

Dargahi Lal Nigam vs Cawnpore Municipal Board on 4 January, 1952

Equivalent citations: AIR1952ALL385, AIR 1952 ALLAHABAD 385

JUDGMENT

Mushtaq Ahmad, J.

1. This is a plaintiff's application in revision against a decree of a Small Cause Court Judge, dismissing his suit for recovery of arrears of pay and certain other amounts. The applicant was in the employ of the Municipal Board, Kanpur at a monthly salary of Es. 50, in charge of looking after the Board's cases in various Courts. He was suspended from service on 2-9-1941 and, later on, prosecuted in two cases for misappropriation of funds. In one he was acquitted on the 4th January, and in the other discharged on 1-2-1943. He was then re-instated on 7-3-1943; but departmental proceedings being taken against him, he was dismissed from service on 22-18 1948. When re-instated, he was not paid the remaining 3/4ths of his salary for the period of his suspension, 3-9-1941 to 7-3 1943, only 1/4th being paid to him during the interval as a subsistence allowance. He served a notice on the Board on 21-10 1944, asking for the arrears of his pay at the rate of Es. 37-8-0 per month, some dearness allowance and the Board's contribution to his Provident Fund Account of the said period. This being refused, he filed the suit on 22-12 1944.

2. Among other defenses, the Board resisted the claim by a plea of limitation which was accepted by the Court below, and, in the result, the suit was dismissed. This is the only point to be decided in this revision.

3. The answer to the question whether or not the suit was time-barred depends on whether it was governed by Section 326, D. P. Municipalities Act (II [2] of 1916), providing a six months' rule of limitation, or by the relevant provisions of the Indian Limitation Act, providing a three years' period. The former section, omitting unnecessary words, lays down :

"No suit against a Board in respect of an act done or purporting to have been done in its official capacity shall be commenced otherwise than within six months next after the accrual of the cause of action."

4. One of the questions before the Court below was whether the cause of action had arisen on 7.3.1943, when the applicant was re-instated or on the date when his demand for payment of the arrears of salary was refused. There is no difficulty in answering this question, as it must be taken that the cause of action had really arisen on the earlier date. The real question is whether the suit should have been brought within six months of the accrual of the cause of action, as required by Section 326, Municipalities Act, or whether it could be filed within the larger period allowed by the

Limitation Act. On this, I find a considerable divergence of opinion in this Court, and it is necessary that the matter be finally determined by a larger Bench.

5. Before I set out the various rulings to indicate the conflict, I may just mention that there is a material difference between the language of Section 73, Municipalities Act XV [15] of 1873 and that of Section 326 of the present Municipalities Act; while the former provided for a suit in respect of any act done or purporting to have been done "in pursuance of the Act," the latter refers, as I have already said, to a suit against a Municipal Board in respect of an act done or purporting to have been done "in its official capacity." Section 273, Cantonments Act II [2] of 1924 and Section 192, U. P. District Boards Act X [10] of 1922 also have the words, shown by me within inverted commas, of Section 73, Municipalities Act XV [15] of 1873 but not Section 326 of the present Municipalities Act. In various cases decided by the Courts in this country, a question arose whether a claim based on a contract entered into by a Board could be said to be one in respect of an act done by it in pursuance of a particular Act, the Municipalities Act, the Cantonments Act, or the District Boards Act, and the consensus of opinion seems to be that it could not be so regarded. The words "in pursuance of the Act" having now been replaced by the words "done in its official capacity," the question arises whether a claim of the nature filed by the present applicant could be said to be one in respect of an act done or omitted to have been done by the opposite party in its official capacity. I would now indicate the conflict to which I have referred.

6. In the following cases, noted chronologically, it was held that the restricted period of limitation provided by the local Act did not apply, but that the suit was governed by the general law of limitation.

(1) District Local Board of Poona v. Vishnu Raghoba Wadherkar, A. I. R. (20) 1933 Bom. 164, (Bench): Suit for damages for breach of a building contract. Section 136, Bombay Local Boards Act, was held inapplicable.

(2) Municipal Board, Agra v. Ram Kishen, 1933 ALL. L. J. 1414 (Mukerji and Bennet JJ.) : Suit for money for work done on contract.

(3) Cantonment Board, Allahabad v. Hazarilal Gangaprasad, 1934 ALL. L. J. 805 (Sulaiman C. J.

and Mukerji J.) : Suit for recovery of value of goods supplied. Section 273 (1), Cantonments Act, held inapplicable.

(4) District Boards, Allahabad v. Bihari Lal, 1936 ALL L J. 1214 (Sulaiman C. J., Niamat Ullah and Bennet JJ.) : Suit for refund of a security deposits and for money for extra work done. Section 192 (1), District Boards Act, held inapplicable.

(5) Ram Narain v. Municipal Board, Muttra, 1938 ALL. L. J 894, (Harries and Misra JJ.): Suit for work done under a contract.

(6) Jagan Nath v. Municipal Board, Soron, 1939 ALL. L. J. 168 .(Bennet and Verma JJ): Suit for declaration that certain bye-laws are illegal.

(7) Municipal Borough of Ahmadabad v. Jayanti Lal Chhotalal Patel, A.I.R. (85) 1948 Bom. 98 : (I L. R. 1947 Bom. 841) (Full Bench): An act done by a Municipal Board under a contract is not "in pursuance of the Act."

7a. In some of the above cases, for instance in the last but one Jagan Nath v. Municipal Board, Soron, 1939 ALL L. J. 168, it was emphasised that the word 'act' in Section 326, U. P. Municipalities Act, referred only to a "tortious" act and not to one based on or done in respect of a contract.

8. A contrary view was taken in the following cases also chronologically noted namely that Section 326, U. P. Municipalities Act, and not the general law in the Limitation Act applied.

(1) Abdul Waheed v. Municipal Board, Allahabad, 21 ALL L J 161 (Meara C. J. and Banerji J.) : The suit was for money for work done on contract.

(2) Banwari Lal v. Municipal Board, Kanpur, 23 ALL. L. J 23 (Daniels J.) : The suit was for arrears of pay. The learned Judge followed the last case.

(3) Municipal Board, Lucknow v. Debi Das, 1 Luck. 444 : A case of contract.

(4) Jaggan Nath v. Municipal Board, Allahabad, 35 ALL L J. 1038 (Mukerji and Sen JJ: A suit for refund of octroi duty.

(5) Munir Khan v. Municipal Board, Allahabad, 1930 ALL L J. 461 Niamat Ullah and Sen JJ.)--A suit for money for work done.

(6) Municipal Board, Lucknow v. S.G. Deb, 8 Luck. 1:--A case of contract.

7. Revati Mohan v. Jatindra Mohan (A. I. R. (21) 1934 P. C. 96):--A case under Section 80, Criminal P. C. in which also, as in Section 326, U. P. Municipalities Act, the words "in respect of any act purporting to be done by such public officer in his official capacity" occur.

8. Municipal Board Lucknow v. Aziz Husain, A. I. R. 35) 1948 Oudh. 282:--A case of contract of service.

9. If it were not for a parenthetical remark in the judgment of the Judicial Committee in the last but one case, it would perhaps have been admissible to hold that the weight of authority, as above set out, was in favour of the view that Section 826, U. P. Municipalities Act prescribing a shorter period of limitation did not apply to claims based on contracts but was confined only to claims arising out of 'tortious' acts of a Municipal Board. In that case, the trial Court had held that Section 80, Criminal P. C., had no application to suits in contract, but Sir George Lowndes, delivering the judgment of the Committee, remarked that: "This dictum was rightly repelled by Mukerji J."

If the words "act done in an official capacity" in Section 80, Criminal P. C. did cover "suits in contract", they in Section 326; U. P. Municipalities Act, would also, by parity of reasoning, cover such suits, and if this is so, the view taken in the cases of the first list given by me was wrong and that taken in those of the second was right.

9a. Two anachronisms, however, present themselves, to my mind, which call for an authoritative solution. One is that the last four cases of the first list were decided after the Privy Council case, but in none of them the remark quoted by me from its judgment appears to have been invoked in aid of the view that the shorter period of limitation applied also to suits based on contract. The other is that Mukerji J., was a party to each of the decisions, *Jaggan Nath v. Municipal Board Allahabad*, 25 ALL. L. J. 1038, of the second and *Municipal Board, Agra v. Ram Kishen*, 1933 ALL. L. J. 1414, of the first list, noted by me, and similarly *Niamat Ullah J.*, was a party to each of the decisions, *Munir Khan v. Municipal Board, Allahabad*, 1930 ALL. L. J. 461 and *District Boards, Allahabad v. Biharilal*, 1935 ALL. L. J. 1214 of the said lists respectively.

10. In this state of the case-law bearing on the point, it is not possible for this Bench to decide the present case without dissenting from the cases, either of the first or of the second Category, and I would, therefore, refer it to the Hon'ble the Chief Justice for constituting a Full Bench for a decision of the following question:

Whether the suit in the present case was governed by Section 326, U. P. Municipalities Act or by the Indian Limitation Act?

Desai, J

11. If the applicant's case is governed by the ordinary law contained in the Limitation Act. His suit would be within time even when the period of limitation is computed from 7-3-1943 or 1-4-1943. But if it is governed by the six months rule of limitation contained in Sub-Section (3) of Section 326 of the Municipalities Act, it would admittedly be barred by time when the period is computed from 7-3-1943 or 1-4-1943. It is true that the applicant's suit is based on a contract of service. He is entitled to whatever is due to him under the contract of service. But the words of Section 326 (8) are wide enough to cover every cause of action regardless of its nature. There are no words in the sub-section to suggest that it applies only to a suit based on a tortious act. There is nothing to qualify the word "suit" in Sub-section (1) except the words "in respect of an act done... official capacity". If a suit based on contract is "in respect of an act done...official capacity", it is a suit fully covered by the provisions of Sub-sections (1) and (3). If what is done or what is not done by a Board does not amount to "an act done", let the Court not apply the provision of Sub-section (3) to the case. If what a Board has or has not, done is not done in its official capacity let the Court again not apply the provision to the case. But if what a Board has, or has not, done is "an act done...official capacity", then I do not know what justification there can be for refusing to apply the provision except that the Court wants to repeal it to say that a suit against a Board for "an act done...official capacity" must be based on tort and not contract is to read words which do not find place in the section--clearly a matter beyond a Court's power. Viscount Sumner stated in *Bhagchand v. Secy. of State*, 25 ALL. L. J. 641 (P. G.) at p. 654 :

"Section 80 is express, explicit and mandatory and it admits of no implications or exceptions. A suit in which inter alia an injunction is prayed is still 'a suit' within the words of the section, then to read any qualification into it is an encroachment on the function of legislation,"

What his Lordship said about Section 80, Civil P. C. can be said with equal force about Section 326, Municipalities Act.

12. Section 326 has been applied by this Court in cases of contract, not only of service but also of supply of goods or to carry out works, *Abdul Wahid v. Municipal Board*, 21 ALL. L. J. 161, was a case of a contract to carry out certain work entered into by Abdul Wahid with a Municipal Board. His suit to recover the price of the work done was held governed by Section 826. In *Banwari Lal v. Municipal Board, Cownpore*, 23 ALL L. J. 23, he sued to recover the arrears of his salary, but did not even pretend that the suit was not governed by Section 826. In *Revati Mohan Das v. Jatindra Mohan Ghosh*, 1934 ALL. L. J. 406 P. C. the Judicial Committee had to deal with Section 80, Civil P. C. which requires a notice of a suit to be instituted in respect of an act purporting to be done by such public officer in his official capacity." Sir George Lowndes, delivering the judgment of the Judicial Committee, observed at p. 408 :

"The learned Subordinate Judge held that the section had no application to suits in contract and this dictum was rightly repelled by Mukerji J., who delivered the judgment of the High Court. Having regard to the decision of this Board in *Bhagchand v Secy. of State*, 51 Ind. App. 338, their Lordships think that no such distinction is possible...Their Lordships do not suggest that a claim based upon a breach of contract by a public officer may not in many cases be sufficient to entitle him to notice under the section."

The Chief Court of Lucknow had consistently applied Section 326 to all cases of contract: see *Municipal Board v. Debi Das*, 1 Luck. 444 *Municipal Board, Lucknow v. S.C. Deb*, 8 Luck. 1 and *Municipal Board v. Aziz Husain*, 1948 Oudh W. N. 1. The first two were cases of contract for the supply of goods, and the third was a case of contract of service.

13. The view that Section 326 applies to a suit based on tort and not on contract seems to be a legacy of the old days when the corresponding provision in the Municipal Act contained the words "for anything done or purporting to be done in pursuance of the Act." It was then held that a breach of a contract entered into by a Board was not an act "done or purporting to have been done in pursuance of the Act." Even if a Board is permitted by the Act to enter into contracts, it may not be said that it entered into a particular contract "in pursuance of the Act." Even if it is possible to say this, when it omits to do an act by committing a breach of its obligation under the contract it is not possible to say that it committed the act of omission "in pursuance of the Act." It was pointed out in *Sharplington v. Fulham Guardians*, (1904) 2 oh. 449, that although the general duty of a Board makes it intra vires to do so, there is no duty to enter into a particular contract and that the mere fact that a contract was within the power of the Board does not render the breach of it anything more than a breach of the private duty to the individual contractor arising out of the terms of the contract. The act may require

certain duties to be performed by a Board, but does not insist upon those duties being performed through a contractor. The making of a contract by a Board cannot be said to be in pursuance of the Act, though it is certainly within its power. So when a person sued a Cantonment Board for the price of goods supplied to it, his suit was held to be not governed by Section 273 of the Cantonments Act which uses the words "any act done or purporting to have been done in pursuance of this Act;" see Cantonment Board v. Hazari Lal Ganga Prasad, 1934 ALL. L. J. 805.

Bennet and Mukerjee JJ, have discussed the meaning of "any thing done or purporting to have been done in pursuance of the Act" in Municipal Board v. Ram Kishen, 1933 ALL. L. J 1414 The words were recently interpreted by a Full Bench of the High Court of Bombay in the Municipal Borough of Ahmedabad v. Jayantilal Chhotalal, I. L. R. (1947) Bom. 841. The Municipal Board of Ahmadabad entered into a contract with Jayantilal for the purpose of street cleaning and Jayantilal gave a deposit later, disputes arose between the parties and the Board forfeited the deposit. Jayantilal sued for its recovery more than eight months after the Board's act but within three years. The suit was held by the Full Bench to be within time according to the ordinary rule of limitation. The Full Bench observed that it was no part of the Board's duty to enter into any contract. With respect to the learned Judges I consider that those cases were correctly decided. But the words that we have to construe are not "an act done or purporting to have been done in pursuance of the Act," but "an act done . . . official capacity." Though the learned Judges were inclined to take the contrary view in the Municipal Board, Agra v. Ram Kishen, I am strongly inclined to the view that there is a material difference between the two sets of words. Sulaiman C. J. stressed the difference between the two sets of words in Cantonment Board, Allahabad v. Hazari Lal Ganga Prasad, and did not consider the decisions interpreting the words of Section 326, Municipalities Act as directly in point when interpreting the words of the Cantonments Act. In the Municipal Act of 1873 which was in force in U. P. in old days the words were 'in pursuance of the Act.' The Legislature has thought fit to give up those words and use other words in the present Act. This itself shows that there is a difference between the two sets of words, and that the meaning that is given to one set cannot always be given to the other set.

14. The view of the Bench in the Case of Municipal Board Agra (1933 ALL. L. J. 1414), that Section 326 does not contemplate a suit based on contract, requires, in my opinion, reconsideration. The view is not based on any interpretation of the words used in the section. The intention behind the Legislature's changing the language of Section 326 may not be to bring a case based on contract under the section but if such a case does come, it is not open to a Court to ignore the language of the section on the ground of the supposed intention of the Legislature. Section 192 of the District Boards Act which contains the same words as 326, Municipalities Act, was considered by a Full Bench of this Court in District Board Allahabad v. Behari Lal, 1935 ALL. L. J. 1214. Sulaiman C. J., with whom the other Judges agreed, based his decision upon Revati Mohan v. Jatindra Mohan, A I. R. (21) 1934 P C. 96 and yet decided that a claim brought by the other contracting party to recover the money due to him on 'a private contract' with the Board would not be governed by Section 192, District; Boards Act.

I confess my inability to find anything in Revati Mohan Das's case to support this decision. Sulaiman C J. also thought it difficult to hold that a mere omission to perform a private contract amounts to

an "act" within the meaning of Section 192, District Boards Act. I am prepared to hold that there is distinction between a private contract entered into by a Board and another kind of contract entered into by it, but I should not be understood to lay down that Section 326, Municipalities Act recognises any distinction between a private contract and any other kind of contract any more than that between a suit based on contract and a suit based on tort. We are not called upon to decide whether the District Board Allahabad v. Behari Lal, was correctly decided or not; it is sufficient for our purpose to distinguish that case. A contract for the purchase of moram entered into by a Board, as was the contract in that case cannot be likened to a contract for service entered into by a Board under its statutory powers. I do not know what exactly is meant by "a private contract" but if it means a contract which a Board enters into for the better performance of its duties and not in compliance with a statutory requirement, a contract of servios entered into by a Board in compliance with a statutory requirement cannot be said to be "a private contract". Section 71 of the Municipalities Act authorises a Board to determine what servants are required by a Board for performance of its duties. Rules 85 to 88 of the Municipal Account Code deal with salary bills and payment of salaries. It is the duty of the Board itself to draw the salaries of the Municipal Establishment. Rule 87 states that:

"When the pay-bill has been drawn the money shall be promptly disbursed to the payees concerned and their receipts taken on the last column of the bill."

The Board was required by Section 71 to enter into a contract of service with the applicant and was bound, in the discharge of its official duties, to pay his salary. I do not think such a contract can be said to be "a private contract" whatever the words mean.

15. All that we have to see in order to apply Section 326, Municipalities Act, to the present case is whether the applicant's suit was one "in respect of an act done . . . official capacity". The act of which the applicant has complained is that of withholding three-fourths of his pay for the period of suspension. According to the applicant the Board was bound to pay him this money when it reinstated him but it did not pay it. The word "act" includes illegal omission when used with reference to a civil wrong; see U. P. General Clauses Act. Wrongful non-payment of a salary is a civil wrong. In Revati Mohan Das's case, A. I R. (21) 1934 P. C. 96, the question was of omission by a Manager of Court of Wards to pay the money due on a mortgage executed by him. Their Lordships held that the non-payment did not amount to illegal omission and also that the omission could not be said to be an act purporting to be done by the Manager in his official capacity. The omission could not be said to be illegal because the mortgage imposed no personal liability upon the Manager, the mortgagee's remedy in the event of non-payment was to realise his dues by sale through the Court, and the Manager had an option to pay in order to avert the sale but was under no duty to pay. A Board which engages servants under its statutory powers is under a duty to pay their salaries Its liability in this respect is not similar to that of a mortgagor to pay his mortgagee. The omission to pay the money due under a mortgage may not be an illegal omission, but the omission to pay the salary of a servant is an illegal omission. In the Lucknow cases to which we have referred, the omission to pay the money due under any con. tract was held to be 'an act,' within the meaning of 8. 336. In District Board Allahabad v. Behari Lal (1935 ALL. L. J. 1214), Sulaiman C. J. felt difficulty in holding that the word "act" includes all cases of omission to perform a private contract because

"damages for breach of contract are based on contractual liability, whereas the claims based on tort are based on wrongful action of defendant and an infringement of the plaintiffs right."

The learned Chief Justice treated the contract there as a private contract, whereas the contract here is not a private contract. Further, the liability of the Board to pay its servants is recognised by the Municipal Account Code referred to above. So the liability of the Board is more than a liability under a private contract. In *Jagannath v. Municipal Board Soron*, 1933 ALL. L. J. 168 and *Commissioner of Buxar Municipality v. Bhagwan Das*, A. I. R. (37) 1950 Pat. 8, the word "act" was held to refer to tortious acts are not to acts arising out at a contractual or quasi contractual basis. In the former case the cause of action was found to be a recurring one and in that view of the matter it was immaterial whether the act complained of was a tortious act or not; the suit was not barred by time even if Section 326 applied. In *Abdul Wahid's case* (21 ALL. L. J, 161), *Grimwood Mears C. J.*, said at p. 162:

"The refusal by the Board was determination by a certain gentleman sitting as a Board in a matter which concerned the finances of the Board which concerned the proper carrying out of the duties of the Board and cannot be otherwise described than as an 'official act'."

So in the present case also the withholding of the balance of the applicant's salary was an official act.

16. The applicant's suit seems to be covered by the words of Section 326 and barred by time. But I agree with my brother *Mustaq Ahmad J.* that an authoritative decision is called for and concur in the order proposed.

17. By the Court--Let the case be placed before the Hon'ble the Chief Justice for being referred to a larger Bench.

[On return of the answer from the Full Bench, which is reported at p. 882 the Court delivered the following judgment.] *Mushtaq Ahmad, J.*

18. The facts of this case were stated by us in our orders referring the case to a Full Bench for a decision of the question of limitation raised by the defendant opposite-party. The answer received is that the shorter period of limitation provided by Section 326 U. P. Municipalities Act (II [2] of 1916) and not any other rule applies. That being so, the suit should have been brought within six months of the date of the accrual of the cause of action. If it is found to have been brought after that period from such a date, it must be held to be barred by limitation.

19. The question about the date on which the cause of action had actually arisen was not referred to the Full Bench, presumably because there appears to have been no contest between the parties on that question before. Learned counsel for the plaintiff-applicant has now contended that, even if the shorter period of limitation provided by Section 826, Municipalities Act, applied, the claim was within time, inasmuch as the cause of action had accrued within six months from the date of the suit. He treats as the date of the accrual of the cause of action the 23rd June 1944, when the

plaintiff's demand for payment of his unpaid salary was alleged to have been refused by the opposite parts. In our separate orders making a reference to the Full Bench we remarked that the only question in controversy between the parties was with regard to the precise rule of limitation applicable to the case. We even said that the cause of action in this case had obviously arisen either on the dates on which the applicant had been acquitted and discharged respectively in the two cases or on the subsequent date of 7th March 1948 when he had been restated in service. That meant that the suit had been filed obviously more than six months from the date of the accrual of the cause of action and was thus time barred. In deference to the argument of the learned counsel for the applicant to day that the cause of action had really arisen on 23rd June 1944, when the opposite party refused to pay the arrears of salary to the plaintiff, we have gone into the question again but reached the same conclusion, namely that it had arisen much earlier on all or any one of the three dates we have already mentioned. Learned counsel has cited to us the case of Gopal Das v. Jugal Kishore, A I. R (30) 1943 Oudh 378 in support of the contention that the causes of action in a case like this always begins on the date of the defendant's refusal to pay and not on any other date. That was a case in which the relief was for damages by a dismissed police Sub Inspector. There was no claim for arrears of salary at all. This, in our opinion, distinguishes that case and does not affect the view which we are inclined to take. In any case that decision is no authority for the proposition that a demand and a refusal to comply with it form parts of the cause of action on which the claim for money can be laid.

20. A simple approach to the determination of the question is furnished by the consideration that, if after his acquittal in one date on 4th January 1949 and discharge in the other on 1st February 1943 or even after his re-instatement on 7th March 1943, the plaintiff had brought the present suit within six months the suit surely could not have been held as without any cause of action. We put it to the learned counsel for the applicant, but he was not prepared to suggest that such a suit could have been successfully defended on the score of want of a cause of action. If there was a cause of action for a suit brought within such a period, surely there was some rule of limitation also running against the plaintiff who had to bring the suit before the prescribed period expired.

21 In every view of the matter, we are of the opinion that the cause of action in this case had arisen much earlier than 23rd June 1944 when the plaintiff's demand was refused by the defendant and that the suit was filed more than six months from the date on which it had accrued. The rule of limitation applicable to this case having now been held by the Full Bench to be as provided by Section 326, Municipalities Act, the claim must be held to be time barred. We, therefore, hold that this appeal cannot succeed and dismiss it. In view of the circumstances of the case, we direct the costs in this Court to be borne by the parties themselves.