1958

August 19.

SITA RAM GOEL

v.

THE MUNICIPAL BOARD, KANPUR AND OTHERS

(S. R. DAS C. J., BHAGWATI, S. K. DAS, J. L. KAPUR and SUBBA RAO JJ.)

Limitation—Dismissal of employee by Municipal Board—Rejection of appeal to Government—Suit against order of dismissal after disposal of appeal—Period of limitation—U. P. Municipalities Act, 1916 (U. P. 2 of 1916), ss. 58, 69, 326.

The appellant was appointed as overseer by the Municipal Board, Kanpur, on March 5, 1937, and continued in its service up to March 19, 1951, when a copy of the resolution passed by the Board on March 5, 1951, purporting to dismiss him from service was handed over to him. On April 7, 1951, he filed an appeal to the Government against the order of dismissal from service, but he was informed on April 8, 1952, that his appeal was rejected. Thereafter on December 8, 1952, the appellant instituted a suit challenging the legality of the order of dismissal on various grounds, and the question arose whether the suit was within time. Sub-section (1) of s. 326 of the U. P. Municipalities Act, 1916, provided that no suit shall be instituted against a Municipal Board "until the expiration of the two months next after notice in writing has been left at the office of the Board... explicitly stating the cause of action"; and sub-s. (3) stated that "no action such as is described in sub-s. (1) shall...be commenced otherwise than within six months next after the accrual of the cause of action". The appellant contended that the cause of action accrued to him on April 8, 1952, when the order of dismissal of his appeal to the Government was communicated to him and the suit, filed within eight months of that date, was within time, and relied on the provisions of s. 58 (1) and (2), read with s. 69, of the Act, which gave an officer dismissed by the Board a right of appeal to the Government within 30 days of the communication to him of the order dismissal:

Held, that though the order passed by the Board on March 5, 1951, was subject to a right of appeal to the Government, the operation of the order was not suspended by the mere filing of the appeal, and the order became effective from March 19, 1951, when it was communicated to the appellant. The cause of action, therefore, accrued to him on that date, and the suit filed by him on December 8, 1952, was barred by limitation under s. 326 of the U. P. Municipalities Act, 1916.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 149 of 1958.

Appeal by special leave from the judgment and order dated September 2, 1957, of the Allahabad High Court in First Appeal No. 474 of 1956, arising out of the judgment and order dated July 30, 1956, of the First Additional Civil Judge, Kanpur, in Civil Suit No. 257 of 1953.

Appellant in person.

C. B. Gupta, G. C. Mathur and *C. P. Lal*, for respondent No. 1.

G. C. Mathur and *C. P. Lal*, for respondent No. 4.

1958. August 19. The Judgment of the Court was delivered by

BHAGWATI J.—This appeal with special leave under Art. 136 of the Constitution raises an interesting question of limitation. *Bhagwati J.*

The appellant was appointed an Overseer by the Municipal Board, Kanpur, on March 5, 1937, with the approval of the Superintending Engineer, Public Health Department, Lucknow. He was confirmed by the Board's special resolution dated July 2, 1938, and continued in employ up to March 19, 1951, when a copy of the resolution No. 1723 passed by the Board on March 5, 1951, purporting to dismiss him from employ was handed over to him. Against the said resolution dated March 5, 1951, the appellant filed an appeal to the Uttar Pradesh Government on April 7, 1951, but was informed by a G. O. dated April 7, 1952, that his appeal had been rejected. This information was received by him on April 8, 1952. Thereafter on December 8, 1952, the appellant filed the suit out of which the present appeal arises, being Suit No. 257 of 1953 in the Court of the Additional Civil Judge, Kanpur, impleading the Municipal Board, Kanpur, Shri S. B. Gupta, Municipal Engineer, Shri Brahmanand Misra, the then Chairman of the Municipal Board and the Government of Uttar Pradesh as defendants and challenged the legality of the dismissal order passed against him on the ground that the previous approval of the Superintending Engineer, Public Health Department was not taken as required by the rules, that the

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appellant was denied an opportunity of being heard in person by the Board, that no show-cause notice for the proposed punishment of dismissal was issued to him by the Board nor were the charges framed by it, that the dismissal order did not specify the charges, that some of the grounds on which he was dismissed did not form the subject-matter of the charges at all, that in any case, the charges framed were false and malicious. The appellant prayed for a declaration that the order of his dismissal was ultra vires, illegal and void and claimed a total amount of Rs. 10,951 in respect of damages, allowances for doing officiating work, bonus, arrears of salary and provident fund.

The suit was contested mainly by the Board and its defence was to the effect that the order of dismissal was not vitiated on the grounds of illegality or irregularity and in any case the suit was barred by limitation.

The trial court found:—

(a) that the appellant's substantive appointment was that of an Overseer and not that of a Drainage Overseer as claimed and the approval of the Superintending Engineer, Public Health Department, Lucknow, for his dismissal was not necessary;

(b) that the order of dismissal of the appellant was ultra vires on the ground that he was not given an opportunity of being personally heard by the Board;

(c) that no notice to show cause against the proposed punishment was issued by the Board;

(d) that the order of dismissal was based on certain grounds which were not the subject-matter of the charge and that the Chairman of the Board was not competent to try the appellant; but

(e) that the suit of the appellant was barred by limitation. The trial court accordingly dismissed the suit with costs.

The appellant carried an appeal being First Appeal No. 474 of 1956 before the High Court of Judicature at Allahabad and contended that the suit filed by him against the Board was within limitation. The appellant relied upon the provisions of s. 326 of the U. P. Municipalities Act (U. P. II of 1916) (hereinafter

referred to as "the Act") and contended that the period of six months contemplated by sub-s. (3) of s. 326 plus the period of two months required for giving notice for filing the suit against the Board under sub-s.(1) of s. 326, that is, 8 months should be computed from April 8, 1952, on which date the order of the dismissal of his appeal by the U. P. Government was communicated to him and not from March 5, 1951, when the order of his dismissal by the Board was passed or March 19, 1951, when that order of dismissal was communicated to him by the Board.

The High Court was of opinion that the Resolution dated March 5, 1951, passed by the Board took effect immediately as it was an order which was complete and effective by itself and its operation was not postponed for any further period nor was its effect suspended until the State Government had passed orders in appeal. It accordingly came to the conclusion that the appellant's suit was barred by limitation under s. 326 of the Act. In view of the said finding the High Court did not go into any other questions at issue between the parties but dismissed the appeal with costs.

An application filed by the appellant for a certificate for leave to appeal to this Court proved infructuous, with the result that the appellant applied for and obtained from this Court special leave to appeal against this judgment of the High Court.

The only question that arises for our determination in this appeal is whether the appellant's suit was barred by limitation, because if that is determined against the appellant it will be conclusive of this appeal.

Section 326 of the Act runs as under:

"326(1) No suit shall be instituted against a Board, or against a member, officer or servant of a board in respect of an act done or purporting to have been done in its or his official capacity, until the expiration of the two months next after notice in writing has been, in the case of a Board, left at its office, and in the case of a member, officer or servant, delivered to him or left at his office or place of abode,

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explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed and the name and place of abode of the intending plaintiff and the plaint shall contain a statement that such notice has been so delivered or left.

.....

(3) No action such as is described in sub-section (1) shall, unless it is an action for the recovery of immoveable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action.

....."

Prima facie the period of six months provided in s. 326(3) above would commence to run after the accrual of the cause of action and the cause of action on which the appellant came before the Court was his wrongful dismissal from employ by the Board. Even the extension of this period by two months, the requisite period of the notice under s. 326(1) would not save the appellant from the bar of limitation because he instituted his suit more than eight months after the Resolution dated March 5, 1951, dismissing him from employ was communicated to him. The appellant, therefore, particularly relied upon the provisions of s. 58(1) and (2) of the Act and urged that the cause of action accrued to him on April 8, 1952, when the order of dismissal of his appeal by the U. P. Government was communicated to him and the suit which he had filed on December 8, 1952, was therefore within time.

Section 69 of the Act which applied to the appellant read as under:

"A board may, by special resolution, punish or dismiss any officer appointed under s. 68 subject to the conditions prescribed in s. 58 in respect of the punishment or dismissal of an Executive Officer," and

Section 58(1) and (2) provide:

"S. 58(1): A board may punish, dismiss or remove its Executive Officer by a special resolution supported by not less than 2/3rd members constituting the board, subject to his right of appeal to the State Government

within 30 days of the communication to him of the order of punishment or dismissal.

(2): The State Government may suspend the Executive Officer pending the decision of an appeal under sub-section (1) and may allow, disallow or vary the order of the Board."

It was argued by the appellant on the strength of these provisions that the special resolution passed by the Board was subject to his right of appeal to the State Government within 30 days of the communication thereof to him and in the event of his filing an appeal against the same within the period specified, the resolution was kept in abeyance and did not come into operation until the decision of the appeal by the State Government. If that was so, he contended, his wrongful dismissal by the Board became operative as from the date when the decision of the State Government was communicated to him and that was the date on which the cause of action in regard to his wrongful dismissal accrued to him, with the result that the suit filed by him within 8 months of such communication (including the period of 2 months' notice) was well within time. He also supported this position by relying upon the provisions of s. 58(2) which empowered the State Government to suspend an employee pending the decision of the appeal, contending that such power vested in the State Government posited that the order of dismissal even though validly passed in accordance with the conditions specified in s. 58(1) was not to become effective until such decision was reached, because only in such event the State Government would be in a position to pass an order of suspension pending the decision of the appeal. If the order of dismissal passed by the Board was to come into effect immediately on such special resolution being passed, there would be no meaning in the State Government being empowered to suspend the officer who had been already dismissed and the provision in that behalf would then be nugatory. It was, therefore, argued that such power vested in the State Government necessarily involved the consequence that the order of dismissal could not be operative by its

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own force but would continue in abeyance until the decision of the appeal, once an appeal was filed by the employee against the order within the period specified.

On a plain reading of the provisions of s. 58(1) and (2), we are of opinion that this contention of the appellant is not tenable. One condition of the validity of the order of dismissal made by the Board is that the special resolution in that behalf should be supported by not less than 2/3rd members constituting the Board. Once that condition is fulfilled there is nothing more to be done by the Board and the only right which then accrues to the officer thus dealt with by the Board is to appeal to the State Government within 30 days of the communication of that order to him. He may choose to exercise this right of appeal or without adopting that procedure he may straightaway challenge the validity of the resolution on any of the grounds available to him in law, *e.g.*, the non-observance of the principles of natural justice and the like. There is nothing in the provisions of s. 58(1) to prevent him from doing so and if without exercising this right of appeal which is given to him by the statute he filed a suit in the Civil Court to establish the ultra vires or the illegal character of such resolution it could not be urged that such a suit was premature, he not having exhausted the remedies given to him under the statute. The principle that the superior courts may not in their discretion issue the prerogative writs unless the applicant has exhausted all his remedies under the special Act does not apply to a suit. There is nothing in s. 58(1) which expressly or impliedly bars his right of suit. The provisions contained in s. 58(2) above would also not help him for the simple reason that the power which is vested in the State Government of suspending an employee pending the decision of the appeal can hardly be said to be a condition of the order of the Board. In any event, that power is given to the State Government for giving relief to the employee who has thus appealed, against the rigour of the order of dismissal passed by the Board against him. The employee may have been dismissed by the

Board, in which case on looking at the prima facie aspect of the matter the State Government may as well come to the conclusion that the operation of the order of dismissal may be stayed and he be suspended instead, thus entitling him to subsistence allowance during the pendency of the appeal. If the appeal is eventually dismissed the order of dismissal by the Board will stand; if the appeal is allowed he will be entitled to continue in the employ and enjoy all the benefits and privileges of such employment, but he would not have to starve during the period that the appeal was pending before the State Government. The provisions of s. 58(2) have to be read along with those of s. 58(1) and it cannot be urged that the power of suspension vested in the State Government is to be exercised in any other case except that of dismissal or removal of the employee by the Board. In the case of any other punishment an order of suspension passed by the State Government pending the decision of the appeal would only mean that during the pendency of the appeal the State Government is empowered to visit on him a higher punishment than what has been meted out to him already by the Board. Such an absurd position could never have been thought of by the legislature and the only way in which s. 58(1) can be read consistently with s. 58(2) is to construe this power of suspension vested in the State Government to apply only to those cases where a higher punishment than suspension has been meted out by Board to the employee. Section 58(2) merely prescribes the powers which the State Government may exercise in the matter of the appeal which has been filed by the employee against the order of the Board. The mere filing of an appeal has not the effect of holding the order of the Board in abeyance or postponing the effect thereof until the decision of the appeal. Such a construction would on the other hand involve that even though a special resolution was passed by the Board dismissing or removing the employee he would continue to function as such and draw his salary pending the decision of his appeal, once he filed an appeal to the State Government as prescribed. We do not see any words in

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s. 58(1) and (2) which would suspend the operation of the order passed by the Board or render it ineffective by reason of the filing or the pendency of the appeal.

As a matter of fact the legislature in s. 61(3) of the very same Act while dealing with the right of appeal from the orders of the executive officer has expressly provided for such a contingency and enacted that when an appeal was filed within the specified period the order would remain suspended until the appeal was decided. A comparison of the provisions of s. 58(1) and s. 61(3) of the Act is thus sufficient to show that no such consequence was intended by the legislature when it enacted s. 58(1) of the Act.

A similar provision enacted in the proviso to s. 71 of the U. P. District Boards Act (U. P. X of 1922) may also be referred to in this context. While dealing with the powers of dismissal or punishment of a Secretary or Superintendent of education by the Board the legislature enacted a proviso thereto that the Secretary or the Superintendent of education of a Board, as the case may be, shall have a right of appeal to the State Government against such resolution within one month from the date of the communication of the resolution to him, and that the resolution shall not take effect until the period of one month has expired or until the State Government has passed orders on any appeal preferred by him. The absence of any such provision in s. 58 of the Act also goes to show that no such consequence was intended by the legislature.

The enactment of s. 58(1) in the manner in which it has been done giving to the employee only a right of appeal to the State Government within 30 days of the communication to him of the order of the Board without anything more is enough to show that neither was the suspension of the order nor the postponement of the effect thereof as a result of the filing of an appeal ever in the contemplation of the legislature.

It may be noted in passing that the appellant relied upon a decision of the Allahabad High Court in *Dist. Board, Shahjahanpur* v. *Kailashi Nath* (1), which turned on the construction of s. 71 of the U.P. District

(1) A.I.R. 1948 All. 199.

Boards Act set out above in support of his contention. The provisions of that section, however, are quite distinct from those of s. 58(1) of the Act before us and this case was rightly distinguished by the High Court in the judgment appealed against inasmuch as by the express terms of s. 71 under consideration there, the dismissal was not to take effect until the period of one month had expired or until the State Government had passed orders on any appeal preferred by the employee. It is, therefore, clear that even though the order passed by the Board was subject to the right of appeal given to the employee in the manner aforesaid, the operation of the order was not suspended nor was its effect in any manner postponed till a later date by the mere filing of the appeal and it became effective from the date when it was communicated to the employee. The cause of action, if any, accrued to the employee on the date of such communication and the period of limitation commenced to run from that date.

If this is the true position on a plain construction of the provisions of s. 58(1) and (2) of the Act what is the other principle which the appellant can call to his aid in order to support his contention? He tried to equate the special resolution passed by the Board with a decree passed by a trial court and the decision of the appeal by the State Government with a decree passed by an appellate court and urged that in the same manner as a decree of the trial court became merged in the decree passed by the appellate court and no decree of the trial court thereafter survived, the decision of the appeal by the State Government replaced the special resolution passed by the Board and such decision if adverse to him gave him a cause of action and the period of limitation commenced to run against him only from the date of such decree. The argument was that even though the cause of action in respect of such wrongful dismissal arose on the date when the order of the Board was communicated to him, once an appeal was filed by him against that order within the period prescribed that cause of action was suspended and became merged in the cause of action which

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would accrue to him on the decision of his appeal by the State Government. The special resolution of the Board would then merge into the decision of the State Government on appeal and the only thing which then survived would be the decision of the State Government on which either there would be a resuscitation or revival of the cause of action which had accrued to him on the communication of the order of the Board or the accrual of a fresh cause of action which could be ventilated by him within the period of limitation commencing therefrom.

The initial difficulty in the way of the appellant, however, is that departmental enquiries even though they culminate in decisions on appeals or revision cannot be equated with proceedings before the regular courts of law. As was observed by this Court in *State of Uttar Pradesh* v. *Mohammad Nooh* (1):

".....an order of dismissal passed on a departmental enquiry by an officer in the department and an order passed by another officer next higher in rank dismissing an appeal therefrom and an order rejecting an application for revision by the head of the department can hardly be equated with any propriety with decrees made in a civil suit under the Code of Civil Procedure by the Court of first instance and the decree dismissing the appeal therefrom by an appeal court and the order dismissing the revision petition by a yet higher court,.....because the departmental tribunals of the first instance or on appeal or revision are not regular courts manned by persons trained in law although they may have the trappings of the courts of law."

The analogy of the decisions of the courts of law would therefore be hardly available to the appellant.

Our attention was drawn in this connection to cases arising under s. 144 of the Code of Civil Procedure which have held that the period of limitation is to be calculated from the date of the original decree which gave rise to the right of restitution and not from the date of the decision of the last appeal which was filed

(1) [1958] S.C.R. 595.

against it. Reliance was placed on the following observations of B. K. Mukherjea J. (as he then was) in *Bhabaranjan Das* v. *Nibaran Chandra* (1):

"The question therefore that really falls for determination is as to whether the time for such an application ought to be calculated from the date of the decision of the last appeal, or from the decree which for the first time gave the appellant a right to apply for restitution. It is conceded by the learned Advocate for the appellant that he had undoubtedly the right to pray for restitution at the time when the judgment was passed by the Munsif. His contention is that it was not necessary for him to apply at the first opportunity as there was an appeal taken against that decision of the trial judge and he could wait till the judgment of the Appellate Court was pronounced. After the Appellate Court had passed its decision the decree of the trial court would no longer be in existence and he would be entitled to base his rights to get restitution on the Appellate Court's decree. I find myself unable to accept this contention as tenable. If the right to apply for restitution was available to the appellant as soon as the first court passed its judgment, time would certainly begin to run from that date under Art. 181 and the mere fact that the judgment was challenged by way of an appeal which might eventually set it aside, does not, in my opinion, operate to suspend the running of time. Nor would the appellate court's decree into which the decree of the trial court would undoubtedly merge give the party a fresh starting point for limitation."

The analogy of the decree of the trial court merging into a decree of the appeal court clearly does not apply to these cases. The observations of Rankin C. J. in *Hari Mohan* v. *Parameshwar Shau* (2) are also in point. Said the learned Chief Justice at p. 78:—

"But the application to be made under s. 144 is an application which must be made to the Court of the first instance whether the decree varied or reversed was passed by that Court or a higher Court.

(1) A.I.R. 1939 Cal. 349, 351. (2) (1928) I.L.R. 56 Cal. 61, 78.

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That Court has to determine whether the applicant is entitled to any and what benefits, by way of restitution or otherwise, by reason of the decree of the appellate court varying or reversing a previous decree. We have to determine, this case, under Art. 181, of the Limitation Act, which directs us, in general language, to find out the date on which the applicant's right accrued. In the ordinary and natural meaning of the words, their right accrued immediately the District Judge reversed the decision of the trial court, and reduced the amount of the plaintiff's claim. Unless, therefore, we are required by reason of the nature of the matter to ignore the effect of that decision, because it was confirmed on appeal, it seems to me to be wrong to do so. To refuse so to do does not involve the proposition that two decrees for the same thing may be executed simultaneously. Nor does it involve, so far as I can see, the affirmance of any other proposition that can be regarded as inconvenient or absurd."

Further, when even if the analogy applies, where the decree of the appeal court only affirms the decree of the trial court, this Court has held in the *State of U. P.* v. *Mohd. Nooh* (1), that the original decree of the trial court remains operative. This Court has said at p. 611:—

"In the next place, while it is true that a decree of a court of first instance may be said to merge in the decree passed on appeal therefrom or even in the order passed in revision, it does so only for certain purposes, namely, for the purposes of computing the period of limitation for execution of the decree as in *Batuk Nath* v. *Munni Dei* (2), or for computing the period of limitation for an application for final decree in a mortgage suit as in *Jowad Hussain* v. *Gendan Singh* (3). But as pointed by Sir Lawrence Jenkins in delivering the judgment of the Privy Council in *Juscurn Boid* v. *Pirthichand Lal* (4), whatever be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended

(1) [1958] S.C.R. 595.
(2) 41 I.A. 104.
(3) 53 I.A. 197.
(4) 46 I.A. 52.

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by the presentation of an appeal nor is its operation interrupted where the decree on appeal is merely one of dismissal. There is nothing in the Indian law to warrant the suggestion that the decree or order of the court or tribunal of the first instance becomes final only on the termination of all proceedings by way of appeal or revision. The filing of the appeal or revision may put the decree or order in jeopardy but until it is reversed or modified it remains effective."

The original decree being thus operative what we are really concerned with is the commencement of the period of limitation as prescribed in the relevant statute and if the statute prescribes that it commences from the date of the accrual of the cause of action there is no getting behind these words in spite of the apparent iniquity of applying the same. As was pointed out by Seshagiri Ayyar J. in *Mathu Korakkai Chetty* v. *Madar Ammal* (1):

"Therefore in my opinion, the true rule deducible from these various decisions of the Judicial Committee is this: that subject to the exemptions, exclusion, mode of computationand the excusing of delay, etc., which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party."

The cause of action in the present case accrued to the appellant the moment the resolution of the Board was communicated to him and that was the date of the commencement of the limitation. The remedy, if any, by way of filing a suit against the Board in respect of his wrongful dismissal was available to him from that date and it was open to him to pursue that remedy within the period of limitation prescribed under s. 326 of the Act.

The result is no doubt unfortunate for the appellant, because the trial court found in his favour in regard to his plea of wrongful dismissal. If he had only brought the suit within the period prescribed by s. 326 of the

(1) (1919) I.L.R. 43 Mad. 185, 213.

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Act, he might possibly have got some relief from the Court. He however chose to wait till the decision of the State Government on his appeal and overstepped the limit of time to his own detriment. We are unable to come to any other conclusion than the one reached above and the appeal must, therefore, stand dismissed; but in the peculiar circumstances of the case we make no order as to costs.

The appellant was given leave to proceed as a pauper and he prosecuted this appeal in *forma pauperis*. He has failed in the appeal and we do order that he shall pay the court-fee which would have been paid by him if he had not been permitted to appeal as a pauper. The Registrar shall send to the Attorney-General for India a memorandum of the court-fees payable by him as required by Or. XIV, r. 12, of the Supreme Court Rules.

Appeal dismissed.

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August 19.

PURANMALL AGARWALLA

v.

THE STATE OF ORISSA

(B. P. SINHA and JAFER IMAM JJ.)

Double Punishment—Person convicted of transporting opium—If can be convicted of being in possession of opium also—Sentence—Opium Act (I of 1878), ss. 4 and 9—Code of Criminal Procedure, (V of 1890), s. 35—Indian Penal Code (XLV of 1860), s. 71.

The appellant was caught while he was himself transporting opium. He was convicted under s. 9(a) of the Opium Act for "possession" of opium and under s. 9(b) of the Act for "transport" of opium and was sentenced to undergo rigorous imprisonment for three months under each count, the sentences to run consecutively. The appellant contended that "transport" included "possession" and so the double punishment for possession and transport was not warranted by law:

Held, that possession of opium and transport of opium are two separate offences and the appellant could be convicted for