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and further examine the convicts and that the law does not place any restrictions upon this power. But if the High Court is of the opinion whether before or after examining the convicts that non-compliance with the provisions of section 342, Criminal Procedure Code, has occasioned or is likely to have occasioned prejudice to the convicts the High Court will order a fresh trial. If, on the other hand, it comes to the conclusion that no such prejudice was caused and no failure of justice was occasioned the appeal will be heard and decided upon merits. With regard to the order of remand this may contain a direction that the trial will proceed from the point where the irregularity occurred or a totally fresh trial may be ordered depending on the facts of that particular case. For instance, if the trial Judge has been transferred a *de novo* trial will be ordered. On the other hand, in some cases the same Sessions Judge may be asked to re-examine the accused and to dispose of the case without holding a completely new trial.

Bhandari, J. BHANDARI, J.—I agree.

Soni, J. SONI, J.—I agree.

CIVIL MISCELLANEOUS

Before Harnam Singh and Kapur, JJ.

DR. MUKAND LAL, M.B.B.S. of Ripon Cottage, Simla, —*Petitioner.*

versus

THE MUNICIPAL COMMITTEE OF SIMLA,—*Respondent.*

Civil Writ No. 228 of 1952

1952

Sept. 17th

Constitution of India—Article 226—Writ of Mandamus—Whether can issue when alternative remedy by way of appeal open—Punjab Municipal Act (III of 1911)—Section 45(1)—Scope of—Termination of service of permanent Municipal Medical Officer on payment of one month's wages in lieu of notice—Allegations of misconduct made—No enquiry held in accordance with the rules and by-laws—Whether proper and legal—Principle of natural justice—audi alteram partem—*Applicability of.*

M.L. was appointed a Medical Officer of Simla Municipality in Ripon Hospital in August, 1941, and his services were terminated on payment of one month's wages in lieu of notice in August, 1952, in pursuance of a resolution passed by the majority of less than two-thirds of all the members of the Committee. No grounds of decision against M. L. were given in the resolution but allegations of misconduct were made. No enquiry was held in accordance with bye-law 62 of the Simla Municipality and the rules framed under section 240(n) of the Punjab Municipal Act and the procedure prescribed by rule 14.13, Punjab Civil Services Rules, Volume I, Part I. M. L. applied under Article 226 of the Constitution of India for the issuance of a writ of *mandamus* directing the Municipal Committee of Simla to forbear from acting on the resolution.

Held, that as the grounds of the decision were not announced to the applicant it was not possible for him to shape his appeal under Rule 4 of the rules framed under section 240(n) of the Punjab Municipal Act and, therefore, the applicant was entitled to a writ of *mandamus*.

Held, that the applicant was a permanent municipal servant and his services could not be terminated without observing the procedure provided by rule 3 made on the 17th of February, 1925, and rule 14.13 of the Civil Services Rules (Punjab), read with bye-law 62 of the Simla Municipality.

Held (*per Kapur J.*), (1) Section 45(1) of the Punjab Municipal Act, does not give to the Municipal Committee an unlimited authority to discharge any servant they like provided it is not for misconduct. No doubt in section 39 the words used are "suspend, remove, dismiss or otherwise punish" and the word used in section 45(1) of the Act is "discharge", but this is not a section of limitation on safeguards but makes a further provision in favour of the servants. If the Civil Services Rules (Punjab) apply as indeed they do, then "discharge" in section 45(1), cannot apply to the removal of permanent servants from service. By the extension of the Civil Services Rules (Punjab) to Municipal servants and the rules made under the Municipal Act a protection is given to the Municipal employees against the vagaries of the Municipal Committee who might at any time by the brute force of majorities try to terminate the services of employees whom they find to be inconvenient or whom they do not like. Section 45(1) has not in any way taken away that guarantee or protection which the law seems to give to all Municipal servants and which the Constitution of India has now given to the Civil Servants under the Central Government and the States.

(2) Even in the absence of any rules, the principle of natural justice, i.e., the maxim *audi alteram partem*—no man shall be condemned unheard—would be applicable.

Petition under Article 226 and 227 of the Constitution of India, praying—

(a) *That this Hon'ble Court may be pleased to hold that the resolution of the Municipal Committee, dated the 4th August, 1952, is illegal, ultra vires and malafide;*

(b) *That this Hon'ble Court may be pleased to issue writ in the nature of* mandamus, *prohibition or pass such other orders or directions as it deems fit to the respondent that the resolution should be cancelled and not given effect to;*

(c) *That pending the final disposal of this petition, this Hon'ble Court may be pleased to pass an interim order directing the respondent not to give effect to the aforesaid resolution; and*

(d) *That this Hon'ble Court may be pleased to pass such other order as it may deem expedient.*

TEK CHAND, D. K. MAHAJAN AND D. K. KHANNA, for Petitioner.

R. P. KHOSLA AND R. S. BHASIN, for Respondent.

ORDER

Harnam Singh, J. HARNAM SINGH, J. Doctor Mukand Lal, hereinafter referred to as the applicant, applies under Article 226 of the Constitution of India for the issuance of a writ of *mandamus* directing the Municipal Committee of Simla to forbear from acting on the resolution passed on the 4th of August 1952, whereby the services of the applicant were terminated forthwith on payment of one month's wages in lieu of notice.

Briefly summarised the facts of the case are these. By application, annexure R.I., the applicant offered himself as a candidate for the post of Deputy Medical Superintendent and Resident Medical Officer, Ripon Hospital, Simla, on a salary of rupees 300—20—500 plus free furnished house with the benefit of municipal provident fund at the rate of one anna in the rupee and leave according to municipal leave rules. On the 14th August 1941, the President, Municipal Committee, by letter,

annexure R. 2, informed the applicant that the committee had decided to offer him the post of Deputy Superintendent and Resident Medical Officer, Ripon Hospital, on the conditions stated in the notice, annexure D, and that he should join service on the 24th August 1941. On the last-mentioned date the applicant assumed office and from that date he has been in service of the Simla Municipality. On the 1st of August 1952, the salary of the applicant was rupees 700 per mensem.

Miss Abraham, Matron of the Hospital, on the termination of her services, made a written representation to the President of the Municipal Committee, Simla, in which she complained about the misconduct of the applicant. Upon that representation the President of the Municipal Committee investigated the matter and came to the conclusion that the complaint of Miss Abraham about the misconduct of the applicant was not proved.

On the 31st July 1952, six members of the Simla Municipality made a requisition under section 25(2) of the Punjab Municipal Act, 1911, hereinafter referred to as the Act, requiring the President of the Committee to convene a special meeting of the Committee to discuss the following resolution—

> "Resolved that (a) under section 45 of the Punjab Municipal Act, 1911, the services of Dr. Mukand Lal, Deputy Superintendent, Ripon Hospital, Simla, be terminated forthwith and he be paid a month's wages in lieu of a month's notice and the Superintendent, Ripon Hospital, should make necessary *interim* arrangements, and (b) the D.H.S. be requested to lend us the services of a suitable and well-qualified P.C.M.S. Officer till we can find a suitable man on contract basis."

In the letter of requisition, annexure F, the requitionists maintained that the applicant had acquired "an unhealthy reputation concerning his

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dealings with the nursing staff and his treatment of patients". In the letter of requisition it was said that it was not in the interests of the hospital, the patients, the staff, the Committee or the town that the applicant should continue in the Municipal service.

On the 1st of August 1952, Colonel Bhatia, Superintendent of the Hospital, sent a detailed note to the Secretary, Simla Municipality, wherein he expressed an opinion that the complaint made by Miss Abraham was false and scandalous.

On the 4th of August 1952, the resolution proposed by the requisitionists was considered in a meeting of the Committee. From a copy of the proceedings of the meeting of the Committee held on the 4th of August 1952, annexure G, it appears that some members of the Committee did not agree with the requisitionists and proposed amendments, but the resolution proposed by the requisitionists was passed, six members of the Committee voting for the resolution and two members of the Committee voting against the resolution. The total strength of the Committee fixed under section 11 of the Act is 16 but on the 4th of August 1952, two seats were vacant.

Basing himself upon the provisions of by-law 52 of the Simla Municipality made under section 31(1) of the Act, which came into force on the 15th of April 1949, and rules 1, 2, and 3 of the rules under section 240(n) of the Act on the 17th February 1925, the applicant applies for the issuance of a writ of *mandamus* directing the Committee to forbear from acting on the resolution, *inter alia*, on the ground that in terminating his services the Committee has not followed the procedure prescribed by law.

Bye-law 62 reads—

"The Civil Services Rules (Punjab) as amended from time to time in future in so far as they are not inconsistent with any

provisions of the Punjab Municipal Act, 1911, and the rules and bye-laws made thereunder shall govern the leave, allowances for additional duties, suspension, removal and retirement of servants and officers of the Municipal Committee of Simla."

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Rules 1 to 3 made on the 17th of February 1925, provide—

"(1) In these rules 'dismissal' means permanent removal from a substantive appointment for misconduct or incompetence and includes discharge for misconduct under subsection (1) of section 45 of the Act.

(2) No officer or servant of a Committee shall be dismissed except after an inquiry as provided in rule 3; provided that no such enquiry shall be necessary if the accused has absconded or if he is to be dismissed on facts or inferences based on the findings of a Court.

(3) A definite charge shall be framed in writing in respect of each offence alleged against the officer or servant sought to be dismissed. The charge shall be explained to the accused and the evidence in support of it and any evidence that the accused may adduce in his defence shall be recorded in his presence and his defence taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge."

In these proceedings it is conceded that the procedure prescribed by the Civil Services Rule 14.13 read with bye-law 62 or rule 2 made on the 17th of February 1925, has not been followed.

Mr. R. P. Khosla, urges that the applicant has not been discharged for misconduct under subsection (1) of section 45 of the Act, and that being so, no enquiry was to be made within rule 3 cited above.

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From what I have said above it is plain that the services of the applicant were terminated for misconduct within section 45(1) of the Act. That this is so is plain from the proceedings of the Committee held on the 4th August 1952, and the proceedings of the Committee held on the 6th of August 1952, when the resolution passed by the Committee terminating the services of the applicant came up before the Committee for confirmation. In the proceedings of the Committee held on the 6th of August 1952, opinion of Colonel Bhatia, Superintendent of the Hospital, was recorded before the resolution terminating the services of the applicant was confirmed. From the record of the proceedings, annexure H, it appears that Colonel Bhatia gave the opinion that the applicant bore good character, was competent and painstaking and that he had heard nothing against the moral character of the applicant. In my judgment, there was no necessity to record the opinion of Colonel Bhatia about the moral character of the applicant if action was not taken against him for reasons of misconduct. The fact that in terminating the services of the applicant the Committee decided to pay him one month's wages in lieu of notice, does not show that his services were not terminated for misconduct within section 45(1) of the Act. Clearly, the applicant was discharged for misconduct. If so, the procedure prescribed by rule 3 was to be followed before his discharge for misconduct could be ordered.

Bye-law 62 of the Simla Municipality read with rule 14.13 of the Civil Services Rules provides, *inter alia*, that no order of removal shall be passed unless the person concerned has been given reasonable opportunity of showing cause against the action proposed to be taken against him. As stated above it is conceded that in terminating the services of the applicant the provisions of bye-law 62 read with rule 14.13 have not been followed.

But it is said that the procedure prescribed by rule 14.13 read with bye-law 62 is to be followed when an employee in permanent service of the

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Municipality is dismissed and that the applicant was not in the permanent service of the Committee.

In my judgment it is not necessary to consider the question of the application of rule 14.13 read with bye-law 62 to temporary employees of the Municipality for copies of the entries in the service book of the applicant, annexure E, put it beyond dispute that the applicant was in the permanent service of the Municipality and it was not pressed that the discharge of the applicant fell within the Explanation appended to rule 14.10, Punjab Civil Services Rules, Volume I, Part I.

For the foregoing reasons, I find that the removal of the applicant from service could not be ordered except in accordance with the procedure prescribed by rule 14.13, Civil Services Rules, and rule 3 made on the 17th February 1925.

Mr. R. P. Khosla then urges that the writ of *mandamus* should be refused on the ground that remedy by way of appeal under rule 4 was open to the applicant.

Rule 4 reads—

> "An officer or servant dismissed by less than a two-thirds majority of all the members from a substantive appointment carrying a salary of twenty-one rupees per mensem or more may, within thirty days from the date of the order of dismissal, appeal to the Commissioner, if he has been dismissed by a Committee of the first class or to the Deputy Commissioner if he has been dismissed by a Committee of the second class unless the Deputy Commissioner is himself a member of such Committee or the appointment in question is that of secretary, Engineer, or Medical Officer of Health in which cases the appeal shall lie to the Commissioner."

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As stated above, the applicant has been dismissed by less than a two-thirds majority of all the members of the Committee from a substantive appointment carrying an initial salary of rupees 300. That being so, it is quite possible that there might have been good grounds for an appeal, if the grounds of the decision had been announced to the applicant, and in that case a *mandamus* would not be granted for there would be an adequate remedy by way of appeal.

In the present case no charge was framed, the applicant was not given an opportunity to show cause against the action proposed to be taken against him and the grounds of the decision are not to be found in the resolution passed by the Committee on the 4th of August 1952. Clearly, it is not possible for the applicant to shape his appeal when he does not know the grounds of decision against him. For an authority on this point *The Queen* v. *Thomas and others*, (1) may be seen. In that case there was an appeal to the Quarter Sessions in the matters in question and yet *mandamus* was granted. In deciding the case Hawkins, J., said:—

> "It has been argued that this matter is only the subject of an appeal to Quarter Sessions. It is quite possible that there might have been good grounds for an appeal if the grounds of the decision had been announced to the applicant, and in that case a *mandamus* would not be granted, for there would be an adequate remedy by appeal. That rule, however, as to the grant of a *mandamus* is not inflexible or applicable in cases of this kind, where a person does not know the grounds of the decision against him and how to shape his appeal.

(1) (1892) Q.B.D. 426

In concurring in the opinion expressed by Hawkins, J., Willis, J., said:—

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"It has been argued that this case is distinguishable from *Reg* v. *Sykes* (1), on the ground that in the latter case there was no right of appeal, whereas in the present case there is a right of appeal, and that, therefore, an appeal is the proper and effectual remedy and a *mandamus* ought not to be granted. I do not agree that this distinction exists, at any rate so as to apply to the present case, where the applicant would have to appeal without knowing what were the grounds of the decision against her, and would not, therefore, be in the same position upon an appeal as she would have been if the grounds had been stated—under which circumstances the remedy by appeal would not be as satisfactory and effectual as the remedy by *mandamus*.

No other point arises in these proceedings.

For the foregoing reasons, I find that the resolution passed by the Committee on the 4th of August 1952, terminating the services of the applicant is vitiated by reason of the non-observance of the procedure provided by rule 3 made on the 17th of February 1925, and rule 14.13, Civil Services Rules, read with bye-law 62 of the Simla Municipality.

In the result, I would direct the respondent Committee to forbear from acting on the resolution passed by the Committee on the 4th of August 1952, whereby the services of the applicant were terminated.

(1) 1 Q.B.D. 52

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Respondent Committee to pay to the applicant costs of these proceedings which are assessed at rupees one hundred only.

Lest there be some confusion, I make it clear that the Committee, if advised, may initiate an enquiry within rule 3 made on the 17th of February 1925, or rule 14.13, Civil Services Rules, Volume I, read with bye-law 62 of the Simla Municipality and on the basis of that enquiry decide the case on merits.

Kapur, J.

KAPUR, J. I agree and because of the importance of the points involved in the case I think it necessary to give my reasons. The petitioner joined the service of the Municipal Committee, Simla, as Deputy Superintendent and Resident Medical Officer, Ripon Hospital, Simla, on the 24th August 1941. On the 19th June 1941, the Municipal Committee, Simla, advertised inviting applications for the post of a Deputy Medical Superintendent which is Annexure 'D'. He, the petitioner, applied for the post and was appointed by a letter of appointment, Annexure 'R/2', which is in the following terms:—

> "With reference to your application, dated 27th June 1941, for the above post, I am directed to inform you that the Committee have decided to offer you the post of Deputy Superintendent and Resident Medical Officer, Ripon Hospital, on the advertised terms, and I am, therefore, to ask you to join on the 24th August 1941."

Annexure 'E' shows that he was a permanent servant of the respondent Municipal Committee.

One Miss M. Abraham was appointed a matron of the Ripon Hospital on three months' probation, at the end of which she was not confirmed and was asked to go. On the 23rd of July 1952, she

made a representation to the President of the Municipal Committee against her non-confirmation and she made certain allegations against the petitioner. A requisition by six members of the Municipal Committee, Autar Singh, Senior Vice-President, Joginder Singh Yogi, L.S. Salhotra, Gian Chand, V. G. Bhan and B. M. Sauhta, was made, it appears, on the 31st July 1952, requiring that a special meeting be held to consider the resolution therein mentioned. The requisition was in the following terms:—

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"President, M. C. Simla.

The Deputy Superintendent, Ripon Hospital—Dr. Mukand Lal—has acquired an unhealthy reputation concerning his dealings with the nursing staff and his treatment of patients, etc., and it is generally believed that yesterday, i.e., on 30th July 1952, the Minister for Education and Health, L. Jagat Narain, and the Administrator also received some complaints at the Ripon Hospital, formally or informally, against this Doctor.

It is not in the interest of the hospital, the patients, the staff, the Committee or the town that such a state of affairs should continue. If a man like him holding such a responsible position had been in Government hospital and there had been complaints like this, he would at least have been transferred in public interest, irrespective of the fact how far the complaints were justified in fact. It is clearly a matter of grave concern that this, Doctor is still continuing in the hospital in a position of authority. In order to set right the arrangements for the administration of Ripon Hospital, once for all, it is essential to change the present system and either to borrow from the D.H.S. the services of a suitable and competent P.C.M.S., Officer for a period

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of three years at a time or to employ a suitable and competent Doctor on a three years' contract basis with option to renew the contract to either side.

We hereby, under section 25(2) of the Punjab Municipal Act, 1911, Punjab Act III of 1911, as modified up to 1948, give this requisition for holding a special meeting of the Committee at your ealiest to discuss the motion—

'Resolved that (a) under section 45 of the Punjab Municipal Act, 1911, the services of Dr. Mukand Lal, Deputy Superintendent, Ripon Hospital, Simla, be terminated forthwith and he be paid a month's wages in lieu of a month's notice and the Superintendent, Ripon Hospital, should make necessary interim arrangements and (b) the D.H.S. be requested to lend us the services of a suitable and well qualified P.C.MS. Officer till we can find a suitable man on contract basis.' "

The meeting was held on the 4th of August 1952. The resolution as given in Annexure 'F' above was moved by Thakur Bhag Mal Sauhta and was seconded by Miss V. G. Bhan. An objection was taken by another member Mr. Durga Dass Khanna that sufficient data had not been disclosed for taking this drastic action under section 45 of the Municipal Act. Another member L. Puran Chandra, also was of the same opinion. A third member Mr. B. D. Ahuja said that "charges should be disclosed as was the practice in Government service before taking such drastic action". The movers explained the circumstances to justify the bringing of the motion and "the absence of any charges in the preamble", relying on certain precedents in which action had previously been taken under section 45(1) "without reference to charges in the public interest". Mr. Durga Dass Khanna then moved the

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following resolution which was seconded by L. Puran Chandra. This resolution was admitted and the objection against it was ruled out:—

> "That in the opinion of this Committee sub-section (1) of section 45, Punjab Municipal Act, does not empower the Committee to dismiss or discharge or remove from service any Municipal employee and particularly Dr. Mukand Lal who is a holder of substantive appointment in the Committee on specific terms and conditions. Even the rules, as given in the Punjab Government notification No. 4421, dated the 17th February 1925, have force of an implied term of agreement which cannot be superseded by the Committee as the main resolution sponsored by six honourable members of the Committee seeks to do. In the opinion of the Committee this would amount to a basic refusal to continue Dr. Mukand Lal on the agreed terms of his employment and is repudiation of that contract and a wrongful dismissal."

The same member then wanted to move the following amendment:—

> "That as it has emerged from the resolution moved by the six members that the resolution was inspired by a complaint initiated by the dismissed matron, it is proposed that an enquiry should be instituted against this complaint."

which was ruled out by the President. L. Mela Ram, another member, moved another resolution to the effect that because certain complaints had been received against Dr. Mukand Lal, a sub-committee consisting of the President, the Senior Vice-President and Superintendent, Ripon Hospital, be appointed to hold an enquiry into them, which was seconded by Mr. Durga Dass Khanna. This last resolution was defeated by 4 to 6. Mr. Durga Dass

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Khanna and L. Puran Chandra said that they would be sending their notes of dissent later.

On the resolution which was moved by Mr. Durga Dass Khanna, the voting was 2 to 6 and it was lost and the original resolution was then carried by 6 to 2, the dissentients being Mr. Durga Dass Khanna and L. Puran Chandra. The official members did not vote.

On the 4th August 1952, a petition under Article 226 of the Constitution of India was moved by Mr. Tek Chand on behalf of the petitioner and a rule was issued and stay *ad interim* as to the effect of the resolution was granted towards the end of the day and the case was fixed for 14th August 1952.

On the 6th August 1952, the minutes of the previous special meeting were confirmed subject to certain addenda which were raised by Mr. Joginder Singh Yogi and the following was added: —

> ".....L. Mela Ram, after moving his resolution No. 2, had invited the Superintendent, Ripon Hospital, to give his views about the Deputy Superintendent, Ripon Hospital, Dr. Mukand Lal. The Superintendent, Ripon Hospital, gave the following views before voting took place on the motion of L. Mela Ram:—
>
> (1) Dr. Mukand Lal is a very good Doctor, competent and painstaking.
>
> (2) The Deputy Superintendent, Ripon Hospital, should be liable to transfer as otherwise vested interests and local prejudices produce an unwholesome atmosphere in the administration. The Superintendent, Ripon Hospital, said that he felt strongly on the subject, and added that this was the only institution in the State which had a permanent Doctor on the post.

(3) As for the moral character of Dr. Mukand Lal, the Superintendent, Ripon Hospital, said that he had heard nothing against him till recently.

(4) The Superintendent, Ripon Hospital, had had from time to time reports about Dr. Mukand Lal's rude behaviour towards patients and their relations. In interpreting the standing rules of the Ripon Hospital he had sometimes shown lack of tact.

(5) On L. Puran Chandra's enquiry, the Superintendent, Ripon Hospital, stated that the reports about the work of Dr. Mukand Lal by the previous Civil Surgeons had been very good, as also the report given by the present Superintendent of the Ripon Hospital."

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In the meetings of the 6th and 7th August 1952, a resolution was sought to be moved for the abolition of the post which the petitioner was holding. There was some apprehension in the minds of the Municipal Committee that the passing of such a resolution would amount to contempt of Court and legal advice was thereupon sought. In the meeting of the 11th August 1952, a resolution was passed by the Municipal Committee, in spite of the protest of two members, abolishing the post of the petitioner and thus achieving the same object in a roundabout way and trying to make the proceedings in this Court nugatory knowing all the time that the matter was *sub judice*. Better counsels seem to have prevailed and the resolution was suspended by the Deputy Commisioner or by some authority higher than the Deputy Commissioner.

In this application the petitioner stated that on the 24th July 1952, the President of the Municipal Committee investigated into the allegations made against him and recorded the statements of

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various nurses and the allegations which had been made against him had not been substantiated; that on 30th July 1952, the President and the Secretary of the Municipal Committee made some investigation into the allegations against the petitioner and recorded the statements of the nurses behind the back of the petitioner; that the petitioner gave an explanation on the 1st August 1952, and Col. Bhatia, the Hospital Superintendent, sent a "detailed note regarding the allegations" which is Annexure 'B' and wherein these allegations were said to be "completely irrelevant and baseless." The rest of the allegations are not necessary for the purpose of this judgment as they contain facts which have already been stated.

On behalf of the Municipal Committee an affidavit in opposition was filed stating that the action taken by the Municipal Committee was an "independent action" under section 45(1) of the Municipal Act. How in the face of the resolutions and the proceedings of the Municipal Committee this could be said to be an independent action is not quite clear. Counsel for the opposite party explained this by saying that the Municipality discharged the petitioner without taking into account the question of misconduct. When I asked him as to how this statement could be reconciled with the proceedings of the meeting of the Municipal Committee in which the resolution was passed, no satisfactory answer was forthcoming. In paragraph No. 10 of this affidavit it is stated: "The proceedings under section 45(1) taken by the Municipal Committee had been completely independent of the representation of Miss Abraham" and that the action of the Municipal Committee was "*bona fide* and in public interest and not unprecedented". The emphasis throughout the affidavit is that the action had been taken independently of the allegations made against the petitioner or the enquiry which was held by the President on those allegations. In another portion of paragraph 10 the affidavit stated at page 3: The services of the petitioner have been terminated under section 45(1) of the Municipal Act. This had no connection with the preliminary

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enquiry taken up by the deponent." In this affidavit it was also denied that the petitioner was a permanent servant.

The petitioner submits that he is a permanent servant of the Municipal Committee as is shown in Annexure 'E' and is governed by the rules made under the Municipal Act in regard to dismissal of Municipal employees. Section 39 of the Act provides:—

> "39. Subject to the provisions of this Act and the rules and bye-laws made thereunder, a committee may, and if so required by the Provincial Government shall, employ other officers and servants, and may assign to such officers and servants such remuneration as it may think fit, and may suspend, remove, dismiss, or otherwise punish any officer or servant so appointed".

and as the action was taken against him for misconduct, he could not be discharged under section 45(1), of the Act without the rules being observed. Reference was also made to bye-law No. 62, by which Civil Services Rules (Punjab) are made applicable to suspension, removal and retirement of Municipal Employees. The rules made under the Municipal Act, section 240, give the definition of the word "dismissal" and provide the procedure for "dismissal". The rules provide as under:—

> *"Dismissal of Municipal Employees.*
>
> 1. In these rules "Dismissal" means permanent removal from a substantive appointment for misconduct or incompetence and includes discharge for misconduct under subsection (1) of section 45 of the Act.
>
> 2. No officer or servant of a committee shall be dismissed except after an inquiry as provided in rule 3 : provided that no

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such inquiry shall be necessary if the accused has absconed or if he is to be dismissed on facts or inferences based on the findings of a Court.

3. A definite charge shall be framed in writing in respect of each offence alleged against the officer or servant sought to be dismissed. The charge shall be explained to the accused and the evidence in support of it and any evidence that the accused may adduce in his defence shall be recorded in his presence and his defence taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge.

Civil Services Rules (Punjab), Volume I, Part I, in chapter XIV, under the heading "Penalties" gives the penalties in rule 14.10. They are:—

(vi) Removal from the civil service of the Crown, which does not disqualify from future employment;

(vii) Dismissal from the civil service of the Crown, which ordinarily disqualifies from future employment".

Explanation to this rule gives what a "discharge" is and it is as follows: —

"The discharge—

(a) of a person appointed on probation, during the period of probation.

(b) of a person appointed otherwise than under contract to hold a temporary appointment, on the expiration of the period of the appointment,

(c) of a person engaged under contract, in accordance with the terms of his contract;

does not amount to removal.

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Rule 14.13 deals with inquiry before imposition of penalties and deals with dismissal, removal or reduction. This also prescribes the procedure which is to be adopted for imposing the penalties given in rule 14.10 of the rules.

The first question to be decided is whether the post of the petitioner was permanent. A reference to the advertisement, the application and letter of appointment and Annexure 'E' shows that the petitioner was employed as and remained a permanent servant of the Municipal Committee. In rule 2.46 of the Civil Services Rules (Punjab), Volume I, Part I, "permanent post" means "a post carrying a definite rate of pay sanctioned without limit of time". Although it is denied by the Municipal Committee that the petitioner was a permanent servant, I must hold him to be one taking into consideration the documents which I have referred to above and the Civil Services Rules (Punjab).

The second question that arises is whether the petitioner was discharged for misconduct. I have gone through the affidavits of the parties. The requisition and the proceedings of the Municipal Committee indicate quite clearly that the reason why the petitioner had been "discharged" is misconduct. I have no doubt that the opposite party was under a misapprehension or was not properly advised when it was stated that the discharge was for some other reason. In the requisition for the calling of the meeting, Annexure 'F', it was definitely stated that the petitioner had acquired an unhealthy reputation concerning his dealings with the nursing staff and that complaints had been received against the doctor and it was against the interest of the hospital and "it was a matter of grave concern" that the petitioner should continue to be in the service of the Municipality and it was on this ground that a requisition had been made. The proceedings show that the Municipality was taking action because of the alleged misconduct of the petitioner. Otherwise there was no reason why a member should have made an exposition of the law of section 45(1) of the Municipal Act and why a committee of inquiry was proposed and why

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a reference was made to the complaint of the dismissed matron. Even the addendum to the proceedings which was made on the 6th August 1952, after the application in this Court shows that the members were very anxious to say something or the other about the conduct of the petitioner.

In the Civil Services Rules (Punjab) the two punishments for the termination of service are removal and dismissal and a discharge does not amount to removal from service if the person discharged is on probation, is on a contract, or is on a temporary appointment. Any other method of putting an end to the service of an employee would, therefore, either be "removal" or "dismissal". In the Government of India Act of 1935, the words used were "dismissal" or "reduction in rank", and "removal from service" was held to be included within the word "dismissal". Under Article 311 of the Constitution it has been held that the words "dismissal", "removal" or "reduction in rank" are technical words used in cases in which a person's services are terminated for misconduct [see *Jayanti Prasad* v. *State of Uttar Pradesh* (1)]. The word "discharge" does not occur either in Article 311 or in the Civil Services Rules (Punjab) in regard to penalties, but the definition of this word given in the Punjab rules shows that it only applies to those cases where a person's service is terminated for reasons given in (a), (b) and (c) of the Explanation under rule 14.10 of the Civil Services Rules (Punjab).

"Discharge" in Shorter Oxford English Dictionary, Volume I, means "to relieve of a charge or office (more usually) to dismiss from office, etc., to cashier". I have already held that the petitioner was a permanent servant of the Municipal Committee and the evidence shows that the petitioner was discharged for reasons of misconduct and his case is covered by the Civil Services Rules (Punjab), referred to above and by the rules made under section 240 of the Municipal Act and it was

(1) 1951 A.L.J. 450 at p. 451

necessary in this case to follow the procedure laid down in the Municipal Rules and the Civil Services Rules (Punjab) and his services could not be otherwise terminated.

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I shall now consider the argument which was raised by counsel for the opposite party that section 45(1) gives to the Municipal Committee an unlimited authority to discharge any servant they like provided it is not for misconduct. No doubt, in section 39 the words used are "suspend, remove, dismiss, or otherwise punish" and the word used in section 45(1) of the Act is "discharge" but this in my opinion is not a section of limitation on safeguards but makes a further provision in favour of the servants. If the Civil Services Rules (Punjab) apply, as indeed they do, then "discharge" in section 45(1) cannot apply to the removal of permanent servants from service. By the extension of the Civil Services Rules (Punjab) to Municipal servants and the rules made under the Municipal Act a protection is given to the Municipal employees against the vagaries of the Municipal Committees who might at any time by the brute forces of majorities try to terminate the services of employees whom they find to be inconvenient or whom they do not like. I do not think that section 45(1) has in any way taken away that guarantee or protection which the law seems to give to all Municipal servants and which the Constitution of India has now given to the Civil servants under the Central Government and the States. Indeed, in democracies it is necessary that servants who have very often to perform unpalatable duties should receive every kind of protection against the tyranny of majorities or the whims of leaders of such majorities and it was for that reason that these rules seem to have been framed and extended to Municipal Committees and there was never a greater necessity for these rules than there is now when everything is governed by force of numbers and very often this force is used without any restraining force.

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Even in the absence of any rules, the principle of natural justice should come into play, i.e., the maxim *audi alteram partem*—no man shall be condemned unheard—would be applicable. It was held in *Cooper* v. *Wandsworth Board of Works* (1), and in a long line of cases where this case was followed that although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature. If the petitioner was to be discharged which in this case really means removal from service for an alleged misconduct, he should in all fairness have been given an opportunity to clear his character.

I am, therefore, of the opinion that—

(1) the petitioner was a permanent servant of the Municipal Committee;

(2) the action taken against the petitioner was for an alleged misconduct;

(3) for the removal of a permanent Municipal servant, particularly when he is accused of misconduct, the safeguards given in the rules made under the Municipal Act and in the Civil Services Rules (Punjab), which have been made applicable to suspension, removal and retirement of the employees of Simla Municipal Committee, come into operation;

(4) section 45(1) does not give a free hand to the Municipality to get rid of any servant they like but gives further protection to the servants of the Municipalities; and

(5) the principle of natural justice would apply in cases of this kind.

I would, therefore, allow this petition and make the rule absolute with costs.

(1) 8 L.T. 278