

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 501 OF 1992

Sow. Sunanda D/o. Digambar Gangle,
Now Sow. Avantika W/o. Arunrao
Kulkarni

...Applicant
(Orig. Plaintiff)

Versus

1. The President,
Rahuri Municipal Council,
Rahuri, Dist. Ahmednagar.
2. The Chief Officer,
Rahuri Municipal Council,
Rahuri, Dist. Ahmednagar.
3. The Administrator,
Municipal Education Committee,
Rahuri, Dist. Ahmednagar.
4. The Director of Education,
Maharashtra State Building,
Pune.

...Respondents
(Orig. Defendants)

Mr. S. V. Kulkarni, Advocate for the Appellants.
Mr. R. V. Naikaware, Advocate for Respondent Nos. 2
and 3

CORAM : R.M. JOSHI, J.

RESERVED ON : 30th March, 2023
PRONOUNCED ON : 18th April, 2023

JUDGMENT

1. While admitting this Appeal following
substantial question of law was framed:

*"Whether notice under section 304-a of
Maharashtra Municipalities Act is must".*

2. Appellant is plaintiff in suit being R.C.S. No. 81/1979 filed for declaration that the order of transfer passed by the defendant is a malafide action and in addition thereto relief of accounts of salary for the period from 01.06.1976 to 10.11.1976 and from 10.11.1976 onwards was sought. It is the case of the plaintiff that she was in service of school run by Rahuri Municipal Council since 10th December, 1973. In the month of 1975 her marriage was performed and she went to Nashik with her husband in the summer vacation of 1976. On 02.05.1976 she asked for *bona fide* certificate and though she never expressed her intention to resign from service, defendant nos. 1 and 2 removed her from service with effect from 01.06.1976. She made complaint about the same to Director of Education, Pune and after enquiry, the said Authority passed order holding that the action of defendants is illegal and they were directed to reinstate plaintiff. Plaintiff claims that at that time she was pregnant and she was transferred and was directed to join duties in School no. III at Waghacha Akhada. She did not join the new posting but gave an application for leave and produced medical certificate. Defendants did not inform

her about sanction or refusal of leave. The plaintiff made demand of accounts of her salary for the period since 01.06.1976 to 09.11.1976. The defendants did not submit the accounts in order to payment of salary but informed her that her leave cannot be sanctioned. Since then the plaintiff remained absent from the duties, on 08.02.1978 she served notices on defendant nos. 1 to 3. Defendants replied the said notice and made allegation against plaintiff. She, therefore, filed suit for declaration that the order of termination of service as well as order of transfer is malafide and null and void and she also claimed relief of reinstatement in service and accounts for salary for the period since 01.06.1976 onwards.

3. Defendant Nos. 1 and 2 did not appear in the suit and hence it proceeded *ex parte* against them. Defendant No. 4 though appeared did not file written statement. Defendant no. 3 resisted the suit by filing written statement at Exhibit 18. It is the contention of these defendants that the suit of the plaintiff is not within limitation and the mandatory notice required for the suit is not served by the plaintiff. The rest

of the contentions regarding liability of giving accounts, termination of service as well as transfer were denied.

4. Learned trial Court framed issues and after hearing case on merit has held that the order of defendant no. 3 dated 01.06.1976 is illegal and void. It was also held that the plaintiff is entitled for the salary for the period from 01.06.1976 and 10.11.1976. It was further held that the suit filed by the plaintiff is within limitation. The suit however was held not maintainable for want of service under Section 304(1)(a) of the Maharashtra Municipalities Act, 1965 (for short 'Act') and for not joining Municipal Council as party defendant.

5. Being aggrieved by the said judgment and decree, plaintiff preferred first appeal bearing R.C.A. No. 465/1981. The only issue agitated before the first appellate Court is dismissal of the suit of the plaintiff on the ground of non issuance of notice under Section 304-A of the Act to the Municipal Council. The first appellate Court concurred to the findings recorded by the trial Court with observation that the

burden lies on plaintiff to prove that the notice was served on the Municipal Council. It is held that though the notice was not served on the Municipal Council, but was served on the President, Chief Officer and Administrative Officer, according to it notice contemplated under Section 304 to the Council and not to the individual like President, Chief Officer or Administrative Officer and therefore, Appellate Court did not find any reason to disturb the findings recorded by the trial Court.

6. Learned Counsel for the plaintiff states that both Courts below have committed serious error of law in dismissing the suit and appeal on the ground that there is no notice issued to the Municipal Council. It is contended that the suit is filed against the Officers of the Municipal Council to whom notice Exhibit 43 was duly served. Thus, according to him, this is sufficient compliance of Section 304(1)(a) of the Act.

7. Learned Counsel for the Defendant No. 3 opposed the said contentions stating that after accrual of cause of action the suit has not been filed within a

period of six months. By relying upon the plaint and admissions of the plaintiff in cross-examination, it is stated that the suit is filed after two years of cause of action and therefore, there is no propriety for causing interference in the impugned judgment. It is further canvassed that notice under Section 304(1)(a) is required to be mandatorily issued to the Council and not to its officers.

8. The fact with regard to the employment of the plaintiff in the school run by the Rahuri Municipal Council is not in dispute. Further the findings recorded by the learned trial Court about the termination of plaintiff being illegal and that plaintiff is entitled for the accounts of salary and salary for the period from 01.06.1976 to 10.11.1976 are not challenged by the defendants by preferring appeal or by raising objections against the said findings before the first appellate Court. The said findings, therefore, have attained finality.

9. Except for deciding question whether issuance of notice to Municipal Council is mandatory under Section 304(1)(a) of the Act, all other findings

recorded by trial Court are confirmed by First Appellate Court including issue of limitation have attained finality. This Court, therefore, had not take into consideration the submissions made by Counsel for the defendants on issue of limitation.

10. For purpose of decision of the issue involved in this appeal, it would be relevant to take note of Section 304 of Act, which reads thus:

304. Limitation of suits against Council, its committees, officers and servants for acts done in pursuance or execution of this Act

(1) No suit shall lie against a Council or against any committee constituted under this Act, or against any officer or servant of a Council in respect of any act done in pursuance or executing or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act—

(a) unless it is commenced within six months next after the accrual of the cause of action ; and

(b) until the expiration of one month after notice in writing has been, in the case of a Council or its committee, delivered or

left at the municipal office and, in the case of an officer or servant of a Council delivered to him or left at his office or place of above; and all such notices shall state with reasonable particularity, the causes of action and the name and place of abode of the intending plaintiff and of his advocate, pleader or agent, if any, for the purpose of the suit.

11. This provision speaks about filing of suit against Council, Committee of Council and Officer or servant of Council and then states that in case of a suit against Municipal Council, notice must be delivered or left at Municipal Office whereas in case of suit against any officer or servant of council, it be delivered to him. It is thus clear that only when Municipal Council is made defendant, notice to it would be mandatory. In the case where officer or servant of Council is defendant, notice to that officer or servant is sufficient compliance of Section 304(1) of the Act. In the instant case suit has been filed against President, Chief Officer and Administration of Rahuri Municipal Council and not against the Council. Except for defendant no. 3, no other defendant has filed

written statement. Even defendant no. 3, in his written statement, does not claim that suit against him is not tenable but it is vaguely stated that no proper notice issued as per law and that suit is not in limitation. There was no specific case made out in written statement that suit is not tenable for want of notice of Municipal Council. This issue of non-joinder of party is never raised before Trial Court.

12. Learned trial Court however without there being any issue raised in written statement as to maintainability of suit on grounds of non-joinder of Municipal Council as party defendant, and non issuance of notice to Municipal Council, on oral arguments accepted the case of defendants and held that suit filed without joining Rahuri Municipal Council is not maintainable. Pertinently, only issue framed by trial Court was "Whether the suit is maintainable without service of notice u/s 304(a) of Maharashtra Municipalities Act ?".

13. This issue does not even remotely covers the exception to the maintainability of suit for not joining Rahuri Municipal Council as party defendant.

The dismissal of suit therefore is on two grounds i.e., firstly for want of service of notice to Municipal Council and secondly for non-joinder of Municipal Council as party defendant. The dismissal of suit for non-joinder cannot be sustained for the reason that issue of non-joinder of party was never raised before trial Court. Order VII, Rule 13 CPC states that objection regarding non-joinder of party shall be taken at the earliest possible opportunity and in all cases mere issues are framed on or before such settlement, unless ground of objection has arisen subsequently and any such objection not so taken shall be deemed to have been waived. In the instant case, no objection about non-joinder of Council as defendant was relied before final arguments. First of all, such objection at that stage ought not to have been entertained by trial Court. In any case, if the Court was of opinion that Council is necessary party, it could have directed plaintiff to make it as party and in no circumstances without giving plaintiff an opportunity to join Council as defendant, could have dismissed suit on ground of non-joinder.

14. As far as non issuance of notice to Municipal Council is concerned, it is not in dispute that the notice (Exh. 43) is issued to Chief Officer, Administrative Officer and President of Council. The Chief Officer being Chief Executive head of Municipal Council received the notice and there can be no reason to hold that it is not a proper notice. In this regard, reference can be made to judgment of Division Bench of this Court in case of Khairunnnissa A. K. Siddiki Vs. Municipal Corporation of Mombay and Others, 1965 (67) Bom.L.R. 903, wherein it is held that:

16. ...

The Municipal Commissioner being the chief executive head of the Corporation received the notice and there can be no reason to hold that it is not a proper notice and thus provide a handle of oppression of the Municipality.

15. Needless to state that intention of notice under Section 304 is to enable the Authority concerned to rectify the wrong and ventilate grievance made. Herein this case, grievance is made to the Chief Officer, who is an executive head of Municipal Council, and hence the same is deemed to have been made to Council. Perusal of notice (Exh. 43) indicates that the

same was not issued in the individual capacity of these Authorities but in the capacity as officers and servants of Council. Thus, there is compliance of Section 304(1)(b) of the Act for filing a suit against them. Assuming that Municipal Council was required to be made as party, in view of the fact that suit is of year 1979, this Court does not find it appropriate to relegate matter back to Trial Court, particularly in view of the fact that on merit all issues are answered in favour of Plaintiff by trial Court. Considering peculiar facts of this case, in any event since Municipal Council is duly represented by its Chief Officer and other officers concerning with subject matter of suit, it could not have been dismissed.

16. As a result of above discussion, in the facts of the case, substantial question of law deserves to be answered in negative. Impugned judgments and decree therefore held to be not sustainable and hence set aside. The suit bearing R.C.S. No. 81/1979 is held maintainable and the same stands decreed. Appeal is allowed with cost in following terms:

ORDER

(i) The suit is partly decreed with cost. The order dated 01.06.1976 issued by Defendant No. 3 is held to be illegal and void.

(ii) Plaintiff is held to be entitled to the salary for the period from 01.06.1976 to 10.11.1976. Plaintiff shall be entitled to receive interest on the aforesaid amount @ 6% p.a. from the date of filing of the suit till realization of the amount.

(iii) Decree be drawn accordingly.

(R.M. JOSHI, J.)

1. After pronouncement of judgment, learned Counsel for the Defendants/Respondents seeks four weeks time to stay to the judgment in order to approach Hon'ble Apex Court.

2. In the interest of justice, the present judgment is stayed for a period of four weeks.

(R.M. JOSHI, J.)

Malani