done in the execution of his duty as such servant. Regarding this case Mr. Justice Broomfield observed as follows:

"As I have mentioned Dr. Marathe was and is a member of the Bombay Subordinate Medical Service. It appears from the Civil Medical Code Bombay, that officers of this service are selected from the successful candidates at the final L. C. P. S. examination. The actual appointments are apparently made by the Surgeon General but certainly under the authority of Government. In the Government of India Act, there is no definition of the expression 'servant of the Crown'. According to the definition in the Penal Code, Ss. 13, 34 and 17, a servant of the Queen, which is the same as a servant of the Crown, includes all officers or servants continued, appointed or employed in India by or under the authority of the Government of India or any Government. That is in accordance with the theory of the constitution and we may fairly assume that the words 'servant of the Crown' in Section 270, Government of India Act, have the same meaning unless there is something in the provisions of that Act which suggests a different meaning."

29. Mr. Prem seeks to apply this ruling to the facts of the present case. But the facts are entirely different. In the Bombay case Dr. Marathe was a member of the Bombay Medical Service and being a member of that service was a servant of the Crown. Here in the present case, Mr. Mangal Sain Marwah is not a servant of the State. He is a servant of the Municipality. The fact that Government has a hand in his appointment or in his dismissal does not make him a servant of the State. In Volume 22 of Halsbury's Laws of England it is stated at page 112 :

"A person may be the servant of another although a third party has the power of appointing or dismissing him or of requiring his dismissal, or has powers of direction and control in regard to his work, or pays him his wages."

In this case it is the Municipality of Ambala City which remunerates the Executive Officer. It is the Committee who appoints him. Only in case where the five-eighths majority cannot be secured for the appointment of the Executive Officer the Government steps in and the Government appoints him. In this case also the Committee dismissed him. It is only when the five-eighths majority is not available that the Government steps in for the dismissal of the Executive Officer. In my opinion he is a servant of the Municipal Committee and holds his office under the Municipal Committee and does not hold a civil post under the State.

30. Mr. Prem's argument was that under Article 311 of the Constitution a man may not be a member of the Service of the State and yet he may hold civil post under the State and that the Executive Officer is a special officer of the State appointed for the purpose of seeing that a

Municipal Committee functions properly. I am not prepared to accept Mr. Prem's argument. Article 311 occurs in Part XIV of the Constitution. Article 308 mentions that in this part, unless the context otherwise requires, the expression "State" means a State specified in Part A or Part B of the First Schedule. The learned Advocate-General drew our attention to Article 12 of the Constitution which occurs in Part III. Article 12 states that in this Part, that is in Part III, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. The object of the learned Advocate-General in referring to Article 12 was to show that wherever the Constitution-makers intended the word "State" to include "local authorities" they stated so as they did in Article 12, while in Article 308 "local authority" is not included. Reference may also be made to Article 321 which also occurs in Part XIV. Before I deal with Article 321, I must refer to Article 320. The first clause of Article 320 reads thus :

"It shall be the duty of the Union and the State Public Service Commission to conduct examinations for appointments to the services of the Union and the services of the State respectively."

Article 321 says :

"An Act made by Parliament or, as the case may be, the Legislature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution."

It is obvious from a comparison of Articles 320 and 321 that the Public Service Commission deals with appointments to services of the Union or the State only and not with appointments to services of any local authority or other body corporate constituted by law or of any public institution. The functions of the Public Service Commission can be extended and they may be asked to deal with services of local bodies, etc., but normally they deal with the services of the Union or the State. If in Article 311 it was intended to give members of the civil services of a local authority or persons holding posts under the local authority the same protection as was given to members of the Civil Services of the Union or of the State or to holders of civil posts under the Union or State, the framers of the Constitution would have said so. But they did not. The omission is significant and I must therefore hold that members of the civil services of a local authority or persons holding posts under a local authority have not the same rights and privileges as are given to the persons mentioned in Article 311 of the Constitution.

31. The grievance of Mr. Mangal Sain Marwah was that before he could be dismissed by the Government under Sub-section (7) of Section 3 of the Punjab Municipal (Executive Officer) Act,

1931, he should have been served with a charge-sheet and inquiry should have been made and an explanation called for from him or an opportunity should have been given to him of showing cause against his removal. That means to say that he was claiming the privileges which are given to members of services or holding of posts mentioned in Article 311 of the Constitution. But if this Article does not apply to him, then his grievance disappears. Under Sub-section (7) of Section 3 of the Punjab Municipal (Executive Officer) Act, 1931, the Executive Officer may at any time be suspended or removed from office by Government. Government has no option but to suspend or remove him if the Committee by a majority of five-eighths vote in favour of his suspension or removal. In other cases Government is the judge as to whether circumstances exist justifying his suspension or removal. The statute lays down no conditions to be fulfilled before Government decides to suspend or remove a person from his office. Government may adopt any procedure it likes when suspending or removing him. The action of Government is purely executive and in such a case no writ of 'certiorari' or prohibition will issue against Government. No ground has been made out for the issue of any other mandatory order against Government or against the Municipal Committee in this case.

32. In view of the foregoing opinion it is not necessary to deal with the other arguments in this case. I would, however, like to mention that had I come to the conclusion that Article 311 covers the case of the petitioner I would have directed that before the petitioner is suspended or removed the procedure laid down in the Article be followed. The learned Advocate-General submitted that a suit provided an adequate remedy to the petitioner. But as laid down in '*Municipal Corporation, Bombay v. Govind Laxman*²', a suit should have given the petitioner an equally efficacious remedy. In the present case a suit could not have done so.

33. For the reasons given above the petition fails and is dismissed. The petitioner will pay the costs of Government and of the Municipal Committee.

Cases Referred.

1 (1851) 10 CB 534

2 AIR 1949 Bom 229